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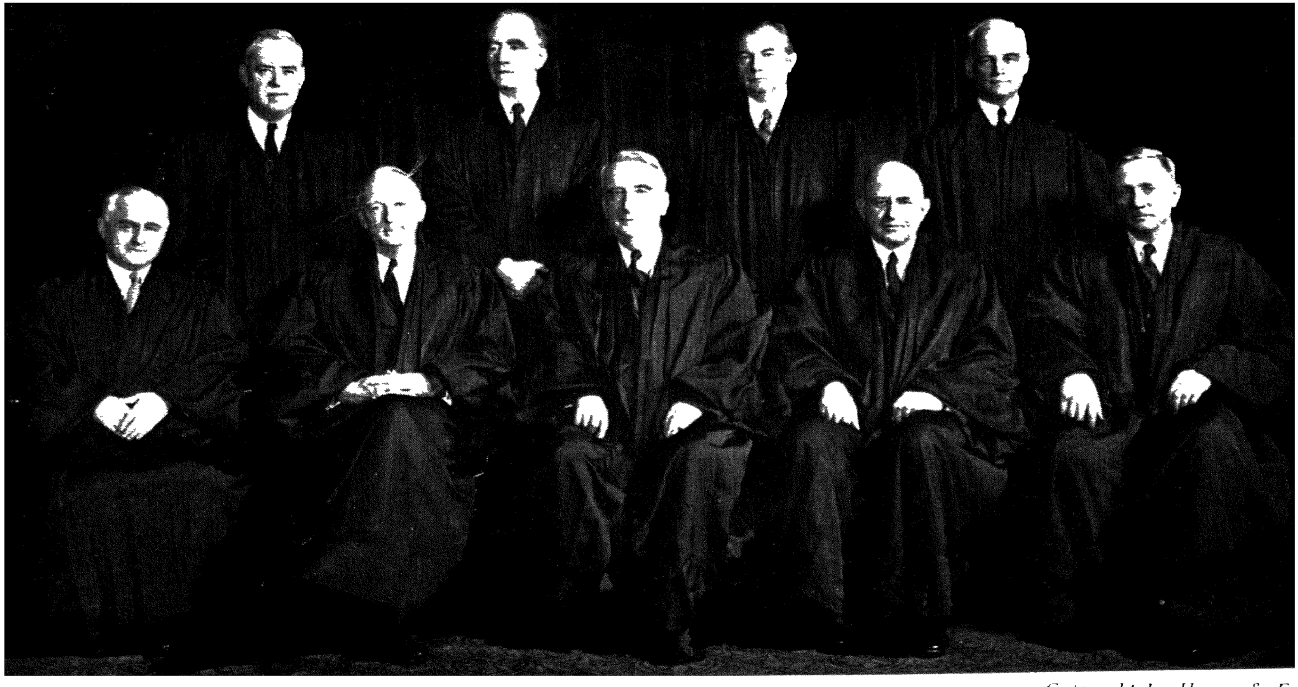

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THE SUPREME COURT, 1947

Frankfurter, Rutledge, Black, Murphy, Vinson, C.J., Jackson, Reed, Burton, Douglas

AMERICAN CONSTITUTIONAL DECISIONS

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PREFACE

This collection of cases is intended primarily for students in courses in American government. Each case selected poses some substantial governmental problem. The Supreme Court is viewed as a part of the machinery of a federal government operating within constitutional limitations. The intake and the dispatching of the Court's business are explained. Litigation is presented as one phase of the process of government, as elections, legislation, the exercise of executive discretion, and administrative action are other phases of the great process whereby individual and social interests are asserted and considered and reconciled within our constitutional system.

It seems preferable that students have a fair comprehension of the Court's action upon a selected range of major problems rather than that they have a more imperfect understanding of what was laid down in a large number of cases. Hence the aim has been to place a few cases each within a rather full setting, and to develop the significance of the Court's conclusions. Where the Justices chose between possible alternatives, the competing considerations should be examined; accordingly there is considerable quotation from dissenting opinions. Generally it has seemed good pedagogy not merely to make an introductory explanation but also to pursue the discussion in a note commenting upon what was done and elaborating observations to which the case gives rise.

The constitutional principles which are authoritative today bear the mark of the men who have served upon the Court. It is well for students of American government to have a just appreciation of the work of some of the major figures. Judicial photographs and the table of succession within the Court reinforce the text in its endeavor to identify Justices whose influence has been outstanding in the history of the Court.

Professor Edward S. Corwin performed the friendly office of reading the author's contribution to this collection and of noting caveats and comments. In making grateful acknowledgment of

the benefit thus conferred there is, of course, no shifting of the author's responsibility for the selection and the editing and the interpretative discussion of these American constitutional decisions.

C. F.

Stanford University
April 16, 1948

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AMERICAN CONSTITUTIONAL DECISIONS

I

INTRODUCTION

One Supreme Court. "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." So speaks the Constitution. One Supreme Court. How does it happen that, notwithstanding the tremendous growth of the country—in population, in area, in industrial operations, in commercial enterprise, in legislative and administrative action—how does it happen that one Supreme Court is still able, as in the days of John Jay (Chief Justice, 1789-1795) and John Marshall (Chief Justice, 1801-1835), to deal with the judicial business which arises from this expanding society? To be sure, Jay had only five associates whereas the Court now has a membership of nine. But this increase in size is in no wise an adequate explanation. Nine judges can turn out more work than six, but capacity does not increase in proportion to numbers, and indeed to increase the Court to more than nine would probably impede its labors. Surely the explanation is not that our people are more reluctant to carry their controversies to the highest court. The contrary seems nearer the truth. The Supreme Court sits for a longer term than in Marshall's time: that adds something to its capacity. In general it limits the oral hearing to one hour on each side, whereas Marshall's Court might listen for days to argument in a great case. But the days are no longer; judicial minds, we may suppose, are no more powerful; the issues, on the average, are certainly more momentous; the need for painstaking and reflective consideration of every case is as great as ever. How can one Supreme Court perform its function?

This question occurs to perhaps not one in ten thousand visitors who wander admiringly through the marble corridors of the Court

building. One who enters the chamber on a day when the Court is sitting is impressed with the quiet, efficient orderliness of the Court's proceedings. "Oyez, oyez, oyez," intones the crier when the Justices have come in. "All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court." Presently a case is called, counsel step forward, each side is heard in turn, and then the order is repeated in another case. Who are the "persons having business" there? How did these specific cases reach the Court? May any persistent litigant carry his appeal so far? How can time be found to attend to all the business of the Court?

Intermediate appellate courts. A partial explanation lies in the fact that Congress, pursuant to its power "to constitute Tribunals inferior to the supreme Court," has created a system of intermediate appellate tribunals—the Circuit Courts of Appeals—whose function is to relieve the pressure of appeals carried up from the federal courts of first instance, the District Courts. Think of these intermediate courts as a screen or barrier, beyond which only the most important federal cases should be allowed to pass. They were created in 1891, when it had become evident that something must be done to reduce the Supreme Court's intake of business.

Discretion in taking cases. The answer to our question also lies in part in the fact that, by a statute of 1925, the Court was given a very broad discretion as to what cases would come before it. To a large extent the Court hears the cases which it considers it ought to hear. We will examine this scheme in a moment, and observe the canons the Court applies in the exercise of this discretion.

The Court's internal economy. Finally there is the interesting matter of the Court's own internal economy—how it hears, studies, confers, decides, and reports. Through the years it has developed a smooth and efficient system whereby it may achieve the maximum in judicial performance.

Each of these points—the hierarchy of courts, the system of appeals, and the Court's own mode of operation—will be considered in turn.

The original judicial system. The federal judicial system, established by the original Judiciary Act of 1789, comprised three grades of court: District, Circuit, and Supreme. The District Court had jurisdiction of only certain matters, particularly cases in admiralty. The Circuit Court was the really important federal court of first instance. It was held in each District by two Justices of the Supreme Court and the district judge for that particular District. Each state had at least one federal District Court; some were divided into two districts. The Justices thus had to spend much of their time and energy traveling about the country, by stagecoach and gig, by sailing vessel and pres-

ently by steamboat. (No wonder that in the early years appointments to the Supreme Court were rather often declined, or that Justices sometimes resigned to accept posts which, by present standards, seem quite inferior in dignity.) Edmund Randolph, who was Washington's first Attorney General, early protested against this circuit riding. Justices of the Supreme Court, he pointed out, needed much time to study. "But what leisure remains from their itinerant dispensation of justice? Sum up all the fragments of their time, hold their fatigue at naught, and let them bid adieu to all domestic concerns, still the average term of a life, already advanced, will be too short for any important proficiency." "I am not quite convinced," said Gouverneur Morris, Founding Father and Senator, "that riding rapidly from one end of this country to another is the best way to study law. I am inclined to believe that knowledge may be more conveniently acquired in the closet than in the high road." [Quoted from Frankfurter and Landis, *The Business of the Supreme Court*, The Macmillan Company, New York (1928)—a memorable "Study in the Federal Judicial System."]

The circuit system's 102 years. The circuit system, with patches added from time to time to cover its weakest spots, was preserved until 1891. After 1802 only one Justice sat in any Circuit Court, and in his absence the district judge held the Circuit Court alone. To recognize the needs of the growing West, the Supreme Court was increased to seven (1807), then to nine (1837); for a few years after 1863 it stood at ten, thus permitting an appointment from California. In 1844 Congress relieved the Justices from attending their circuits more than one term each year; in 1869 the requirement was reduced to once in two years. In 1869, too, Congress provided that there should be nine circuit judges, one for each circuit, to relieve the Justices of some of the burden of circuit work.

After the Civil War, the Republican and nationally minded Congresses permitted an ever-increasing volume of litigation to flow into the federal courts. That meant that the Justices were much concerned with the problems of their respective circuits. But more business below meant more appeals to the Supreme Court. That meant that the Justices had to hold longer terms in the Supreme Court in Washington, working away at the ever-mounting pile of cases. Everyone knew that something must be done to relieve the congestion. Various measures, some of them rather bizarre, were proposed, and for years Congress debated, in the meantime adding more patches.

The Circuit Courts of Appeals Act, 1891. Finally in 1891 nine Circuit Courts of Appeals were created, above the District and Circuit Courts and inferior to the Supreme Court. That permitted the mass of appeals to be stopped before they reached the Supreme Court. In 1911 the Circuit Court was abolished: its business was given to the District Court. (For many years the two courts had normally been

held by the same district judge.) Add that in 1929 Congress created a Tenth Circuit (to meet the needs of the Western states), and we arrive at the existing system of courts. Each state has at least one District Court, some have two, or three, or even four. Some District Courts are allocated a single judge; some have two or more. Courts sitting in the great cities draw a tremendous volume of work; as one would suppose, the Southern District of New York, with New York City, requires the largest panel of District Judges.

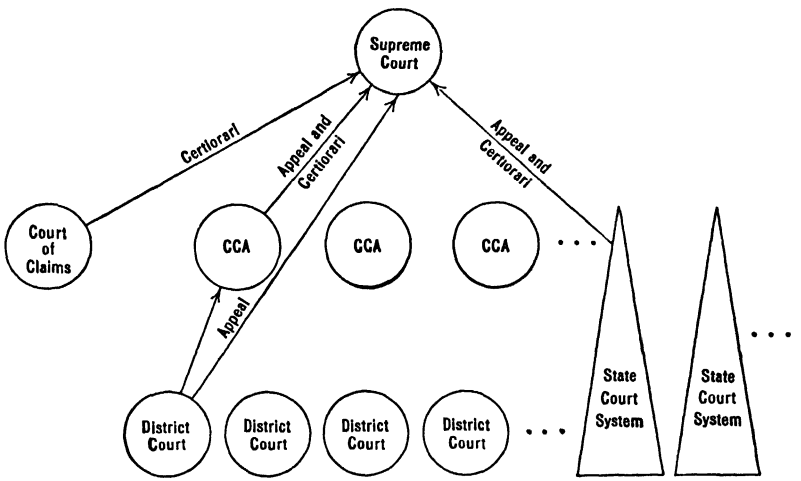
The District of Columbia. In the District of Columbia there is a District Court, also a Court of Appeals which may be thought of as comparable to the Circuit Courts of Appeals.

The state courts. Every state has, of course, its own system of state courts, as provided by its constitution and laws. From time to time "federal questions" arise in the state courts. Suppose, for example, that in the course of a prosecution the defendant says, "You are not giving me a fair hearing; I demand that 'due process of law' which is guaranteed to me by the Fourteenth Amendment." Or suppose that in a suit in a state court one party relies upon some statute, and the other contends that that statute is invalid because inconsistent with a provision in the United States Constitution. Or there may be a conflict as to the meaning of a treaty between the United States and a foreign state. Each of these is a "federal question" which is capable of being brought before the Supreme Court. One does not, however, simply run forthwith into the Supreme Court of the United States: the question can be taken there only from the highest state court wherein a decision could be had. That means that so far as possible the higher state courts should be called upon to consider the claim of a federal right before the Supreme Court in Washington is disturbed. Note that the highest court wherein a decision could be had may not be the highest court of the state: perhaps the state's judiciary legislation does not permit the case to be carried to the top. Grovey *v.* Townsend, mentioned later in this book, was taken all the way from a justice court in Texas to the Supreme Court in Washington in one long jump. For the justice of the peace was the last as well as the first court in which, by the law of Texas, that particular case could be heard.

The appellate system. Now we are ready to consider what cases reach the Supreme Court. While this is a subject which abounds in technical niceties, the broad outlines are easy to understand. Here a sketch will be of help (see p. 5).

Appeals from state courts. Let us look at the right-hand side of the chart. There are two ways of taking a case from the state courts to the Supreme Court of the United States: appeal and certiorari. When one has a right to *appeal* to the Supreme Court, that case must be heard. A *writ of certiorari* is granted by the Supreme Court, in its discretion, where it believes that, in the public interest, it ought to hear the case.

First, the situations where there is a right of *appeal.* (1) Suppose that a litigant has invoked a federal statute or treaty, and its validity has been *denied* by the state court. (2) Suppose that a litigant has challenged the law of the state as being in contravention of the Constitution or laws or treaties of the United States, and the state court has *sustained* the state law. In either case *the claim of federal right has been denied,* and here the dissatisfied litigant is given a right to *appeal* to the Supreme Court. The Supreme Court must hear his contention. The thought of Congress was that state courts might be in-



clined to take a narrow and grudging view of claims of federal right; in order to assure a vindication of such rights there should be an appeal to the Supreme Court.

Situations where there is no right of appeal. Suppose on the contrary that the state court *sustains* the claim of federal right—there may still be good reason why the Supreme Court should be able to reexamine the question. For example, take Graves *v.* State of New York *ex rel.* O'Keefe, a case included in this collection. Was it permissible for New York to collect its income tax from an employee of the United States? The New York courts held No, thinking that that was the answer they were required to give in the light of earlier decisions by the Supreme Court of the United States. But, as it turned out, the Supreme Court had been changing its views on that question. Ought there not to be some means for permitting the Supreme Court to consider whether the state court has not *upheld* the claim of federal right when, in the final judgment of the Supreme Court, it really should have rejected it? Would it be proper to assume that state courts will err only on the side of minimizing federal rights, never on the side of

reading them too large? We know that sometimes the state courts have held a state law to be repugnant to the federal Constitution, only to have it appear later that the Supreme Court of the United States will sustain such a state statute.

Review on certiorari to the state court. Congress recognized this situation, and made suitable provision to meet it. Where a "federal question" is involved, and the case is not one where there is a right to *appeal,* the dissatisfied litigant may *petition* the Supreme Court to consider the question. This is done by petitioning for a writ of certiorari. Certiorari means, literally, "let it be certified." If the Supreme Court grants a writ of certiorari it gives to the court below a direction to send the federal question up to it for its consideration. *Appeals* are taken as of right, but *certiorari* is granted in the discretion of the Court.

An example will show how the scheme works. Mark Graves, the New York Tax Commissioner in the case mentioned above, had carried the state's claim to New York's highest court and had lost. He believed, however, that the Supreme Court of the United States might sustain his contention. So he submitted to the Supreme Court a petition for a writ of certiorari. In making that request he did not argue at length the merits of his case. He merely argued that the federal question was an important one, and urged his reasons why the Supreme Court ought to consent to hear it. This was by what is called "a brief in support of application for writ of certiorari"; it was all in writing and there was no oral argument. The other side—the taxpayer—had an opportunity to file a brief urging that the Supreme Court should not take up and consider the judgment he had just won. Every Justice examined the petition and the supporting and opposing briefs, and one day at conference the Court concluded that this was a question which should be allowed to come up. (If as many as four of the Justices vote in favor, the petition is granted.) So on December 19, 1938, the order was made: "Petition for writ of certiorari to the Supreme Court of the State of New York granted." That was set down in 305 U.S. 592—the 305th volume of *United States Reports,* at page 592. Graves *v.* O'Keefe was placed on the docket. Each side, the tax commissioner and the taxpayer, then submitted its brief, arguing now the substantive merits of the federal question. On March 6, 1939, the case came up for oral argument in the Supreme Court. On March 29 a decision was handed down, saying that Graves' contention was the correct one: the New York courts in their construction of the Constitution had erred to the prejudice of their own state; the federal employee must pay the state tax. The Court's judgment and its opinion—the reasons it gives for its judgment—are reported in 306 U.S. 466.

Review of judgments in the CCA. Look back now to our sketch. From the Circuit Courts of Appeals, also, cases may go to the Supreme Court by appeal and on writ of certiorari. Rightly or wrongly, Con-

gress had an idea that, just as state courts are supposed to view claims of federal right with perhaps an unfriendly bias, conversely the federal courts might be prone to strike down state laws as repugnant to the Constitution or laws or treaties of the United States. So when a state law is held invalid on that ground, the disappointed litigant may *appeal* to the Supreme Court. Congress thus produced a symmetry in matters of appeal, as between the state courts and the Circuit Courts of Appeals. Any other case decided by a CCA is reviewable by the Supreme Court on writ of certiorari. Thus for the great mass of litigation in the Circuit Court of Appeals, the Supreme Court grants the petition in those cases in which it appears that the question merits the Court's consideration.

The Court's Rule 38. To a considerable extent, then, the Court hears the cases it believes it ought to hear. What are the indicia of such a case? Here is what the Court has laid down, in paragraph 5 of its Rule 38:

> A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indictate the character of reasons which will be considered:
>
> (*a*) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.
>
> (*b*) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision. . . .

Rationale. Consider the sense of the thing. Two Circuit Courts of Appeals have passed upon the same question of law: one held one way, and now another holds to the contrary. This is a situation where the Supreme Court should settle which view is to prevail. Again, perhaps a CCA has had a case where it had to apply the law of one of the states, and it appears that the federal court ignored the decisions of the state courts on that point. To protect the state law from being thus disregarded, the Supreme Court agrees to look into that conten-

tion. Or again, some important and novel question of federal law has arisen—e.g., the construction of a recent act of Congress—that too will be an adequate reason for granting certiorari.

Perhaps the CCA has misconstrued a decision of the Supreme Court. Perhaps even the Supreme Court has changed its mind. In such a case the Court grants certiorari to establish what it regards as right. Take Smith *v.* Allwright, included in this collection. In 1935 the Court had held that the Democratic Party in Texas was similar to a private club, and so was free to exclude Negroes from its primary elections. Then in 1941 it had to consider whether corruption in a primary election for a seat in Congress was punishable under the federal law, and decided that it was. Here, then, was inconsistency. Smith *v.* Allwright turned on whether voting at a primary election in Texas was only a private affair or, on the contrary, a matter of federal right. The CCA applied the 1935 precedent; the Supreme Court granted certiorari and overruled the precedent.

Departure from the "accepted and usual course of judicial proceedings" in a lower federal court is another adequate reason for reviewing a case on certiorari. The Supreme Court has a responsibility to exercise a constant supervision over the operation of the inferior federal courts. (Of course it has no such general authority over the courts of the several states.) Any significant departure from the fair and orderly administration of justice calls for prompt attention and correction.

An important public interest. The Court is in the habit of explaining in a few words why in each case it granted certiorari. Here are some samples:

because of a conflict of decision among the Circuit Courts of Appeals;

in view of the close similarity between this case and an earlier case which we decided the other way;

because both parties rely on the same decision of this Court;

on account of the importance of the issues in the administration of the Social Security Act . . . of the National Labor Relations Act . . . of the Federal Power Act . . . of the Federal Communications Act;

because of doubts as to this construction of the Federal Kidnaping Act;

because this is an important case of first impression;

because there was a substantial question whether this imprisonment was not a denial of due process of law;

since these judicial safeguards are prized privileges of our system of government;

because of the importance of the issue in the administration of justice.

These are typical reasons why the Court granted the petition for certiorari. Note in every case the *public interest* involved. If Black simply argues that he, not White, should have won the suit, the Court declines to review the question. It could not possibly give its ear to all these contentions. The parties have already had one appeal. The Supreme Court's duty is to the public, to act as the arbiter of legal issues of national importance. Only by limiting its attention to these really major considerations can it possibly keep up to date. And as is often said, to delay justice is to deny justice. It is imperative, therefore, that the Court take on no more cases than it can promptly hear and determine.

Direct appeals from district court. Turn back once more to the sketch, to note that some cases may be appealed from a district court directly to the Supreme Court. The categories are not numerous but they are important. Here are examples: One is appeals in criminal cases where the district court has held the penal statute unconstitutional. Pretty clearly, such a question would be so important that it would have to be settled by the Supreme Court, and the sooner the better. Of the cases here collected, the Darby and Classic Cases reached the Supreme Court by this route. Appeals under the antitrust law go straight to the highest Court: they too are matters of great national importance. Suppose that a plaintiff has brought a suit in a district court to enjoin the enforcement of a state statute or some administrative action by the state authorities on the ground of unconstitutionality. To stop any of the wheels of state government is, of course, a very serious matter, and here again appeal lies directly to the Supreme Court. (In such a case, by the way, the district court would have been held by three judges.) Colegrove *v.* Green and West Virginia Board of Education *v.* Barnette are examples of this type of direct appeal. In 1937 Congress provided that if any district court (which here again would be a three-judge court) should enjoin the enforcement of any federal statute on the ground that it was unconstitutional, appeal should lie directly to the Supreme Court. It was under this provision that Wickard *v.* Filburn, another of the cases in this collection, was carried up.

Jurisdiction of the district court. Some explanation should be made of the cases which may be originated in the federal district court. Look at section 2 of Article III of the Constitution, and one reads that "The judicial Power shall extend to . . .," with an enumeration of the types of controversy which the Constitution permits to be made a matter of federal cognizance. Within the outside limits thus established, Congress determines specifically what categories of litigation may be brought. This it has done by the Judiciary Act, as amended from time to time. Here are some of the staple categories: crimes against the United States; suits under the revenue, the postal, the patent, copyright, and trademark laws; bankruptcy; suits under

the interstate commerce laws. Suits may be brought in the federal courts to vindicate civil rights secured by the Constitution and laws of the United States. Also—and this is important—Congress has given the federal district court jurisdiction of suits "between citizens of different states" where the matter in controversy exceeds the sum or value of $3000. These are commonly spoken of as "cases of diversity of citizenship." The original Judiciary Act of 1789 opened the door to such cases if the amount in dispute exceeded $500. The Federalist Party's abortive Judiciary Act of 1801 reduced the figure to $400. The Republican Congress restored the old figure in 1802. The Judiciary Act of 1887 as amended in 1888 partially closed the door against diverse-citizenship litigation, placing the jurisdictional amount at $2000. The present figure was set in 1911.

What has just been said is to be borne in mind in reading Luther *v.* Borden, Aetna Life Insurance Co. *v.* Haworth, and especially Erie Railroad Co. *v.* Tompkins.

Courts for the District of Columbia. For the District of Columbia, over which it exercises "exclusive legislation," Congress has provided inferior municipal courts, a district court of the United States with general jurisdiction, and above it a Court of Appeals. So far as concerns review by the Supreme Court of the United States, the Court of Appeals is, generally speaking, assimilated to the federal Circuit Courts of Appeals: its judgments are reviewable on writ of certiorari.

Review of the Court of Claims. Mention should also be made of the Court of Claims, which Congress created to pass upon claims brought against the United States. No *appeal* lies from the Court of Claims to the Supreme Court, but cases may be taken up if certiorari is granted. The Court of Claims—and the Circuit Courts of Appeals as well—are also authorized to certify questions of law to the Supreme Court, for its "binding instructions." Among the cases here collected it will be noted that Humphrey's Executor (Rathbun) *v.* United States is one where the Court of Claims certified questions to the Supreme Court for decision.

It may be noticed that some of the older cases in this collection reached the Supreme Court on writ of error. That was simply another mode of bringing up a case with certain technical differences from appeal and certiorari.

One reason for divisions in the Court. This explanation of the Supreme Court's jurisdiction suggests one reason why its decisions are so often reached by a divided vote. If the cases were easy, the rate of agreement would no doubt be high. But as we see, the system of review is contrived—and this is essential and wise—so that the Court devotes its time to hard cases. If, for example, two Circuit Courts of Appeals have reached opposite conclusions, is it surprising that some of the Justices should take one view and some the other? This is far from telling the whole story, but it is an important element.

A system responsive to public needs. "To establish Justice" was one of the great purposes for which our Constitution was adopted. The realization of that purpose calls for, among other things, a judicial system which is flexible and responsive to new needs. Congress by its more recent legislation has done much to facilitate the administration of justice. District judges may be called up to sit on the Circuit Court of Appeals, circuit judges may sit in the district court. Judges may be temporarily assigned to other jurisdictions to relieve courts which are overburdened. (A Justice of the Supreme Court is competent to sit in either inferior court—but that is little more than a vestige of the old system of circuit riding.) Each circuit has its judicial conference, often under the leadership of the Justice assigned to that circuit. There is an annual conference of senior circuit judges, presided over by the Chief Justice. The purpose of these meetings is to study problems of judicial administration and to survey the needs of the federal system.

The Court's internal administration. We come finally to the internal administration of the Supreme Court. The term begins on the first Monday in October; adjournment usually occurs early in June. The Court meets at noon, from Monday through Friday. It goes out for lunch from 2 to 2:30, and rises at 4:30 in the afternoon. With normally one hour allowed to each side in each case, that means about two cases a day. Certain matters are heard more summarily. Sometimes one or both litigants will merely submit their case on a brief, without oral argument. That means that the Court considers perhaps 20 or 30 cases in a fortnight. Probably the Court will then recess for the next two weeks, to permit the Justices to write their opinions. Multiply this typical month by eight, and the result is that the Court produces perhaps 175 full opinions in the entire term. Then there will be trivial questions, disposed of perhaps by a little *per curiam* opinion—that is, a terse statement of the decision with a citation of the controlling precedents, announced simply as *"per curiam"*—by the Court.

How the Court decides cases. The Court's method of deciding cases in conference seems to have remained essentially the same through many decades. Former Justice Campbell, in his memorial address on former Justice Curtis, related the system as it was under Chief Justice Taney (20 Wallace x). Mr. Charles Evans Hughes, in the interval between his first and second service on the Court, described the procedure he had known, in his published lectures, *The Supreme Court of the United States,* Columbia University Press, 1928, at 58. Here is Justice Stone's account:

> Every Saturday the Court sits in conference, meeting at noon, just when the call for golf is most alluring. At the sessions of the Court during the week the judges have heard arguments in cases

on the merits. The time of argument as you know is limited so as to make impracticable decision from the bench in most cases. During the spacious hours of leisure before the Court sits at twelve, and after it adjourns at half past four, the judges have had opportunity to examine the records in the argued and submitted cases, and to examine the petitions and briefs upon current applications for certiorari. They have also received and examined the papers in the miscellaneous motions affecting the cases which have been docketed. On the day before the conference each judge receives a list giving the cases which will be taken up at the conference, and the order in which they will be considered. This list usually includes every cause which is ready for final disposition, including the cases argued the day before the conference, and all pending motions and applications for certiorari.

At conference each case is presented for discussion by the Chief Justice, usually by a brief statement of the facts, the questions of law involved and with such suggestions for their disposition as he may think appropriate. No cases have been assigned to any particular judge in advance of the conference. Each Justice is prepared to discuss the case at length and to give his views as to the proper solution of the questions presented. In Mr. Justice Holmes' pungent phrase, each must be ready to "recite" on the case. Each judge is requested by the Chief Justice, in the order of seniority, to give his views and the conclusions which he has reached. The discussion is of the freest character and at its end, after full opportunity has been given for each member of the Court to be heard and for the asking and answering of questions, the vote is taken and recorded in the reverse order of the discussion, the youngest, in point of service, voting first.

On the same evening, after the conclusion of the conference, each member of the Court receives at his home a memorandum from the Chief Justice advising him of the assignment of cases for opinions. Opinions are written for the most part in recess, and as they are written they are printed and circulated among the Justices, who make suggestions for their correction and revision. At the next succeeding conference these suggestions are brought before the full conference and accepted or rejected as the case may be. On the following Monday the opinion is announced by the writer as the opinion of the Court.

In the preparation of opinions it has been, from the beginning, the practice to state the case fully in the opinion. This practice gives a clarity and focus to the opinion not otherwise attainable and has added in no small degree to the prestige and influence of the Court. In recent years there has been a trend toward brevity and directness in the judicial style which, without sacrifice

of the essentials of the opinions has, I believe, enhanced their value as expositions of legal science. . . .

An interesting, and I am inclined to believe, important feature of the Court's method of doing its work is that every decision, even of a motion, is a nine-judge decision. No one knows in advance of the vote and the assignment of the case by the Chief Justice who will write the opinion. No judge, more than another, is expected to advise his associates with respect to any case.

The method of dealing with motions and applications for certiorari is in no wise different. The popular impression that the work of examining these applications is divided up among the judges is not true. Every motion and every petition, with papers supporting it, is examined by each judge of the nine and he comes to conference with a memorandum, often written out in his own hand, embodying the results of his investigation of each application.

Petitions for certiorari are granted on the affirmative vote of four of the nine judges. This part of the Court's work is very laborious. At the opening of the last term there were awaiting disposition 228 applications for certiorari, which had accumulated during the summer vacation. At the end of the first seven weeks of the term these applications had been taken up and disposed of in addition to the current work of hearing and disposing of argued and submitted cases and the preparation of opinions.

Of course, so heavy a burden of work could not have been disposed of in so brief a time if all the judges had not spent some of the summer in examining the accumulations of applications for certiorari. Nor would such a continuous burden of work as I have described be supportable were it not for the very great skill of the more experienced judges in reading records and getting quickly to the essential points in each case, nor, indeed, if it were not for the extraordinary and abiding interest which attends it. [14 *American Bar Association Journal* 428, 435 (1928); 8 *Oregon Law Review* 248, 266 (1929).]

The Court keeps up with its docket. On July 3, 1941, upon the retirement of Hughes, C.J., Justice Stone was made Chief Justice. A year later, addressing the annual judicial conference of the Fourth Circuit, he gave this report on the latest term of the Court, "certainly the busiest in its long history."

During the term just ended the Court has had on its appellate docket 1290 cases, of which it has finally disposed of 1166, 187 more than were disposed of at the last term of Court. When we adjourned we had disposed of all cases ready for argument, with

> one possible exception, and there were remaining on our docket 124 numbered cases or, if we allow for duplication of numbers, 105, which is 10 less than were on our docket at the end of the 1940 term. Three hundred and eighty-one of these cases were disposed of on their merits, 95 more than during the previous term. There were 951 applications for certiorari, 62 more than during the previous term. Of these we granted 166, actually 28 less than were granted during the previous year. As these statistics indicate there was a marked falling off in the quality of the applications. [28 *American Bar Association Journal* 519 (1942).]

An imposition upon the Court. Note with what determination the Court keeps up with its docket. Note too how many petitions for certiorari are filed, how few, relatively, are granted. Therein lies a real abuse, and the one great avoidable waste of the time of the Justices. A lawyer ought to know whether his case presents a problem which has a fair chance of gaining the Court's attention. It is truly culpable to impose upon the Court with a petition really devoid of merit, merely to indulge a last vain hope or to wear down one's adversary by delay. The greatest contribution which could be made to the efficiency of the Court would be for the members of its bar to confine their petitions for review to those cases which have some reasonable likelihood of being granted.

The reporters. Now a few details about reports and citations. Down to 1875 the reports of decisions in the Supreme Court were known by the name of the reporter. Here is the list, with the usual abbreviations:

1789-1800	Dallas	4	volumes	Dall.
1801-1815	Cranch	9	"	Cr.
1816-1827	Wheaton	12	"	Wheat.
1828-1842	Peters	16	"	Pet.
1843-1860	Howard	24	"	How.
1861-1862	Black	2	"	Bl.
1863-1874	Wallace	23	"	Wall.

That makes a total of 90 volumes. From there on they are cited as 91 U.S. and so forth.

Citations. There are now two leading unofficial series of reports of the Supreme Court: the *Supreme Court Reporter* and *Lawyers' Edition.* Thus the case of Ashwander *v.* Tennessee Valley Authority, decided in 1936, may be found in 297 U.S. 288, or in 56 S.Ct. 466, or in 80 L.Ed. 688. The Circuit Courts of Appeals are reported in a series called the *Federal Reporter,* which went to volume 300 and then began numbering anew as F.(2d). District Courts are reported in *Federal Supplement.* The citation for the Ashwander Case in the District Court is 9 F. Supp. 965; it was appealed to the Circuit Court of Appeals, whose decision is reported at 78 F.(2d) 578. The highest

courts of the several states are also reported in official and unofficial reports. For example, West Coast Hotel Co. *v.* Parrish was appealed to the Supreme Court of the United States from the Supreme Court of Washington. The decision below is reported in 185 Wash. 581; also in 55 P.(2d) 1083, meaning volume 55 of Pacific (2d). Near *v.* Minnesota came up from the Supreme Court of Minnesota, whose decision is at 179 Minn. 40 and 288 N.W. 326, N.W. signifying the *Northwestern Reporter.*

How to abstract a case. Finally a hint on abstracting a case, to bring out the important points in order. Here is a satisfactory form:

TITLE: (for example) Muskrat *v.* United States 219 U.S. 346 (1911)
FACTS: Here jot down the few really essential facts.
QUESTION: What was the general question on which the case turned?
HELD: What the Court "holds"—its answer to the question.
OPINION: Outline, by main points, the course of the reasoning.
DISSENT: Where there was a dissent, that is worth noting. Often a dissenting opinion is very helpful in pointing out just what the majority has said or has omitted to say.

Sometimes a case does not lend itself to just this scheme of abstracting. Perhaps the very first case, Marbury *v.* Madison, does not. The significant concern is to understand what the Court was doing, and then to consider, soberly, whether that was the most just and wise solution of the problem.

A word from Justice Brewer. Some of the Court's strongest Justices have stressed the value of a vigilant and attentive public interest in its work. Consider this from Mr. Justice Brewer:

> It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgments subject to the freest criticism. The time is past in the history of the world when any living man or body of men can be set on a pedestal and decorated with a halo. True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all. The moving waters are full of life and health; only in the still waters is stagnation and death. 15 *Nat. Corp. Rep.* 849 (1898).

II

THE FUNDAMENTAL LAW AND THE JUDICIAL FUNCTION

MARBURY *v.* MADISON, Secretary of State of the United States

1 Cranch 137, 2 L.Ed. 60 (1803).

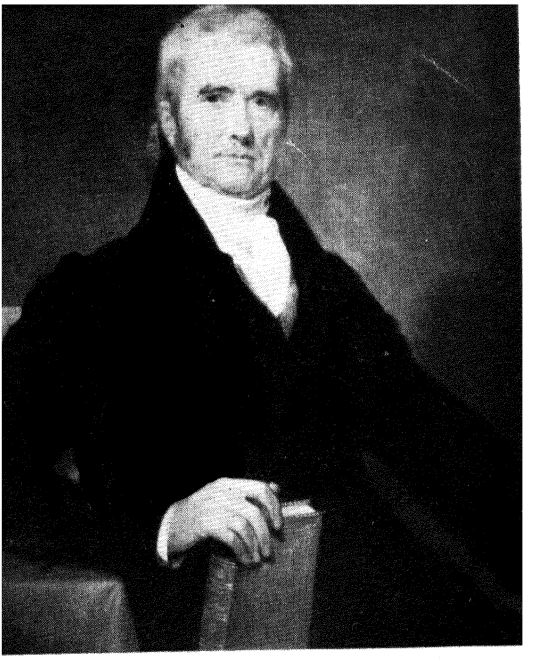
Original action in the Supreme Court.

Introduction

The historic importance of this case is that Chief Justice Marshall made the decision the occasion for establishing the power of the federal courts to strike down acts of Congress which the courts find to be inconsistent with the Constitution. This is one of the most salient characteristics of the American system of government.

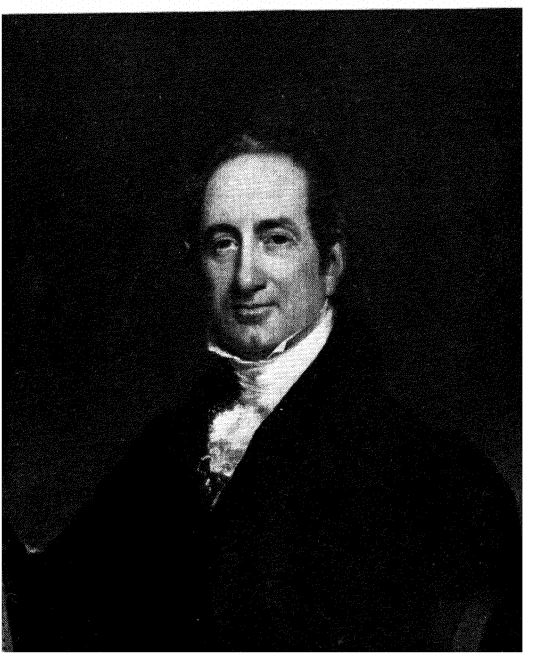
Origin of the controversy. The Act concerning the District of Columbia, which became law on February 27, 1801, provided that there should be appointed "such number of discreet persons to be justices of the peace, as the President of the United States shall from time to time think expedient, to continue in office five years. . . ." President John Adams, whose term of office was fast drawing to a close, hastened to nominate forty-two men to this petty office. The Senate confirmed, and commissions—the formal evidence of the appointments—were executed. Such was the rush, however, in the expiring hours of the Adams administration that some of the commissions remained undelivered when, on March 4, Jefferson took office. His view was that

John Marshall
Chief Justice,
1801-1835



Courtesy of Virginia State Library and Frick Art Reference Library

William Johnson
Associate Justice,
1804-1834



Courtesy of The New-York Historical Society, New York City

Joseph Story
Associate Justice,
1811-1845

Courtesy of the Massachusetts and The New-York Historical Societies

Benjamin Robbins Curtis
Associate Justice,
1851-1857

Courtesy of the Massachusetts and The New-York Historical Societies

"the nominations crowded in by Mr. Adams after he knew he was not appointing for himself I treat as mere nullities." He instructed the new Secretary of State, James Madison, not to deliver the commissions. To twenty-five of those chosen by Adams, Jefferson gave new appointments. Among the remaining seventeen not so favored, William Marbury and three others saw fit to bring a suit to force Madison to deliver the commissions which President Adams had signed. At the December term, 1801, their counsel came into the Supreme Court and moved for a rule to Madison to show cause why a mandamus should not issue commanding him to deliver the commissions. (This is lawyer's language for a request that Madison be called upon to show any lawful reason, if such there were, why the Court should not order him to comply with the plaintiffs' demands.) The Court granted the rule, setting the next term of court as the time when Madison should answer.

An unexpected outcome. What if the Court should then command him to do that which the President had forbidden? As the case turned out, no such collision occurred. In February 1803, when the case came on for hearing, Madison made no answer, and Marbury's counsel pressed for the granting of the order. But when a decision was handed down, on February 24, the Court held that Marbury's action must be dismissed because the Court had no jurisdiction. The statute on which Marbury had relied in commencing his suit in the Supreme Court was unconstitutional. So the case went off in an unexpected direction.

Contradiction between statute and Constitution? Wherein lay the unconstitutionality? Section 13 of the Judiciary Act of 1789, provided that

> . . . The Supreme Court . . . shall have power to issue . . . writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.

But Article III of the Constitution said:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned [i.e., in all other cases to which the judicial power of the United States extended], the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Here was the supposed contradiction. Marbury's suit was not a case affecting an ambassador, etc., from a foreign government, it was not a suit to which a state was party: it was not a suit which, consistently with the Constitution, could be *initiated* in the Supreme Court. The

plaintiffs, regardless of the merits of their complaint, had started in the wrong forum. (Seemingly they could have sued in the Circuit Court for the District of Columbia, 2 Stat. 103, at § 5, and appeal would then have lain to the Supreme Court, § 8. This expresses the view taken by the Court in Kendall *v.* United States, 12 Pet. 524, 622 ff. (1838), though three Justices dissented from that holding as to the jurisdiction of the Circuit Court.) Section 13 of the Judiciary Act on which they had relied was repugnant to the Constitution and invalid.

Here is how Chief Justice Marshall, speaking for the Court, reasoned his way through the problem.

Opinion

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

. . . The first object of inquiry is—Has the applicant a right to the commission he demands? . . . Mr. Marbury, then, since his commission was signed by the President and sealed by the Secretary of State, was appointed; and as the law creating the office gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country. . . .

2. This brings us to the second inquiry; which is: If he has a right, and that right has been violated, do the laws of his country afford him a remedy? . . . [The Court finds that they do.]

3. It remains to be inquired whether he is entitled to the remedy for which he applies? This depends on—*first*, the nature of the writ applied for; and *second*, the power of this Court.

First. The nature of the writ. . . . This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired, whether it can issue from this Court?

The act to establish the judicial courts of the United States authorizes the Supreme Court "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." . . . The Constitution vests the whole judicial power of the United States in one Supreme Court, and such inferior courts as Congress shall, from time to time, ordain and establish. . . . In the distribution of this power, it is declared, that "the Supreme Court shall have original Jurisdiction,

in all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party. In all other cases, the Supreme Court shall have appellate jurisdiction." . . . If it had been intended to leave it in the discretion of the legislature, to apportion the judicial power between the Supreme and inferior courts, according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage —is entirely without meaning, if such is to be the construction. . . . To enable this Court, then, to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction. . . . It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer, for the delivery of a paper, is, in effect, the same as to sustain an original action for that paper, and therefore, seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the Court to exercise its appellate jurisdiction. The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the Constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question whether an act repugnant to the Constitution can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and

assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act.

Between these alternatives there is no middle ground. 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.

If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this Court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favor of its rejection.

The judicial power of the United States is extended to all cases arising under the Constitution.

Could it be the intention of those who gave this power, to say that in using it the Constitution should not be looked into? That

a case arising under the Constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the Constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the Constitution which serve to illustrate this subject.

It is declared that "No Tax or Duty shall be laid on Articles exported from any State." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the Constitution, and only see the law?

The Constitution declares that "No Bill of Attainder or ex post facto Law shall be passed."

If, however, such a bill should be passed, and a person should be prosecuted under it, must the court condemn to death those victims whom the Constitution endeavors to preserve?

"No Person," says the Constitution, "shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."

Here the language of the Constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor

and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as , according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

Comment

No better example could be found to show how large a range of deliberate choice may be available to the Justices in their handling of a case—notwithstanding protestations that they are but following the straight path of judicial duty. Look at the order in which Marshall chose to take up the points at issue. First, "Has the applicant a right to the commission he demands?" The Chief Justice went to great length, in a portion of the opinion not quoted above, to demonstrate that the answer was Yes. This meant that Jefferson and Madison were wrong. Next, Do the laws afford a remedy? Again the answer is Yes. Marshall goes on to show that a writ of mandamus (literally, "we command") was the appropriate means for compelling the head of an executive department to perform a ministerial duty. (The distinction is between merely *ministerial* acts, calling for no exercise of judgment, no choice of means, and *discretionary* acts, which involve the exercise of judgment and the evaluation of competing considerations. As to matters of the latter sort, it would be "absurd and excessive" for the judiciary to "intermeddle with the prerogatives of the executive." But the demand for the delivery of an executed commission,

"far from being an intrusion into the secrets of the cabinet," was simply the matter of a paper which the law required to be upon record.) Jefferson and Madison were wrong again: there was nothing in "the exalted station" of Secretary of State which exempted that officer from being compelled to obey the judgment of the law.

The reasoning was thus marching straight toward the conclusion that the Court must order Secretary Madison to render to the plaintiffs that to which they were entitled. But wait! Before finally it makes the order, the Court must assure itself that it has jurisdiction to hear and decide the controversy on whose merits it has already expressed itself so fully. Is the statute on which Marbury began his suit in the Supreme Court consistent with the Constitution? If no, then what shall the Court do when the voice of the Constitution whispers one thing and the Congress commands another? It is "the very essence of judicial duty" to decide between them, and the paramount law of the Constitution must prevail.

Would it not be the normal order for the Court to look first to its own jurisdiction? For if it is without authority to decide a case, there will be no reason for it to express its opinion upon the merits. With what grace does the Court read lectures to both the other branches of government on an occasion on which it itself has no right to speak? Why not ascertain, first of all, whether this is a case which the Court is authorized to decide; if the answer is No, then say so and stop, without volunteering anything further. Jefferson—who doubtless leveled many unjust and carping accusations at John Marshall—had some reason for complaining of "the impropriety of this gratuitous interference"; it was, he thought, "very irregular and very censurable: . . . the Chief Justice went on to lay down what the law would be, had they jurisdiction of the case, to wit: that they should command the delivery. The object was clearly to instruct any other Court having jurisdiction what they should do if Marbury should apply to them." It seems evident that the Chief Justice chose to depart a long way from the straight path, with the definite purpose of teaching the President a lesson.

It was not really necessary, either, for the Court to declare an act of Congress unconstitutional. Had it not been that Marshall thought it opportune to establish such a precedent, he could have reconciled Section 13 of the Judiciary Act with Article III of the Constitution without any real difficulty. He could have treated it as a simple matter of statutory construction. The Constitution said that the Supreme Court had *original* jurisdiction of two sorts of cases: those affecting ambassadors, etc., and those to which a state was a party. Section 13 said that the Supreme Court should have power to issue writs of mandamus. Of course every statute should be read in the light of the controlling provisions of the Constitution. Section 13 would mean that the Court had power to issue the writ of mandamus whenever

that remedy was appropriate in the disposition of those cases which, consistently with the Constitution, were properly brought in the Supreme Court. (For example, suppose that the Secretary of the Treasury should refuse to distribute to the various states funds which Congress had directed him to divide among them as grants-in-aid: any state could bring an original action against the Secretary in the Supreme Court, and the appropriate remedy would be a writ of mandamus directing him to make the distribution.) How simple the matter really was may be seen by glancing at Section 688 of the Revised Statutes of 1874, now 28 U.S. Code 342, where Congress has perpetuated the language of Section 13 of the Judiciary Act, simply adding the words "where a State, or an ambassador, or other public minister, or a consul or vice consul is a party." Marshall and his colleagues could easily have read the original statute as meaning just that and said all that was necessary to a correct decision in a few paragraphs.

Historical background of the case. Why did the Chief Justice choose to travel over so much ground when a proper decision could have been reached so simply and directly? Surely it would seem to have been for some external reason.

To understand John Marshall's method of dealing with the case one must recall the mighty struggle between the Federalists, who had just been routed in the election of 1800, and the Republicans, led by Thomas Jefferson. Marbury's suit was a foray which developed into one of the major engagements of this party warfare. When the Federalists learned of their reverses in the national election they made haste to consolidate their position. They regarded themselves as the only defenders of adequate national authority, of a liberal construction of the Constitution, of a strong federal judiciary. One of their hurried efforts was the passage of the Act of February 13, 1801, "to provide for the more convenient organization of the courts of the United States." That statute created sixteen circuit judgeships, and relieved the Justices of the Supreme Court of the onerous duty of traveling about the country holding circuit courts. The Supreme Court would fall from six to five Justices whenever the next vacancy should occur.

President Adams, with the concurrence of the Federalist Senate, seized the opportunity to place his own appointees in the new judgeships. Many of the commissions were made out in what were literally the closing hours of the Federalist regime—hence the taunting phrase, "midnight judges." To the Republicans, this was sharp practice and politically immoral. To the Federalists, it was wise and prudent to see to it that the federal courts at any rate had a full complement of sound judges at the moment when the other branches of the government fell into the hands of a dangerous and even revolutionary party. "The Federalists have retired into the judiciary as a stronghold," wrote Jefferson, "and from that battery all the works of republicanism are to be beaten down and erased."

Republican antagonism toward federal—and Federalist—judges was an old story. To no small degree the judges had themselves to blame for this situation. For instance, take their manner of enforcing the Sedition Act of 1798. By that purblind enactment the Federalist Congress made it a crime to publish

> . . . any false, scandalous, and malicious writing or writings against the government of the United States, or either House of Congress, or the President of the United States, with the intent to defame the said government, or either House of the said Congress, or the said President, or to bring them or either of them, into contempt or disrepute; or to excite against them, or either of them, the hatred of the good people of the United States . . .

Exciting the country against President Adams and the Federalist Congress was, of course, one of the principal occupations of the Jeffersonians. The First Amendment to the Constitution declared: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." No other act of Congress in the early history of the nation so badly needed to be tested by the fundamental law as did the Sedition Act. Yet the federal judiciary entered into the business of enforcing the act with the ardor of partisans, fining and jailing Anti-federalists for utterances which today would be regarded as no more than the permissible hyperbole of partisan controversy. Small wonder that the federal judges stood high in the bad books of President Jefferson.

On the other hand, the Jeffersonians had been professing doctrines of state rights, strict construction, and jealousy of national authority, which Federalists believed to be a threat to the existence of the Union. The judgment of history has been that in this view the Federalists were in large measure right.

When the Marbury Case is viewed against the background of the maneuverings for position by the forces of Federalism and of Republicanism, one may form some conjecture of the inner reasons which dictated Marshall's strategy. On March 4, 1801, Jefferson took office. In December 1801, the Republican Congress convened for its first session. In the course of his message of December 8, Jefferson had written, with a reassuring moderation, that "the Judiciary system . . . and especially that portion of it recently enacted, will, of course, present itself to the contemplation of Congress . . ." In December, also, the Supreme Court convened for its regular term. On December 21, Marbury's action against Madison was commenced. When the Court promptly granted the motion calling upon the Secretary of State to respond, Republicans cried out in alarm that the judges made bold to direct the President as to the mode in which he should discharge the duties of his office. On January 6, 1802, Senator John Breckinridge,

Kentucky Republican, introduced a bill to repeal the Judiciary Act of 1801. This bold proposal was certainly not free from constitutional difficulties. Whilst the circuit judges held office for good behavior, might they yet be put out of the way by the device of repealing the statute by which their offices were created? Fervor mounted as the debate progressed. The judges, declared the Republicans, menaced not only the Executive, but the functions of Congress as well. This was a struggle between judicial despotism and responsible representative government, they said. By party votes in both houses, the repeal passed and became law on March 8. This pulled the bench out from beneath the newly seated judges and made it the duty of the Justices of the Supreme Court to resume their old task of holding circuit court. Another act, of April 29, 1802, provided that the Justices should each have a circuit (formerly they had gone in pairs) and also that the Supreme Court should hold one session a year, opening on the first Monday in February. The result was that the Court would not convene again until February 1803 and that in the meantime the Justices must resume their circuit functions. They would thus severally have acquiesced in the statute before any litigation to test its validity could reach the Supreme Court. It is said that Marshall proposed to his brethren that they refuse to sit as circuit judges and "risk the consequences," but they were not prepared to take so bold a course. [Albert J. Beveridge, *Life of John Marshall*, Houghton Mifflin Co., Boston (1919), Vol. III, 122, quoting Chancellor Kent in 3 *New York Review* 34. See too Stuart *v.* Laird, 1 Cranch 299 (1803).]

When Marbury *v.* Madison came on for decision in February 1803, it seemed to Marshall that this was an appropriate moment for making pronouncements on some of the issues raised in this debate over the place of the judiciary. So he contrived an opinion which, without patent impropriety, would demonstrate the authority of the courts as against the Executive and the Congress—and yet in the end would avoid an actual collision which could only have resulted in impairing the Court's prestige. In historical perspective, few actions of the Court have done so much to establish its position in the American scheme of government.

Historical roots of judicial review. The principle that an act of the legislature could be held invalid because in conflict with a law of superior authority was no innovation by John Marshall. It had roots which ran far into the past. A colonial legislature was a subordinate body which was limited by the charter of the colony and by the laws of England. The Privy Council in England, which acted in these matters through a committee known as the Board of Trade, could and did disallow colonial statutes. Often this was on the ground that it disagreed with the policy of the statute, but sometimes because it found the act unauthorized by the charter or inconsistent with the laws of

England. In litigation before a colonial court the contention might be made that an enactment of the local legislature was in excess of its powers and so void. Appeal might be taken from the courts of the colonies to the Privy Council in its judicial aspect, and in the notable case of Winthrop *v.* Lechmere in 1727 a Connecticut statute was held void as being "contrary to the laws of England" and "not warranted by the Charter of that colony." [Thayer, *Cases on Constitutional Law* (1895), I, 34.] So it was understood in the polity of colonial America that the legislatures were limited by law, and that one affected by a colonial statute was entitled to raise, as a matter of law, the question whether the legislature had acted *intra* or *ultra vires*—within or beyond its powers.

Even the briefest discussion of the historical background should mention, too, the dictum of Lord Coke in Dr. Bonham's Case. 8 *Coke's Reports* at 118*a* (1610). The Lord Chief Justice there said:

> And it appears in our books, that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void; for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void.

Lord Coke spoke at a time when the authority respectively of the King, the Parliament, and the common law as declared by the judges was a matter of high controversy. Coke was an active participant in that struggle. He fudged badly in vouching precedent for his bold statement. As we know, history has settled it that the King in Parliament is supreme and the judges must obey the statute. But Coke's dictum stuck there in the books and was found particularly useful to the colonists in justifying resistance to the British Parliament. The idea that a statute contrary to common right and reason is void, and that it pertains to the judges to apply the test, entered into the American political heritage and had much to do with promoting the practice of judicial review of legislation.

Judicial review after 1776. After Independence was declared, state constitutions were framed in place of the colonial charters. It was of course fundamental that the state legislature was bound by the state constitution; but what is quite a different proposition, it was also an accepted view that it belonged to the judiciary to pass on the question of repugnancy. Prior to Marbury *v.* Madison there had been several cases where a state court had declared a state statute to be invalid.

Of the duty of any court, state or federal, to refuse to enforce a state act found inconsistent with the Constitution, laws, or treaties of the United States, there could be no doubt at all. Section 2 of Article

VI was categorical on that point. (How could the federal system have operated if it were not so?)

Of the power of the federal judiciary under the Constitution, Hamilton had written in *The Federalist* (No. 78):

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Marbury Case not the first wherein an act of Congress was held invalid. It seems that Marbury *v.* Madison was the second, not the first case wherein the Supreme Court held an act of Congress unconstitutional. Apparently the Act of March 23, 1792, was held invalid in United States *v.* Yale Todd, decided in 1794 and reported in a note to United States *v.* Ferreira, 13 How. 40 (1851). That was a statute which granted circuit courts jurisdiction to hear claims for pensions, and directed that they transmit their opinions to the Secretary of War; the Secretary was to place a name so certified on the pension list—provided, however, that if the Secretary suspected that there had been any imposition or mistake he was authorized to withhold the name and report the matter to Congress. The Todd case was not reported at the time, and no opinion was filed. But considering together Hayburn's Case, 2 Dall. 409 (1792), and the record in Todd's Case, Chief Justice Taney later concluded that the Court must have held the statute of 1792 unconstitutional as imposing on the federal courts a duty not judicial in nature.

The Dred Scott Case. The next instance after Marbury *v.* Madison wherein the Court held an act of Congress unconstitutional was the Dred Scott Case, 19 How. 393 (1857), where a majority of the Court held that Congress had exceeded its power in that provision of the Missouri Compromise of 1820 which prohibited slavery in a territory of the United States. Of that decision Lincoln said, in his First Inaugural:

> I do not forget the position, assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding, in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the government. And while it

is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal. . . .

ASHWANDER *et al.* *v.* TENNESSEE VALLEY AUTHORITY *et al.*

297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936).

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Introduction

Although research has shown and practice has established the futility of the charge that it was a usurpation when this Court undertook to declare an Act of Congress unconstitutional, I suppose that we all agree that to do so is the gravest and most delicate duty that this Court is called upon to perform.

So spoke Mr. Justice Holmes in Blodgett *v.* Holden, 275 U.S. 142, 147 (1927).

The Court has at all times professed a concern to keep scrupulously within the domain appropriate to judicial action. (How well it has lived up to its professions is a major question to be kept in mind as one studies what the Court has done.) Some of the consequences of this attitude of self-restraint were stated by Mr. Justice Brandeis in a classic passage in his concurring opinion in Ashwander *v.* TVA, quoted below.

The ultimate purpose of that lawsuit had been to elicit from the Supreme Court a declaration that the activities of the TVA were unwarranted by the Constitution. To attain that object, Ashwander, who owned preferred stock in the Alabama Power Company, brought suit to restrain the directors of the company from carrying out a contract

which they had made with the TVA; the complaint charged that the contract was invalid because the action of the TVA in making it was repugnant to the Constitution. The Supreme Court, speaking through Mr. Chief Justice Hughes, sustained the act of Congress creating the TVA, and the action which had been taken under it. Mr. Justice McReynolds dissented. Justice Brandeis, with whom Justices Stone, Roberts, and Cardozo were in agreement, had no difference with regard to the conclusion announced by the Chief Justice on the question of constitutionality. But they did not think that the Court should have decided the question in that case, considering that Ashwander really had no interest sufficient to give him a standing to raise the issue. As they saw it, he had not been hurt. This was the occasion for Mr. Justice Brandeis' discussion of the canons which should guide the Court in dealing with questions of constitutionality. Since then the Court has several times cited these remarks with approval.

Opinion

Mr. Justice BRANDEIS (Mr. Justice STONE, Mr. Justice ROBERTS, and Mr. Justice CARDOZO joining with him), concurring.

"Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it." Blair *v.* United States, 250 U.S. 273, 279. . . .

The Court has frequently called attention to the "great gravity and delicacy" of its function in passing upon the validity of an act of Congress; and has restricted exercise of this function by rigid insistence that the jurisdiction of federal courts is limited to actual cases and controversies; and that they have no power to give advisory opinions. On this ground it has in recent years ordered the dismissal of several suits challenging the constitutionality of important acts of Congress. . . .

The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:

1. The Court will not pass upon the constitutionality of legislation in a friendly, nonadversary, proceeding, declining because to decide such questions "is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals. It never was the thought that, by

means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act." Chicago & Grand Trunk Ry. Co. *v.* Wellman, 143 U.S. 339, 345.

2. The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it." . . . "It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."

3. The Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." . . .

4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. . . . Appeals from the highest court of a state challenging its decision of a question under the federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground.

5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. . . . Among the many applications of this rule, none is more striking than the denial of the right of challenge to one who lacks a personal or property right. Thus, the challenge by a public official interested only in the performance of his official duty will not be entertained. . . . In Fairchild *v.* Hughes, 258 U.S. 126, the Court affirmed the dismissal of a suit brought by a citizen who sought to have the Nineteenth Amendment declared unconstitutional. In Massachusetts *v.* Mellon, 262 U.S. 447, the challenge of the federal Maternity Act was not entertained although made by the commonwealth on behalf of all its citizens.

6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits. . . .

7. "When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." . . .

Comment

In the Wellman Case the Michigan legislature had passed a statute regulating railroad passenger rates. On the day the law went into operation, Wellman demanded a ticket at the new and lower rate, and was refused. He then sued the railroad company for damages, thus putting himself in the position of a champion of the statute. But it was evident throughout that this was a friendly suit, and that Wellman was really making no effort to defend the law. It was like a rigged fight in the ring, where one boxer makes only a pretense at resisting the other. Here was an attempt, then, to abuse the judicial power to pass upon the constitutionality of legislation, and the Supreme Court refused to be a party to it. In concluding his opinion, Justice Brewer pointed out "how easily courts may be misled into doing grievous wrong to the public, and how careful they should be to not declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure of all material facts." For all the Court could say, perhaps a full presentation of the case would have shown that the rates fixed by the legislature were perfectly reasonable and constitutional.

The Court has been taught by experience that its function is far too serious, in consequences in the present and for the future, to permit looseness in the practice before it. It has not always been so circumspect. For example, Hylton *v.* United States,* 3 Dallas 171 (1796), where the Court for the first time passed expressly upon the validity of an act of Congress—an excise law of 1794. The files of the Court show that Hylton stated formally that "my object in contesting the law upon which the cause depends" was "merely to ascertain a constitutional point and not by any means to delay the payment of a public duty." The government was anxious to have the case fully argued and decided, and to that end agreed to pay the counsel fees on both sides. [Charles Warren, *The Supreme Court in United States History*, Little, Brown & Co., Boston (1928), Vol. I, 146-49.] The Court sustained the tax.

Today the Court would make sure that the case had been properly brought up before it would give a decision. It does not render judgments merely for the accommodation of persons who would find it convenient to have an authoritative ruling. This reticence is especially appropriate in instances where someone is seeking to snatch a hasty determination that Congress has exceeded its powers.

LUTHER *v.* BORDEN *et al.*

7 Howard 1, 12 L.Ed. 581 (1849).

On Writ of Error to the Circuit Court of the United States for the District of Rhode Island.

Introduction

> Some claims of unconstitutionality [wrote Professor (now Mr. Justice) Frankfurter], however much they may be wrapped in the form of a conventional litigation, the court will never adjudicate. Such issues are deemed beyond the province of a court and are compendiously characterized as political questions. Thus although according to the Constitution "The United States shall guarantee to every state in this union a republican form of government," the Supreme Court cannot be called upon to decide whether a particular state government is "republican." This and like questions are not suited for settlement by the training and technique and the body of judicial experience which guide a court. What such questions are and what they are not do not lend themselves to enumeration. In these, as in other matters, the wisdom of the court defines its boundaries. [From "The Supreme Court" by Frankfurter in 14 *Encyclopaedia of the Social Sciences*, 474, 476. Copyright, 1934 by The Macmillan Company and used with their permission.]

The "Dorr Rebellion." Luther *v.* Borden presents a classic example of a "political question." It arose out of a contest between two governments, each claiming to be the rightful government of Rhode Island. The old and established government was based upon the colonial charter of 1663, which had been perpetuated throughout the period of the American Revolution and thereafter. Suffrage was restricted to those holding real property of a certain value, and representatives were apportioned unequally. Protesting against this undemocratic system, a rival government under Governor Thomas W. Dorr came into being in 1842, on the basis of a spontaneous popular movement wherein a constitution had been adopted and officers chosen at elections thrown open to adult males. These steps had been taken without the sanction of the established government under Governor Samuel W. King which, in the view of Dorr's followers, had now been superseded by an exercise of popular sovereignty. In the face of "Dorr's Rebellion," the legislature of the charter government enacted

on June 25, 1842, a statute which purported to place the state under "martial law." Application was made to President Tyler (see Section 4 of Article IV of the Constitution), who indicated that he was prepared to sustain the charter government. Actually Dorr's movement was put down without the aid of any federal forces.

Borden and the other defendants were members of the militia who, under orders of their commanding officer, entered the house of Luther, one of Dorr's adherents, and arrested him. For this forcible entry, Luther sued Borden and others.

The old government fell in with the trend of the times and permitted a new constitution to go into effect in 1843, providing for manhood suffrage. But Dorr was tried for treason in the Supreme Court of Rhode Island and on conviction sentenced to life imprisonment. An original application in the Supreme Court of the United States for a writ of habeas corpus to release him failed. *Ex parte* Dorr, 3 Howard 103 (1845). Subsequently Dorr was pardoned. His movement, affirming as it did the moral right of the people to establish a government of their choice, gained sympathy outside Rhode Island, particularly within the Democratic Party and press. It would be a great triumph if in some way a decision could be obtained from the Supreme Court of the United States holding that Dorr's had been the rightful government of Rhode Island. There were some who believed that such a judgment might be expected from a bench of Justices almost all of whom had adhered to the Democratic Party.

Federal jurisdiction invoked. Luther's suit against Borden was an attempt to win such a decision. The plaintiff's position was that Dorr's government had been supported by an actual majority of the people and on that basis was entitled to rule; the charter government had lost its right to govern, and therefore its command to Borden could be no justification for his trespass. Pretty clearly it was hopeless to address this argument to a Rhode Island court which traced its authority to the very government which Luther regarded as abrogated. But if suit could be brought in a federal court, it seemed possible that this contention would succeed. Luther moved to Massachusetts. Thus his complaint against Borden became a controversy "between citizens of different States" and could be brought in the federal circuit court. This was done in October 1842. But that court refused to consider testimony showing the popular strength of the Dorr movement, and ruled that the charter government and its laws had been in full force and constituted a justification of Borden's acts.

Luther then took his case to the Supreme Court, where because of vacancies and illness in the Court a decision was not announced until 1849.

The outcome demonstrated that the judges were guided by principle rather than by immediate partisan advantage.

Opinion

Mr. Chief Justice TANEY delivered the opinion of the Court.

. . . Certainly, the question which the plaintiff proposed to raise by the testimony he offered has not heretofore been recognized as a judicial one in any of the state courts. In forming the constitutions of the different states, after the Declaration of Independence, and in the various changes and alterations which have since been made, the political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the state, and the judicial power has followed its decision. In Rhode Island, the question has been directly decided. . . .

The point, then, raised here has been already decided by the courts of Rhode Island. The question relates, altogether, to the constitution and laws of that state; and the well settled rule in this court is, that the courts of the United States adopt and follow the decisions of the state courts in questions which concern merely the constitution and laws of the state. . . .

Moreover, the Constitution of the United States, so far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a state, has treated the subject as political in its nature, and placed the power in the hands of that department.

The fourth section of the fourth Article of the Constitution of the United States provides that the United States shall guarantee to every state in the 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.

Under this Article of the Constitution it rests with Congress to decide what government is the established one in a state. For as the United States guarantee to each state a republican government, Congress must necessarily decide what government is established in the state before it can determine whether it is republican or not. And when the senators and representatives of a state are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not

last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts.

So, too, as relates to the clause in the above mentioned Article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfill this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the federal government to interfere. But Congress thought otherwise, and no doubt wisely; and by the Act of February 28, 1795, provided that, "in case of an insurrection in any state against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such state or of the executive (when the legislature cannot be convened), to call forth such number of the militia of any other state or states, as may be applied for, as he may judge sufficient to suppress such insurrection."

By this Act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. He is to act upon the application of the legislature or of the executive, and consequently he must determine what body of men constitute the legislature, and who is the governor, before he can act. The fact that both parties claim the right to the government cannot alter the case, for both cannot be entitled to it. If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. And 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 act of Congress.

After the President has acted and called out the militia, is a circuit court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented a majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or

detained by the troops in the service of the United States or the government which the President was endeavoring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order. Yet if this right does not reside in the courts when the conflict is raging, if the judicial power is, at that time, bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offenses and crimes the acts which it before recognized, and was bound to recognize, as lawful.

It is true that in this case the militia were not called out by the President. But upon the application of the governor under the charter government, the President recognized him as the executive power of the state, and took measures to call out the militia to support his authority, if it should be found necessary for the general government to interfere; and it is admitted in the argument, that it was the knowledge of this decision that put an end to the armed opposition to the charter government, and prevented any further efforts to establish by force the proposed constitution. The interference of the President, therefore, by announcing his determination, was as effectual as if the militia had been assembled under his orders. And it should be equally authoritative. For certainly no court of the United States, with a knowledge of this decision, would have been justified in recognizing the opposing party as the lawful government; or in treating as wrongdoers or insurgents the officers of the government which the President had recognized, and was prepared to support by an armed force. In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice. And this principle has been applied by the act of Congress to the sovereign states of the Union.

It is said that this power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual. When citizens of the same state are in arms against each other, and the constituted authorities unable to execute the laws, the interposition of the United States must be prompt, or it is of little value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis. And the elevated office of the President, chosen as he is by the people of the United States, and the high responsibility he

could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a willful abuse of power as human prudence and foresight could well provide. At all events, it is conferred upon him by the Constitution and laws of the United States, and must therefore be respected and enforced in its judicial tribunals.

A question very similar to this arose in the case of Martin *v.* Mott, 12 Wheat. 29-31. The first clause of the first section of the Act of February 28, 1795, of which we have been speaking, authorizes the President to call out the militia to repel invasion. It is the second clause in the same section which authorizes the call to suppress an insurrection against a state government. The power given to the President in each case is the same, with this difference only: that it cannot be exercised by him in the latter case, except upon the application of the legislature or executive of the state. The case above mentioned arose out of a call made by the President, by virtue of the power conferred by the first clause; and the court said, that, "whenever a statute gives a discretionary power to any person to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts." The grounds upon which that opinion is maintained are set forth in the report, and we think are conclusive. The same principle applies to the case now before the Court. Undoubtedly, if the President in exercising this power shall fall into error, or invade the rights of the people of the state, it would be in the power of Congress to apply the proper remedy. But the courts must administer the law as they find it. . . .

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. The high power has been conferred on this Court of passing judgment upon the acts of the state sovereignties, and of the legislative and executive branches of the federal government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discus-

sions which properly belong to other forums. No one, we believe, 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 own pleasure. But whether they have changed it or not by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it.

The judgment of the Circuit Court must, therefore, be affirmed.

Mr. Justice WOODBURY, dissenting. . . . [He concurred with the Court on the principles set out in the passages above. In his view, however, the charter government's resort to "martial law" had been a violation of the state constitution; its action was inconsistent, too, with the Constitution of the United States, which gave to Congress exclusively the power to declare war.]

COLEMAN *et al. v.* MILLER, Secretary of the Senate of State of Kansas, *et al.*

307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939).

On Writ of Certiorari to the Supreme Court of the State of Kansas.

Introduction

In Article V the Constitution sets out procedures whereby it may be amended. In some of the issues which arise as to whether these provisions have been satisfied, the Court has regarded the question as "political" and deferred to the eventual judgment of the Congress.

Consider the proposed amendments which in times past have been submitted to the states but never received the requisite ratifications. Does such a dormant proposal eventually lose its vitality, so that further ratifications could not revive it? The Constitution does not specifically reply. When Congress submitted the measure which became the Eighteenth (Prohibition) Amendment it declared that the proposal should become inoperative unless ratified within seven years. In fact, ratification was completed in thirteen months. In Dillon *v.* Gloss, 256 U.S. 368 (1921), a man charged with violating the Prohibition Act sought to escape through the contention that the Eighteenth Amend-

ment was invalid because Congress had no power to fix a time limit for ratification. The Court considered and rejected this argument, concluding that "the fair inference or implication from Article V is that ratification must be within some reasonable time after the proposal." It added that "Of the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt." The Court thus treated the matter as one for judicial scrutiny of the exercise of Congressional power. Did it go too far even in saying this? Should it have declared simply that the matter belonged entirely to Congress? Four of the Justices in Coleman *v.* Miller thought that the question in Dillon *v.* Gloss had been one on which the Court had no authority to express an opinion.

Consider other questions which sometimes arise in action upon a proposed amendment. Suppose a state legislature votes to reject, and later the legislature reconsiders and votes to ratify. Suppose conversely that before the requisite number of ratifications have been effected a state legislature votes to withdraw a ratification already given. Is it for the Court, or for the Congress, to determine the effect of these actions? The practice of Congress has been to count the ratification in either case; and Coleman *v.* Miller tells us that this is a political question on which the decision of Congress is controlling.

Opinion

Mr. Chief Justice HUGHES delivered the opinion of the Court.

In June, 1924, the Congress proposed an amendment to the Constitution, known as the Child Labor Amendment. In January, 1925, the legislature of Kansas adopted a resolution rejecting the proposed amendment and a certified copy of the resolution was sent to the Secretary of State of the United States. In January, 1937, a resolution . . . was introduced in the senate of Kansas ratifying the proposed amendment. There were forty senators. When the resolution came up for consideration, twenty senators voted in favor of its adoption and twenty voted against it. The lieutenant governor, the presiding officer of the senate, then cast his vote in favor of the resolution. The resolution was later adopted by the house of representatives on the vote of a majority of its members.

This original proceeding in mandamus was then brought in the Supreme Court of Kansas by twenty-one members of the senate, including the twenty senators who had voted against the resolution, and three members of the house of representatives, to compel the secretary of the senate to erase an endorsement on the resolution to the effect that it had been adopted by the senate

and to endorse thereon the words "was not passed," and to restrain the officers of the senate and house of representatives from signing the resolution and the secretary of state of Kansas from authenticating it and delivering it to the governor. The petition challenged the right of the lieutenant governor to cast the deciding vote in the senate. The petition also set forth the prior rejection of the proposed amendment and alleged that in the period from June, 1924, to March, 1927, the amendment had been rejected by both houses of the legislatures of twenty-six states, and had been ratified in only five states, and that by reason of that rejection and the failure of ratification within a reasonable time the proposed amendment had lost its vitality. . . .

[The Court first considered the jurisdictional question whether the Kansas legislators who petitioned the Supreme Court had an interest in the matter entitling them to be heard. It answered in the affirmative. Mr. Justice FRANKFURTER (ROBERTS, BLACK, and DOUGLAS, JJ., joining with him) wrote a very cogent dissent on this point.

Next the Court took up the question whether the lieutenant governor was a part of the "legislature" and entitled to break a tie in the state senate. The Court was evenly divided on whether this was a "justiciable" or a "political" question and therefore expressed no opinion on the point.]

Third. The effect of the previous rejection of the amendment and of the lapse of time since its submission.

1. The state court adopted the view expressed by text-writers that a state legislature which has rejected an amendment proposed by the Congress may later ratify. The argument in support of that view is that Article V says nothing of rejection but speaks only of ratification and provides that a proposed amendment shall be valid as part of the Constitution when ratified by three-fourths of the states; that the power to ratify is thus conferred upon the state by the Constitution and, as a ratifying power, persists despite a previous rejection. The opposing view proceeds on an assumption that if ratification by "conventions" were prescribed by the Congress, a convention could not reject and, having adjourned sine die, be reassembled and ratify. It is also premised, in accordance with views expressed by text-writers, that ratification if once given cannot afterwards be rescinded and the amendment rejected, and it is urged that the same effect in the exhaustion of the state's power to act should be ascribed

to rejection; that a state can act "but once, either by convention or through its legislature."

Historic instances are cited. In 1865, the Thirteenth Amendment was rejected by the legislature of New Jersey which subsequently ratified it, but the question did not become important as ratification by the requisite number of states had already been proclaimed. The question did arise in connection with the adoption of the Fourteenth Amendment. The legislatures of Georgia, North Carolina and South Carolina had rejected the amendment in November and December, 1866. New governments were erected in those states (and in others) under the direction of Congress. The new legislatures ratified the amendment, that of North Carolina on July 4, 1868, that of South Carolina on July 9, 1868, and that of Georgia on July 21, 1868. Ohio and New Jersey first ratified and then passed resolutions withdrawing their consent. As there were then thirty-seven states, twenty-eight were needed to constitute the requisite three-fourths. On July 9, 1868, the Congress adopted a resolution requesting the Secretary of State to communicate "a list of the states of the Union whose legislatures have ratified the fourteenth article of amendment," and in Secretary Seward's report attention was called to the action of Ohio and New Jersey. On July 20 Secretary Seward issued a proclamation reciting the ratification by twenty-eight states, including North Carolina, South Carolina, Ohio and New Jersey, and stating that it appeared that Ohio and New Jersey had since passed resolutions withdrawing their consent and that "it is deemed a matter of doubt and uncertainty whether such resolutions are not irregular, invalid and therefore ineffectual." The Secretary certified that if the ratifying resolutions of Ohio and New Jersey were still in full force and effect, notwithstanding the attempted withdrawal, the amendment had become a part of the Constitution. On the following day the Congress adopted a concurrent resolution which, reciting that three-fourths of the states having ratified (the list including North Carolina, South Carolina, Ohio and New Jersey), declared the Fourteenth Amendment to be a part of the Constitution and that it should be duly promulgated as such by the Secretary of State. Accordingly, Secretary Seward, on July 28th, issued his proclamation embracing the states mentioned in the congressional resolution and adding Georgia.

Thus the political departments of the government dealt with the effect both of previous rejection and of attempted withdrawal

and determined that both were ineffectual in the presence of an actual ratification. . . . This decision by the political departments of the government as to the validity of the adoption of the Fourteenth Amendment has been accepted.

We think that in accordance with this historic precedent the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment. . . .

2. The more serious question is whether the proposal by the Congress of the amendment had lost its vitality through lapse of time and hence it could not be ratified by the Kansas legislature in 1937. The argument of petitioners stresses the fact that nearly thirteen years elapsed between the proposal in 1924 and the ratification in question. It is said that when the amendment was proposed there was a definitely adverse popular sentiment and that at the end of 1925 there had been rejection by both houses of the legislatures of sixteen states and ratification by only four states, and that it was not until about 1933 that an aggressive campaign was started in favor of the amendment. In reply, it is urged that Congress did not fix a limit of time for ratification and that an unreasonably long time had not elapsed since the submission; that the conditions which gave rise to the amendment had not been eliminated; that the prevalence of child labor, the diversity of state laws and the disparity in their administration, with the resulting competitive inequalities, continued to exist. Reference is also made to the fact that a number of the states have treated the amendment as still pending and that in the proceedings of the national government there have been indications of the same view. It is said that there were fourteen ratifications in 1933, four in 1935, one in 1936, and three in 1937.

We have held that the Congress in proposing an amendment may fix a reasonable time for ratification. Dillon *v.* Gloss, 256 U.S. 368. There we sustained the action of the Congress in providing in the proposed Eighteenth Amendment that it should be inoperative unless ratified within seven years. No limitation of time for ratification is provided in the instant case either in the proposed amendment or in the resolution of submission. But petitioners contend that, in the absence of a limitation by the Congress, the Court can and should decide what is a reasonable

period within which ratification may be had. We are unable to agree with that contention.

It is true that in Dillon *v.* Gloss the Court said that nothing was found in Article V which suggested that an amendment once proposed was to be open to ratification for all time, or that ratification in some states might be separated from that in others by many years and yet be effective; that there was a strong suggestion to the contrary in that proposal and ratification were but succeeding steps in a single endeavor; that as amendments were deemed to be prompted by necessity, they should be considered and disposed of presently; and that there is a fair implication that ratification must be sufficiently contemporaneous in the required number of states to reflect the will of the people in all sections at relatively the same period; and hence that ratification must be within some reasonable time after the proposal. These considerations were cogent reasons for the decision in Dillon *v.* Gloss, that the Congress had the power to fix a reasonable time for ratification. But it does not follow that, whenever Congress has not exercised that power, the Court should take upon itself the responsibility of deciding what constitutes a reasonable time and determine accordingly the validity of ratifications. That question was not involved in Dillon *v.* Gloss and, in accordance with familiar principle, what was there said must be read in the light of the point decided.

Where are to be found the criteria for such a judicial determination? None are to be found in Constitution or statute. In their endeavor to answer this question petitioners' counsel have suggested that at least two years should be allowed; that six years would not seem to be unreasonably long; that seven years had been used by the Congress as a reasonable period; that one year, six months and thirteen days was the average time used in passing upon amendments which have been ratified since the first ten amendments; that three years, six months and twenty-five days has been the longest time used in ratifying. To this list of variables, counsel add that "the nature and extent of publicity and the activity of the public and of the legislatures of the several states in relation to any particular proposal should be taken into consideration." That statement is pertinent, but there are additional matters to be examined and weighed. When a proposed amendment springs from a conception of economic needs, it would be necessary, in determining whether a reasonable time had elapsed since its submission, to consider the economic condi-

tions prevailing in the country, whether these had so far changed since the submission as to make the proposal no longer responsive to the conception which inspired it or whether conditions were such as to intensify the feeling of need and the appropriateness of the proposed remedial action. In short, the question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified. On the other hand, these conditions are appropriate for the consideration of the political departments of the government. The questions they involve are essentially political and not justiciable. They can be decided by the Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since the submission of the amendment.

Our decision that the Congress has the power under Article V to fix a reasonable limit of time for ratification in proposing an amendment proceeds upon the assumption that the question, what is a reasonable time, lies within the congressional province. If it be deemed that such a question is an open one when the limit has not been fixed in advance, we think that it should also be regarded as an open one for the consideration of the Congress when, in the presence of certified ratifications by three-fourths of the states, the time arrives for the promulgation of the adoption of the amendment. The decision by the Congress, in its control of the action of the Secretary of State, of the question whether the amendment had been adopted within a reasonable time would not be subject to review by the courts. . . .

For the reasons we have stated . . . we think that the Congress in controlling the promulgation of the adoption of a constitutional amendment has the final determination of the question whether by lapse of time its proposal of the amendment had lost its vitality prior to the required ratifications. The state officials should not be restrained from certifying to the Secretary of State the adoption by the legislature of Kansas of the resolution of ratification.

As we find no reason for disturbing the decision of the Supreme Court of Kansas in denying the mandamus sought by petitioners, its judgment is affirmed but upon the grounds stated in this opinion.

Mr. Justice BLACK (Mr. Justice ROBERTS, Mr. Justice FRANKFURTER, and Mr. Justice DOUGLAS joining with him), concurring in the result. . . .

Congress, possessing exclusive power over the amending process, cannot be bound by and is under no duty to accept the pronouncements upon that exclusive power by this Court or by the Kansas courts. Neither state nor federal courts can review that power. Therefore, any judicial expression amounting to more than mere acknowledgment of exclusive Congressional power over the political process of amendment is a mere admonition to the Congress in the nature of an advisory opinion, given wholly without constitutional authority.

Mr. Justice BUTLER (Mr. Justice MCREYNOLDS joining with him), dissenting. [They agreed that the Court had jurisdiction, and, carrying forward the reasoning of Dillon *v.* Gloss to the instant case, would have held that more than a reasonable time had elapsed and that the proposed Child Labor Amendment was no longer before the states.]

Comment

Some recent movements for amending the federal Constitution have encountered a stubborn resistance which has sought battle in the courts on every occasion which seemed to offer even a forlorn hope of success. No appeal to the Supreme Court in such a case has been successful. Some have failed because the Court found the contention to be without merit; again, as in Coleman *v.* Miller, the question was found to be a "political" rather than "justiciable."

Judicial construction of Article V. Action by Congress in the amending process, as set out in Article V, is distinct from the legislative activity governed by Article I. Thus the Court early decided that a proposed amendment, unlike a bill, need not be presented to the President. Hollingsworth *v.* Virginia, 3 Dall. 378 (1798), where that objection had been raised to the Eleventh Amendment. In Hawke *v.* Smith, 253 U.S. 221 (1920), the question was whether Ohio could subject to a popular referendum the action of its legislature in ratifying a proposed amendment to the Constitution of the United States—

in this case, the Prohibition Amendment. The Court held that when Article V spoke of ratification by "Legislatures" it referred to "the representative body which made the laws of the people"; the legislature when acting upon a proposed amendment exercised a federal function and its action was not controlled by a state constitutional provision for a popular referendum. Applying this principle, the decision in Leser *v.* Garnett, 258 U.S. 130 (1922), sustained the effectiveness of the Nineteenth (Woman Suffrage) Amendment against the objection that some of the legislatures which ratified it had transcended limitations on their competence imposed by the state constitution. The National Prohibition Cases, 253 U.S. 350 (1920), held the Eighteenth Amendment proof against a variety of objections—among others, that the amending power was subject to limits in addition to those specified in Article V, and that the imposition of prohibition was beyond that power. United States *v.* Sprague, 282 U.S. 716 (1931), unsuccessfully presented this idea in a more refined form: while mere changes in the federal machinery might properly be submitted to the state legislatures for ratification, so it was argued, measures affecting the liberties of the people—such as prohibition—could be ratified only by the people represented in conventions.

The question in Coleman v. *Miller.* In rejecting all these wishful contentions, the Court was able to reach its conclusions with a sense of assurance, using familiar methods of constitutional construction, such as the plain meaning of the words, a comparison with other passages in the text, and the history of constitutional practice. How great the contrast is between this type of thinking and the mental operation involved is judging how long is too long for a proposed amendment to be under consideration, which is what the Court was asked to do in Coleman *v.* Miller.

Sometimes the Constitution speaks in words of great precision—e.g., the Seventh Amendment when it secures the right to jury trial "In suits at common law, where the value in controversy shall exceed twenty dollars. . . ." Sometimes its language expresses a large concept—e.g., "Commerce . . . among the several States." The Court can reason its way to a conclusion as to what this expression embraces, rejecting those activities which are not "Commerce," and distinguishing further between the phenomena which are "among the several States" and those which are wholly local. Again, the Constitution may prescribe a broad standard to be followed—e.g., "due process of law." The phrase has a wide variety of applications, but wherever applied it means that measures of government must satisfy a test of what is reasonable and just and decent. The judges feel at home in dealing with rules and conceptions and standards such as these, arriving at firm conclusions by traditional methods of thought which they recognize as "judicial." But the judges, as judges, have no criteria for appreciating the many considerations which would enter into a con-

clusion as to when a proposed amendment had lost its vitality—as Chief Justice Hughes explains in an admirable paragraph (page 45, above).

COLEGROVE *et al. v.* GREEN *et al.*

328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946).

Appeal from the District Court of the United States of the Northern District of Illinois.

Introduction

The Justices are, of course, in perfect agreement on the general proposition that the Court should limit its rulings to those occasions where there is actually a duty to decide the case. Other governmental authorities, and the country as a whole, could hardly be expected to bow to pronouncements which were gratuitous and out of order. Not infrequently, however, the Justices disagree as to whether a given case is one which it is really their duty to decide. Some may believe that the question rightly falls to the political side of the government. Again, some Justices may think that the plaintiff who raised the issue has not shown that he was really hurt and so is not entitled to invoke the judicial power. Coleman *v.* Miller illustrated both of these difficulties.

The Court has construed the word "legislature." In Smiley *v.* Holm, 285 U.S. 355 (1932), the Court, without dissent, had construed the constitutional provision that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; . . ." It held that "Legislature" as there used referred to the entire lawmaking authority in the state, in which, under the constitution of Minnesota, the governor had a part. Accordingly, where the state's legislative chambers had attempted to make a reapportionment of congressional districts by a mere resolution—seeking thereby to dodge the governor's veto—the Court held that the federal Constitution had not been satisfied and that the attempted reapportionment was invalid. It so happened that Minnesota's allotment in the lower house of the Congress had just been reduced from ten to nine. So the result of Smiley *v.* Holm was that the previous state law dividing the state into ten districts could no longer be applied; the Supreme Court's decision produced a situation where either new state legislation must be passed in haste or the state's representatives in Congress would be elected at large.

Will the Court control the fairness of apportionment? The case of Colegrove *v.* Green attacked the apportionment of Illinois into congressional districts, but for a very different complaint—namely, the grossly unequal distribution of representation. This apportionment had been made in 1901 on the basis of the census of 1900. In the course of years there were large shifts in population, so that by 1946 it appeared that one district had a population of 914,053 while another district had only 112,116. The legislature refused to make a new apportionment, and the courts of Illinois had held that it was not within their province to interfere.

Colegrove and others, qualified voters in districts of large population, brought suit against members of the Illinois Primary Certifying Board to restrain them, in effect, from taking proceedings for an election in November 1946 under the provisions of the Illinois law of 1901.

Opinion

Mr. Justice FRANKFURTER announced the judgment of the Court and an opinion in which Mr. Justice REED and Mr. Justice BURTON concurred. . . .

We are of opinion that the petitioners ask of this Court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about "jurisdiction." It must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination.

This is not an action to recover for damage because of the discriminatory exclusion of a plaintiff from rights enjoyed by other citizens. The basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity. In effect this is an appeal to the federal courts to reconstruct the electoral process of Illinois in order that it may be adequately represented in the councils of the Nation. Because the Illinois legislature has failed to revise its Congressional Representative districts in order to reflect great changes, during more than a generation, in the distribution of its population, we are asked to do this, as it were, for Illinois.

Of course no court can affirmatively remap the Illinois districts so as to bring them more in conformity with the standards of fairness for a representative system. At best we could only de-

clare the existing electoral system invalid. The result would be to leave Illinois undistricted and to bring into operation, if the Illinois legislature chose not to act, the choice of members for the House of Representatives on a state-wide ticket. The last stage may be worse than the first. The upshot of judicial action may defeat the vital political principle which led Congress, more than a hundred years ago, to require districting. This requirement, in the language of Chancellor Kent, "was recommended by the wisdom and justice of giving, as far as possible, to the local subdivisions of the people of each state, a due influence in the choice of representatives, so as not to leave the aggregate minority of the people in a state, though approaching perhaps to a majority, to be wholly overpowered by the combined action of the numerical majority, without any voice whatever in the national councils." 1 Kent, *Commentaries* (12th ed., 1873) *230-31, n.(c). Assuming acquiescence on the part of the authorities of Illinois in the selection of its Representatives by a mode that defies the direction of Congress for selection by districts, the House of Representatives may not acquiesce. In the exercise of its power to judge the qualifications of its own members, the House may reject a delegation of Representatives-at-large. Article I, section 5, clause 1. For the detailed system by which Congress supervises the election of its members, see e.g., 2 U.S.C. secs. 201-226; Bartlett, *Contested Elections in the House of Representatives* (2 vols.); Alexander, *History and Procedure of the House of Representatives* (1916) c. XVI. Nothing is clearer than that this controversy concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof. It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law.

The petitioners urge with great zeal that the conditions of which they complain are grave evils and offend public morality. The Constitution of the United States gives ample power to provide against these evils. But due regard for the Constitution as a viable system precludes judicial correction. Authority for dealing with such problems resides elsewhere. Article I, section 4 of the Constitution provides that "The Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may

at any time by Law make or alter such Regulations, . . ." The short of it is that the Constitution has conferred upon Congress exclusive authority to secure fair representation by the states in the popular House and left to that House determination whether states have fulfilled their responsibility. If Congress failed in exercising its powers, whereby standards of fairness are offended, the remedy ultimately lies with the people. Whether Congress faithfully discharges its duty or not, the subject has been committed to the exclusive control of Congress. An aspect of government from which the judiciary, in view of what is involved, has been excluded by the clear intention of the Constitution cannot be entered by the federal courts because Congress may have been in default in exacting from states obedience to its mandate.

The one stark fact that emerges from a study of the history of congressional apportionment is its embroilment in politics, in the sense of party contests and party interests. The Constitution enjoins upon Congress the duty of apportioning Representatives "among the several States . . . according to their respective Numbers, . . ." Article I, section 2. Yet, Congress has at times been heedless of this command and not apportioned according to the requirements of the Census. It never occurred to anyone that this Court could issue mandamus to compel Congress to perform its mandatory duty to apportion. "What might not be done directly by mandamus, could not be attained indirectly by injunction." Chafee, "Congressional Reapportionment" (1929) 42 *Harv. L. Rev.* 1015, 1019. Until 1842 there was the greatest diversity among the states in the manner of choosing Representatives because Congress had made no requirement for districting. 5 Stat. 491. Congress then provided for the election of Representatives by districts. Strangely enough, the power to do so was seriously questioned; it was still doubted by a committee of Congress as late as 1901. . . . In 1850 Congress dropped the requirement. 9 Stat. 428, 432-33. The Reapportionment Act of 1862 required that the districts be of contiguous territory. 12 Stat. 572. In 1872 Congress added the requirement of substantial equality of inhabitants. 17 Stat. 28. This was reinforced in 1911. 37 Stat. 13, 14. But the 1929 Act, as we have seen, dropped these requirements. 46 Stat. 21. Throughout our history, whatever may have been the controlling Apportionment Act, the most glaring disparities have prevailed as to the contours and the population of districts. Appendix I summarizes recent disparities in the various Congressional Representative districts throughout the country

and Appendix II gives fair samples of prevailing gerrymanders. [Omitted.] For other illustrations of glaring inequalities, see 71 Cong. Rec. 2278, 79, 2480 *et seq.;* 86 Cong. Rec. 4369, 4370, 71, 76th Cong., 2d sess. (1940); H.R.Rep.No.1695, 61st Cong., 2d sess. (1910); (1920) 24 *Law Notes* 124; (October 30, 1902) 75 *The Nation* 343; and see, generally, Schmeckebier, *Congressional Apportionment* (1941); and on gerrymandering, see Griffith, *The Rise and Development of the Gerrymander* (1907).

To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure state legislatures that will apportion properly, or to invoke the ample powers of Congress. The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action. Thus, "on Demand of the executive Authority," Art. IV, section 2, of a state it is the duty of a sister state to deliver up a fugitive from justice. But the fulfillment of this duty cannot be judicially enforced. Commonwealth of Kentucky *v.* Dennison, 24 How. 66. The duty to see to it that the laws are faithfully executed cannot be brought under legal compulsion. State of Mississippi *v.* Johnson, 4 Wall. 475. Violation of the great guaranty of a republican form of government in states cannot be challenged in the courts. Pacific States Telephone & Telegraph Co. *v.* Oregon, 223 U.S. 118. The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights.

Dismissal of the complaint is affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice RUTLEDGE.

I concur in the result. . . .

Mr. Justice BLACK (Mr. Justice DOUGLAS and Mr. Justice MURPHY concurring with him), dissenting. . . .

It is difficult for me to see why the 1901 State Apportionment Act does not deny petitioners equal protection of the laws. The failure of the legislature to reapportion the congressional election districts for forty years, despite census figures indicating great

changes in the distribution of the population, has resulted in election districts the populations of which range from 112,000 to 900,000. One of the petitioners lives in a district of more than 900,000 people. His vote is consequently much less effective than that of each of the citizens living in the district of 112,000. And such a gross inequality in the voting power of citizens irrefutably demonstrates a complete lack of effort to make an equitable apportionment. The 1901 State Apportionment Act if applied to the next election would thus result in a wholly indefensible discrimination against petitioners and all other voters in heavily populated districts. The equal protection clause of the Fourteenth Amendment forbids such discrimination. It does not permit the States to pick out certain qualified citizens or groups of citizens and deny them the right to vote at all. See Nixon *v.* Herndon, 273 U.S. 536, 541; Nixon *v.* Condon, 286 U.S. 73. No one would deny that the equal protection clause would also prohibit a law that would expressly give certain citizens a half-vote and others a full vote. The probable effect of the 1901 State Apportionment Act in the coming election will be that certain citizens, and among them the petitioners, will in some instances have votes only one-ninth as effective in choosing representatives to Congress as the votes of other citizens. Such discriminatory legislation seems to me exactly the kind that the equal protection clause was intended to prohibit.

The 1901 State Apportionment Act in reducing the effectiveness of petitioners' votes abridges their privilege as citizens to vote for Congressmen and violates Article 1 of the Constitution. Article 1 provides that Congressmen "shall be . . . chosen . . . by the People of the several States." It thus gives those qualified a right to vote and a right to have their vote counted. *Ex parte* Yarbrough, 110 U.S. 651; United States *v.* Mosley, 238 U.S. 383. This Court in order to prevent "an interference with the effective choice of the voters" has held that this right extends to primaries. United States *v.* Classic, 313 U.S. 299, 314. While the Constitution contains no express provision requiring that congressional election districts established by the states must contain approximately equal populations, the constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their form, should be designed to give approximately equal weight to each vote cast. To some extent this implication of Article 1 is expressly stated by section 2 of the Fourteenth Amendment which

provides that "Representatives shall be apportioned among the several States according to their respective numbers. . . ." The purpose of this requirement is obvious: It is to make the votes of the citizens of the several states equally effective in the selection of members of Congress. It was intended to make illegal a nation-wide "rotten borough" system as between the states. The policy behind it is broader than that. It prohibits as well congressional "rotten boroughs" within the states, such as the ones here involved. The policy is that which is laid down by all the Constitutional provisions regulating the election of members of the House of Representatives, including Article 1 which guarantees the right to vote and to have that vote effectively counted: All groups, classes, and individuals shall to the extent that it is practically feasible be given equal representation in the House of Representatives, which, in conjunction with the Senate, writes the laws affecting the life, liberty, and property of all the people. . . .

Comment

Gerrymandering, disparities in the drawing of election districts, and other devices for making representation misrepresentative of the people, are an old story in American politics. The prevalence and persistence of these abuses suggests that the country as a whole has made no very energetic effort to correct them. The broad question before the Court in the Colegrove Case was whether the judiciary should create a remedy for a political evil which had at all times been subject to correction by the people's representatives in Congress. "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . ." The House of Representatives could have refused to seat Congressmen elected on the basis of gross inequality. How far should the Court go in protecting the people from the consequences of their own apathy? The answer to such a question depends upon one's conception of judicial statesmanship.

Justice Black's view. Mr. Justice Black says that "such discrimination seems to me exactly the kind that the equal protection clause was intended to prohibit." If this was meant to invoke the history of the adoption of the Fourteenth Amendment, it may be replied that the debates in Congress on the submission of that measure do not at all seem to suggest that this was one of the evils sought to be corrected, and it is very much to be doubted whether the state legislatures which ratified it had any such intent.

Justice Black also says that "What is asked is that this Court do exactly what it did in Smiley *v.* Holm. It is asked to declare a state

apportionment bill invalid. . . ." But how nearly alike are the two cases? Smiley asked the Court to say what was meant by "Legislature" as used in a particular passage in the Constitution. The Court was able to answer on the basis of an analysis of the word in its context and in the light of our constitutional history and practice. Construing words is the everyday business of the judiciary. Colegrove's request called for a very different kind of judicial cogitation. He asked the judiciary to compare figures and to impose its own standard of equality upon an operation which basically was subject to complete control by the federal House of Representatives. Of course no court would itself have undertaken to draw the lines of a new apportionment. But the Supreme Court would have had to hold itself ready to consider a flood of suits to test other apportionments, and would presently have been confronted with the question how small an inequality would suffice to invalidate.

Its implication. The view taken by Justice Black and those who stood with him in the Colegrove Case necessarily involved much more than apportionment of Congressional districts. If the equal protection clause means that each voter's voice shall be substantially as effective as every other voter's, the guarantee must apply to elections generally. Disparities in districting for state legislatures, city councils, and other popularly elected bodies would all present justiciable questions of constitutionality. Of course the courts may not deny justice in one case merely to avoid a flood of other cases. But supposing an analysis of Colegrove's complaint left the mind in doubt as to whether this was more accurately classified as "justiciable" or "political," the Court might well reflect upon the consequences to which the two answers respectively would lead. Would American democracy be strengthened if equality in representation were secured to the voters by judicial action, regardless of their own lethargy? Would the Court do well to correct an old evil over which the legislative branch has always had full power but which it has consistently failed to remedy?

The sequel. By an Act of June 26, 1947—scarcely more than a year after the decision of Colegrove *v.* Green—the Illinois Legislature repealed the Act of 1901 and made a new and fairer apportionment. Ill. Rev. Stats. 1947, ch. 46, sec. 156. Evidently the normal forces of democratic government had not become inoperative in Illinois.

III

THE THREE BRANCHES OF GOVERNMENT

MUSKRAT *v.* UNITED STATES

219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246 (1911).

Appeal from the Court of Claims.

Introduction

In 1901 Congress admitted the Cherokee Indians to citizenship. By the Act of July 1, 1902, it provided for the distribution of the lands and other property theretofore held by the tribe. Indians enrolled on September 1 following were to receive land equal in value to 110 acres of average allottable land and to share in what would finally remain of the tribal property. A Cherokee Indian could not dispose of his allotment before the expiration of five years except with the approval of the Secretary of the Interior.

Presently Congress passed statutes which modified the situation. An act of 1906 increased the period of inalienability to twenty-five years. Other legislation of the same year, giving effect to a request of the tribal council, declared that children living on March 4, 1906, should also receive allotments of land and share in the eventual distribution of the tribal property. The effect of this was that while the Indians in existence in 1902 lost nothing that had actually been allotted to them, they would receive somewhat smaller shares in the land and property remaining for final distribution.

It was a question whether this later legislation took rights which had already vested in the individual Indians, thereby violating the Constitution, or merely cut down their expectations. Hoping to have an early answer to these doubts, Congress wrote into an Indian Appropriation Act of March 1, 1907, a provision authorizing Gritts and Brown, and also Muskrat and Dick, on their own behalf and on behalf of all Cherokees similarly interested, to bring suits in the Court of Claims to determine the validity of the Cherokee legislation passed since 1902. The suits were to name the United States as the defendant, and "jurisdiction is hereby conferred upon the Court of Claims, with the right of appeal, by either party, to the Supreme Court of the United States, to hear, determine, and adjudicate each of said suits."

The United States did not claim any of the Cherokee property and had no interest adverse to Muskrat and the others. The controversy lay between the Indians of 1902 and the papooses of 1906. This, then, was an attempt by Congress "to secure an abstract determination by the Court of the validity of a statute" [Brandeis, J., in Willing *v.* Chicago Auditorium Assn., 277 U.S. 274, 289 (1928); Stone, J., in Nashville, C. & St. L. Ry. *v.* Wallace, 288 U.S. 249, 262 (1933)], by means of a proceeding where the "defendant" was really a stranger to the conflict. Could the Supreme Court properly take such a case, leading as it would to a merely abstract opinion rather than a determination binding upon adverse parties?

Opinion

Mr. Justice DAY delivered the opinion of the Court. . . .

The first question in these cases, as in others, involves the jurisdiction of this Court, to entertain the proceeding, and that depends upon whether the jurisdiction conferred is within the power of Congress, having in view the limitations of the judicial power as established by the Constitution of the United States. . . .

In 1793, by direction of the President, Secretary of State Jefferson addressed to the Justices of the Supreme Court a communication soliciting their views upon the question whether their advice to the Executive would be available in the solution of important questions of the construction of treaties, laws of nations, and laws of the land, which the Secretary said were often presented under circumstances which "*do not give a cognizance of them to the tribunals of the country.*" The answer to the question was postponed until the subsequent sitting of the Supreme Court, when Chief Justice Jay and his associates answered to

President Washington that, in consideration of the lines of separation drawn by the Constitution between the three departments of government, and being judges of a court of last resort, afforded strong arguments against the propriety of extrajudicially deciding the questions alluded to, and expressing the view that the power given by the Constitution to the President, of calling on heads of departments for opinions, "seems to have been purposely, as well as expressly, united to the executive departments." 3 *Correspondence & Public Papers of John Jay*, 486.

The subject underwent a complete examination in the case of Gordon *v.* United States, reported in an appendix to 117 U.S. 697, in which the opinion of Mr. Chief Justice Taney, prepared by him and placed in the hands of the clerk, is published in full. It is said to have been his last judicial utterance, and the whole subject of the nature and extent of the judicial power conferred by the Constitution is treated with great learning and fullness. In that case an act of Congress was held invalid which undertook to confer jurisdiction upon the Court of Claims, and thence by appeal to this Court, the judgment, however, not to be paid until an appropriation had been estimated therefor by the Secretary of the Treasury; and, as was said by the Chief Justice, the result was that neither court could enforce its judgment by any process, and whether it was to be paid or not depended on the future action of the Secretary of the Treasury and of Congress. "The Supreme Court," says the Chief Justice, "does not owe its existence or its powers to the legislative department of the government. It is created by the Constitution, and represents one of the three great divisions of power in the government of the United States, to each of which the Constitution has assigned its appropriate duties and powers, and made each independent of the other in performing its appropriate functions. The power conferred on this Court is exclusively judicial, and it cannot be required or authorized to exercise any other."

Concluding his discussion of the subject, the Chief Justice said, after treating of the powers of the different branches of the government, and laying emphasis upon the independence of the judicial power as established under our Constitution:

"These cardinal principles of free government had not only been long established in England, but also in the United States from the time of their earliest colonization, and guided the American people in framing and adopting the present Constitution. And it is the duty of this Court to maintain it unimpaired as

far as it may have the power. And while it executes firmly all the judicial powers intrusted to it, the Court will carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to it by the Constitution."

At the last term of the Court, in the case of Baltimore & O. R. Co. *v.* Interstate Commerce Commission, 215 U.S. 216, this Court declined to take jurisdiction of a case which undertook to extend its appellate power to the consideration of a case in which there was no judgment in the court below. In that case former cases were reviewed by Mr. Chief Justice Fuller, who spoke for the Court, and the requirement that this Court adhere strictly to the jurisdiction, original and appellate, conferred upon it by the Constitution, was emphasized and enforced. It is therefore apparent that from its earliest history this Court has consistently declined to exercise any powers other than those which are strictly judicial in their nature.

It therefore becomes necessary to inquire what is meant by the judicial power thus conferred by the Constitution upon this Court, and, with the aid of appropriate legislation upon the inferior courts of the United States. "Judicial power," says Mr. Justice Miller, in his work on the Constitution, "is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." Miller, *Constitution* 314.

As we have already seen by the express terms of the Constitution, the exercise of the judicial power is limited to "cases" and "controversies." Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.

What, then, does the Constitution mean in conferring this judicial power with the right to determine "cases" and "controversies"? A "case" was defined by Mr. Chief Justice Marshall as early as the leading case of Marbury *v.* Madison, 1 Cranch 137, to be a suit instituted according to the regular course of judicial procedure. And what more, if anything, is meant in the use of the term "controversy"? That question was dealt with by Mr. Justice Field, at the circuit, in the case of *In re* Pacific Railway Commission, 32 *Fed. Rep.* 241, 255. Of these terms that learned Justice said:

"The judicial article of the Constitution mentions cases and controversies. The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter,

and includes only suits of a civil nature. Chisholm *v.* Georgia, 2 Dall. 431, 432; 1 Tuck. *Bl. Comm.* App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the Court for adjudication."

The power being thus limited to require an application of the judicial power to cases and controversies, is the act which undertook to authorize the present suits to determine the constitutional validity of certain legislation within the constitutional authority of the Court? This inquiry in the case before us includes the broader question, When may this Court, in the exercise of the judicial power, pass upon the constitutional validity of an act of Congress? That question has been settled from the early history of the Court, the leading case on the subject being Marbury *v.* Madison, *supra.*

In that case Chief Justice Marshall, who spoke for the Court, was careful to point out that the right to declare an act of Congress unconstitutional could only be exercised when a proper case between opposing parties was submitted for judicial determination; that there was no general veto power in the Court upon the legislation of Congress; and that the authority to declare an act unconstitutional sprang from the requirement that the Court, in administering the law and pronouncing judgment between the parties to a case, and choosing between the requirements of the fundamental law established by the people and embodied in the Constitution and an act of the agents of the people, acting under authority of the Constitution, should enforce the Constitution as the supreme law of the land. The Chief Justice demonstrated, in a manner which has been regarded as settling the question, that with the choice thus given between a constitutional requirement and a conflicting statutory enactment, the plain duty of the Court was to follow and enforce the Constitution as the supreme law established by the people. And the Court recognized, in Marbury *v.* Madison and subsequent cases, that the exercise of this great power could only be invoked in cases which came regularly be-

fore the courts for determination, for, said the Chief Justice, in Osborn *v.* Bank of United States, 9 Wheat. 819, speaking of the third article of the Constitution, conferring judicial power:

"This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States."

Again, in the case of Cohen *v.* Virginia, 6 Wheat. 264, Chief Justice Marshall, amplifying and reasserting the doctrine of Marbury *v.* Madison, recognized the limitations upon the right of this Court to declare an act of Congress unconstitutional, and granting that there might be instances of its violation which could not be brought within the jurisdiction of the courts, and referring to a grant by a state of a patent of nobility as a case of that class, and conceding that the Court would have no power to annul such a grant, said:

"This may be very true; but by no means justifies the inference drawn from it. The Article does not extend the judicial power to every violation of the Constitution which may possibly take place, but to 'a case in law or equity' in which a right under such law is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the Article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the Constitution, to which the judicial power of the United States would extend. The same observation applies to the other instances with which the counsel who opened the cause has illustrated this argument. Although they show that there may be violations of the Constitution of which the courts can take no cognizance, they do not show that an interpretation more restrictive than the words themselves import ought to be given to this article. They do not show that there can be 'a *case* in law or equity' arising under the Constitution, to which the judicial power does not extend."

See also, in this connection, Chicago & G. T. R. Co. *v.* Wellman, 143 U.S. 339. . . .

Applying the principles thus long settled by the decisions of this Court to the act of Congress undertaking to confer jurisdiction in this case, we find that William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens having like interest in the property allotted under the act of July 1, 1902, and David Muskrat and J. Henry Dick, for themselves and representatives of all Cherokee citizens enrolled as such for allotment as of September 1, 1902, are authorized and empowered to institute suits in the Court of Claims to determine the validity of acts of Congress passed since the Act of July 1, 1902, in so far as the same attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September 1, 1902, and provided for in the said Act of July 1, 1902.

The jurisdiction was given for that purpose first to the Court of Claims and then upon appeal to this Court. That is, the object and purpose of the suit is wholly comprised in the determination of the constitutional validity of certain acts of Congress; and furthermore, in the last paragraph of the section, should a judgment be rendered in the Court of Claims or this Court, denying the constitutional validity of such acts, then the amount of compensation to be paid to attorneys employed for the purpose of testing the constitutionality of the law is to be paid out of funds in the Treasury of the United States belonging to the beneficiaries, the act having previously provided that the United States should be made a party and the Attorney General be charged with the defense of the suits.

It is therefore evident that there is neither more nor less in this procedure than an attempt to provide for a judicial determination, final in this Court, of the constitutional validity of an act of Congress. Is such a determination within the judicial power conferred by the Constitution, as the same has been interpreted and defined in the authoritative decisions to which we have referred? We think it is not. That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law.

The exercise of this, the most important and delicate duty of this Court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the Court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the government. This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a "case" or "controversy," to which, under the Constitution of the United States, the judicial power alone extends. It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question. Such judgment will not conclude private parties, when actual litigation brings to the Court the question of the constitutionality of such legislation. In a legal sense the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question. Confining the jurisdiction of this Court within the limitations conferred by the Constitution, which the Court has hitherto been careful to observe, and whose boundaries it has refused to transcend, we think the Congress, in the Act of March 1, 1907, exceeded the limitations of legislative authority, so far as it required of this Court action not judicial in its nature within the meaning of the Constitution.

Nor can it make any difference that the petitioners had brought suits in the Supreme Court of the District of Columbia to enjoin the Secretary of the Interior from carrying into effect the legislation subsequent to the Act of July 1, 1902, which suits were pending when the jurisdictional act here involved was passed. The latter act must depend upon its own terms and be judged by the authority which it undertakes to confer. If such actions as are here attempted, to determine the validity of legislation, are sustained, the result will be that this Court, instead of keeping within the limits of judicial power, and deciding cases or controversies aris-

ing between opposing parties, as the Constitution intended it should, will be required to give opinions in the nature of advice concerning legislative action, a function never conferred upon it by the Constitution, and against the exercise of which this Court has steadily set its face from the beginning.

The questions involved in this proceeding as to the validity of the legislation may arise in suits between individuals, and when they do and are properly brought before this Court for consideration they, of course, must be determined in the exercise of its judicial functions. For the reasons we have stated, we are constrained to hold that these actions present no justiciable controversy within the authority of the Court, acting within the limits of the Constitution under which it was created. As Congress, in passing this act as part of the plan involved, evidently intended to provide a review of the judgment of the Court of Claims in this Court, as the constitutionality of important legislation is concerned, we think the act cannot be held to intend to confer jurisdiction on that court separately considered.

The judgments will be reversed and the cases remanded to the Court of Claims, with directions to dismiss the petitions for want of jurisdiction.

Comment

The Sequel. It proved perfectly possible to obtain a final determination in the Supreme Court, in suits which conformed to the requirements of judicial action, of the questions which disturbed the Cherokees. In Tiger *v.* Western Investment Company, 221 U.S. 286 (1911), the Court held that Congress had not exceeded its authority in extending the period of inalienability to twenty-five years, considering the relation of guardianship which the United States held toward the Indians. Gritts *v.* Fisher, 224 U.S. 640 (1912), held that the Indians of 1902 had no such vested rights in the distribution of remaining tribal property as would prevent Congress from admitting newly born members of the tribe to the allotment and distribution.

AETNA LIFE INSURANCE CO. *v.* HAWORTH

300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937).

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Introduction

The Federal Declaratory Judgment Act of June 14, 1934, provides that

> In cases of actual controversy . . . the courts of the United States shall have power upon petition, declaration, complaint, on other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

Where questions of fact were involved which were triable by a jury, a jury should be called.

The present case was the first in which the Supreme Court had occasion to determine whether the procedure which Congress thus established met the constitutional requirements for judicial action.

The controversy. The insurance company had issued to Haworth five policies upon his life in an aggregate amount of $30,000. All provided for certain benefits in the event that Haworth became totally and permanently disabled: under two of the policies the company would at once begin payments to the insured, and under the other three the policies thereupon became paid up and the insurance continued in force. In 1930 Haworth asserted that he had become totally and permanently disabled; he ceased to pay premiums and claimed that he was entitled to the disability benefits. The insurance company denied that he was so disabled and regarded the policies as having lapsed by reason of nonpayment of premiums.

There was thus an actual controversy between insurer and insured. Haworth, however, did not see fit to take the offensive by suing the company for such of the benefits as he claimed were payable at once. But the company wished to have the controversy settled. It believed that its prospects of proving that Haworth was not disabled were better at the moment than they would be if the matter remained in dispute until Haworth's death, by which time evidence might be lost

through the disappearance, illness, or death of witnesses; also, the company must hold reserves to meet the claims so long as they remained unsettled.

Accordingly, the insurance company came into a federal district court and asked for a declaratory judgment holding that the policies had lapsed. (Since the insurance company and Haworth were "citizens of different States," and more than $3000 was in issue, the case could be brought in the federal court.) The district court and then the Circuit Court of Appeals took the view that this was not a "controversy" in the constitutional sense; but the Supreme Court was unanimous in holding that it was.

Opinion

Mr. Chief Justice HUGHES delivered the opinion of the Court.

The question presented is whether the District Court had jurisdiction of this suit under the Federal Declaratory Judgment Act. Act of June 14, 1934, 48 Stat. 955; Jud.Code § 274D; 28 U.S.C. § 400. . . .

First. The Constitution (Article 3, section 2) limits the exercise of the judicial power to "cases" and "controversies." "The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature." Per Mr. Justice Field in *Re* Pacific Railway Commission (C.C.) 32 F. 241, 255. The Declaratory Judgment Act of 1934, in its limitation to "cases of actual controversy," manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense. The word "actual" is one of emphasis rather than of definition. Thus the operation of the Declaratory Judgment Act is procedural only. In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the federal courts which the Congress is authorized to establish. Exercising this control of practice and procedure the Congress is not confined to traditional forms or traditional remedies. The judiciary clause of the Constitution "did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts." Nashville, Chattanooga & St. Louis R. Co. *v.* Wallace, 288 U.S. 249, 264. In dealing with methods within its sphere of remedial action the Congress may create and improve as well as abolish or restrict. The

Declaratory Judgment Act must be deemed to fall within this ambit of congressional power, so far as it authorizes relief which is consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial power extends.

A "controversy" in this sense must be one that is appropriate for judicial determination. Osborn *v.* Bank of United States, 9 Wheat. 738, 819. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. See Muskrat *v.* United States, 219 U.S. 346; Ashwander *v.* Tennessee Valley Authority, 297 U.S. 288, 324. Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required. Nashville, C. & St. L. R. Co. *v.* Wallace, *supra.*

With these principles governing the application of the Declaratory Judgment Act, we turn to the nature of the controversy, the relation and interests of the parties, and the relief sought in the instant case.

Second. There is here a dispute between parties who face each other in an adversary proceeding. The dispute relates to legal rights and obligations arising from the contracts of insurance. The dispute is definite and concrete, not hypothetical or abstract. Prior to this suit, the parties had taken adverse positions with respect to their existing obligations. Their contentions concerned the disability benefits which were to be payable upon prescribed conditions. On the one side, the insured claimed that he had become totally and permanently disabled and hence was relieved of the obligation to continue the payment of premiums and was entitled to the stipulated disability benefits and to the continuance of the policies in force. The insured presented this claim

formally, as required by the policies. It was a claim of a present, specific right. On the other side, the company made an equally definite claim that the alleged basic fact did not exist, that the insured was not totally and permanently disabled and had not been relieved of the duty to continue the payment of premiums, that in consequence the policies had lapsed, and that the company was thus freed from its obligation either to pay disability benefits or to continue the insurance in force. Such a dispute is manifestly susceptible of judicial determination. It calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts. . . .

Our conclusion is that the complaint presented a controversy to which the judicial power extends and that authority to hear and determine it has been conferred upon the District Court by the Declaratory Judgment Act. The decree is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Comment

This was not, like Chicago & Grand Trunk Ry. *v.* Wellman, 143 U.S. 339 (1892), a friendly nonadversary suit: the insurance company and Haworth were really opposed to one another. And, unlike the situation found in the Muskrat Case, the two opposing sides were here before the Court, and their rights would be settled, once for always, by the Court's ruling. "The requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit." Stone, C.J., in Alabama State Federation of Labor *v.* McAdory, 325 U.S. 450, 461 (1945). Sooner or later it would have to be settled whether or not the insurance company had to pay; the fact on which the controversy turned was Haworth's condition in 1930, and justice would be promoted by an early trial of that issue.

State declaratory judgment statutes. Some of the states for a long time have had a declaratory judgment procedure, and most of them today have either adopted the Uniform Declaratory Judgments Act or drawn similar statutes of their own. Prior to the Haworth Case, wherein the federal statute was sustained, the Supreme Court had had several occasions to consider state declaratory judgment laws. What it said on that subject produced considerable uncertainty, which was dispelled by the opinion of Mr. Justice Stone for a unanimous Court in Nashville, C. & St. L. Ry. *v.* Wallace, 288 U.S. 249 (1933). The railroad had sought a declaratory judgment in the courts of Tennessee, as authorized by the statute of that state. It lost the suit, and the question then was whether the Supreme Court of the United States

would hear an appeal in a declaratory judgment proceeding, in order to settle a claim of federal right there involved. The answer was as follows:

> Whenever the judicial power is invoked to review a judgment of a state court, the ultimate constitutional purpose is the protection, by the exercise of the judicial function, of rights arising under the Constitution and laws of the United States. The states are left free to regulate their own judicial procedure. Hence changes merely in the form or method of procedure by which federal rights are brought to final adjudication in the state courts are not enough to preclude review of the adjudication by this Court, so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy, which is finally determined by the judgment below.

Judicial discretion in use of declaratory judgment procedure. The declaratory judgment is a very useful addition to the forms by which the courts may do justice. But quite properly, as the House report said of the declaratory judgment bill when it was before Congress, "large discretion is conferred upon the courts as to whether or not they will administer justice by this procedure." H.R. Rep. No. 1264, 73d Cong., 2d Sess., 2. For example, take the problem presented in Great Lakes Dredge & Dock Co. *v.* Huffman, 319 U.S. 293 (1943). Louisiana had an unemployment compensation law, under which it claimed that the company should pay contributions on behalf of its employees. The company contended that its operations were governed by the maritime law, and not by the Louisiana statute. The company being a "citizen" of another state, and the amount in dispute being in excess of $3000, it went into a federal district court and sued the Louisiana administrator of employment security, asking a declaratory judgment that it need not contribute. Was this an appropriate case for the federal court to render a declaratory judgment? No, said the Supreme Court of the United States, when the case was brought before it. Louisiana had a statute whereby the dredge company, after paying the tax under protest, could have had a prompt determination in the state courts of its liability to pay. If it won, its money would have been repaid with interest. If it lost, it could still have appealed to the Supreme Court of the United States to pass upon its claim of a federal right. That, said the Supreme Court, was the better way to handle the controversy, for two reasons. First, it is preferable, in general, that the state courts, rather than the federal, should have the original opportunity to construe a state tax law. What the law means is a state question. Then if some claim of a right under the Constitution or laws or treaties of the United States remains in dispute, the Supreme Court can settle that question. This shows a due regard for the state's

internal economy and administration. Secondly, it is a good general principle of government that the taxpayer should pay first and then sue to recover, rather than that he be permitted to litigate before he pays. Thus the vital function of tax gathering is not delayed by the proceedings of the courts. Here, then, was a situation in which the declaratory judgment was not a useful device, and the court below should, in the exercise of its discretion, have declined to render such a judgment.

Alabama State Federation of Labor *v.* McAdory, 325 U.S. 450 (1945), was a case where the Alabama courts had been asked by the plaintiff to give a declaratory judgment holding that a certain statute —a comprehensive enactment to regulate labor unions functioning in Alabama—was void under the state and federal constitutions. When the state courts held, on the contrary, that the statute was valid, the Federation asked the Supreme Court of the United States to review and reverse that judgment. The Supreme Court, upon examination, declared that "the case is plainly not one to be disposed of by the declaratory judgment procedure." Why was this? The statute contained numerous detailed provisions, and the Court could not say, simply by reading the words, how those various provisions would actually be interpreted and applied by the administrative authorities and the courts of Alabama. The Federation had pointed to several sections of the act and, reading each in an unfavorable light, asked the Supreme Court to say that that was what the statute meant and that, so construed, it was unconstitutional. Mr. Chief Justice Stone explained why this would not be a proper course.

> A law which is constitutional as applied in one manner may, it is true, violate the Constitution when applied in another. But "Since all contingencies of attempted enforcement cannot be envisioned in advance of those applications" this Court has felt bound to delay passing on "the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured."

So the rule that "We deal . . ., not with the theoretical disputes but with concrete and specific issues raised by actual cases," Douglas, J., in Allen-Bradley Local No. 1111 *v.* Wisconsin E.R. Board, 315 U.S. 740, 746 (1942), is no less applicable to requests for a declaratory judgment. In insisting on this essential principle, just as in its scrupulous requirements that its own jurisdiction be shown, that the real parties to the controversy be present, and that it will speak only where its ruling will really determine the matter, the Supreme Court is not being obstinate or stickling over mere technicalities; it is holding to prerequisites of the orderly, proper, and intelligent administra-

tion of justice. Said Mr. Justice Frankfurter in a concurring opinion in United States *v.* Lovett, 328 U.S. 303 at 320 (1946):

> Some of these rules [for abstention from avoidable adjudications] may well appear over-refined or evasive to the laity. But they have the support not only of the profoundest wisdom. They have been vindicated, in conspicuous instances of disregard, by the most painful lessons of our constitutional history.

McGRAIN *v.* DAUGHERTY

273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580 (1927)

Appeal from the District Court of the United States for the Southern District of Ohio.

Introduction

The separation of powers.

The federal Constitution nowhere expressly declares that the three branches of the government shall be kept separate and independent [wrote Mr. Chief Justice Taft for the Court in *Ex parte* Grossman, 267 U.S. 87, 119 (1925)]. All legislative powers are vested in a Congress. The executive power is vested in a President. The judicial power is vested in one Supreme Court and in such inferior courts as Congress may from time to time establish. The judges are given life tenure and a compensation that may not be diminished during their continuance in office, with the evident purpose of securing them and their courts an independence of Congress and the executive. Complete independence and separation between the three branches, however, are not attained, or intended, as other provisions of the Constitution and the normal operation of government under it easily demonstrate. By affirmative action through the veto power, the executive and one more than one third of either House may defeat all legislation. One half of the House and two thirds of the Senate may impeach and remove the members of the judiciary. The executive can reprieve or pardon all offenses after their commission, either before trial, during trial or after trial, by individuals, or by classes, conditionally or absolutely, and this without modification or regulation by Congress. Negatively one house of Congress can withhold all appropriations and stop the operations of government. The Senate can hold up all appointments, confirmation of which either the Constitution or a

> statute requires, and thus deprive the President of the necessary agents with which he is to take care that the laws be faithfully executed.
>
> These are some instances of positive and negative restraints possibly available under the Constitution to each branch of the government in defeat of the action of the other. They show that the independence of each of the other is qualified and is so subject to exception as not to constitute a broadly positive injunction or a necessarily controlling rule of construction.

Problems in the relations between the branches of government are not to be solved by abstract demonstrations, removed from the context of government, that a given operation is "legislative" or "executive" or "judicial" in character. The constitutional distribution of the functions of government between the three branches is to be so construed as to achieve the great ultimate objective, the most effective and harmonious working of the system. The separation of powers was made for man, not man for the separation of powers.

In McGrain *v.* Daugherty we observe the Court working out the solution of such a problem.

The facts in the Daugherty Case. Harry M. Daugherty served as Attorney General of the United States from March 1921, when the Harding administration began, until March 1924, when he resigned under fire. When his administration of the Department of Justice appeared to be involved in the unfolding spectacle of corruption, Congress provided that certain important litigation be taken out of the hands of the Department and confided to special counsel to be appointed by the President. The Senate adopted a resolution directing a select committee of its members

> . . . to investigate circumstances and facts, and report the same to the Senate, concerning the alleged failure of Harry M. Daugherty, Attorney General of the United States, to prosecute properly violators of the Sherman Anti-Trust Act and the Clayton Act . . .; the alleged neglect and failure of the said Harry M. Daugherty . . . to arrest and prosecute Albert B. Fall, Harry F. Sinclair, E. L. Doheny, C. R. Forbes, and their coconspirators in defrauding the government, as well as the alleged neglect and failure of the said Attorney General to arrest and prosecute many others for violations of federal statutes, and his alleged failure to prosecute properly, efficiently, and promptly, and to defend, all manner of civil and criminal actions wherein the government of the United States is interested . . .

The resolution authorized the committee to send for books and papers, to subpoena witnesses, to administer oaths, and to sit at such times and places as it might deem advisable.

In the course of its investigation the committee subpoenaed Mally

S. Daugherty, brother of the Attorney General. He failed to respond. The committee reported this to the Senate, which thereupon adopted a resolution reciting that the testimony of M. S. Daugherty was material and necessary as the basis for such legislative action as the Senate might deem necessary and directing that the President of the Senate pro tempore issue his warrant to the sergeant at arms or his deputy to bring Daugherty before the bar of the Senate to answer questions pertinent to the inquiry. The warrant was served on Daugherty in Ohio by McGrain, deputy sergeant at arms. Daugherty rushed into the federal district court, which granted a writ of habeas corpus and, upon a hearing, discharged him. The Senate, said the district court, was not investigating the Department of Justice, it was investigating the former Attorney General. "In so doing it is exercising the judicial function. This it has no power to do."

An appeal was taken to the Supreme Court, which, after holding the case very long under advisement, upheld the action of the Senate and reversed the decision below.

Opinion

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is an appeal from the final order in a proceeding in habeas corpus discharging a recusant witness held in custody under process of attachment issued from the United States Senate in the course of an investigation which it was making of the administration of the Department of Justice. . . .

The first of the principal questions—the one which the witness particularly presses on our attention—is, as before shown, whether the Senate—or the House of Representatives, both being on the same plane in this regard—has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution.

The Constitution provides for a Congress consisting of a Senate and House of Representatives and invests it with "all legislative powers" granted to the United States, and with power "to make all laws which shall be necessary and proper" for carrying into execution these powers and "all other powers" vested by the Constitution in the United States or in any department or officer thereof. Article I, sections 1, 8. . . . But there is no provision expressly investing either house with power to make investigations and exact testimony to the end that it may exercise its legislative function advisedly and effectively. So the question arises whether

this power is so far incidental to the legislative function as to be implied.

In actual legislative practice power to secure needed information by such means has long been treated as an attribute of the power to legislate. It was so regarded in the British Parliament and in the colonial legislatures before the American Revolution; and a like view has prevailed and been carried into effect in both houses of Congress and in most of the state legislatures.

This power was both asserted and exerted by the House of Representatives in 1792, when it appointed a select committee to inquire into the St. Clair expedition and authorized the committee to send for necessary persons, papers and records. Mr. Madison, who had taken an important part in framing the Constitution only five years before, and four of his associates in that work, were members of the House of Representatives at the time, and all voted for the inquiry. 3 *Cong. Ann.* 494. Other exertions of the power by the House of Representatives, as also by the Senate, are shown in the citations already made. Among those by the Senate, the inquiry ordered in 1859 respecting the raid by John Brown and his adherents on the armory and arsenal of the United States at Harper's Ferry is of special significance. The resolution directing the inquiry authorized the committee to send for persons and papers, to inquire into the facts pertaining to the raid and the means by which it was organized and supported, and to report what legislation, if any, was necessary to preserve the peace of the country and protect the public property. The resolution was briefly discussed and adopted without opposition. *Cong. Globe,* 36th Cong., 1st Sess., 141, 152. Later on the committee reported that Thaddeus Hyatt, although subpoenaed to appear as a witness, had refused to do so, whereupon the Senate ordered that he be attached and brought before it to answer for his refusal. When he was brought in he answered by challenging the power of the Senate to direct the inquiry and exact testimony to aid it in exercising its legislative function. The question of power thus presented was thoroughly discussed by several Senators—Mr. Sumner of Massachusetts taking the lead in denying the power, and Mr. Fessenden of Maine in supporting it. Sectional and party lines were put aside and the question was debated and determined with special regard to principle and precedent. The vote was taken on a resolution pronouncing the witness's answer insufficient and directing that he be committed until he should signify that he was ready and willing to testify. The resolution was adopted—forty-four Senators voting for it and

ten against. *Cong. Globe,* 36th Cong. 1st Sess., 1100-1109, 3006-3007. . . .

The deliberate solution of the question on that occasion has been accepted and followed on other occasions by both houses of Congress, and never has been rejected or questioned by either.

The state courts quite generally have held that the power to legislate carries with it by necessary implication ample authority to obtain information needed in the rightful exercise of that power, and to employ compulsory process for the purpose. . . .

We have referred to the practice of the two houses of Congress; and we now shall notice some significant congressional enactments. May 3, 1798, chap. 36, 1 Stat. at L. 554, Congress provided that oaths or affirmations might be administered to witnesses by the President of the Senate, the Speaker of the House of Representatives, the chairman of a committee of the whole, or the chairman of a select committee, "in any case under their examination." February 8, 1817, chap. 10, 3 Stat. at L. 345, it enlarged that provision so as to include the chairman of a standing committee. January 24, 1857, chap. 19, 11 Stat. at L. 155, it passed "An Act More Effectually to Enforce the Attendance of Witnesses on the Summons of Either House of Congress, and to Compel Them to Discover Testimony." This Act provided, first, that any person summoned as a witness to give testimony or produce papers in any matter under inquiry before either house of Congress, or any committee of either house, who should willfully make default, or, if appearing, should refuse to answer any question pertinent to the inquiry, should, in addition to the pains and penalties then existing, be deemed guilty of a misdemeanor and be subject to indictment and punishment as there prescribed; and secondly, that no person should be excused from giving evidence in such an inquiry on the ground that it might tend to incriminate or disgrace him, nor be held to answer criminally, or be subjected to any penalty or forfeiture, for any fact or act as to which he was required to testify, excepting that he might be subjected to prosecution for perjury committed while so testifying. January 24, 1862, chap. 11, 12 Stat. at L. 333, Congress modified the immunity provision in particulars not material here. These enactments are now embodied in sections 101-104 and 859 of Revised Statutes. They show very plainly that Congress intended thereby (*a*) to recognize the power of either house to institute inquiries and exact evidence touching subjects within its jurisdiction and on which it was disposed to act; (*b*) to recognize that such inquiries may be conducted through

committees; (*c*) to subject defaulting and contumacious witnesses to indictment and punishment in the courts, and thereby to enable either house to exert the power of inquiry "more effectually"; and (*d*) to open the way for obtaining evidence in such an inquiry, which otherwise could not be obtained, by exempting witnesses required to give evidence therein from criminal and penal prosecutions in respect of matters disclosed by their evidence.

Four decisions of this Court are cited and more or less relied on, and we now turn to them.

The first decision was in Anderson *v.* Dunn, 6 Wheat. 204. . . . The question there was whether, under the Constitution, the House of Representatives has power to attach and punish a person other than a member for contempt of its authority—in fact, an attempt to bribe one of its members. The Court regarded the power as essential to the effective exertion of other powers expressly granted, and therefore as implied. . . .

The next decision was in Kilbourn *v.* Thompson, 103 U.S. 168. The question there was whether the House of Representatives had exceeded its power in directing one of its committees to make a particular investigation. The decision was that it had. The principles announced and applied in the case are—that neither house of Congress possesses a "general power of making inquiry into the private affairs of the citizen"; that the power actually possessed is limited to inquiries relating to matters of which the particular house "has jurisdiction" and in respect of which it rightfully may take other action; that if the inquiry relates to "a matter wherein relief or redress could be had only by a judicial proceeding" it is not within the range of this power, but must be left to the courts, conformably to the constitutional separation of governmental powers; and that for the purpose of determining the essential character of the inquiry recourse may be had to the resolution or order under which it is made. The Court examined the resolution which was the basis of the particular inquiry, and ascertained therefrom that the inquiry related to a private real estate pool or partnership in the District of Columbia. Jay Cooke & Company had had an interest in the pool, but had become bankrupts, and their estate was in course of administration in a federal bankruptcy court in Pennsylvania. The United States was one of their creditors. The trustee in the bankruptcy proceeding had effected a settlement of the bankrupts' interest in the pool, and of course his action was subject to examination and approval or disapproval by the bankruptcy court. Some of the creditors, including the United States,

were dissatisfied with the settlement. In these circumstances, disclosed in the preamble, the resolution directed the committee "to inquire into the matter and history of said real estate pool and the character of said settlement, with the amount of property involved in which Jay Cooke & Company were interested, and the amount paid or to be paid in said settlement, with power to send for persons and papers and report to the House." The Court pointed out that the resolution contained no suggestion of contemplated legislation; that the matter was one in respect to which no valid legislation could be had; that the bankrupts' estate and the trustee's settlement were still pending in the bankruptcy court; and that the United States and other creditors were free to press their claims in that proceeding. And on these grounds the Court held that in undertaking the investigation "the House of Representatives not only exceeded the limit of its own authority, but assumed power which could only be properly exercised by another branch of the government, because it was in its nature clearly judicial."

The case has been cited at times, and is cited to us now, as strongly intimating, if not holding, that neither house of Congress has power to make inquiries and exact evidence in aid of contemplated legislation. There are expressions in the opinion which, separately considered, might bear such an interpretation; but that this was not intended is shown by the immediately succeeding statement (p. 189) that "This latter proposition is one which we do not propose to decide in the present case because we are able to decide it without passing upon the existence or nonexistence of such a power in aid of the legislative function."

Next in order is *In re* Chapman, 166 U.S. 661. The inquiry there in question was conducted under a resolution of the Senate and related to charges, published in the press, that Senators were yielding to corrupt influences in considering a tariff bill then before the Senate and were speculating in stocks the value of which would be affected by pending amendments to the bill. Chapman appeared before the committee in response to a subpoena, but refused to answer questions pertinent to the inquiry, and was indicted and convicted under the Act of 1857 for his refusal. The Court sustained the constitutional validity of the Act of 1857, and, after referring to the constitutional provision empowering either house to punish its members for disorderly behavior and by a vote of two-thirds to expel a member, held that the inquiry related to the integrity and fidelity of Senators

in the discharge of their duties, and therefore to a matter "within the range of the constitutional powers of the Senate," and in respect of which it could compel witnesses to appear and testify. In overruling an objection that the inquiry was without any defined or admissible purpose, in that the preamble and resolution made no reference to any contemplated expulsion, censure, or other action by the Senate, the Court held that they adequately disclosed a subject matter of which the Senate had jurisdiction, that it was not essential that the Senate declare in advance what it meditated doing, and that the assumption could not be indulged that the Senate was making the inquiry without a legitimate object.

The case is relied on here as fully sustaining the power of either house to conduct investigations and exact testimony from witnesses for legislative purposes. In the course of the opinion (p. 671) it is said that disclosures by witnesses may be compelled constitutionally "to enable the respective bodies to discharge their legitimate functions, and that it was to effect this that the Act of 1857 was passed"; and also "We grant that Congress could not divest itself, or either of its houses, of the essential and inherent power to punish for contempt, in cases to which the power of either house properly extended; but, because Congress, by the Act of 1857, sought to aid each of the houses in the discharge of its constitutional functions, it does not follow that any delegation of the power in each to punish for contempt was involved." The terms "legitimate functions" and "constitutional functions" are broad and might well be regarded as including the legislative function, but as the case in hand did not call for any expression respecting that function, it hardly can be said that these terms were purposely used as including it.

The latest case is Marshall *v.* Gordon, 243 U.S. 521. The question there was whether the House of Representatives exceeded its power in punishing, as for a contempt of its authority, a person—not a member—who had written, published, and sent to the chairman of one of its committees an ill-tempered and irritating letter respecting the action and purposes of the committee. Power to make inquiries and obtain evidence by compulsory process was not involved. The Court recognized distinctly that the House of Representatives has implied power to punish a person not a member for contempt, as was ruled in Anderson *v.* Dunn, *supra*, but held that its action in this instance was without constitutional justification. The decision was put on the ground that the letter, while offensive and vexatious, was not cal-

culated or likely to affect the House in any of its proceedings or in the exercise of any of its functions—in short, that the act which was punished as a contempt was not of such a character as to bring it within the rule that an express power draws after it others which are necessary and appropriate to give effect to it.

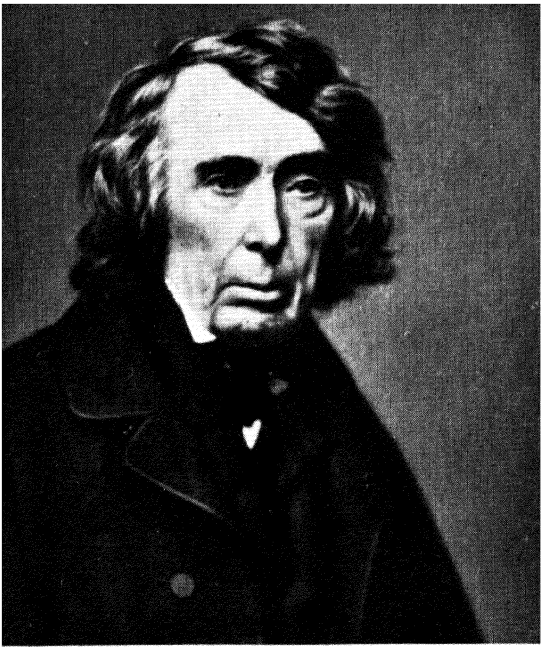
While these cases are not decisive of the question we are considering, they definitely settle two propositions which we recognize as entirely sound and having a bearing on its solution: One, that the two houses of Congress, in their separate relations, possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective; and, the other, that neither house is invested with "general" power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist when the rule of constitutional interpretation just stated is rightly applied. . . .

With this review of the legislative practice, congressional enactments, and court decisions, we proceed to a statement of our conclusions on the question.

We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified. Both houses of Congress took this view of it early in their history—the House of Representatives with the approving votes of Mr. Madison and other members whose service in the convention which framed the Constitution gives special significance to their action —and both houses have employed the power accordingly up to the present time. The acts of 1798 and 1857, judged by their comprehensive terms, were intended to recognize the existence of this power in both houses and to enable them to employ it "more effectually" than before. So, when their practice in the matter is appraised according to the circumstances in which it was begun and to those in which it has been continued, it falls nothing short of a practical construction, long continued, of the constitutional provisions respecting their powers, and therefore should be taken as fixing the meaning of those provisions, if otherwise doubtful.

We are further of opinion that the provisions are not of doubtful meaning, but, as was held by this Court in the cases we have reviewed, are intended to be effectively exercised, and therefore to carry with them such auxiliary powers as are necessary and

Roger Brooke Taney
Chief Justice,
1836-1864



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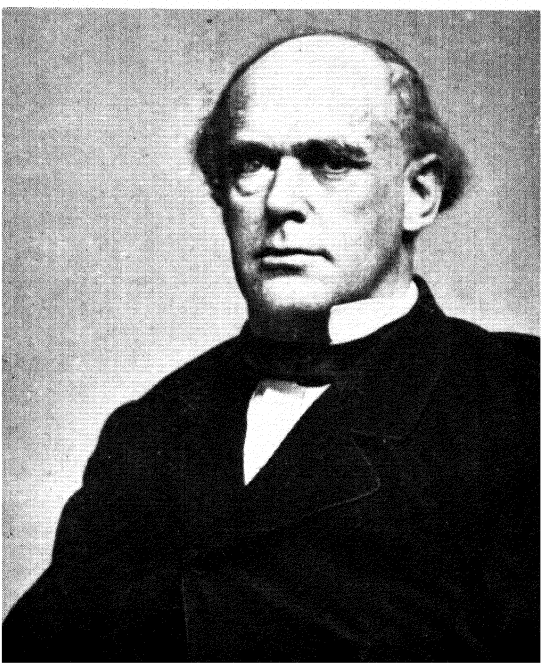
Salmon Portland Chase
Chief Justice,
1864-1873



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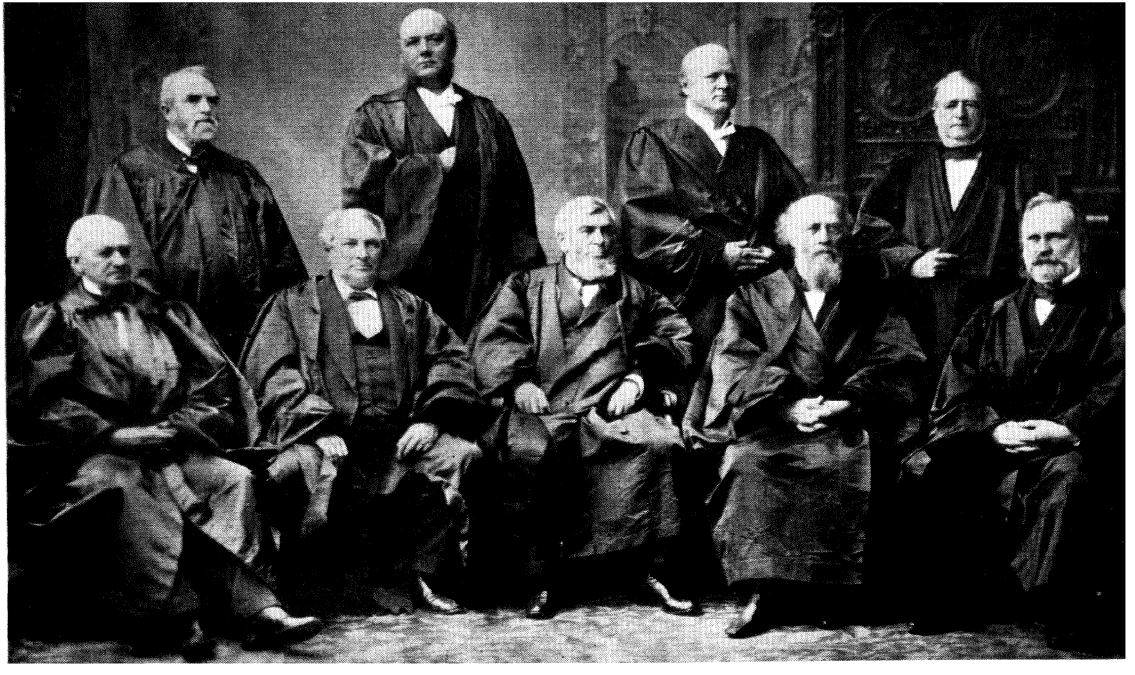

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THE SUPREME COURT, 1882

Woods Gray Harlan Blatchford
Bradley Miller Waite, C.J. Field Matthews

appropriate to that end. While the power to exact information in aid of the legislative function was not involved in those cases, the rule of interpretation applied there is applicable here. A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. . . .

The contention is earnestly made on behalf of the witness that this power of inquiry, if sustained, may be abusively and oppressively exerted. If this be so, it affords no ground for denying the power. . . . And it is a necessary deduction from the decisions in Kilbourn *v.* Thompson and *In re* Chapman that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry.

We come now to the question whether it sufficiently appears that the purpose for which the witness's testimony was sought was to obtain information in aid of the legislative function. The court below answered the question in the negative, and put its decision largely on this ground, as is shown by the following excerpts from its opinion (299 Fed. 638, 639, 640):

"It will be noted that in the second resolution the Senate has expressly avowed that the investigation is in aid of other action than legislation. Its purpose is to 'obtain information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper.' This indicates that the Senate is contemplating the taking of action other than legislative, as the outcome of the investigation, at least the possibility of so doing. The extreme personal cast of the original resolutions; the spirit of hostility towards the then Attorney General which they breathe; that it was not avowed that legislative action was had in view until after the action of the Senate had been challenged; and that the avowal then was coupled with an avowal that other action was had in view—are calculated to create the impression that the idea of legislative action being in contemplation was an afterthought.

"That the Senate has in contemplation the possibility of taking

action other than legislation as an outcome of the investigation, as thus expressly avowed, would seem of itself to invalidate the entire proceeding. But, whether so or not, the Senate's action is invalid and absolutely void, in that, in ordering and conducting the investigation, it is exercising the judicial function, and power to exercise that function, in such a case as we have here, has not been conferred upon it expressly or by fair implication. What it is proposing to do is to determine the guilt of the Attorney General of the shortcomings and wrongdoings set forth in the resolutions. It is 'to hear, adjudge, and condemn.' In so doing it is exercising the judicial function.

"What the Senate is engaged in doing is not investigating the Attorney General's office; it is investigating the former Attorney General. What it has done is to put him on trial before it. In so doing it is exercising the judicial function. This it has no power to do."

We are of opinion that the court's ruling on this question was wrong, and that it sufficiently appears, when the proceedings are rightly interpreted, that the object of the investigation and of the effort to secure the witness's testimony was to obtain information for legislative purposes.

It is quite true that the resolution directing the investigation does not in terms avow that it is intended to be in aid of legislation; but it does show that the subject to be investigated was the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers—specific instances of alleged neglect being recited. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General and the duties of his assistants, are all subject to regulation by congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year.

The only legitimate object the Senate could have in ordering

the investigation was to aid it in legislating; and we think the subject matter was such that the presumption should be indulged that this was the real object. An express avowal of the object would have been better; but in view of the particular subject matter was not indispensable. . . .

We conclude that the investigation was ordered for a legitimate object; that the witness wrongfully refused to appear and testify before the committee and was lawfully attached; that the Senate is entitled to have him give testimony pertinent to the inquiry, either at its bar or before the committee; and that the district court erred in discharging him from custody under the attachment. . . .

Final order reversed.

Mr. Justice STONE did not participate in the consideration or decision of the case.

Comment

Barry *v.* United States *ex rel.* Cunningham, 279 U.S. 597 (1929), dealt with another recusant witness, this time in connection with a Senate inquiry, the purpose of which was not to aid the legislative function but to provide the basis for judging of the election and qualifications of William S. Vare as a Senator from Pennsylvania. Cunningham, one of Vare's henchmen, had refused to tell the Senate committee where he obtained the $50,000 he put into the Vare campaign chest; the Senate caused a warrant to issue for Cunningham's arrest, and he sought release on a writ of habeas corpus. The Supreme Court had no difficulty in concluding that, since each house is made the judge of the elections, returns, and qualifications of its members, necessarily it must be able to require the attendance of witnesses to aid in its determinations.

In Jurney *v.* MacCracken, 294 U.S. 125 (1935), the Senate, by one of its committees, had been investigating ocean- and air-mail contracts, and MacCracken had been subpoenaed to appear before the committee with certain relevant papers; an air-line official was permitted, however, to remove and destroy some of the papers before the committee had seen them. Had the Senate authority to cause MacCracken to be brought before it with a view to punishing him for contempt if, upon inquiry, it found that he had been responsible for the removal? MacCracken urged that it could not: since the papers were gone, no punishment for contempt which the Senate might thereafter impose could possibly be of any aid to legislation. The Supreme

Court, per Brandeis, J., held otherwise: where the act had been of a nature to obstruct the legislative process, the fact that the obstruction was impossible to remove did not shield the one guilty of contempt from punishment. Nor did it matter that the same act might be punished by the Senate as a contempt and by the courts as a misdemeanor under the Act of 1857. As the Court had said in *In re* Chapman: ". . . the same act may be an offense against one jurisdiction and also an offense against another; and indictable statutory offenses may be punished as such, while the offenders may likewise be subjected to punishment for the same acts as contempts, the two being *diverso intuitu,* and capable of standing together." "The statute [of 1857] was enacted," said Mr. Justice Brandeis, "not because the power of the houses to punish for a past contempt was doubted, but because imprisonment limited to the duration of the session was not considered sufficiently drastic a punishment for contumacious witnesses."

In Marshall *v.* Gordon the Court declared, obiter, that the power to punish for contempt "is limited to imprisonment, and such imprisonment may not be extended beyond the session of the body in which the contempt occurred."

Justice Miller's view. "I think the public has been much abused, the time of legislative bodies uselessly consumed and rights of the citizen ruthlessly invaded under the new familiar pretext of legislative investigation . . ." Thus wrote Mr. Justice Miller in a private letter shortly after he had delivered the opinion of the Court in Kilbourn *v.* Thompson, discussed in page 77 above. The letter disclosed that a majority of the Court in 1880 held the view not merely that that particular congressional inquiry was unjustified but that neither house had power to compel testimony in aid of the *legislative* function. The majority thought that witnesses could not properly be compelled to testify save in those instances where the house had specific constitutional authority to make inquiry, as in judging the election of a member, or in matters of impeachment. But, explained Justice Miller, "dealing as we were with the asserted privileges of one of the most important coordinate branches of the government, it was very desirable to have unanimity in the Court, as well as to decide no more than what was necessary. It was partly due to my conservative habit of deciding no more than is necessary in any case, that I was selected to write the opinion." [Reprinted by permission of the publishers from Charles Fairman, *Mr. Justice Miller and the Supreme Court,* 1862-1890, Cambridge, Mass.: Harvard University Press, 1939, at 333.]

Justice Miller had been shocked by some of the excesses of Congress during the period following the Civil War. He came to believe that the legislature was the least rational part of the government. It is not to be doubted that the quality of legislation has improved very greatly since those days. But it is still true that at times committees of

Congress give themselves over to undignified and sensational investigations which merit the censure expressed by Justice Miller in his letter.

HUMPHREY'S EXECUTOR (RATHBUN) *v.* UNITED STATES

295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935).

On Certificate from the Court of Claims.

Opinion

Mr. Justice SUTHERLAND delivered the opinion of the Court.

Plaintiff brought suit in the Court of Claims against the United States to recover a sum of money alleged to be due the deceased for salary as a Federal Trade Commissioner from October 8, 1933, when the President undertook to remove him from office, to the time of his death on February 14, 1934. The court below has certified to this Court two questions . . ., in respect of the power of the President to make the removal. The material facts which give rise to the questions are as follows:

William E. Humphrey, the decedent, on December 10, 1931, was nominated by President Hoover to succeed himself as a member of the Federal Trade Commission, and was confirmed by the United States Senate. He was duly commissioned for a term of seven years, expiring September 25, 1938; and, after taking the required oath of office, entered upon his duties. On July 25, 1933, President Roosevelt addressed a letter to the commissioner asking for his resignation, on the ground "that the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection," but disclaiming any reflection upon the commissioner personally or upon his services. The commissioner replied, asking time to consult his friends. After some further correspondence upon the subject, the President on August 31, 1933, wrote the commissioner expressing the hope that the resignation would be forthcoming and saying:

"You will, I know, realize that your mind and my mind do not go along together on either the policies or the administering of

the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence."

The commissioner declined to resign, and on October 7, 1933, the President wrote him:

"Effective as of this date, you are hereby removed from the office of Commissioner of the Federal Trade Commission."

Humphrey never acquiesced in this action, but continued thereafter to insist that he was still a member of the Commission, entitled to perform its duties and receive the compensation provided by law at the rate of $10,000 per annum. Upon these and other facts set forth in the certificate which we deem it unnecessary to recite, the following questions are certified:

"1. Do the provisions of section 1 of the Federal Trade Commission Act, stating that 'any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office,' restrict or limit the power of the President to remove a commissioner except upon one or more of the causes named?

"If the foregoing question is answered in the affirmative, then—

"2. If the power of the President to remove a commissioner is restricted or limited as shown by the foregoing interrogatory and the answer made thereto, is such a restriction or limitation valid under the Constitution of the United States?"

The Federal Trade Commission Act . . . creates a commission of five members to be appointed by the President by and with the advice and consent of the Senate, and section 1 provides:

"Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The Commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."

Section 5 of the Act in part provides:

"That unfair methods of competition in commerce are hereby declared unlawful.

"The Commission is hereby empowered and directed to pre-

vent persons, partnerships, or corporations, except banks, and common carriers subject to the acts to regulate commerce, from using unfair methods of competition in commerce."

In exercising this power, the Commission must issue a complaint stating its charges and giving notice of hearing upon a day to be fixed. A person, partnership, or corporation proceeded against is given the right to appear at the time and place fixed and show cause why an order to cease and desist should not be issued. There is provision for intervention by others interested. If the commission finds the method of competition is one prohibited by the Act, it is directed to make a report in writing stating its findings as to the facts, and to issue and cause to be served a cease and desist order. If the order is disobeyed, the Commission may apply to the appropriate Circuit Court of Appeals for its enforcement. The party subject to the order may seek and obtain a review in the Circuit Court of Appeals in a manner provided by the Act.

Section 6, among other things, gives the Commission wide powers of investigation in respect of certain corporations subject to the Act, and in respect of other matters, upon which it must report to Congress with recommendations. Many such investigations have been made, and some have served as the basis of congressional legislation.

Section 7 provides:

"That in any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the Commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. The Commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require."

First. The question first to be considered is whether, by the provisions of section 1 of the Federal Trade Commission Act already quoted, the President's power is limited to removal for the specific causes enumerated therein. . . .

. . . The statute fixes a term of office, in accordance with many

precedents. The first commissioners appointed are to continue in office for terms of three, four, five, six, and seven years, respectively; and their successors are to be appointed for terms of seven years—any commissioner being subject to removal by the President for inefficiency, neglect of duty, or malfeasance in office. The words of the Act are definite and unambiguous.

The government says the phrase "continue in office" is of no legal significance and, moreover, applies only to the first commissioners. We think it has significance. It may be that, literally, its application is restricted as suggested; but it, nevertheless, lends support to a view contrary to that of the government as to the meaning of the entire requirement in respect of tenure; for it is not easy to suppose that Congress intended to secure the first commissioners against removal except for the causes specified and deny like security to their successors. Putting this phrase aside, however, the fixing of a definite term subject to removal for cause, unless there be some countervailing provision or circumstance indicating the contrary, which here we are unable to find, is enough to establish the legislative intent that the term is not to be curtailed in the absence of such cause. But if the intention of Congress that no removal should be made during the specified term except for one or more of the enumerated causes were not clear upon the face of the statute, as we think it is, it would be made clear by a consideration of the character of the Commission and the legislative history which accompanied and preceded the passage of the Act.

The Commission is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts "appointed by law and informed by experience."

The legislative reports in both houses of Congress clearly reflect the view that a fixed term was necessary to the effective and fair administration of the law. . . .

The debates in both houses demonstrate that the prevailing view was that the Commission was not to be "subject to anybody in the government but . . . only to the people of the United States," free from "political domination or control," or the "probability or possibility of such a thing;" to be "separate and apart

from any existing department of the government—not subject to the orders of the President." . . .

Thus, the language of the Act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the congressional intent to create a body of experts who shall gain experience by length of service—a body which shall be independent of executive authority, *except in its selection,* and free to exercise its judgment without the leave or hindrance of any other official or any department of the government. To the accomplishment of these purposes, it is clear that Congress was of opinion that length and certainty of tenure would vitally contribute. And to hold that, nevertheless, the members of the Commission continue in office at the mere will of the President, might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office.

We conclude that the intent of the Act is to limit the executive power of removal to the causes enumerated, the existence of none of which is claimed here; and we pass to the second question.

Second. To support its contention that the removal provision of section 1, as we have just construed it, is an unconstitutional interference with the executive power of the President, the government's chief reliance is Myers *v.* United States, 272 U.S. 52. That case has been so recently decided, and the prevailing and dissenting opinions so fully review the general subject of the power of executive removal, that further discussion would add little of value to the wealth of material there collected. These opinions examine at length the historical, legislative and judicial data bearing upon the question, beginning with what is called "the decision of 1789" in the first Congress and coming down almost to the day when the opinions were delivered. They occupy 243 pages of the volume in which they are printed. Nevertheless, the narrow point actually decided was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress. In the course of the opinion of the Court, expressions occur which tend to sustain the government's contention, but these are beyond the point involved and, therefore, do not come within the rule of stare decisis. In so far as they are out of harmony with the views here set forth, these expressions are disapproved. A like situation was presented in the case of Cohens

v. Virginia, 6 Wheat. 264, 399, in respect of certain general expressions in the opinion in Marbury *v.* Madison, 1 Cranch 137. Chief Justice Marshall, who delivered the opinion in the Marbury Case, speaking again for the Court in the Cohens Case, said: "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." . . .

The office of a postmaster is so essentially unlike the office now involved that the decision in the Myers Case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the Myers Case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the chief executive, whose subordinate and aid he is. Putting aside dicta, which may be followed if sufficiently persuasive but which are not controlling, the necessary reach of the decision goes far enough to include all purely executive officers. It goes no farther;—much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.

The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. In administering the provisions of the statute in respect of "unfair methods of competition"—that is to say in filling in and administering the details embodied by the general standard—the

Commission acts in part quasi-legislatively and in part quasi-judicially. In making investigations and reports thereon for the information of Congress under section 6, in aid of the legislative power, it acts as a legislative agency. Under section 7, which authorizes the Commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary. To the extent that it exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government.

If Congress is without authority to prescribe causes for removal of members of the Trade Commission and limit executive power of removal accordingly, that power at once becomes practically all-inclusive in respect of civil officers with the exception of the judiciary provided for by the Constitution. The Solicitor General, at the bar, apparently recognizing this to be true, with commendable candor, agreed that his view in respect of the removability of members of the Federal Trade Commission necessitated a like view in respect of the Interstate Commerce Commission and the Court of Claims. We are thus confronted with the serious question whether not only the members of these quasi-legislative and quasi-judicial bodies, but the judges of the legislative Court of Claims, exercising judicial power, continue in office only at the pleasure of the President.

We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will.

The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious

question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. . . .

The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments.

In the light of the question now under consideration, we have re-examined the precedents referred to in the Myers Case, and find nothing in them to justify a conclusion contrary to that which we have reached. . . .

The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office; the Myers decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.

To the extent that, between the decision in the Myers Case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they arise.

In accordance with the foregoing the questions submitted are answered.

Question No. 1, Yes.

Question No. 2, Yes.

Comment

The Myers Case. The case of Myers *v.* United States, discussed in the Rathbun opinion above, had been argued elaborately and considered at unusual length by the Supreme Court. Chief Justice Taft, who wrote the opinion, took tremendous interest and pride in the work and expressed very bitter disappointment when he discovered that three of his brethren—Holmes, McReynolds, and Brandeis—would not follow him. [Henry F. Pringle, *The Life and Times of William Howard Taft,* Vol. 2, Farrar & Rinehart, Inc. (1939), 1023.] The opinion met with serious criticism, as to the conclusions it drew from the history of constitutional practice and as to the statesmanship of its construction of the Constitution. The Rathbun Case shows that the Court, on further reflection, concluded that it had gone too far.

Myers was appointed a first-class postmaster by President Wilson. The applicable statute declared that "Postmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law." President Wilson removed Myers, without the consent of the Senate, prior to the expiration of the four-year term. Myers sued in the Court of Claims for the balance of his salary.

Opinion of the majority. Chief Justice Taft's opinion held that the Constitution gave the President an unrestrictable power to remove the officers whom he appointed (other than judicial officers protected by section 1 of Article III). He examined what practical construction had been given to the Constitution throughout the history of the government. He stressed especially the initial discussion in the House of Representatives in 1789. A bill to establish a Department of Foreign Affairs had provided that the Secretary was "to be removable from office by the President of the United States," which seemed to imply that without this provision the President would not have the power. The language was amended to make it clear that Congress was recognizing rather than conferring the power to remove.

Chief Justice Taft dwelt upon the two clauses of the Constitution: "The executive Power shall be vested in a President of the United States of America," and ". . . he shall take Care that the Laws be faithfully executed. . . ." The former he read not as merely designating an office but as "essentially a grant of the power to execute the laws." And the duty to execute the laws implied that "he should select those who were to act for him under his direction," with the further implication that "as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible."

The Chief Justice went on to say—though this pronouncement was unnecessary to a decision as to the tenure of a postmaster:

> Then there may be duties of a quasi judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed.

This was clearly in collision with the opinion Chief Justice Marshall had expressed in Marbury *v.* Madison. Marbury had been appointed a justice of the peace, "and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country." 2 Cranch 137, 162. Chief Justice Taft had to admit that this was inconsistent with his own view; but he went on to quote Marshall in another case, Cohens *v.* Virginia, 6 Wheat. 264, 399 (1821), where he had said that "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used," and so forth—as quoted in the Rathbun opinion, *supra.*

The conclusion was stated broadly that any attempt by the Congress to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate was in violation of the Constitution.

Dissenting opinions. Mr. Justice Holmes, dissenting, said:

> The arguments drawn from the executive power of the President, and from his duty to appoint officers of the United States (when Congress does not vest the appointment elsewhere), to take care that the laws be faithfully executed, and to commission all officers of the United States, seem to me spiders' webs inadequate to control the dominant facts.

Mr. Justice Brandeis, dissenting, took care to focus upon the question actually before the Court. It was admitted that a postmaster was an inferior officer whose appointment might have been vested in the head of a department. (Until the legislation was amended in 1836, all postmasters had been appointed by the Postmaster General.) And it was settled that Congress could limit the power of the head of a department to remove an officer so appointed by requiring the consent of the Senate. United States *v.* Perkins, 116 U.S. 483 (1886). It was not questioned that the President acting alone had power to suspend

an officer of the executive branch. And the present controversy had to do with an inferior officer—a matter which was easily distinguished from a high political officer such as the head of one of the executive departments.

Obiter dicta. Instruction and some humor is to be derived from regarding the sequence: Marbury-Myers-Rathbun. In the Marbury Case the great Chief Justice certainly said many things not essential to a decision, among them the proposition that Marbury's office was not one from which the President could remove. Chief Justice Taft put this aside by quoting Marshall in Cohens *v.* Virginia to the effect that expressions which go beyond the case in hand should not control the decision of subsequent cases. Then in the Rathbun Case, Justice Sutherland shows that what Chief Justice Taft had said in the Myers Case about members of administrative tribunals was obiter and unnecessary and quoted the same passage from Cohens *v.* Virginia to show that what Taft had laid down need not be followed. Lawyers have a saying that no question is really settled until it is settled right.

In Morgan *v.* Tennessee Valley Authority, 115 F. (2d) 990 (1940), the Circuit Court of Appeals held that the tenure of a member of the board of directors of the TVA is governed by the doctrine of the Myers Case rather than by that of the Rathbun Case; the board has predominantly an executive or administrative function. Accordingly the President had power to remove Dr. A. E. Morgan from the board, without regard for the specific provisions in the statute "that any member of said board may be removed from office at any time by a concurrent resolution of the Senate and the House of Representatives" and that the President should remove any member who applied political tests in selecting officials and employees. The Supreme Court denied a petition to review this decision on certiorari, 312 U.S. 701 (1941).

In United States *v.* Lovett. 328 U.S. 303 (1946), the Court construed the constitutional prohibition of "bills of attainder" as broad enough to invalidate a legislative provision that no compensation should be paid to certain named individuals then employed by the government. Congressman Dies, chairman of the Committee on Un-American Activities, had attacked 39 named employees of the government as "irresponsible, unrepresentative, crackpot, radical bureaucrats." The House wrote into an appropriation bill a provision that three of those thus attacked should not be paid out of that or any other appropriation to any department, agency, or instrumentality of the United States. The Senate endeavored to eliminate this section, but the House stood adamant. The President signed the measure "to avoid delaying our conduct of the war," but recorded his view "that the provision is not only unwise and discriminatory, but unconstitutional."

Appointment of Lewis to the Tariff Commission. In connection with the problem considered in Rathbun *v.* United States, that of the tenure secured to members of the great administrative tribunals such as the Interstate Commerce Commission, Federal Trade Commission, Securities and Exchange Commission, and Tariff Commission, the following correspondence is significant. Commissioner Culbertson is writing to his colleague, Commissioner Costigan, recording the attitude of President Coolidge on the reappointment of Commissioner David J. Lewis to the Tariff Commission.

UNITED STATES TARIFF COMMISSION
William F. Culbertson, Vice Chairman

Washington, September 9, 1924.

My Dear Costigan:

You will perhaps have seen to-day in the press that Mr. Lewis was reappointed yesterday. I reached Washington Sunday evening and had not been in my office very long Monday morning before I was sent for by the President. The result of my interview is covered by a memorandum, a copy of which I inclose.

When I returned to the office I took the President's suggestions up with Lewis, and later he reached the decision that he would not write the letter of resignation requested by the President. He, however, went to see the President during the afternoon, and I presume he will write you the details of what took place. In general this is what happened—

He went into the President's office, and the President had before him the commission. He took up his pen and signed it in Lewis's presence. He then turned to Lewis and asked him whether he had "that letter." Lewis then explained that he did not feel free to furnish the President with the letter which he requested. Lewis said that the President was visibly disturbed and said with a little heat that it did not make any difference anyway; that the position would be held only at the pleasure of the President. Lewis then said to the President that only the two of them knew that the commission was signed, and he suggested that the President was at liberty to destroy the commission. The President, however, did not respond to this suggestion, and Lewis left the President's office with his commission. A little later he was sworn in.

Thus ends another curious chapter in the Tariff Commission's history. It indicates clearly, I think, that there is a line beyond which the President will not go in opposing the principles for which the three of us have stood in the development of the Tariff Commission.

We miss your counsels very much, but I suggest that you stay in the Colorado climate until you are certain that your return here will not bring with [*sic*] a return of your hay fever.

Very cordially yours,

Culbertson.

Hon. Edward P. Costigan,
Palmer Lake, Colo.

[Enclosure]

Contemporary memorandum of the interview with the President, September 8, 1924:

Shortly after I reached my office this morning—about 9:30—I received a request over the telephone to come to the White House to see the President. I went over immediately. The President was reasonably cordial. He began by saying that the subject of the interview was Mr. Lewis's reappointment. Mr. Lewis's term as a member of the Tariff Commission expired yesterday. The President stated that he intended to reappoint Mr. Lewis but that he desired that Mr. Lewis prepare and give to him a letter of resignation as a member of the Tariff Commission. At first I did not fully comprehend the nature of this request.

I spoke of Mr. Lewis's term having already expired. Then the President explained that he wanted Mr. Lewis to submit his resignation under the new commission to be effective in case he (the President) desired at any time in the future to accept it.

The President at this point called in Mr. Forster, one of his secretaries, and instructed him to make out Mr. Lewis's commission of reappointment as a member of the Tariff Commission, effective to-day.

The President then handed me a sheet of White House paper, so that I could take down the tenor of the letter which he wished Mr. Lewis to write. I wrote down the following words: "I hereby resign as a member of the Tariff Commission, to take effect upon your acceptance."

I raised the objection at this point that an unqualified resignation of this kind would imply on the record that Mr. Lewis did not desire to continue as a member of the Tariff Commission. The President replied that this was a matter for Mr. Lewis to decide. In explanation of his request the President said that he desired to be free after the election concerning the position filled by Mr. Lewis. He said that if he were not elected the Democrats might undertake to hold up other appointments which he made during the next session of the Senate, and he implied that he desired to use the reappointment of Mr. Lewis for trading purposes in case of necessity.

I thereupon asked the President whether I could have his as-

surance that if he were reelected Mr. Lewis would be continued as a member of the Tariff Commission. He said that he could not at this time make any commitments.

We then talked of other matters, and at the end the President asked me to have Mr. Lewis see him during the afternoon, when he said he would give him his commission. [67 *Congressional Record,* 2187-89 (1926). See Edwin S. Corwin, *The President, Office and Powers,* New York University Press, New York, 1940, at ch. 3, where this incident is recorded.]

YAKUS *v.* UNITED STATES
ROTTENBERG *v.* UNITED STATES

321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944).

On Writs of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Introduction

From time to time throughout our history under the Constitution, and with increasing frequency since the turn of the present century, statutes have been challenged on the ground that Congress has attempted to hand over a portion of the "legislative power" to be exercised by some other branch of the federal government. These contentions were always found to be unsound until 1935 when, in the case of Panama Refining Co. *v.* Ryan, 293 U.S. 388, a section of the National Industrial Recovery Act of 1933 was held to have made such an unconstitutional delegation. This was followed later in the same year by Schechter Poultry Corporation *v.* United States, 295 U.S. 495, where the central scheme of the Act was held invalid both as involving unconstitutional delegation and as reaching matters beyond the commerce power. Though subsequent statutes erecting administrative controls within the national economy have escaped that fate—notably the Emergency Price Control Act of 1942, sustained in Yakus *v.* United States—the problem of undue delegation of legislative power remains a matter of major interest.

The problem. Before becoming involved in the thorny details of recent cases, it will be well to lay out the problem in simple terms. The Constitution declares that "All legislative Powers herein granted shall be vested in a Congress of the United States . . ." The power thus fastened upon Congress is to be exercised by it: the responsibility

cannot be shifted elsewhere. So much has never been doubted. Imagine if one can that Congress were to pass a statute in such terms as these: "Whereas the power to lay and collect duties is vested in Congress; but whereas by reason of the present confusion in world economy it is expedient that the control of the tariff be in the hands of the President: Be it enacted . . . that the power to lay and collect duties is for the time being delegated to the President." The unconstitutionality would be patent.

A matter of degree. Take an example at the opposite extremity of the scale. In the Tariff Act of 1922 Congress laid a duty on "barium dioxide, 4 cents per pound." Legislation could not be more precise: whether a substance is barium dioxide can be settled in a test tube, and weight can be measured exactly in the balance. A few lines further down Congress taxed the importation of "chemical compounds, salts and mixtures of bismuth, 35 per centum ad valorem." This is a little less definite: value cannot be measured as closely as weight. To be sure, Congress explained what it meant by "value"—in a provision which covers one and a half pages. Even with the aid of such a definition, however, the Treasury Department will doubtless find it necessary to make a good many rulings as to how value is to be determined in particular situations. Still Congress has legislated with great precision.

Move to a case a little further down the scale. Congress enacts that it shall be unlawful to import any tea which is "inferior in purity, quality, and fitness for consumption" to approved grades; these grades are to be fixed by the Secretary of the Treasury, on the recommendation of a board of seven members, "each of whom shall be an expert in teas." Congress has declared its purpose—to exclude inferior tea—but it has left it to the Secretary, advised by expert tea tasters, to establish samples whereby customs inspectors and dealers in tea can know, by comparison, just what may be imported. Did Congress delegate its "legislative power" to the Secretary? No, said the Supreme Court in Buttfield *v.* Stranaham, 192 U.S. 470 (1904).

> [The enactment] was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute. . . . Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted.

Go on now to a case where Congress leaves to the executive a determination much larger in scope than the fixing of a minimum

quality of tea. The McKinley Tariff of 1890 provided that sugar, molasses, coffee, tea, and hides should be admitted free of duty; but if a foreign country producing any of the articles thus favored should impose upon the products of the United States duties which the President "may deem to be reciprocally unequal and unreasonable," then the President shall have power to suspend, "for such time as he shall deem just," the free importation of the favored articles from that country, and thereupon certain duties, set out in the Act, shall become payable. The President looks, for instance, at Ruritania with its tariff wall: is that tariff too high against American exports, considering the low spots in the American tariff wall through which Ruritanian sugar and hides may enter free? If the President thinks the Ruritarian tariff "reciprocally unequal and unreasonable," then he closes the low spots against Ruritanian sugar and hides. Though two Justices thought this provision "in palpable violation of the Constitution," the majority sustained it. Field *v.* Clark, 143 U.S. 649 (1892). Justice Harlan, who spoke for the Court, said in part:

> That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The Act of October 1, 1890, in the particular under consideration, is not inconsistent with that principle. It does not, in any real sense, invest the President with the power of legislation. . . . Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. . . . [The President] was the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will was to take effect.

The "Flexible" tariff. One further example, the so-called "flexible" provision of the Tariff of 1922. Section 315(*a*) of the Act said that whenever the President, upon investigation, found that any duty failed to equalize the cost of production of a given commodity in the United States with the cost of production in the principal competing country, he should, by proclamation, alter the duty to equalize such costs; provided, however, that such a change should not exceed 50 percent of the rate specified in the Act. To assist in such determinations the Tariff Commission should first investigate and report. In J. W. Hampton, Jr., & Co. *v.* United States, 276 U.S. 394 (1928), the President had increased the duty on barium dioxide from the rate of 4 cents to 6 cents per pound, and an importer challenged the action as based on an invalid delegation of legislative power. A unanimous Court sustained the statute. Chief Justice Taft said, in determining what Congress might do in seeking the assistance of another branch,

> the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination. . . . Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an executive. . . . Again, one of the great functions conferred on Congress . . . is the regulation of interstate commerce and rates . . . The rates to be fixed are myriad. If Congress were required to fix every rate, it would be impossible to exercise the power at all. Therefore, common sense requires that in the fixing of such rates, Congress may provide a commission, as it does, called the Interstate Commerce Commission, to fix those rates, after hearing evidence and argument concerning them from interested parties, all in accord with a general rule that Congress first lays down that rates shall be just and reasonable considering the service given, and not discriminatory.

Filling up the details. Chief Justice Marshall discussed the problem of undue delegation of legislative power in Wayman *v.* Southard, 10 Wheat. 1 (1825). No one would contend, he said, that Congress could delegate "powers which are strictly and exclusively legislative." But certainly it might see fit to delegate to others some of the powers it might rightfully exercise itself. "The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."

A problem in modern legislation. If it were only a matter of "filling up the details" there would be little difficulty. But a complicated modern society, beset by economic dislocation, strained foreign relations, perhaps even a struggle for survival, finds it necessary to vest in its executive government a discretion much wider than that. It may be that the problem can be solved only by co-ordinating activities in several different fields. Controls must be changed from day to day as the situation evolves, regardless of whether Congress is in session at the moment or not. Perhaps regulation will necessarily run out into an infinite number of specific requirements—as was recognized long ago in the fixing of railroad rates and more recently in the control of prices. Congress is in no wise adapted to work so continuous and detailed. An adequate direction of our foreign relations—increasingly now as our one world grows small—requires that the President be invested with a tremendous power to work for the realization of our national purposes. "Practically every volume of the United States Statutes," wrote Sutherland, J., in United States *v.* Curtiss-Wright Ex-

port Corp., 299 U.S. 304 (1936), "contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs." May not our Congress make broad grants of discretion and create great administrative agencies adequate to the public need? On the other hand, may Congress virtually abdicate its functions by referring the most difficult problems of our times to the President, "with power to act"? How is the line to be drawn, so that Congress shall have "the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards . . . ?" Hughes, C.J., in Panama Refining Co. *v.* Ryan, 293 U.S. 388, 421 (1935). Though we treat this as a question of constitutional law, it is really a general problem of democratic government which presents itself also in Great Britain, the Dominions, France, and indeed all liberal political systems. The Justices of the Court have been endeavoring to arrive at a statesmanlike solution. We must solve the problem in terms of "common sense and the inherent necessities of governmental co-ordination" said Chief Justice Taft, as quoted above. Mr. Justice Stone's discussion in Opp Cotton Mills *v.* Administrator of Wage and Hour Division, 312 U.S. 126, 145 (1941), is far more helpful:

> In an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy in fixing, for example, a tariff rate, a railroad rate or the rate of wages to be applied in particular industries by a minimum wage law. The Constitution, viewed as a continuously operative charter of government, is not to be interpreted as demanding the impossible or the impracticable. [Note this sentence: it is one of the most characteristic expressions of a very great judge.] The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. Those essentials are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective.

Critical points in delegation. In the concluding sentence above, Mr. Justice Stone put his finger on the two points in legislation at which the infirmity of undue delegation may be expected to appear: Is the statute tight enough (1) in defining the contingency upon which action is to be taken, and (2) in commanding what is to be done? In the joint resolution under consideration in the Curtiss-

Wright Case, Congress had said that (1) if the President found that an embargo on arms would contribute to restoring peace in the Chaco and made a proclamation to that effect, then (2) it should be unlawful to sell arms to the countries engaged in the Chaco war, except under such limitations and exceptions as the President might prescribe. The Curtiss-Wright Export Corporation, charged with conspiracy to sell arms, found fault with both points. First, the contingency: it argued that Congress had gone too far in making its command hinge upon the President's unfettered judgment whether an embargo would be beneficial and whether he should issue his proclamation. Second, the command: the prohibition was subject to whatever limitations and exceptions the President might make, with no standards laid down to guide him. Mr. Justice Sutherland for the Court said that this might perhaps be too loose a delegation if confined to internal affairs, but, considering the wide authority which the President enjoys in the conduct of foreign relations, the language was not too indefinite.

The Panama Refining Case and the Schechter Case, respectively, illustrate the two infirmities mentioned above. In section 9(*c*) of the National Industrial Recovery Act, Congress had said that "The President is authorized to prohibit the transportation in interstate and foreign commerce" of petroleum produced in excess of what was permitted by law or regulation in the state of production. The action to be taken was clear enough, but what was the contingency upon which this was to be done? What was the President to find as a condition to the exercise of this power to ban "hot oil"? Section 9(*c*) did not say. Mr. Justice Cardozo thought that "If we look to the whole structure of the statute" the intent of Congress might be inferred. The majority of the Justices discerned no proper standard at all; as they saw it, Congress had in this section really handed over the lawmaking function to the President.

In the Schechter Case the NIRA was found defective, not as to the When, but the What. Section 3 of the Act authorized trade groups from the various industries to draw up "codes of fair competition" which, when approved by the President, should have the force of law, sanctioned by the penalty of a fine. The Court scanned the Act in vain for any standard as to what these trade groups might prescribe in their codes, as well as for any adequate tests which the President must apply before he approved them. Congress had delegated a lawmaking power which was "unconfined and vagrant," "not canalized within banks to keep it from overflowing," said Cardozo, J., in a concurring opinion. And here the delegation of power to draft codes was given, not to a responsible governmental authority, but to trade groups drawn for that purpose from within the various categories of industry. It is, to be sure, a salutary practice in administrative rule making to hear and consider the points of view of the different interests to be affected,

Norwegian Nitrogen Products Co. *v.* United States, 288 U.S. 294 (1933). But it is "legislative delegation in its most obnoxious form" when there is placed in the hands of private individuals a public power to make rules binding upon others. Per Sutherland, J., in Carter *v.* Carter Coal Co., 298 U.S. 238, 311 (1936); see too Eubank *v.* Richmond, 226 U.S. 137 (1912); Washington *ex rel.* Seattle Trust Co. *v.* Roberge, 278 U.S. 116 (1928).

The OPA. In December 1941 the United States entered World War II. It had already been operating as a great arsenal producing munitions for those countries whose defense was essential to our own. Throughout 1941 strenuous efforts were exerted by the Administration to combat the upward movement of prices incident to this tremendous demand for goods. In August the Office of Price Administration was created by executive order. But Congress had given no statutory authority to fix prices; such control as was achieved came through persuasion, agreements, and price schedules announced by the government. This attempt to fight inflation by "jawbone control" was not good enough for a war in deadly earnest. The Emergency Price Control Act of January 30, 1942, gave the OPA Administrator authority to establish maximum prices on most commodities and on residential rents, with a variety of sanctions. An Emergency Court of Appeals was created, to be composed of federal judges designated by the Chief Justice of the United States, with exclusive jurisdiction to determine the validity of OPA regulations. (Judge Fred M. Vinson, now the Chief Justice of the United States, was designated as the first chief judge.) Though the federal and state courts generally were competent to enforce the regulations against violators, the remedy of one who would challenge the validity of a regulation was to protest to the price administrator, with appeal to the Emergency Court of Appeals and thence to the Supreme Court. Congress thought it essential in combatting wartime inflation that questions of validity be settled at once.

In Yakus *v.* United States, decided on March 27, 1944, the Supreme Court sustained the Emergency Price Control Act against the objection that Congress had delegated its legislative function. Justices Rutledge and Murphy found fault with the judicial procedure authorized in prosecutions but were in agreement with the majority on the substantive question. Justice Roberts dissented both as to the procedure and as to the matter of undue delegation. He protested that, to be consistent with the Schechter Case, the Court's judgment should strike down the EPCA. But dissenting Justices are prone to express too pessimistic a view of the decision of the majority. Chief Justice Stone's opinion gave several reasons why the price fixing by the OPA seemed distinguishable from codes of fair competition under the NIRA.

Bowles *v.* Willingham, 321 U.S. 503, decided the same day as the Yakus Case, sustained in particular the rent-control provision of the Emergency Price Control Act. Mr. Justice Roberts dissented.

Opinion

Mr. Chief Justice STONE prepared the opinion of the Court.

The questions for our decision are: (1) Whether the Emergency Price Control Act of January 30, 1942, as amended by the Inflation Control Act of October 2, 1942, involves an unconstitutional delegation to the price administrator of the legislative power of Congress to control prices . . .

The Emergency Price Control Act provides for the establishment of the Office of Price Administration under the direction of a price administrator appointed by the President, and sets up a comprehensive scheme for the promulgation by the administrator of regulations or orders fixing such maximum prices of commodities and rents as will effectuate the purposes of the Act and conform to the standards which it prescribes. The Act was adopted as a temporary wartime measure, and provides in section 1(*b*) for its termination on June 30, 1943, unless sooner terminated by Presidential proclamation or concurrent resolution of Congress. By the Amendatory Act of October 2, 1942, it was extended to June 30, 1944.

Section 1(*a*) declares that the Act is "in the interest of the national defense and security and necessary to the effective prosecution of the present war," and that its purposes are: "to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, . . . and to the federal, state, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; . . ."

The standards which are to guide the administrator's exercise of his authority to fix prices, so far as now relevant, are prescribed by section 2(*a*) and by section 1 of the Amendatory Act of October 2, 1942, and Executive Order 9250, promulgated under it. 7 Fed.Reg. 7871. By section 2(*a*) the administrator is authorized, after consultation with representative members of the industry so far as practicable, to promulgate regulations fixing prices of commodities which "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act" when, in his judgment, their prices "have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act."

The section also directs that

"So far as practicable, in establishing any maximum price, the administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the administrator, the prices for such commodity are generally representative) . . . and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including. . . . Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941."

By the Act of October 2, 1942, the President is directed to stabilize prices, wages, and salaries "so far as practicable" on the basis of the levels which existed on September 15, 1942, except as otherwise provided in the Act. By Title I, section 4 of Executive Order No. 9250, he has directed "all departments and agencies of the government" "to stabilize the cost of living in accordance with the Act of October 2, 1942."

Revised Maximum Price Regulation No. 169 was issued December 10, 1942, under authority of the Emergency Price Control Act as amended and Executive Order No. 9250. The Regulation established specific maximum prices for the sale at wholesale of specified cuts of beef and veal. As is required by section 2(*a*) of the Act, it was accompanied by a "statement of the considera-

tions involved" in prescribing it. From the preamble to the Regulation and from the Statement of Considerations accompanying it, it appears that the prices fixed for sales at wholesale were slightly in excess of those prevailing between March 16 and March 28, 1942, and approximated those prevailing on September 15, 1942. Findings that the Regulation was necessary, that the prices which it fixed were fair and equitable, and that it otherwise conformed to the standards prescribed by the Act, appear in the Statement of Considerations.

That Congress has constitutional authority to prescribe commodity prices as a war emergency measure, and that the Act was adopted by Congress in the exercise of that power, are not questioned here, and need not now be considered save as they have a bearing on the procedural features of the Act later to be considered which are challenged on constitutional grounds.

Congress enacted the Emergency Price Control Act in pursuance of a defined policy and required that the prices fixed by the administrator should further that policy and conform to standards prescribed by the Act. The boundaries of the field of the administrator's permissible action are marked by the statute. It directs that the prices fixed shall effectuate the declared policy of the Act to stabilize commodity prices so as to prevent wartime inflation and its enumerated disruptive causes and effects. In addition the prices established must be fair and equitable, and in fixing them the administrator is directed to give due consideration, so far as practicable, to prevailing prices during the designated base period, with prescribed administrative adjustments to compensate for enumerated disturbing factors affecting prices. In short the purposes of the Act specified in section 1 denote the objective to be sought by the administrator in fixing prices—the prevention of inflation and its enumerated consequences. The standards set out in section 2 define the boundaries within which prices having that purpose must be fixed. It is enough to satisfy the statutory requirements that the administrator finds that the prices fixed will tend to achieve that objective and will conform to those standards, and that the courts in an appropriate proceeding can see that substantial basis for those findings is not wanting.

The Act is thus an exercise by Congress of its legislative power. In it Congress has stated the legislative objective, has prescribed the method of achieving that objective—maximum price fixing—and has laid down standards to guide the administrative deter-

mination of both the occasions for the exercise of the price-fixing power, and the particular prices to be established. Compare Field *v.* Clark, 143 U.S. 649; Hampton & Co. *v.* United States, 276 U.S. 394; Mulford *v.* Smith, 307 U.S. 38. . . .

The Act is unlike the National Industrial Recovery Act of June 16, 1933, considered in Schechter Poultry Corp. *v.* United States, 295 U.S. 495, which proclaimed in the broadest terms its purpose "to rehabilitate industry and to conserve natural resources." It prescribed no method of attaining that end save by the establishment of codes of fair competition, the nature of whose permissible provisions was left undefined. It provided no standards to which those codes were to conform. The function of formulating the codes was delegated, not to a public official responsible to Congress or the executive, but to private individuals engaged in the industries to be regulated.

The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate. The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct—here the rule, with penal sanctions, that prices shall not be greater than those fixed by maximum price regulations which conform to standards and will tend to further the policy which Congress has established. These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective. It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework.

Nor does the doctrine of separation of powers deny to Congress power to direct that an administrative officer properly designated for that purpose have ample latitude within which he is to ascertain the conditions which Congress has made pre-

requisite to the operation of its legislative command. Acting within its constitutional power to fix prices it is for Congress to say whether the data on the basis of which prices are to be fixed are to be confined within a narrow or a broad range. In either case the only concern of courts is to ascertain whether the will of Congress has been obeyed. This depends not upon the breadth of the definition of the facts or conditions which the administrative officer is to find but upon the determination whether the definition sufficiently marks the field within which the administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.

As we have said, "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality . . . to perform its function." Currin *v.* Wallace, 306 U.S. 1, at page 15. Hence it is irrelevant that Congress might itself have prescribed the maximum prices or have provided a more rigid standard by which they are to be fixed; for example, that all prices should be frozen at the levels obtaining during a certain period or on a certain date. Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers. Compare McCulloch *v.* Maryland, 4 Wheat. 316, 413 *et seq.* . . . It is free to avoid the rigidity of such a system, which might well result in serious hardship, and to choose instead the flexibility attainable by the use of less restrictive standards. Cf. Hampton *v.* United States, *supra,* 276 U.S. at pages 408, 409. Only if we could say that there is an absence of standards for the guidance of the administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose of preventing inflation.

The standards prescribed by the present Act, with the aid of the "statement of the considerations" required to be made by the administrator, are sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the administrator, in fixing the designated prices, has conformed to those standards. Hence we are unable to find in them an unauthorized delegation of legislative power. The authority to fix prices only when prices have risen or threaten to rise to an extent or in a manner inconsistent with the purpose of the Act to prevent inflation is no broader than the authority to fix maximum

prices when deemed necessary to protect consumers against unreasonably high prices, sustained in Sunshine Anthracite Coal Co. *v.* Adkins, 310 U.S. 381; or the authority to take possession of and operate telegraph lines whenever deemed necessary for the national security or defense, upheld in Dakota Cent. Tel. Co. *v.* State of South Dakota, 250 U.S. 163; or the authority to suspend tariff provisions upon findings that the duties imposed by a foreign state are "reciprocally unequal and unreasonable," held valid in Field *v.* Clark, *supra.*

The directions that the prices fixed shall be fair and equitable, that in addition they shall tend to promote the purposes of the Act, and that in promulgating them consideration shall be given to prices prevailing in a stated base period, confer no greater reach for administrative determination than the power to fix just and reasonable rates . . .; or the power to approve consolidations in the "public interest" . . .; or the power to regulate radio stations engaged in chain broadcasting "as public interest, convenience or necessity requires" . . .; or the power to prohibit "unfair methods of competition" not defined or forbidden by the common law . . .; or the direction that in alloting marketing quotas among states and producers due consideration be given to a variety of economic factors, sustained in Mulford *v.* Smith; or the similar direction that in adjusting tariffs to meet differences in costs of production the President "take into consideration" "in so far as he finds it practicable" a variety of economic matters, sustained in Hampton & Co. *v.* United States; or the similar authority, in making classifications within an industry, to consider various named and unnamed "relevant factors" and determine the respective weights attributable to each, held valid in Opp Cotton Mills *v.* Administrator. . . .

Affirmed.

Mr. Justice ROBERTS.

I dissent. I find it unnecessary to discuss certain of the questions treated in the opinion of the Court. I am of opinion that the Act unconstitutionally delegates legislative power to the administrator. As I read the opinion of the Court it holds the Act valid on the ground that sufficiently precise standards are prescribed to confine the administrator's regulations and orders within fixed limits, and that judicial review is provided effectively

to prohibit his transgression of those limits. I believe that analysis demonstrates the contrary. . . .

Mr. Justice RUTLEDGE (Mr. Justice MURPHY concurring with him), dissenting.

I agree with the Court's conclusions upon the substantive issues. But I am unable to believe that the trial afforded the petitioners conformed to constitutional requirements. . . .

IV

INTERGOVERNMENTAL RELATIONS

McCULLOCH *v.* MARYLAND

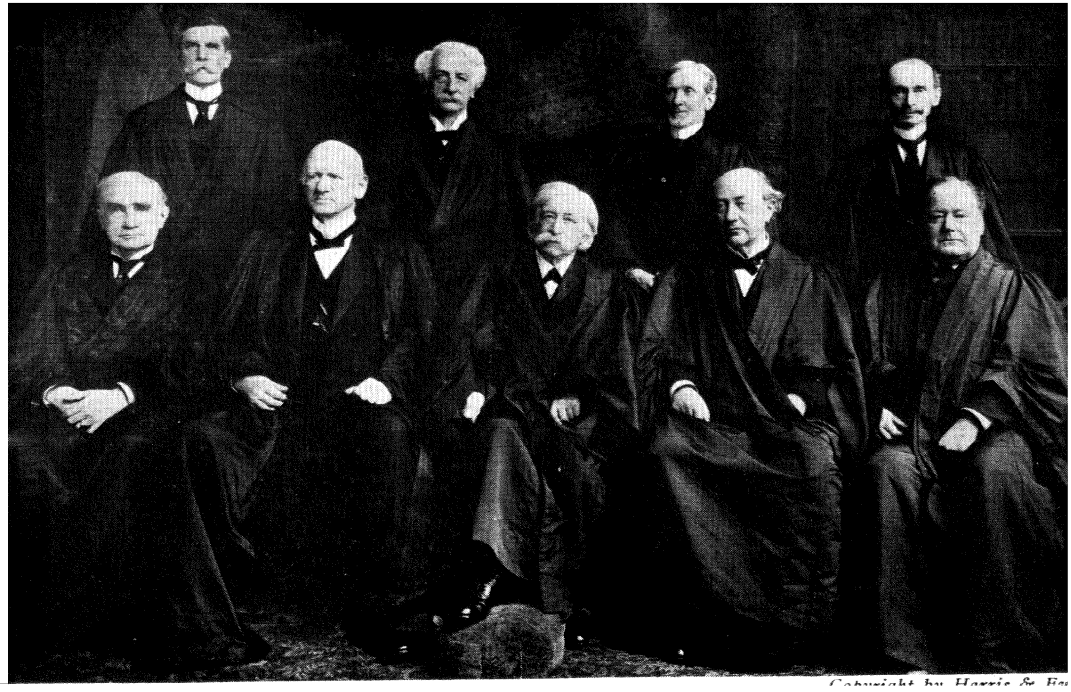
4 Wheaton 316, 4 L.Ed. 579 (1819).

On Writ of Error to the Court of Appeals of the State of Maryland.

Introduction

In 1791 Congress granted a charter creating the Bank of the United States. This was one of the major features of the fiscal policy of the Secretary of the Treasury, the brilliant Alexander Hamilton. Whether a power to incorporate a bank could be implied from the Constitution was violently controverted. Was it "necessary and proper" (Art. I, sec. 8, cl. 18) to carry into execution any of the express powers of Congress? Before acting upon the bill, President Washington sought the advice of his Cabinet. Secretary of State Jefferson urged that the measure was unconstitutional—"convenience is not necessity." Hamilton countered with a great state paper contending for an implied power to "employ all the means requisite and fairly applicable to the attainment of the ends" for which the federal government was created. "The powers contained in a constitution of government . . . ought to be construed liberally in advancement of the public good." Hamilton's reasoning carried the day, and Washington signed the bill.

Marshall, as author of a biography of Washington, was familiar with these carefully drafted arguments. In a passage in his opinion



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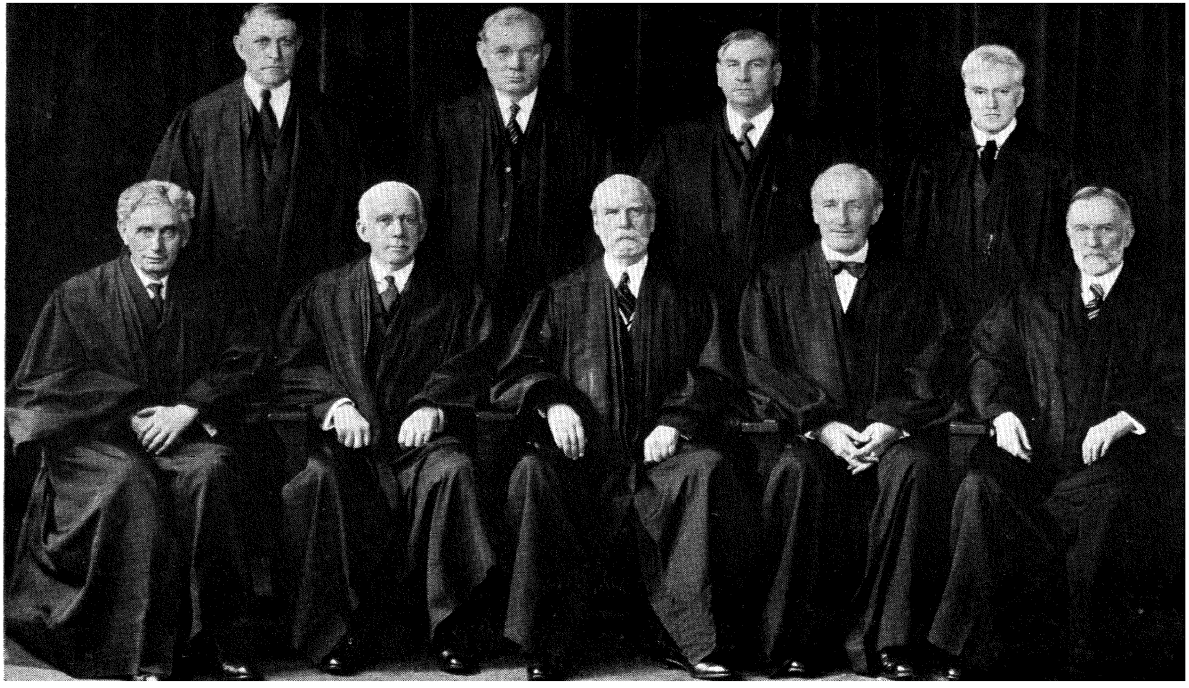
THE SUPREME COURT, 1903

Holmes Peckham McKenna Day
Brown Harlan Fuller, C.J. Brewer White



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THE SUPREME COURT, 1932

Brandeis Roberts Van Devanter Butler Hughes, C.J. Stone McReynolds Cardozo Sutherland

in McCulloch *v.* Maryland he speaks of the bill granting the original charter:

> After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law.

In 1800, when Jefferson was Vice President, a bill was introduced in Congress to incorporate a company to mine copper. He ridiculed the doctrine of implied powers in the following travesty:

> Congress are authorized to defend the nation. Ships are necessary for defense; copper is necessary for ships; mines, necessary for copper; a company necessary to work the mines; and who can doubt this reasoning who has ever played at "This is the House that Jack Built"?

The charter of 1791 expired by its own terms in 1811. Such was the utility, however, of a strong banking institution, operating throughout the country, that a second charter was granted by act of Congress, April 10, 1816. The bank was exceedingly unpopular in some sections of the country. In a measure this hostility arose from jealous local interests which wanted easy credit through banks functioning under lax state supervision. But it was also complained, and with much reason, that in incorporating the bank, Congress had vested a tremendous monopolistic power in private hands. The expansion and contraction of credit must ever be a matter of the very greatest public concern; yet Congress had surrendered it to a little group of bankers. (This opposition finally triumphed in President Jackson's victory over the "Monster.") Some state legislatures passed resolutions opposing the second bank; some enacted unfriendly legislation. The bank question was, then, the subject of intemperate discussion when the McCulloch Case came before the Supreme Court.

The facts in the McCulloch Case. In 1818 the Maryland legislature passed "An act to impose a tax on all banks or branches thereof in the state of Maryland, not chartered by the legislature." On the issue of a $5 bank note the tax was 10 cents, and so on up to $20 for every $1000 note; or the tax might be commuted by an annual payment of $15,000.

McCulloch, cashier of the Baltimore branch, issued bank notes on which no tax had been paid, and suit was brought under the statute. The county court and the Court of Appeals sustained the tax, and the bank carried the case to the Supreme Court.

Argument of counsel. Argument began on February 22, and the Justices listened through March 3, 1819. These were among the

greatest days the Court has ever witnessed. Senator Daniel Webster, Attorney General William Wirt, and William Pinkney appeared for the bank. Maryland was represented by lawyers of almost equal power. The state's case was not rested on a bigoted view of state rights; in fact some of their points had greater merit than one would suppose from the Chief Justice's masterful opinion. Both sides argued acutely over the question how far Congress might go in passing laws "necessary and proper" for carrying into execution its express powers. But the only really difficult question, said Pinkney, was the alleged power of the state to tax the bank. "An unlimited power to tax involves, necessarily, a power to destroy," Webster had declared in opening the argument—a phrase which kept cropping up as the debate progressed. But counsel for Maryland insisted that the state had made no pretension to tax the army or the administration of justice or any other of the operations of the United States government: the tax was on the activities of "a partnership of bankers" who were primarily engaged in business for private gain; only "the nature of their employment as agents or officers of the government, if anything," would entitle this banking house to exemption from state taxation. Maryland's legislation was characterized as "the ordinary and equal taxation of property": but this was quite erroneous, since the tax applied only to banks not chartered in Maryland, i.e., to the bank chartered by the federal government. Actually it was "an unambiguous measure of discrimination. . . ." Frankfurter, J., concurring in Graves *v.* New York *ex rel.* O'Keefe, 306 U.S. 466, 488 (1939).

Chief Justice Marshall delivered the opinion of the Court on March 6, 1819. How was it possible, within three days after the argument closed, for Marshall to prepare this long opinion—probably his greatest—and obtain the assent of his brethren? Beveridge, his biographer and never an unfriendly critic, thinks it "not unlikely that much of it had been written before the argument." [*Life of John Marshall,* Houghton Mifflin Co., Boston (1919), Vol. IV, 290.] In general, it would seem improper for a judge to frame his conclusions before the case had been argued. But this great question had been debated, in the cabinet, in Congress, in state legislatures, and in newspapers and pamphlets for almost thirty years. So the main points on each side were already familiar. At any rate, Marshall's opinion is very tightly integrated with the arguments of counsel, which suggests that at the least he revised what he had written to pick up the points made at the bar.

Opinion

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union; and the plaintiff, on his part, contests the validity of

an act which has been passed by the legislature of that state. The Constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that Constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the Constitution of our country devolved this important duty.

The first question made in the cause is, Has Congress power to incorporate a bank? It has been truly said, that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.

It will not be denied, that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted, if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the Constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

The power now contested was exercised by the first Congress elected under the present Constitution. The bill for incorporating the Bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported

by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law. It would require no ordinary share of intrepidity to assert, that a measure adopted under these circumstances, was a bold and plain usurpation, to which the Constitution gave no countenance. These observations belong to the cause: but they are not made under the impression that, were the question entirely new, the law would be found irreconcilable with the Constitution.

In discussing this question, the counsel for the state of Maryland have deemed it of some importance, in the construction of the Constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent states. The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion. It would be difficult to sustain this proposition. The convention which framed the Constitution was, indeed, elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might "be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification." This mode of proceeding was adopted; and by the convention, by Congress, and by the state legislatures, the instrument was submitted to the *people*. They acted upon it, in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several states; and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.

From these conventions, the Constitution derives its whole authority. The government proceeds directly from the people; is

"ordained and established" in the name of the people; and is declared to be ordained, "in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, . . . and secure the Blessings of Liberty to themselves [ourselves] and to their [our] Posterity." The assent of the states, in their sovereign capacity, is implied, in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the state governments. The Constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.

. . . The government of the Union, then (whatever may be the influence of this fact on the case), is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist. In discussing these questions, the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect that it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result, necessarily, from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof, . . . shall be the supreme Law of the Land," and by requiring that the members of the state legislatures, and

the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Among the enumerated powers we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the Articles of Confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the Tenth Amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States [by the Constitution], nor prohibited [by it] to the States, are reserved to the States [respectively], or to the people"; thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this Amendment had experienced the embarrassments resulting from the insertion of this word in the Articles of Confederation, and probably omitted it, to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the First Article, introduced? It is also, in some degree, warranted, by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is a *constitution* we are expounding.

Although, among the enumerated powers of government, we

do not find the word "bank," or "incorporation," we find the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended, that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution, by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require, that the treasure raised in the north should be transported to the south, that raised in the east, conveyed to the west, or that this order should be reversed. Is that construction of the Constitution to be preferred, which would render these operations difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it), which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the Constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential, to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

It is not denied, that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied, that the govern-

ment has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation. . . .

. . . The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

But the Constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this Constitution, in the government of the United States, or in any department thereof."

The counsel for the state of Maryland have urged various arguments, to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers.

In support of this proposition, they have found it necessary to contend, that this clause was inserted for the purpose of conferring on Congress the power of making laws. That, without it, doubts might be entertained, whether Congress could exercise its powers in the form of legislation.

But could this be the object for which it was inserted? . . . That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned.

But the argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.

Is it true, that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several phrases. . . . This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a

nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. . . .

But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the state of Maryland, is founded on the intention of the convention, as manifested in the whole clause. To waste time and argument in proving that, without it, Congress might carry its powers into execution, would be not much less idle than to hold a lighted taper to the sun. As little can it be required to prove, that in the absence of this clause, Congress would have some choice of means. That it might employ those which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional. This clause, as construed by the state of Maryland, would abridge and almost annihilate this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think, had it not been already controverted, too apparent for controversy. We think so for the following reasons:

1. The clause is placed among the powers of Congress, not among the limitations on those powers.

2. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power,

not a restriction on those already granted. No reason has been or can be assigned, for thus concealing an intention to narrow the discretion of the national legislature, under words which purport to enlarge it. The framers of the Constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea, and, after deep reflection, impress on the mind another, they would rather have disguised the grant of power, than its limitation. If, then, their intention had been, by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these: "In carrying into execution the foregoing powers, and all others," etc., "no laws shall be passed but such as are necessary and proper." Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional. . . .

If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a

bank, if required for its fiscal operations. To use one, must be within the discretion of Congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy. All those who have been concerned in the administration of our finances, have concurred in representing its importance and necessity; and so strongly have they been felt, that statesmen of the first class, whose previous opinions against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. . . .

After the most deliberate consideration, it is the unanimous and decided opinion of this Court, that the act to incorporate the Bank of the United States is a law made in pursuance of the Constitution, and is a part of the supreme law of the land. . . .

It being the opinion of the Court that the act incorporating the bank is constitutional; and that the power of establishing a branch in the state of Maryland might be properly exercised by the bank itself, we proceed to inquire:

2. Whether the state of Maryland may, without violating the Constitution, tax that branch?

That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments; are truths which have never been denied. But such is the paramount character of the Constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The states are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded—if it may restrain a state from the exercise of its taxing power on imports and exports, the same paramount character would seem to restrain, as it certainly may restrain, a state from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used.

On this ground, the counsel for the bank place its claim to be exempted from the power of a state to tax its operations. There is no express provision for the case; but the claim has been sustained on a principle which so entirely pervades the Consti-

tution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds.

This great principle is, that the Constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1. That a power to create implies a power to preserve. 2. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and preserve. 3. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme. . . .

The power of Congress to create, and of course to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable.

That the power of taxing it by the states may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the Constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it. . . .

The argument on the part of the state of Maryland, is, not that the states may directly resist a law of Congress, but that they may exercise their acknowledged powers upon it, and that the Constitution leaves them this right in the confidence that they will not abuse it. . . .

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word *confidence*. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.

But is this a case of confidence? Would the people of any one

state trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose that the people of any one state should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it as it really is.

If we apply the principle for which the state of Maryland contends, to the Constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the states. The American people have declared their Constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the states.

If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states. . . .

It has also been insisted, that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the states, will equally sustain the right of the states to tax banks chartered by the general government.

But the two cases are not on the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it

but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.

But if the full application of this argument could be admitted, it might bring into question the right of Congress to tax the state banks, and could not prove the right of the states to tax the Bank of the United States.

The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that 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. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared.

We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional. . . .

Reversed and annulled.

Comment

The opinion falls into two distinct parts—the exposition of the doctrine of implied powers, and the treatment of the problem of state taxation.

The doctrine of implied powers. Marshall's great affirmation that "we must never forget that it is a *constitution* we are expounding . . . —a constitution, intended to endure for ages to come, and consequently,

to be adapted to the various *crises* of human affairs," has become the first principle of judicial statesmanship. His gloss, "Let the end be legitimate . . ." is now virtually as much a part of the Constitution as if it were written in the text.

We, the children of a later day which accepts these propositions as wise and utterly right, may not realize how much strength of character the Chief Justice displayed in proclaiming them so unequivocally. Though Marshall had learned to possess his soul in peace, he had a sincere craving for the approbation of his compatriots. When he returned to his home in Richmond he was disturbed to find that a tremendous attack upon his opinion was being concerted, by a brilliant coterie of state-rights dogmatists. "Our opinion in the Bank case has aroused the sleeping spirit of Virginia, if indeed it ever sleeps," he reported to Justice Story. "It will, I understand, be attacked in the papers with some asperity, and as those who favor it never write for the publick it will remain undefended & of course be considered as *damnably heretical.*" [Beveridge, *op. cit.*, IV, 313.]

Personalia. One of the skillful dialecticians of strict construction was Spencer Roane, Judge of the Virginia Court of Appeals, who disguised himself by various pen names. (The fanatical attachment to "state sovereignty" as against adequate national authority expressed by these writers in 1819 and 1820 remind one of the comparable jealousies voiced in the debate over the League of Nations just a century later.) These attacks bothered Marshall to the point where he took a step quite out of keeping with his customary dignity. He prepared a series of articles in reply to Roane, and arranged through Justice Washington to have them published anonymously in a Federalist newspaper in Philadelphia. But Marshall the controversialist was far inferior to Marshall the Chief Justice; moreover, his articles were so garbled in printing as to make him doubly anxious that his authorship remain hidden. Marshall, it should be recalled, had become Chief Justice on January 27, 1801, by appointment of President Adams. Jefferson became President on March 4. It was well known that Jefferson had expected, if the vacancy fell to him, to appoint Spencer Roane, the jealous censor of federal authority. This seems to be one point where history was appreciably deflected by the character of a great man.

While dealing with personalia, one further point is worth noting. Marshall, who had long held stock of the Bank of the United States, sold it when he learned of the bringing of a suit which would surely come up to the Supreme Court. It would have been improper to sit in a case in which he had a pecuniary interest; and, certainly, it was wiser to sell the stock than to disqualify himself from hearing probably the most important case that came before the Court during his 34 years of service.

State taxation and federal immunity. The second branch of Marshall's opinion has not resisted the erosion of criticism as has the first. Was it necessarily true that because Congress saw fit to create a corporation to engage in some activity in which the federal government had a legitimate interest, the corporation must be exempt from even nondiscriminatory state taxation? In the movement of national expansion which came with the Civil War, Congress gave charters to railroads in the West. Would such a railroad company be immune to taxation in the states through which its lines ran? In Union Pacific Railroad Co. *v.* Peniston, 18 Wall. 5 (1873), the Court sustained nondiscriminatory state taxation over a vigorous dissent based upon McCulloch *v.* Maryland. Of course no state may be allowed to tear down that which the United States has built up, but immunity to the normal state taxation may not be essential to that result. Marshall suggests as clearly obnoxious a state tax on patent rights. But is it really good sense that one whose income is derived from a patent or a copyright—privileges enjoyed under federal legislation—should be exempt from the state income tax by which all about him are compelled to contribute to the general good? In what conceivable way would the United States be strengthened thereby? In Long *v.* Rockwood, 277 U.S. 142 (1928), the Supreme Court, by a bare majority, followed Marshall's reasoning even to this exorbitant result; but four years later, "upon a re-examination of the question," the Court agreed unanimously in holding that this had gone too far. Fox Film Corp. *v.* Doyle, 286 U.S. 123 (1932). Indeed Marshall's analysis of the problem of intergovernmental immunities, like the first map brought back by some early explorer, has proved to be not quite accurate in its orientation, so that those who came after have at times been led somewhat astray. In Graves *v.* New York *ex rel.* O'Keefe, 306 U.S. 466 (1939), the Court made a more accurate survey of the same terrain.

In re NEAGLE

135 U.S. 1, 10 S.Ct. 658, 34 L.Ed. 55 (1890).

Appeal from the Circuit Court of the United States for the Northern District of California.

Introduction

The cold law of this case is that where the statute authorizes federal courts to release, on writ of habeas corpus, one who is held in custody "for an act done or omitted in pursuance of a law of the

United States," it is not requisite that the petitioner point to any specific statute of Congress under which he acted. Any obligation fairly inferable from the Constitution, or any duty of a United States officer to be derived from the general scope of his lawful duties, is a "law" within the meaning of the statute.

The controversy. Justice Field, in his progress through his judicial circuit, had been attacked by one Terry; Neagle, a deputy United States marshal detailed to protect the Justice, shot and killed the assailant. Neagle was thereupon arrested by a California sheriff and held on a charge of murder. He applied to the federal court to be released from state custody under the statute quoted above. The circuit court granted the petition, and on an appeal by the sheriff, the Supreme Court affirmed the judgment releasing Neagle.

Justice Field. Quite aside from the vigorous opinion Justice Miller wrote for the Supreme Court, a cursory review of the historical background gives an insight into some significant aspects of American civilization at that period. The case has all the human interest that a Hollywood producer could desire. The scenario would open with a view of a New England parsonage where the Reverend David Dudley Field and his wife, on a salary of a few hundred dollars a year, are raising their large and interesting family. Among the children is Stephen J. Field, later to be a Justice of the Supreme Court and the central figure in the story. We also note David Dudley, his eldest brother, eventually one of the great masters of the legal profession—a leader in the codification of municipal and of international law and, on the bad side, an astute practitioner serving the interests of "Boss" Tweed, "Jubilee Jim" Fisk, and other notorious malefactors. The family scene includes Cyrus Field, who was to gain a place in history by laying the Atlantic cable. And then the youngest brother, Henry—later distinguished as a clergyman and today well-known to readers of the novel *All This and Heaven Too.* One of the daughters married a missionary and went to Asia Minor; their son, David J. Brewer, sat on the Supreme Court from 1889 to 1910. Who will say that Horatio Alger's success stories exaggerated the promise of American life at the middle of the nineteenth century?

Our concern is with Stephen J. Field, Justice of the Supreme Court from 1863 to 1897. [See Carl B. Swisher, *Stephen J. Field, Craftsman of the Law,* The Brookings Institution, Washington, D. C. (1930).] Field went to California in 1849 and plunged into the rough and tumble of frontier life—as he himself later recounted in an indulgent autobiographical sketch, *Personal Reminiscences of Early Days in California.* In 1857 Field was appointed to the Supreme Court of the state, where for a time he sat beside Chief Justice David S. Terry. Terry is the man who thirty-two years later, was shot in the course of an assault on Field. In 1863 Field was appointed to the Supreme Court of the United States (at the urging of David Dudley Field,

who as a prominent war Democrat had President Lincoln's ear). Justice Field was assigned to the Western circuit. Thus each summer, when the Supreme Court was not sitting, he would go to the Pacific Coast to assist in the holding of the various federal circuit courts.

A Western lawsuit. One of the cases that came before Justice Field on the circuit was the protracted suit of Sharon *v.* Hill. William Sharon was a wealthy banker, mine owner, and Senator from Nevada —a red-blooded man who took what he wanted. Sarah Althea Hill was a flirtatious and dangerous lady. They saw much of one another, then became estranged; presently Miss Hill produced a paper which she claimed was a declaration of marriage signed by Sharon. She sought a divorce and a division of Sharon's estate. Sharon brought suit in the federal circuit court at San Francisco, alleging diversity of citizenship, and asking for a decree that the declaration had been forged and was a nullity. The court decided in Sharon's favor and decreed that Hill should surrender the paper to be canceled. Sharon died. Miss Hill married Terry, the former chief justice. Sharon's son as executor went into the federal court with a view to obtaining execution of the decree that the forged declaration be surrendered. On September 3, 1888, Justice Field in the circuit court at San Francisco read a judgment in Sharon's favor. Mrs. Terry arose and made a scene, and Justice Field directed the marshal to remove her from the courtroom. This was done, with the aid of the deputy marshal Neagle. The instant hands were laid on his wife, Terry went into action. A general fracas ensued; Terry drew a bowie knife; a loaded revolver was later found in Mrs. Terry's satchel. The upshot of this lively frontier scene was that Terry and wife were summarily sentenced to imprisonment for contempt of court. The Supreme Court sustained the circuit court, both as to its judgment in favor of Sharon, Terry *et ux. v.* Sharon, 131 U.S. 40 (1889), and as to sentencing Terry to six months imprisonment for contempt, *In re* Terry, 128 U.S. 289 (1888). (Of course, Field, J., did not participate in either case in the Supreme Court.)

Throughout the winter that followed, the Terrys made dark threats as to what they would do to Justice Field if he dared to set foot in California. Their talk ranged from slapping, nose pulling, and horsewhipping to dueling and killing. The affair became notorious. The Attorney General directed the United States marshal to take special precautions to protect the federal judges. Field returned to his circuit in the summer of 1889, and Neagle was charged to accompany and protect him. (As the statute required the Justices to visit each circuit court only once in two years, Justice Field could have stayed away from the court at San Francisco until 1890. But he was never one to shirk a hazardous duty. He said: "As a judge of the highest court in the country, I should be ashamed to look any man in the face if I allowed a ruffian, by threats against my person, to keep me from hold-

ing the regular courts of my circuit." [Quoted by Swisher, p. 343.]

The inevitable encounter finally occurred in a railroad restaurant on the line between Los Angeles and San Francisco. The Terrys had boarded Field's train en route. Field, refusing to have breakfast in the seclusion of the coach, walked into the restaurant and sat down, Neagle at his side. The Terrys entered. A little later Terry approached Field from the rear and struck him, on one side of the head and then on the other. Neagle jumped up and (as he testified), seeing Terry make a motion as if to draw a knife, shot and killed him.

Mrs. Terry endeavored to stir up the bystanders to lynch Justice Field and Neagle. Then the sheriff arrived and arrested the deputy marshal, over Field's protest. Mrs. Terry swore out a complaint charging Field and Neagle with murder. What followed illustrates the dramatic quality which often marked the administration of justice in a frontier environment. The sheriff went to arrest Justice Field. By arrangement, the warrant was served at the federal court. Field had had a petition for a writ of habeas corpus prepared, and, the moment the arrest was made, the petition was presented to the federal circuit judge, and granted. That let Justice Field out of the sheriff's custody, though the charge stood. The governor, however, told the Attorney General that these proceedings against the Justice were a disgrace to the state, and this initiative led to dismissing the case against Field. But Neagle remained in jail, in a community where Terry had had many friends. He faced with some anxiety the prospect of a trial in the state court before a jury drawn from the vicinage—if meantime Mrs. Terry did not stir some hotheads to more precipitate action.

Relation of federal to state authority. What is the relation between federal and state authority in such a situation? To be sure, primary responsibility for the maintenance of peace rests with the state. But suppose that one has done an act on behalf of the United States which, if not justified, would be criminal. Must such a person be left to make his peace with the state? Or may the United States extend its hand and command that, if the accused can show to a federal court that he acted under the authority of the United States, he shall forthwith be released from the state's custody? *In re* Neagle shows that the answer to the last question is Yes. The federal circuit court granted Neagle's petition for a writ of habeas corpus and, after a very full hearing, discharged him. The sheriff appealed to the Supreme Court.

Opinion

Mr. Justice MILLER delivered the opinion of the Court.

If it be true, as stated in this order of the court discharging the prisoner, that he was held "in custody for an act done in pursuance of a law of the United States, and in custody in violation of the Constitution and laws of the United States," there

does not seem to be any doubt that, under the statute on that subject, he was properly discharged by the circuit court. . . .

These are the material circumstances produced in evidence before the circuit court on the hearing of this habeas corpus case. It is but a short sketch of a history which is given in over five hundred pages in the record, but we think it is sufficient to enable us to apply the law of the case to the question before us. Without a more minute discussion of this testimony, it produces upon us the conviction of a settled purpose on the part of Terry and his wife, amounting to a conspiracy, to murder Justice Field. And we are quite sure that if Neagle had been merely a brother or a friend of Judge Field, traveling with him, and aware of all the previous relations of Terry to the Judge, as he was, of his bitter animosity, his declared purpose to have revenge even to the point of killing him, he would have been justified in what he did in defense of Mr. Justice Field's life, and possibly of his own.

But such a justification would be a proper subject for consideration on a trial of the case for murder in the courts of the state of California, and there exists no authority in the courts of the United States to discharge the prisoner while held in custody by the state authorities for this offense, unless there be found in aid of the defense of the prisoner some element of power and authority asserted under the government of the United States.

This element is said to be found in the facts that Mr. Justice Field, when attacked, was in the immediate discharge of his duty as judge of the circuit courts of the United States within California; that the assault upon him grew out of the animosity of Terry and wife, arising out of the previous discharge of his duty as circuit justice in the case for which they were committed for contempt of court; and that the deputy marshal of the United States, who killed Terry in defense of Field's life, was charged with a duty under the law of the United States to protect Field from the violence which Terry was inflicting, and which was intended to lead to Field's death.

To the inquiry whether this proposition is sustained by law and the facts which we have recited, we now address ourselves.

Mr. Justice Field was a member of the Supreme Court of the United States, and had been a member of that Court for over a quarter of a century, during which he had become venerable for his age and for his long and valuable service in that Court. The business of the Supreme Court has become so exacting that for

many years past the Justices of it have been compelled to remain for the larger part of the year in Washington city, from whatever part of the country they may have been appointed. The term for each year, including the necessary travel and preparations to attend at its beginning, has generally lasted from eight to nine months. But the Justices of this Court have imposed on them other duties, the most important of which arise out of the fact that they are also judges of the circuit courts of the United States. Of these circuits there are nine, to each of which a Justice of the Supreme Court is allotted . . .

We have no doubt that Mr. Justice Field when attacked by Terry was engaged in the discharge of his duties as circuit justice of the Ninth Circuit, and was entitled to all the protection under those circumstances which the law could give him.

It is urged, however, that there exists no statute authorizing any such protection as that which Neagle was instructed to give Judge Field in the present case, and indeed no protection whatever against a vindictive or malicious assault growing out of the faithful discharge of his official duties; and that the language of section 753 of the Revised Statutes, that the party seeking the benefit of the writ of habeas corpus must in this connection show that he is "in custody for an act done or omitted in pursuance of a law of the United States," makes it necessary that upon this occasion it should be shown that the act for which Neagle is imprisoned was done by virtue of an act of Congress. It is not supposed that any special act of Congress exists which authorizes the marshals or deputy marshals of the United States in express terms to accompany the judges of the Supreme Court through their circuits, and act as a bodyguard to them, to defend them against malicious assaults against their persons. But we are of opinion that this view of the statute is an unwarranted restriction of the meaning of a law designed to extend in a liberal manner the benefit of the writ of habeas corpus to persons imprisoned for the performance of their duty. And we are satisfied that if it was the duty of Neagle, under the circumstances, a duty which could only arise under the laws of the United States, to defend Mr. Justice Field from a murderous attack upon him, he brings himself within the meaning of the section we have recited. This view of the subject is confirmed by the alternative provision, that he must be in custody "for an act done or omitted in pursuance of a law of the United States or of an order, process, or decree of a court or judge thereof, or is in custody in

violation of the Constitution or of a law or treaty of the United States."

In the view we take of the Constitution of the United States, any obligation fairly and properly inferrible from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is "a law" within the meaning of this phrase. It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably. . . .

Where, then, are we to look for the protection which we have shown Judge Field was entitled to when engaged in the discharge of his official duties? Not to the courts of the United States; because, as has been more than once said in this Court, in the division of the powers of government between the three great departments, executive, legislative and judicial, the judicial is the weakest for the purposes of self-protection and for the enforcement of the powers which it exercises. The ministerial officers through whom its commands must be executed are marshals of the United States, and belong emphatically to the executive department of the government. They are appointed by the President, with the advice and consent of the Senate. They are removable from office at his pleasure. They are subjected by act of Congress to the supervision and control of the Department of Justice, in the hands of one of the cabinet officers of the President, and their compensation is provided by acts of Congress. The same may be said of the district attorneys of the United States, who prosecute and defend the claims of the government in the courts.

The legislative branch of the government can only protect the judicial officers by the enactment of laws for that purpose, and the argument we are now combating assumes that no such law has been passed by Congress.

If we turn to the executive department of the government, we find a very different condition of affairs. The Constitution, Article 2, section 3, declares that the President "shall take Care that the Laws be faithfully executed," and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice

and consent of the Senate, to appoint the most important of them and to fill vacancies. He is declared to be commander in chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that "he shall take Care that the Laws be faithfully executed."

Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution? . . .

We cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death, and we think it clear that where this protection is to be afforded through the civil power, the Department of Justice is the proper one to set in motion the necessary means of protection. The correspondence already cited in this opinion between the marshal of the Northern District of California, and the Attorney General, and the district attorney of the United States for that district, although prescribing no very specific mode of affording his protection by the Attorney General, is sufficient, we think, to warrant the marshal in taking the steps which he did take, in making the provision which he did make, for the protection and defense of Mr. Justice Field.

But there is positive law investing the marshals and their deputies with powers which not only justify what Marshal Neagle did in this matter, but which imposed it upon him as a duty. In chapter 14 of the Revised Statutes of the United States, which is devoted to the appointment and duties of the district attorneys, marshals, and clerks of the courts of the United States, section 788 declares:

"The marshals and their deputies shall have, in each state,

the same powers, in executing the laws of the United States, as the sheriffs and their deputies in such state may have, by law, in executing the laws thereof."

If, therefore, a sheriff of the state of California was authorized to do in regard to the laws of California what Neagle did, that is, if he is authorized to keep the peace, to protect a judge from assault and murder, then Neagle was authorized to do the same thing in reference to the laws of the United States. . . .

That there is a peace of the United States; that a man assaulting a judge of the United States while in the discharge of his duties violates that peace; that in such case the marshal of the United States stands in the same relation to the peace of the United States which the sheriff of the county does to the peace of the state of California are questions too clear to need argument to prove them. That it would be the duty of a sheriff, if one had been present at this assault by Terry upon Judge Field, to prevent this breach of the peace, to prevent this assault, to prevent the murder which was contemplated by it, cannot be doubted. And if, in performing this duty, it became necessary for the protection of Judge Field, or of himself, to kill Terry, in a case where, like this, it was evidently a question of the choice of who should be killed, the assailant and violator of the law and disturber of the peace, or the unoffending man who was in his power, there can be no question of the authority of the sheriff to have killed Terry. So the marshal of the United States, charged with the duty of protecting and guarding the judge of the United States court against this special assault upon his person and his life, being present at the critical moment, when prompt action was necessary, found it to be his duty, a duty which he had no liberty to refuse to perform, to take the steps which resulted in Terry's death. This duty was imposed on him by the section of the Revised Statutes which we have cited, in connection with the powers conferred by the state of California upon its peace officers, which become, by this statute, in proper cases, transferred as duties to the marshals of the United States. . . .

The result at which we have arrived upon this examination is, that in the protection of the person and the life of Mr. Justice Field while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that without prompt action on his part the assault of Terry upon the judge would have ended in the death

of the latter; that such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction.

We therefore affirm the judgment of the circuit court authorizing his discharge from the custody of the sheriff of San Joaquin County.

Mr. Justice LAMAR (Mr. Chief Justice FULLER concurring with him), dissenting. . . .

Now, we agree, taking the facts of the case as they are shown by the record, that the personal protection of Mr. Justice Field as a private citizen, even to the death of Terry, was not only the right, but was also the duty of Neagle and of any other bystander. And we maintain that for the exercise of that right or duty he is answerable to the courts of the state of California, and to them alone. But we deny that upon the facts of this record, he, as deputy marshal Neagle, or as private citizen Neagle, had any duty imposed on him by the laws of the United States growing out of the official character of Judge Field as a circuit justice. We deny that anywhere in this transaction, accepting throughout the appellee's version of the facts, he occupied in law any position other than what would have been occupied by any other person who should have interfered in the same manner, in any other assault of the same character, between any two other persons in that room. In short, we think that there was nothing whatever in fact of an official character in the transaction, whatever may have been the appellee's view of his alleged official duties and powers; and, therefore, we think that the courts of the United States have in the present state of our legislation no jurisdiction whatever in the premises, and that the appellee should have been remanded to the custody of the sheriff.

. . . we are the less reluctant to express this conclusion, because we cannot permit ourselves to doubt that the authorities of the state of California are competent and willing to do justice; and that, even if the appellee had been indicted and gone to trial upon this record, God and his country would have given him a good deliverance.

Comment

The Justices on circuit. Justice Miller's reference to the burden of the circuit court duties then borne by the Justices is worth comment. Miller was assigned to the Eighth Circuit, Field to the Ninth. Between them they covered almost all of the territory west of the Mississippi River, making the rounds at least once in two years and traveling in the heat of the summer. *In re* Neagle was almost the last of Justice Miller's utterances from the bench of the Supreme Court. Shortly after it was delivered he went once more on his circuit, finding the work more than ordinarily exhausting. Returning to Washington for the October Term, he was stricken with paralysis and died on October 13, 1890. [See Fairman, *op. cit.*, ch. 17.] By the Circuit Courts of Appeals Act of 1891 Congress at long last established an adequate framework for the inferior federal courts and excused the Justices of the Supreme Court from further attendance at the circuit.

Expansion of federal jurisdiction after the Civil War. The fact that Chief Justice Fuller and Justice Lamar dissented in the Neagle Case also calls for remark. Of the eight Justices who participated in that decision—Field, J., of course, took no part—the majority comprised the Justices who adhered to the Republican Party; Fuller and Lamar were Democrats recently appointed by President Cleveland. One should not jump to any inference that the Justices were acting on the basis of any narrow partisan motives. But it is true that the two national parties had displayed, in the period after the Civil War, different tendencies toward the federal judiciary. The Republicans had been disposed to bring litigation into the federal courts and to create new federal rights—e.g., under Reconstruction legislation for the protection of Negroes in the South. The Democrats, with their state-rights tradition and strong Southern leaning, resisted the expansion of federal jurisdiction; they preferred that the federal judicial structure be held to modest proportions, and that litigation be allowed to flow into the state courts. In a great many ways it made enormous difference whether cases were tried before a state judge (who would ordinarily be popularly elected) or by a federal judge (who held office during good behavior). From 1861 until Cleveland came to the Presidency in 1885, the Republicans controlled the national administration, and federal judges were ordinarily selected from within that party. Federal justice in the former Confederate states smelled of the carpetbag. For these reasons, Justices who accepted the Democratic tenets were generally inclined to resist any striking expansion of federal authority, whereas the strong nationalists on the Court could be counted upon to speak out in the accents of Chief Justice Marshall's opinion in McCulloch *v.* Maryland.

Situations where federal courts may release from state custody. Section 753 of the Revised Statutes, quoted in Justice Miller's opinion,

was a composite of several provisions, each intended to checkmate some state action which would threaten the safety of the Union. One clause dated from 1833, when federal officers needed protection from the Nullification legislation of South Carolina. Another clause was enacted in 1842, as a result of the McLeod Case in the courts of New York. During the Canadian rebellion in 1837 a British force had crossed the Niagara River into American waters and destroyed the ship *Caroline,* then being prepared for a hostile expedition against the British in Canada. Two Americans were killed. Later McLeod, a British subject, was put on trial in the courts of New York for murder and arson on that occasion. Between the United States and Great Britain, peace and comity prevailed. Secretary of State Webster agreed that the invasion was justifiable if the British could show a "necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberating." This was a question to be settled between governments. The Secretary of State also said that "It is as well settled in the United States as in Great Britain that a person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission, to any judiciary tribunal in the United States." (This may be tested by imagining the reverse situation: suppose that at the time of the punitive expedition after Villa in 1916 General Pershing had been captured and placed on trial for the "murder" of Mexicans killed in a skirmish.) But the New York courts held onto McLeod—he later proved an alibi and was acquitted—and as the law then stood there was no means by which the authority of the United States could be promptly asserted. To correct this defect in our federal system, Congress made the writ of habeas corpus available where a foreigner was held by a state to answer for what he had done by the authority of a foreign state. If such a situation were to present itself today, no doubt habeas corpus would be sought in a federal court, and a representative of the Department of Justice would appear to advise the court what was the attitude of the United States government in the matter.

In Tennessee *v.* Davis, 100 U.S. 257 (1880), the Supreme Court sustained a somewhat milder remedy for situations where the action of state courts might impinge upon the authority of the United States. Section 643 of the Revised Statutes said that whenever a civil suit or criminal prosecution is commenced against a federal revenue officer "on account of any act done under color of his office . . . ," the defendant may have the case removed to the federal court. This means that the federal court shall proceed to try the case, administering such laws of the state as may be applicable but under conditions which are better calculated to insure a trial free from any local prejudice. During the period of national prohibition, Congress gave prohibition officers the benefit of this statute. But if the officer is to show himself entitled to have a prosecution removed to a federal court, his show-

ing must "exclude the possibility that it was based on acts or conduct of his, not justified by his federal duty." State of Maryland *v.* Soper, No. 1, 270 U.S. 9 (1926). In that case some prohibition officers had been indicted for murder, but, presumably for reasons best known to themselves, they were not prepared to admit more than that the homicide occurred at a time when they were engaged in performing their official duties; they did not negative the possibility that they were implicated by reason of acts quite outside the line of duty. The Supreme Court held that they should stand their trial in the state court.

State courts may not release from federal control. State courts are without authority to release one who is held under claim or color of the authority of the United States. The leading authority for this proposition is Tarble's Case, 13 Wall. 397 (1872). Tarble had joined the army. His father insisted that he was too young to be enlisted, and asked the Wisconsin court to issue a writ of habeas corpus directed to the recruiting officer. The Supreme Court of Wisconsin held that Tarble should be discharged, but the Supreme Court of the United States, per Field, J., reversed this judgment. Only federal courts are entitled to determine the validity of federal custody.

This was not the first time that the Supreme Court of the United States had had to bring the Supreme Court of Wisconsin into line on this matter. In Ableman *v.* Booth, 21 How. 506 (1859), the United States marshal was holding Booth on a charge of aiding the escape of a fugitive slave, in violation of the Act of Congress of 1850. (That Act was one of the elements in the great "Compromise of 1850.") Booth sought a writ of habeas corpus from a Wisconsin judge on the ground that the Fugitive Slave Act was unconstitutional. The Wisconsin courts discharged Booth. Coming at a time when the South was about ready to seek a separation, the question aroused the whole country; and here for once it was the South which exalted the federal authority and the Northern abolitionists who looked to the state courts for protection. The Supreme Court of the United States was unanimous in holding, per Taney, C.J., that it was the duty of the United States marshal to refuse to obey the mandate of the state court.

The *Manual for Courts-Martial,* U. S. Army, sets out instructions to be followed if a state court should issue a writ of habeas corpus in the case of one held by the military authorities: the court is to be respectfully referred to Ableman *v.* Booth and Tarble's Case as authority for refusing to obey the writ.

Federal government may waive its right. Though the state may not wrest a prisoner from the custody of a federal officer, the United States is free to surrender one in its custody for trial or punishment by the state. This is what Ponzi, the financial wizard, learned in Ponzi *v.* Fessenden, 258 U.S. 254 (1922). Ponzi had been sentenced to five years' imprisonment for a federal offense. Massachusetts wished to try

him for larceny. The Attorney General thought this procedure had merit and directed that he be produced for trial. The Supreme Court had no difficulty in deciding that the right of the United States to exclusive custody could be waived; it was not a privilege for Ponzi's benefit. And the Attorney General was the proper officer to waive the federal right. Chief Justice Taft said in part:

> We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory. It would be impossible for such courts to fulfill their respective functions without embarrassing conflict unless rules were adopted by them to avoid it. The people for whose benefit these two systems are maintained are deeply interested that each system shall be effective and unhindered in its vindication of its laws. The situation requires, therefore, not only definite rules fixing the powers of the courts in cases of jurisdiction over the same persons and things in actual litigation but also a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure.

State courts and officers discharging federal functions. Provided that the state interposes no objection, the federal government may avail itself of state courts and officers as instruments for the carrying out of federal functions. Thus, from the earliest history of the government, Congress has passed laws regulating the admission of aliens to citizenship and has authorized naturalization proceedings in state as well as federal courts. Holmgren *v.* United States, 217 U.S. 509 (1910). By the Emergency Price Control Act of 1942, regulations of the OPA were made enforceable in both state and federal courts. Still another example is the reliance upon state agencies in connection with drafting men for the armed services under the Selective Service Act.

MISSOURI *v.* HOLLAND

252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641 (1920).

Appeal from the District Court of the United States for the Western District of Missouri.

Opinion

Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill in equity brought by the state of Missouri to

prevent a game warden of the United States from attempting to enforce the Migratory Bird Treaty Act of July 3, 1918, chap. 128, 40 Stat. 755, and the regulations made by the Secretary of Agriculture in pursuance of the same. The ground of the bill is that the statute is an unconstitutional interference with the rights reserved to the states by the Tenth Amendment, and that the acts of the defendant done and threatened under that authority invade the sovereign right of the state and contravene its will manifested in statutes. The state also alleges a pecuniary interest, as owner of the wild birds within its borders and otherwise, admitted by the government to be sufficient, but it is enough that the bill is a reasonable and proper means to assert the alleged quasi sovereign rights of a state. . . . A motion to dismiss was sustained by the district court on the ground that the act of Congress is constitutional. 258 Fed. Rep. 479. . . . The State appeals.

On December 8, 1916, a treaty between the United States and Great Britain was proclaimed by the President. It recited that many species of birds in their annual migrations traversed certain parts of the United States and of Canada, that they were of great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination through lack of adequate protection. It therefore provided for specified closed seasons and protection in other forms, and agreed that the two powers would take or propose to their law-making bodies the necessary measures for carrying the treaty out. 39 Stat. 1702. The above mentioned Act of July 3, 1918, entitled an act to give effect to the convention, prohibited the killing, capturing, or selling any of the migratory birds included in the terms of the treaty except as permitted by regulations compatible with those terms, to be made by the Secretary of Agriculture. Regulations were proclaimed on July 31, and October 25, 1918. 40 Stat. 1812; 1863. It is unnecessary to go into any details, because, as we have said, the question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the states.

To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, section 2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are

declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article I, section 8, as a necessary and proper means to execute the powers of the government. The language of the Constitution as to the supremacy of treaties being general, the question before us is narrowed to an inquiry into the ground upon which the present supposed exception is placed.

It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the states, a treaty cannot do. An earlier act of Congress that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the states had been held bad in the District Court. United States *v.* Shauver, 214 Fed. Rep. 154. United States *v.* McCullagh, 221 Fed. Rep. 288. Those decisions were supported by arguments that migratory birds were owned by the states in their sovereign capacity for the benefit of their people, and that under cases like Geer *v.* Connecticut, 161 U.S. 519, this control was one that Congress had no power to displace. The same argument is supposed to apply now with equal force.

Whether the two cases cited were decided rightly or not they cannot be accepted as a test of the treaty power. Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found. . . . We are not yet discussing the particular case before us but only are considering the validity of the test proposed. With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the develop-

ment of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that amendment has reserved.

The state as we have intimated founds its claim of exclusive authority upon an assertion of title to migratory birds, an assertion that is embodied in statute. No doubt it is true that as between a state and its inhabitants the state may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the state upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the state's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another state and in a week a thousand miles away. If we are to be accurate we cannot put the case of the state upon higher ground than that the treaty deals with creatures that for the moment are within the state borders, that it must be carried out by officers of the United States within the same territory, and that but for the treaty the state would be free to regulate this subject itself.

As most of the laws of the United States are carried out within the states and as many of them deal with matters which in the silence of such laws the state might regulate, such general grounds are not enough to support Missouri's claim. Valid treaties of course "are as binding within the territorial limits of the states as they are elsewhere throughout the dominion of the United States." . . . No doubt the great body of private relations usually fall within the control of the state, but a treaty may override its power. . . .

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the state and has no permanent habitat therein. But for

the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the states. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of the opinion that the treaty and statute must be upheld.

Decree affirmed.

Mr. Justice VAN DEVANTER and Mr. Justice PITNEY dissent.

Comment

Holmes and Marshall. For those who have marked Mr. Justice Holmes' style, it is superfluous to record that he delivered the opinion of the court. No one else would have written it just that way. Reread the passage about constitutional construction: the Constitution means more than the founders foresaw; it has cost their successors much sweat and blood to prove that they created a nation; the case is not to be decided merely on the basis of what was said a hundred years ago. Compare this with Marshall's language in McCulloch *v.* Maryland: We must never forget that it is a *constitution* we are expounding—a constitution intended to endure for ages to come.

Both Holmes and Marshall had affirmed in battle their faith in this nation. In a short autobiographical sketch which Marshall set out for Justice Story, he records that in the summer of 1775, when he was not quite twenty years old, he was appointed first lieutenant in a company of minutemen raised for actual service. A year later he was appointed first lieutenant in a regiment of the Virginia line, as near to an "outfit of regulars" as the country then knew. He marched north with them and presently was promoted to captain. He campaigned under Washington throughout the Middle States, spent the winter of '77 at Valley Forge, and learned from sore distress the need for an energetic national government. In the autobiographical sketch Marshall recalled his youthful "devotion to the union, and to a government competent to its preservation," and his attachment to the maxim "united we stand, divided we fall."

> I had imbibed these sentiments so thoroughly that they constituted a part of my being. I carried them with me into the army where I found myself associated with brave men from different states who were risking life and everything valuable in a common cause believed by all to be most precious; and where I was

confirmed in the habit of considering America as my country, and congress as my government. [*An Autobiographical Sketch by John Marshall,* John S. Adams (ed.), University of Michigan Press, Ann Arbor (1937). By permission of the publisher.]

So it was with Holmes. He enlisted in a militia battalion in April 1861, shortly before his graduation from Harvard College. Soon he went to the front as a lieutenant in the 20th Massachusetts Volunteer Infantry. "For its killed and wounded in battle it stood in the first half-dozen of all the regiments of the north," he later recalled. [Address at the fiftieth anniversary of the Class of '61, in *Speeches* by Oliver Wendell Holmes, Little, Brown, and Co., Boston (1934).] Holmes served three years in the Army of the Potomac, through Grant's campaign in the Wilderness, and was wounded three times. There can be no doubt that these years were, in intensity, the supreme moment of his long life. This experience remained ever present in his thought and came out constantly in his utterances—as in Missouri *v.* Holland. After Justice Holmes' death his executors found in his bedroom, carefully preserved, a blood-stained uniform. His tombstone in the National Cemetery at Arlington records the matters which he regarded as most important:

OLIVER WENDELL HOLMES

Captain and Brevet Colonel

20th Massachusetts Volunteer Infantry, Civil War

Justice Supreme Court of the United States

March 1841 March 1935

GRAVES *v.* NEW YORK *ex rel.* O'KEEFE

306 U.S. 466, 59 S.Ct. 595, 83 L.Ed. 927 (1939).

On Writ of Certiorari to the Supreme Court of the State of New York.

Introduction

At no time from McCulloch *v.* Maryland to the present has the Supreme Court had an entirely consistent and adequate theory of intergovernmental tax immunities. It is not surprising that this is so because, while the Constitution imposes some limitations on the taxing power of the state and others upon that of the nation, it makes no

express provision on how the taxes laid by one may bear upon the operations of the other. Consequently the Court has had to answer questions as they have arisen, on the basis of what it has conceived to be the general principles of our federal system. And, at the times when the earlier analyses were made, it could not foresee the complexities and the urgencies which characterize taxation in our own day.

Marshall's analysis of the problem. In the McCulloch Case the Chief Justice had said:

> The question is, in truth, a question of supremacy. . . . The American people have declared their Constitution, and the laws made in pursuance thereof, to be supreme. . . . It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. 4 Wheat. at 427, 432, 433.

Marshall's conception was that what emanated from the authority of the United States simply must not be touched by the states. This principle, he pointed out, did not work both ways. It did not follow that because the states were thus denied power to tax the Bank of the United States the Congress could not tax the banks chartered by the states: Congress represented the entire nation, and when it taxed it taxed its own constituents; but if a state could tax the operations of the general government, that which was only a part could control that which was created for the benefit of the whole.

Weston *v.* City Council of Charleston, 2 Pet. 449 (1829), had to do with a city tax on bonds, notes, and insurance stock, including United States stock but exempting South Carolina stock and the stock of South Carolina banks and the Bank of the United States. The tax, though small, was thus discriminatory, since it put the obligations of the United States at a slight disadvantage when compared with those of South Carolina. If such taxes were sustained, investors would be encouraged to buy state issues in preference to federal issues, and the federal power to borrow would be somewhat impaired. This economic analysis was developed in argument; but Marshall's opinion for the Court did not make the discriminatory feature of the tax the basis for holding it invalid. The reasoning was in legal concepts rather than in economic effects. Charleston's tax touched the securities issued by the United States and consequently—so it was held—burdened the power to borrow. Justices Johnson and Thompson dissented. They saw in the tax nothing hostile to the operations of the United States: what Charleston sought to do was simply to tax its citizens on the income they derived from securities; the stock of the United States had become mixed up in this mass of capital.

Salary of federal officer. Dobbins *v.* Erie County, 16 Pet. 435 (1842), concerned the law of Pennsylvania which authorized the assessment of a tax upon "all offices and posts of profit"—in effect, a somewhat restricted tax on income. Dobbins was captain of a federal revenue cutter. His pay was $500 per annum, and on this basis the tax-gatherers had, over three years, put him down for a total contribution of $10.75. Were the operations of the United States thereby burdened? Surely this was even more remote than Charleston's tax on Weston. First, it was not discriminatory. And second, employees are less fluid than capital and so are less likely to be impelled toward or away from government employment by the circumstance of immunity or subjection to the normal taxation of the other government. But the Court held the tax bad—partly as a burden upon the operations of the United States, and partly as being in conflict with the command of Congress that Captain Dobbins should have the enjoyment of a full $500.

Salary of state officer. Thus far the converse question, what of federal taxes as they touch state bonds and the salaries of state officers, had not arisen. This is explained by the fact that in the years 1817 to 1860 the United States imposed no internal revenue tax of any nature. The Civil War, however, drove the Congress to various new exactions. Seven successive income tax laws were passed, the last expiring in 1871. Day was a probate judge in Massachusetts. Was he required to pay out of his salary a tax of some $30 to help support the federal government? Collector *v.* Day, 11 Wall. 113 (1871). The Court did not apply Marshall's distinction that the whole taxing all its parts was different from a part taxing the operations of the whole. It held that the reasoning of Dobbins *v.* Erie County was equally applicable to a federal tax as it touched the salary of a state officer. Justice Bradley filed a brief dissent marked by his strong nationalism: "No man ceases to be a citizen of the United States by being an officer under the state government. I cannot accede to the doctrine that the general government is to be regarded as in any sense foreign or antagonistic to the state governments, their officers or people. . . ." He did not believe that federal taxation should be constitutionally any less applicable to the salary of a state officer than to that of an officer of the United States.

After Collector *v.* Day, state and federal immunities were regarded as being substantially reciprocal.

Federal income tax. At that time the income tax had been an expedient made necessary by the Civil War. But a conviction was growing that the burdens of an expanding administration should be distributed according to the ability to pay. This led in 1894 to the adoption of the income tax as a feature of the federal fiscal system. Out of regard for Collector *v.* Day, Congress exempted the salaries

of state and municipal officers; but a proposal to write in a like exemption as to interest from state and municipal bonds failed.

A case was hastily contrived to carry to the Supreme Court the various constitutional objections raised against the income tax. In Pollock *v.* Farmers' Loan and Trust Co., 157 U.S. 429, 158 U.S. 601 (1895), the Court declared the levy invalid, holding among other things that it was "a tax on the power of the states and their instrumentalities to borrow, and consequently repugnant to the Constitution."

The Sixteenth Amendment. As a result of the Pollock decision, a constitutional amendment was adopted in 1913, declaring that "The Congress shall have power to lay and collect taxes on income, from whatever source derived, . . ." The Court has repeatedly held—though not without dissent—that "it was not the purpose or effect of that amendment to bring any new subject within the taxing power." Bowers *v.* Kerbaugh-Empire Co., 271 U.S. 170, 174 (1926); Eisner *v.* Macomber, 252 U.S. 189, 206 (1920), and cases there cited. The prospect, then, for a favorable decision if Congress should extend the tax to include income from state and municipal bonds was not promising, and such income remains untouched. However, in 1938 Mr. Justice Black, then new to the Court, intimated (as had Holmes, Day, Brandeis and Clarke, JJ., before him) that perhaps the words "from whatever source derived" meant exactly what they said. And since major shifts have occurred in other branches of the subject of intergovernmental immunities, perhaps the doctrine that the yield of state and municipal bonds is immune to the federal income tax may no longer be really impregnable.

Expansion and contraction of immunity. The Supreme Court as it existed in the 1920's was dubbed, with reason, the taxpayer's friend. That was a period when immunities really flourished—only to be cut down in a later season. As already mentioned in discussing the McCulloch Case, the doctrine that the federal privilege conferred by a patent or a copyright carried with it a further privilege not to pay any state income tax on the royalties, Long *v.* Rockwood, 277 U.S. 142 (1928)—surely an example of arid conceptualism—was overruled in Fox Film Corp. *v.* Doyle, 286 U.S. 123 (1932). For a time, lessees of public lands also enjoyed immunity: Gillespie *v.* Oklahoma, 257 U.S. 501 (1922), saved the lessee of restricted Indian lands from the state income tax, and Burnet *v.* Coronado Oil and Gas Co., 285 U.S. 393 (1932), held that the federal income tax was constitutionally inapplicable to the income of the lessee of state school lands. Helvering *v.* Mountain Products Corp., 303 U.S. 376 (1938), overruled these decisions.

For a time the state sale tax could not be collected on sales made to the United States: Panhandle Oil Co. *v.* Mississippi, 277 U.S. 218

(1928); Graves *v.* Texas Co., 298 U.S. 393 (1936). Those cases were overruled by Alabama *v.* King & Boozer, 314 U.S. 1 (1941).

Independent contractors. An independent contractor, as distinguished from a governmental employee, has always been held subject to nondiscriminatory taxation. For instance, Metcalf & Eddy *v.* Mitchell, 269 U.S. 514 (1926), rejected the claim of consulting engineers as to fees received from states and subdivisions of states for advice on water supply and sewage disposal systems. The operator of an automotive stage line was not able to escape the state highway tax on gross receipts by showing that his receipts came from carrying the mail. Alward *v.* Johnson, 282 U.S. 509 (1931). And the construction company which built levees under a contract with the federal government was required to pay the state use tax on the gasoline consumed on the job. Trinityfarm Const. Co. *v.* Grosjean, 291 U.S. 466 (1934).

Movement to limit tax immunities. Those responsible for finding ways and means of financing the federal government became alarmed at the extent of tax immunity. What the United States gained by the doctrine seemed to be much more than offset by what it was denied. Since the Court, in Collector *v.* Day and thereafter, had in general treated state and nation as on a par in this regard, it behooved the federal government to urge that state taxation be permitted to approach somewhat closer to the operations of the United States. This new attitude became apparent in James *v.* Dravo Contracting Co., 302 U.S. 134 (1937). Dravo was building locks and dams in West Virginia, under a contract with the federal government. West Virginia's fiscal system included taxes on various businesses and other activities: "Upon every person engaging . . . in the business of contracting, the tax shall be equal to two percent of the gross income of the business." Pretty clearly, the United States would have to pay more to have its work done if its contractors were held subject to state taxation on their gross receipts: contractors would have to charge the government as much as they charged anyone else. Even so, Solicitor General Reed (the present Justice Reed) appeared as friend of the court to urge that the tax be sustained. Indeed the Solicitor General suggested a reconsideration of Graves *v.* Texas Co., 298 U.S. 393 (1936), where a gasoline storage tax was held inapplicable to one who sold to the United States,—an immunity for which the same Solicitor General had at that time contended! With both West Virginia and the United States arguing that Dravo should pay, the Supreme Court, by a five-to-four decision, sustained the state tax. This represented a major shift in doctrine.

On April 25, 1938, President Roosevelt sent a message to Congress recommending legislation to abolish immunity from income taxation, state and federal, in respect to the salaries of officers and employees of federal and state governments and in respect to income

from securities subsequently issued by the United States or by a state. The President said:

> The desirability of this recommendation has been apparent for some time, but heretofore it has been assumed that the Congress was obliged to wait upon that cumbersome and uncertain remedy—a constitutional amendment—before taking action. Today, however, expressions in recent judicial opinions lead us to hope that the assumptions underlying these doctrines are being questioned by the Court itself and that these tax immunities are not inexorable requirements under the Constitution itself but are the result of judicial decision. Therefore, it is not unreasonable to hope that judicial decision may find it possible to correct it.

The Court reconsiders its doctrine. The decision of Helvering *v.* Gerhardt, 304 U.S. 405, on May 23, 1938, showed the Court disposed to limit immunity in the field of official salaries. The specific question was whether the federal income tax was constitutionally applicable to employees of the Port of New York Authority, an agency created by compact between New York and New Jersey to operate terminal and transportation facilities within the port. Twenty-seven states joined as friends of the court in arguing for tax exemption. Nevertheless, the Court held the employees to be taxable, Butler and McReynolds, JJ., dissenting. Mr. Justice Stone's opinion opened on the note sounded by Chief Justice Marshall when he said that a tax laid by the whole upon the parts was not subject to the same objection as a tax by a part upon the whole. Two principles, continued Stone, J., were controlling in questions of the immunity of state instrumentalities: one denied immunity to "activities thought not to be essential to the preservation of state governments . . ."; the other forbade recognition of the immunity "when the burden on the state is so speculative and uncertain that if allowed it would restrict the federal taxing power without affording any corresponding tangible protection to the state government; even though the function be thought important enough to demand immunity from a tax upon the state itself, it is not necessarily protected from a tax which well may be substantially or entirely absorbed by private persons." The opinion seemed portentous. Though no precedents were expressly overruled, it implied at every turn that old landmarks would probably go tumbling down in the first strong wind: "We need not stop to inquire . . .," "It is enough for present purposes . . .," "The reasoning . . . is not controlling here . . .," ". . . expressing no opinion whether . . .," and so on. Evidently the landscape might soon look very different.

Graves *v.* O'Keefe, raising the question whether an employee of the federal government was liable to the state income tax, was argued and decided in March 1939. Solicitor General Jackson (the present

Justice Jackson) appeared as *amicus curiae* to join New York in urging the applicability of the tax. (Indeed the Department of Justice had recently published an extensive study of "Taxation of Government Bondholders and Employees" which argued against the exemption from nondiscriminatory taxation of private income derived from governmental sources.) When the Court delivered its judgment, the constitutional immunity from income taxation of the salaries of officers or employees of either state or national governments was at an end.

Opinion

Mr. Justice STONE delivered the opinion of the Court.

We are asked to decide whether the imposition by the state of New York of an income tax on the salary of an employee of the Home Owners' Loan Corporation places an unconstitutional burden upon the federal government.

Respondent, a resident of New York, was employed during 1934 as an examining attorney for the Home Owners' Loan Corporation at an annual salary of $2400. In his income tax return for that year he included his salary as subject to the New York state income tax. . . . Petitioners, New York State Tax Commissioners, rejected respondent's claim for a refund of the tax based on the ground that his salary was constitutionally exempt from state taxation . . .

For the purposes of this case we may assume that the creation of the Home Owners' Loan Corporation was a constitutional exercise of the powers of the federal government. . . . As that government derives its authority wholly from powers delegated to it by the Constitution, its every action within its constitutional power is governmental action, and since Congress is made the sole judge of what powers within the constitutional grant are to be exercised, all activities of government constitutionally authorized by Congress must stand on a parity with respect to their constitutional immunity from taxation. . . . And when the national government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the government itself through its departments. . . .

The single question with which we are now concerned is whether the tax laid by the state upon the salary of respondent, employed by a corporate instrumentality of the federal government, imposes an unconstitutional burden upon that government.

The theory of the tax immunity of either government, state or national, and its instrumentalities, from taxation by the other, has been rested upon an implied limitation on the taxing power of each, such as to forestall undue interference, through the exercise of that power, with the governmental activities of the other. That the two types of immunity may not, in all respects, stand on a parity has been recognized from the beginning, McCulloch *v.* Maryland (4 Wheat. 316, 435-436), and possible differences in application, deriving from differences in the source, nature and extent of the immunity of the governments and their agencies, were pointed out and discussed by this Court in detail during the last term. Helvering *v.* Gerhardt (304 U.S. 405, 412-413, 416).

So far as now relevant, those differences have been thought to be traceable to the fact that the federal government is one of delegated powers in the exercise of which Congress is supreme; so that every agency which Congress can constitutionally create is a governmental agency. And since the power to create the agency includes the implied power to do whatever is needful or appropriate, if not expressly prohibited, to protect the agency, there has been attributed to Congress some scope, the limits of which it is not now necessary to define, for granting or withholding immunity of federal agencies from state taxation. . . . Whether its power to grant tax exemptions as an incident to the exercise of powers specifically granted by the Constitution can ever, in any circumstances, extend beyond the constitutional immunity of federal agencies which courts have implied, is a question which need not now be determined.

Congress has declared in section 4 of the Act that the Home Owners' Loan Corporation is an instrumentality of the United States and that its bonds are exempt, as to principal and interest, from federal and state taxation, except surtaxes, estate, inheritance and gift taxes. The corporation itself, "including its franchise, its capital, reserves and surplus, and its loans and income," is likewise exempted from taxation; its real property is subject to tax to the same extent as other real property. But Congress has given no intimation of any purpose either to grant or withhold immunity from state taxation of the salary of the corporation's employees, and the congressional intention is not to be gathered from the statute by implication. . . .

It is true that the silence of Congress, when it has authority to speak, may sometimes give rise to an implication as to the congressional purpose. The nature and extent of that implication de-

pend upon the nature of the congressional power and the effect of its exercise. But there is little scope for the application of that doctrine to the tax immunity of governmental instrumentalities. The constitutional immunity of either government from taxation by the other, where Congress is silent, has its source in an implied restriction upon the powers of the taxing government. So far as the implication rests upon the purpose to avoid interference with the functions of the taxed government or the imposition upon it of the economic burden of the tax, it is plain that there is no basis for implying a purpose of Congress to exempt the federal government or its agencies from tax burdens which are unsubstantial or which courts are unable to discern. Silence of Congress implies immunity no more than does the silence of the Constitution. It follows that when exemption from state taxation is claimed on the ground that the federal government is burdened by the tax, and Congress has disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity.

The present tax is a nondiscriminatory tax on income applied to salaries at a specified rate. It is not in form or substance a tax upon the Home Owners' Loan Corporation or its property or income, nor is it paid by the corporation or the government from their funds. It is measured by income which becomes the property of the taxpayer when received as compensation for his services; and the tax laid upon the privilege of receiving it is paid from his private funds and not from the funds of the government, either directly or indirectly. The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable, . . . and the only possible basis for implying a constitutional immunity from state income tax of the salary of an employee of the national government or of a governmental agency is that the economic burden of the tax is in some way passed on so as to impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions.

In the four cases in which this Court has held that the salary of an officer or employee of one government or its instrumentality was immune from taxation by the other, it was assumed, without discussion, that the immunity of a government or its in-

strumentality extends to the salaries of its officers and employees. . . . It was further pointed out that, as applied to the taxation of salaries of the employees of one government, the purpose of the immunity was not to confer benefits on the employees by relieving them from contributing their share of the financial support of the other government, whose benefits they enjoy, or to give an advantage to that government by enabling it to engage employees at salaries lower than those paid for like services by other employers, public or private, but to prevent undue interference with the one government by imposing on it the tax burdens of the other.

In applying these controlling principles in the Gerhardt Case the Court held that the salaries of employees of the New York Port Authority, a state instrumentality created by New York and New Jersey, were not immune from federal income tax, even though the Authority be regarded as not subject to federal taxation. It was said that the taxpayers enjoyed the benefit and protection of the laws of the United States and were under a duty, common to all citizens, to contribute financial support to the government; that the tax laid on their salaries and paid by them could be said to affect or burden their employer, the Port Authority, or the states creating it, only so far as the burden of the tax was economically passed on to the employer; that a nondiscriminatory tax laid on the income of all members of the community could not be assumed to obstruct the function which New York and New Jersey had undertaken to perform, or to cast an economic burden upon them, more than does the general taxation of property and income which, to some extent, incapable of measurement by economists, may tend to raise the price level of labor and materials. The Court concluded that the claimed immunity would do no more than relieve the taxpayers from the duty of financial support to the national government in order to secure to the state a theoretical advantage, speculative in character and measurement and too unsubstantial to form the basis of an implied constitutional immunity from taxation.

The conclusion reached in the Gerhardt Case that in terms of constitutional tax immunity a federal income tax on the salary of an employee is not a prohibited burden on the employer makes it imperative that we should consider anew the immunity here claimed for the salary of an employee of a federal instrumentality. As already indicated, such differences as there may be between the implied tax immunity of a state and the

corresponding immunity of the national government and its instrumentalities may be traced to the fact that the national government is one of delegated powers, in the exercise of which it is supreme. Whatever scope this may give to the national government to claim immunity from state taxation of all instrumentalities which it may constitutionally create, and whatever authority Congress may possess as incidental to the exercise of its delegated powers to grant or withhold immunity from state taxation, Congress has not sought in this case to exercise such power. Hence these distinctions between the two types of immunity cannot affect the question with which we are now concerned. The burden on government of a nondiscriminatory income tax applied to the salary of the employee of a government or its instrumentality is the same, whether a state or national government is concerned. The determination in the Gerhardt Case that the federal income tax imposed on the employees of the Port Authority was not a burden on the Port Authority made it unnecessary to consider whether the Authority itself was immune from federal taxation; the claimed immunity failed because even if the Port Authority were itself immune from federal income tax, the tax upon the income of its employees cast upon it no unconstitutional burden.

Assuming, as we do, that the Home Owners' Loan Corporation is clothed with the same immunity from state taxation as the government itself, we cannot say that the present tax on the income of its employees lays any unconstitutional burden upon it. All the reasons for refusing to imply a constitutional prohibition of federal income taxation of salaries of state employees, stated at length in the Gerhardt Case, are of equal force when immunity is claimed from state income tax on salaries paid by the national government or its agencies. In this respect we perceive no basis for a difference in result whether the taxed income be salary or some other form of compensation, or whether the taxpayer be an employee or an officer of either a state or the national government, or of its instrumentalities. In no case is there basis for the assumption that any such tangible or certain economic burden is imposed on the government concerned as would justify a court's declaring that the taxpayer is clothed with the implied constitutional tax immunity of the government by which he is employed. That assumption, made in Collector *v.* Day, 11 Wall. 113, and New York *ex rel.* Rogers *v.* Graves, 299 U.S. 401, is contrary to the reasoning and to the conclusions

reached in the Gerhardt Case and in Metcalf & Eddy *v.* Mitchell, 269 U.S. 514. . . . In their light the assumption can no longer be made. Collector *v.* Day and New York *ex rel.* Rogers *v.* Graves are overruled so far as they recognize an implied constitutional immunity from income taxation of the salaries of officers or employees of the national or a state government or their instrumentalities.

So much of the burden of a nondiscriminatory general tax upon the incomes of employees of a government, state or national, as may be passed on economically to that government, through the effect of the tax on the price level of labor or materials, is but the normal incident of the organization within the same territory of two governments, each possessing the taxing power. The burden, so far as it can be said to exist or to affect the government in any indirect or incidental way, is one which the Constitution presupposes, and hence it cannot rightly be deemed to be within an implied restriction upon the taxing power of the national and state governments which the Constitution has expressly granted to one and has confirmed to the other. The immunity is not one to be implied from the Constitution, because if allowed it would impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to the state governments.

Reversed.

Mr. Chief Justice HUGHES concurs in the result.

Mr. Justice FRANKFURTER, concurring. . . .

The arguments upon which McCulloch *v.* Maryland, 4 Wheat. 316, rested had their roots in actuality. But they have been distorted by sterile refinements unrelated to affairs. These refinements derived authority from an unfortunate remark in the opinion in McCulloch *v.* Maryland. Partly as a flourish of rhetoric and partly because the intellectual fashion of the times indulged a free use of absolutes, Chief Justice Marshall gave currency to the phrase that "the power to tax involves the power to destroy." *Ibid.* at page 431 of 4 Wheat. This dictum was treated as though it were a constitutional mandate. But not without protest. One of the most trenchant minds on the Marshall court, Justice William Johnson, early analyzed the dangerous inroads upon the political freedom of the states and the Union within their respective orbits resulting from a doctrinaire

application of the generalities uttered in the course of the opinion in McCulloch *v.* Maryland. The seductive cliché that the power to tax involves the power to destroy was fused with another assumption, likewise not to be found in the Constitution itself, namely the doctrine that the immunities are correlative—because the existence of the national government implies immunities from state taxation, the existence of state governments implies equivalent immunities from federal taxation. When this doctrine was first applied Mr. Justice Bradley registered a powerful dissent, the force of which gathered rather than lost strength with time. Collector *v.* Day, 11 Wall. 113, 128.

All these doctrines of intergovernmental immunity have until recently been moving in the realm of what Lincoln called "pernicious abstractions." The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes's pen: "The power to tax is not the power to destroy while this Court sits." Panhandle Oil Co. *v.* Mississippi, 277 U.S. 218, 223 (dissent). Failure to exempt public functionaries from the universal duties of citizenship to pay for the costs of government was hypothetically transmuted into hostile action of one government against the other. A succession of decisions thereby withdrew from the taxing power of the states and nation a very considerable range of wealth without regard to the actual workings of our federalism, and this, too, when the financial needs of all governments began steadily to mount. These decisions have encountered increasing dissent. In view of the powerful pull of our decisions upon the courts charged with maintaining the constitutional equilibrium of the two other great English federalisms, the Canadian and the Australian courts were at first inclined to follow the earlier doctrines of this Court regarding intergovernmental immunity. Both the Supreme Court of Canada and the High Court of Australia on fuller consideration—and for present purposes the British North America Act, 30 & 31 Vict., c. 3, and the Commonwealth of Australia Constitution Act, 63 & 64 Vict., c. 12, raise the same legal issues as does our Constitution—have completely rejected the doctrine of intergovernmental immunity. In this Court dissents have gradually become majority opinions, and even before the present decision the rationale of the doctrine had been undermined.

. . . Whether Congress may, by express legislation, relieve its functionaries from their civic obligations to pay for the benefits

of the state governments under which they live is matter for another day.

Mr. Justice BUTLER (Mr. Justice MCREYNOLDS concurring with him), dissented. . . .

Comment

Congressional grant of immunity. The Court was at pains in Graves *v.* O'Keefe to say that it was not committing itself on the question which may now be anticipated: How far may Congress go in conferring exemption from state taxation? But in Federal Land Bank *v.* Bismark Lumber Co., 314 U.S. 95 (1941), it held that Congress could constitutionally immunize from state taxation activities in furtherance of the lending functions of federal land banks, this conclusion being derived from the "necessary and proper" clause. Specifically, the land bank was excused from paying the sales tax on lumber purchased to repair farm property it had acquired by foreclosure. (Similar rulings had previously been made over a number of years.) The import seems to be that Congress will not find itself fenced in on occasions when it sees fit to confer some immunity by statute, even though the Court would no longer infer that immunity from the Constitution alone.

State taxes and federal cost-plus contracts. As recorded above, James *v.* Dravo Contracting Co., 302 U.S. 134 (1937), upheld a state tax of 2 percent on the gross receipts of contractors, as applied to one who was performing a contract with the United States. Though such taxes would result in larger costs to the United States, the Solicitor General had joined in supporting it. The sequel came in Alabama *v.* King & Boozer, 314 U.S. 1 (1941), where the state laid a 2-percent gross retail sales tax on building materials. King & Boozer had a contract to build an army camp, on a cost-plus-a-fixed-fee basis. Whilst the tax fell nominally upon them, there was no doubt that every cent of it was passed on to the United States. This time when the Solicitor General appeared it was to urge the Court to halt the trend which the government itself had recently been urging! Considering the prevalence of cost-plus contracting, there could be no doubt that gross-receipts taxes would add greatly to the cost of national defense. A consideration on the other side, however, was that when the government created some large installation, such as a cantonment, it produced a host of problems for state and local governments and so might properly be required to pay its share toward their support. Without dissent the Court sustained the tax.

The state may not tax the property of the United States. It is old law that the state may not tax the property of the United States without its consent. Van Brocklin *v.* Tennessee, 117 U.S. 151 (1886). This doctrine was recently applied in a somewhat unusual situation. Where

Pennsylvania's general property tax fell upon a war contractor who had in his plant machinery belonging to the United States, leased to him for use in making guns, it was held that this property could not be considered in assessing the value of the plant. United States *v.* Allegheny County, 322 U.S. 174 (1944).

Some state activities are taxable by the federal government. It used to be said quite simply that if a state engaged in a "business which is of a private nature," as distinguished from the exercise of "governmental functions," the business was not withdrawn from federal taxation. Thus when South Carolina took over the retail liquor business, it found that it must pay the federal excise. South Carolina *v.* United States, 199 U.S. 437 (1905). Ohio received the same answer in 1934, after putting up an argument that our experience with Prohibition had converted the sale of liquor into a "governmental function." Ohio *v.* Helvering, 292 U.S. 360. When the University of Georgia plays Georgia Tech in football, the men who carry the ball are not performing one of Georgia's governmental functions, and the federal admissions tax is applicable. Allen *v.* Regents of University System, 304 U.S. 439 (1938). And when the state of New York sells mineral water from Saratoga Springs, it must pay the federal tax on soft drinks. New York *v.* United States, 326 U.S. 572 (1946). When this last situation arose one might have expected the Court to say, in few words, that "a state which sells soft drinks is no less subject to the federal excise than one which sells hard liquor: this case is governed by South Carolina *v.* United States." Indeed all the Justices agreed that the tax must be upheld here if the South Carolina Case was not to be overruled. But the attorneys general of 46 states, as friends of the court, joined in urging that New York's activities be held not taxable, so the case seemed to call for a reasoned judgment. And when this was attempted, the result was an opinion by Stone, C.J., Reed, Murphy, and Burton, JJ., concurring; an opinion by Frankfurter, J., in which Rutledge, J., joined; some further remarks by Rutledge; and a dissent by Douglas, J., in which Black, J., concurred. (Justice Jackson was then at Nürnberg.) In the South Carolina Case the Court had referred to conditions which prevailed when the Constitution was adopted and said that liquor selling was not then "governmental." But the Court today realizes that it would not do to say that any state function of a sort not exercised in 1787 may properly be taxed; neither is the distinction between "proprietary" and "governmental" a satisfactory one. Though agreed that a state business in mineral water was taxable, the majority could not bring their ideas into a single focus on how to frame a general rule for the future.

Justices Douglas and Black thought that South Carolina *v.* United States had been wrongly decided. "A state's project is as much a legitimate governmental activity whether it is traditional, or akin to private enterprise, or conducted for profit." The dissenting opinion

says that "The Constitution is a compact between sovereigns," which sounds exceedingly old-fashioned; it goes on to favor tax immunity for "the activity of states in the fields of housing, public power, and the like," which sounds quite advanced. (Justices Roberts and Brandeis, on the contrary, once said that "federal or state business ought to bear its proportionate share of taxation in order that comparison may be made between the cost of conducting public and private business." Brush *v.* Commissioner of Internal Revenue, 300 U.S. 352, dissenting at 374, 377 (1937).)

"*The line drawn with an unsteady hand.*" In the course of his dissent in the case last cited, Mr. Justice Roberts also said that

> The frank admissions of counsel at the bar concerning the confusion and apparent inconsistency in administrative rulings [as to one of the problems of tax immunity] seem to call for an equally candid statement that our decisions in the same field have not furnished the executive a consistent rule of action. 300 U.S. at 375.

More recently, Mr. Justice Jackson, for the Court, said: "Looking backward it is easy to see that the line between the taxable and the immune has been drawn with an unsteady hand." United States *v.* Allegheny County, *supra,* at 176.

It seems probable that the hand will continue to draw unsteadily for some time to come. Out of the interaction of legislation, administration, and judicial decision, informed by public needs and guided by critical discussion, the lines of a sound public policy may be expected gradually to emerge.

ERIE RAILROAD CO. *v.* TOMPKINS

304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Introduction

Article III of the Constitution provides that "The judicial Power shall extend . . . to Controversies . . . between Citizens of different States . . ."

A case of diversity of citizenship. Suppose that Standish, a citizen of Massachusetts, drives on a New York highway, where he collides

with Knickerbocker. Knickerbocker is damaged to the extent of $4000 and brings suit against Standish for that amount in a local court. Standish retains a New York lawyer who explains to him that under the federal Judiciary Act, which implements the constitutional provision quoted above, he may have the case removed to a United States district court in New York. It is conceivable that he, an outsider, might be at some disadvantage in the court of the plaintiff's state. At any rate, the framers of the Constitution made it possible to open the federal courts to such a controversy. Before a judge of the United States, the New Yorker and the citizen of Massachusetts will stand on even ground.

Accordingly Standish exercises his federal right and removes the suit to the federal court. The case comes to trial, and the facts of the collision are presented. Now what is the law to be applied to the facts found—by what rule is the question of Standish's liability to be determined? Surely it must be the law of New York. The moment Standish entered the state it was that law which governed his speed, his signals, etc., and which established the standard of care which he must observe toward others whom he encountered therein. So the function of the federal court will be to administer fairly, as between the New Yorker and the man from Massachusetts, the law of New York. Perhaps the legislature has enacted a statute which covers this situation. Perhaps the statutes are silent, leaving the matter to be governed by the common law, that body of principles which New York derived from England and which ever since the New York judges have been applying and adapting and modifying as they have decided case after case.

To find what is the law of New York the federal judge will read the state statutes. He will then look to the decisions of the New York courts to see how they have construed those statutes, and also to see how they have declared the common law of New York on matters where no statute has been provided. It is quite possible that in their arguments Knickerbocker's and Standish's lawyers, respectively, will cite decisions in other American jurisdictions and even in England and the Dominions; perhaps they will quote from treatises and articles wherein writers have expounded and commented upon the law. The federal judge may find these interesting and instructive. But he must never lose sight of the fact that it is the New York law by which he must decide this case. No matter what the rule may be somewhere else, no matter what some writer may have urged, no matter even that the federal judge may think he could improve upon what the New York judges have laid down, his function in this case of diversity of citizenship is to take the local law as it is and apply it impartially.

What has just been laid down dogmatically may seem so reasonable and obvious that it need not be labored. It is an accurate statement of the situation today. But it is quite different from what the Supreme

Court, per Story, J., laid down in 1842 in Swift *v.* Tyson, 16 Pet. 1,—a decision which stood until 1938, when the Court, in Erie Railroad Co. *v.* Tompkins, pronounced it erroneous. Throughout that long period the federal judiciary, as we now see it, encroached upon the authority of the several states, producing a considerable dislocation in our federal system.

"The common law is not a brooding omnipresence in the sky." The essentials of the matter can be explained without going into technicalities and refinements. In drawing up the original Judiciary Act of 1789, Congress made provision for bringing into the federal courts cases between citizens of different states. It went on to declare what rules the federal judges should apply. This was in section 34 of the Act: "The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." What was meant by "The laws of the several states"? In Swift *v.* Tyson, Justice Story construed "laws" to mean "enactments promulgated by the legislative authority" of the state. "In the ordinary use of language it will hardly be contended that the decisions of the courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws."

This we now see was an error, though much has been written explaining how it came to be made. One contributing cause was Justice Story himself. In addition to being a judge, Story was also a professor in Harvard Law School and the author of a number of great legal treatises. Of all the Justices down to Holmes he was certainly the most learned—and indeed he was a trifle vain about his learning. The influence of his texts was far greater than that of his judgments on the bench, important though they were. He believed that there was one great body of common or general law which prevailed throughout all the states; the judges here and there, like his law school students, might vary in their ability to comprehend, but that there was one ultimate right answer Story did not doubt. One can understand how, holding that view, he could believe that when the federal courts took a case between citizens of different states they were free to decide it on the basis of their own independent judgment of the common law, even though a different rule prevailed in the courts of the state where the cause of action arose. Of course, if the state had a statute on the point, the federal judges must apply that statute. But if the matter had been left to the common law, then the federal judges in, say, New York could lay down the law according to their own notions, independently of what the state judges in the courthouse across the street might be holding in the cases that came before them.

In a dissenting opinion which expresses what has now become the

view of the Court, Justice Holmes explained the "subtle fallacy" of Swift *v.* Tyson:

> Books written about any branch of the common law treat it as a unit, cite cases from this Court, from the Circuit Courts of Appeals, from the state courts, from England and the Colonies of England indiscriminately, and criticise them as right or wrong according to the writer's notions of a single theory. It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any court concerned. If there were such a transcendental body of law outside of any particular state but obligatory within it unless and until changed by statute, the courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a state, whether called common law or not, is not the common law generally but the law of that state existing by the authority of that state without regard to what it may have been in England or anywhere else. [Black & White Taxi. Co. *v.* Brown & Yellow Taxi. Co., 276 U.S. 518, dissenting at 532, 533 (1928), Brandeis and Stone, JJ., concurring in the dissent.]

In the time of Marshall and Story the Supreme Court had great difficulty in establishing the proposition that it had constitutional authority to hear appeals from the state courts on matters of federal law and to correct any error which it found in the application of "the supreme law of the land." Story's great opinion in Martin *v.* Hunter's Lessee, 1 Wheat. 304 (1816), and Marshall's in Cohens *v.* Virginia, 6 Wheat. 264 (1821), are the demonstrations of that authority. But just as the interpretation of the Constitution, an act of Congress, or a treaty of the United States raised a federal question where the state judges must bow to the Justices of the Supreme Court, so the law of any state—constitutional, statutory, or common—was a matter on which the state courts spoke with an authority which the federal judges in turn should have respected. What the federal courts did under the doctrine of Swift *v.* Tyson was a trespass upon the state domain.

"Federal common law" as it operated. To see how this worked in actual practice, return now to the case of Knickerbocker *v.* Standish and suppose that it arose prior to 1938. What Standish's lawyer did was to compare the law which the New York courts were applying with the "independent judgment" which the federal judges took on the issues which would arise in that case. Knickerbocker will contend that Standish was negligent, and the case may turn on the stand-

ard of care which Standish owed to Knickerbocker. Standish's lawyer finds, let us suppose, that the federal judges take a less strict view of liability in this matter than do the state judges. So he advises his client to exercise his federal right to remove the suit to the United States court—in order to escape the strictness of the state law rather than because of any bias on the part of the state courts. Was it defensible that Knickerbocker should thus lose the protection which the common law of New York had thrown about him and all others within that state? With what right did federal judges place this case beyond the operation of the law of New York simply because they think their "independent judgment" is wiser than that of the state courts? To be sure, the New York legislature could enact a statute on the subject, and that of course would govern. But why should the state have to post a statute in order to keep federal judges from trespassing?

One pragmatic justification was that if the federal judiciary, headed by the Supreme Court, built up a body of "federal common law," perhaps the state judges would conform, and thus a greater unification of private law would be attained. To a certain extent this was successful. Take for instance Justice Bradley's great opinion for the Supreme Court in New York Central Railroad Co. *v.* Lockwood, 17 Wall. 357 (1873). This did more than any other decision to establish that, as a matter of public policy, courts will not enforce a common carrier's stipulation for exemption from responsibility for negligence. Though he himself had been a "railroad lawyer," Justice Bradley pointed out that "The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it." Since the customer had no "real freedom of choice," the courts should not permit the railroads to contract out of liability for negligence. But federal doctrines of "general law" were not always so enlightened; in any event it was wrong to invade a domain which belonged to the state courts. Better ways have been found for promoting the unification of the law—notably through the work of the Commissioners on Uniform State Laws and the unofficial work of the American Law Institute in preparing restatements of the common law in various fields.

Rise of corporations. Really to understand how the "federal common law" worked, one must recall that business in this country came to be carried on largely through corporations. A corporation chartered in, say, Delaware would, for purposes of federal jurisdiction, be treated as a citizen of Delaware; thus it was enabled to invoke the federal courts in all other states in which it did business. (It took the Supreme Court several jumps to reach this result: Bank of the United States *v.* Deveaux, 5 Cr. 61 (1809); Louisville, C. & N. RR. Co. *v.* Letson, 1 How. 497 (1844); St. Louis & S. F. Ry. Co. *v.* James, 161 U.S. 545 (1896).) Thus a tremendous volume of litigation was shunted into the federal courts. State judges, whose function it was to know

the law and public policy of the state, could be ignored within their own home by out-of-state corporations. A striking example was the controversy between the Black & White Taxicab Co., of Kentucky, and the Brown & Yellow Taxicab Co., of Kentucky but later of Tennessee, recounted in Justice Brandeis' opinion below. The story might be entitled "Why Corporations Leave Home."

Criticism of Swift v. *Tyson.* Sharp minds among the Justices had made the doctrine insecure—Miller, J., by digging close beside it, and Field and Holmes, JJ., by laying bare the weak foundation. Mr. Charles Warren discovered the original draft of the Judiciary Act of 1789 and challenged the historical accuracy of Justice Story's construction of section 34. An impressive literature grew up in protest—and the Justices do seem to pay attention to the leading law reviews. And then in 1938 up came another case involving a problem of "federal common law," and on counting noses at conference it appeared that a majority of the Justices were prepared to overrule Swift *v.* Tyson. This was the case of Erie Railroad Co. *v.* Tompkins.

Situation in the Tompkins Case. In this particular case Tompkins had been struck by the Erie in Pennsylvania. He went up to New York and, showing that this was a controversy between citizens of different states, brought his suit in the federal court. The Erie said that Tompkins had been a trespasser and that by the law of Pennsylvania it was not liable to trespassers save for wanton or willful negligence. The federal judges said that they need not consider what the common law of Pennsylvania might be on this point because the "general law" governed. Tompkins recovered a judgment for $30,000 and the Erie asked the Supreme Court to review.

Opinion

Mr. Justice BRANDEIS delivered the opinion of the Court.

The question for decision is whether the oft-challenged doctrine of Swift *v.* Tyson shall now be disapproved. . . .

First. Swift *v.* Tyson, 16 Pet. 1, 18, held that federal courts exercising jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the state as declared by its highest court; that they are free to exercise an independent judgment as to what the common law of the state is—or should be; and that, as there stated by Mr. Justice Story, "the true interpretation of the 34th section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their

nature and character. It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case."

The Court in applying the rule of section 34 to equity cases, in Mason *v.* United States, 260 U.S. 545, 559, said: "The statute, however, is merely declarative of the rule which would exist in the absence of the statute." The federal courts assumed, in the broad field of "general law," the power to declare rules of decision which Congress was confessedly without power to enact as statutes. Doubt was repeatedly expressed as to the correctness of the construction given section 34, and as to the soundness of the rule which it introduced. But it was the more recent research of a competent scholar, who examined the original document, which established that the construction given to it by the Court was erroneous; and that the purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the state, unwritten as well as written.

Criticism of the doctrine became widespread after the decision of Black & White Taxicab & Transfer Co. *v.* Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518. There, Brown & Yellow, a Kentucky corporation owned by Kentuckians, and the Louisville & Nashville Railroad, also a Kentucky corporation, wished that the former should have the exclusive privilege of soliciting passenger and baggage transportation at the Bowling Green, Ky., railroad station; and that the Black & White, a competing Kentucky corporation, should be prevented from interfering with that privilege. Knowing that such a contract would be void under the common law of Kentucky, it was arranged that the Brown & Yellow reincorporate under the law of Tennessee, and that the contract with the railroad should be executed there. The suit was then brought by the Tennessee corporation in the federal court

for Western Kentucky to enjoin competition by the Black & White; an injunction issued by the District Court was sustained by the Court of Appeals; and this Court, citing many decisions in which the doctrine of Swift *v.* Tyson had been applied, affirmed the decree.

Second. Experience in applying the doctrine of Swift *v.* Tyson had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue. Persistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.

On the other hand, the mischievous results of the doctrine had become apparent. Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state. Swift *v.* Tyson introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten "general law" vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the state.

The discrimination resulting became in practice far-reaching. This resulted in part from the broad province accorded to the so-called "general law" as to which federal courts exercised an independent judgment. In addition to questions of purely commercial law, "general law" was held to include the obligations under contracts entered into and to be performed within the state; the extent to which a carrier operating within a state may stipulate for exemption from liability for his own negligence or that of his employee; the liability for torts committed within the state upon persons resident or property located there, even where the question of liability depended upon the scope of a property right conferred by the state; and the right to exemplary or punitive damages. Furthermore, state decisions construing local deeds, mineral conveyances, and even devises of real estate were disregarded.

In part the discrimination resulted from the wide range of persons held entitled to avail themselves of the federal rule by

resort to the diversity of citizenship jurisdiction. Through this jurisdiction individual citizens willing to remove from their own state and become citizens of another might avail themselves of the federal rule. And, without even change of residence, a corporate citizen of the state could avail itself of the federal rule by re-incorporating under the laws of another state, as was done in the Taxicab Case.

The injustice and confusion incident to the doctrine of Swift *v.* Tyson have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction. Other legislative relief has been proposed. If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so.

Third. Except in matters governed by the federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. As stated by Mr. Justice Field when protesting in Baltimore & Ohio R. R. Co. *v.* Baugh, 149 U.S. 368, 401, against ignoring the Ohio common law of fellow-servant liability: "I am aware that what has been termed the general law of the country—which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject—has been often advanced in judicial opinions of this Court to control a conflicting law of a state. I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a state in conflict with their views. And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now erroneously, repeated the same doctrine. But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repe-

tition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the states—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state and, to that extent, a denial of its independence."

The fallacy underlying the rule declared in Swift *v.* Tyson is made clear by Mr. Justice Holmes. [Quoting language from the Black & White Taxicab Case, set out in the Introduction above, and from Kuhn *v.* Fairmont Coal Co., 215 U.S. 349, 370.]

Thus the doctrine of Swift *v.* Tyson is, as Mr. Justice Holmes said, "an unconstitutional assumption of powers by the courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." In disapproving that doctrine we do not hold unconstitutional section 34 of the Federal Judiciary Act of 1789 or any other act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states.

Fourth. The defendant contended that by the common law of Pennsylvania as declared by its highest court in Falchetti *v.* Pennsylvania R. Co., 307 Pa. 203, 160 A. 859, the only duty owed to the plaintiff was to refrain from willful or wanton injury. The plaintiff denied that such is the Pennsylvania law. In support of their respective contentions the parties discussed and cited many decisions of the supreme court of the state. The Circuit Court of Appeals ruled that the question of liability is one of general law; and on that ground declined to decide the issue of state law. As we hold this was error, the judgment is reversed and the case remanded to it for further proceedings in conformity with our opinion.

Reversed.

Mr. Justice BUTLER (Mr. Justice MCREYNOLDS concurring with him), dissenting. . . .

Mr. Justice REED, concurring. . . .

To decide the case now before us and to "disapprove" the doctrine of Swift *v.* Tyson requires only that we say that the words

"the laws" include in their meaning the decisions of the local tribunals. As the majority opinion shows, by its reference to Mr. Warren's researches and the first quotation from Mr. Justice Holmes, that this Court is now of the view that "laws" includes "decisions," it is unnecessary to go further and declare that the "course pursued" was "unconstitutional," instead of merely erroneous. . . .

Comment

Though it now seems well that the Court in the above decision corrected 95 years of judicial error, we should not fail to mark attentively the manner in which this was accomplished. In his separate opinion Mr. Justice Reed points out what his brethren are doing.

Mr. Justice Brandeis might have confined his judgment to something like the following: "In their construction of section 34 of the Judiciary Act, our predecessors diverted the course of judicial decision from its proper channel. We now restore it to the direction from which it should never have departed. From this case forth, 'the laws of the several states' as used in section 34 will be construed to include the state's common law as well as its statutes."

Mr. Justice Brandeis' opinion said this, and something more. It said that the Constitution required that this be so. Here, then, was a gratuitous declaration that if Congress should ever enact that federal courts might ignore the state's common law in cases of diversity of citizenship (which Congress has never done) then such a statute would be unconstitutional.

At this point the reader should turn back to Mr. Justice Brandeis' opinion in Ashwander *v.* Tennessee Valley Authority and reread his canons, particularly points 2, 4, and 7.

V

POWERS OF THE NATIONAL GOVERNMENT

GIBBONS *v.* OGDEN

9 Wheaton 1, 6 L.Ed. 23 (1824).

On Writ of Error to the Court for the Trial of Impeachments and Correction of Errors of the State of New York.

Introduction

Technology and the Commerce Clause. The commerce clause and the steamboat are contemporaries. In August 1787, while the delegates to the Constitutional Convention at Philadelphia were debating the grant of power to regulate commerce, they took time out to go down to the banks of the Delaware River, to see John Fitch demonstrate his steamboat, a sensation of the moment. As we look back, it seems that Fitch and the Founding Fathers were working at different parts of one unfolding problem. His experiment was an episode in the application of steam to transportation. The Founders, purposing that American commerce should develop under the authority of an adequate national government, framed the grant that "The Congress shall have Power . . . To regulate commerce with foreign Nations, and among the several States, . . ." It is largely the application of technology which has produced that "commerce" which Congress is to govern.

Steamboat monopoly in New York. In 1787 the New York legis-

lature granted Fitch an exclusive privilege to navigate the waters of that state by steamboat, provided he met certain conditions. He failed, and in 1798 Chancellor Livingston procured a transfer of the grant to himself. At first he too failed, but by successive acts the grant was kept open. In the meantime, Livingston met Robert Fulton in Paris and saw his model steamboat on the Seine. They formed a partnership, and in 1807 their steamboat made a successful trip from New York to Albany. The legislature thereupon enlarged the exclusive privilege for a term which might extend to 30 years.

View of New York courts. Others developed steamboats at about the same time, and presently competitors invaded the monopoly. Livingston and Fulton *v.* Van Ingen, 9 Johnson 507 (N. Y., 1812), was a suit to enjoin one of these rivals from using his steamboat on the waters of New York. Van Ingen replied that the monopoly was a violation of the Constitution. Had the commerce clause granted an exclusive power, so that thenceforth the states were utterly forbidden to regulate interstate commerce? Or did the states retain a concurrent power to make laws operating until Congress actually occupied the field? The Court of Errors—as New York then styled its highest court—sustained the monopoly. Speaking through the great Chief Justice (later Chancellor) Kent, the New York court laid down the following rule for reconciling state and federal power:

> Our safe rule of construction and of action is this, that if any given power was originally vested in this state, if it has not been exclusively ceded to Congress, or if the exercise of it has not been prohibited to the states, we may then go on in the exercise of the power until it comes practically in collision with the actual exercise of some congressional power. When that happens to be the case, the state authority will so far be controlled, but it will still be good in all those respects in which it does not absolutely contravene the provision of the paramount law.

A few years later the problem was raised again in the New York courts, in the suit of Ogden *v.* Gibbons. Ogden derived from Livingston and Fulton an assignment of their rights to operate a steam ferry between New York and Elizabethtown, N. J. Gibbons was operating his steamboats on the same run. Ogden obtained an injunction. Chancellor Kent repeated the earlier ruling: the state regulation was enforceable until it came into actual conflict with federal law. 4 Johnson Chancery 150 (1818), affirmed by the Court of Errors, 17 Johnson 488 (1820).

The Licensing Act. Congress had indeed passed a law, whose bearing on this case was, however, not clear. The Act of February 18, 1793, regulating the coasting trade and fisheries, had laid down what was required for a ship to be licensed for that trade. The form was: ". . . license is hereby granted for the said vessel to be employed in

carrying on the coasting trade." Gibbons' steamboats were licensed under this act.

The situation when the Steamboat Case arose. Gibbons appealed to the Supreme Court against this decision in Ogden's favor. It was the Court's first occasion to make an exposition of the commerce clause. The original analysis would powerfully influence subsequent decisions. Congress was in great doubt as to the extent of its power, particularly as to whether it might promote transportation by making internal improvements. In fact it was debating that perennial question at the moment Gibbons *v.* Ogden was being argued. The growing problem of state monopolies called for an authoritative solution. Massachusetts, New Hampshire, Pennsylvania, Georgia, Tennessee, and Louisiana had made exclusive grants similar to that by New York. New York's neighbors, New Jersey and Connecticut, had reacted violently against New York with retaliatory measures. Attorney General Wirt, in concluding his argument against the monopoly, said: "It is a momentous decision which this Court is called on to make. Here are three states almost on the eve of war."

Opinion

Mr. Chief Justice MARSHALL delivered the opinion of the Court. . . .

The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains are repugnant to the Constitution and laws of the United States.

They are said to be repugnant—

1. To that clause in the Constitution which authorizes Congress to regulate commerce.

2. To that which authorizes Congress to promote the progress of science and useful arts. . . .

As preliminary to the very able discussions of the Constitution which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these states, anterior to its formation. It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But, when these allied sovereigns converted their league into a government, when they converted their congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character in which the states appear underwent a change, the extent

of which must be determined by a fair consideration of the instrument by which that change was effected.

This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means for carrying all others into execution, Congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used is not extended to the powers which are conferred; nor is there one sentence in the Constitution, which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded. As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlighted patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well-settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which

might be beneficial to the grantor, if retained by himself, or which can enure solely to the benefit of the grantee; but is an investment of power for the general advantage, in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant. We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred.

The words are: "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the Constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in

forming it. The Convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late. . . .

The word used in the Constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."

To what commerce does this power extend? The Constitution informs us, to commerce "with foreign Nations, and among the several States, and with the Indian Tribes." It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other to which this power does not extend. It has been truly said that commerce, as the word is used in the Constitution, is a unit, every part of which is indicated by the term. If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied is to commerce "among the several States." The word "among" means intermingled with. A thing which is among others is intermingled with them. Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. . . . The completely internal commerce of a state, then, may be considered as reserved for the state itself.

But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several states. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in

every direction pass through the interior of almost every state in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the states, if a foreign voyage may commence or terminate at a port within a state, then the power of Congress may be exercised within a state.

This principle is, if possible, still more clear when applied to commerce "among the several States." They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other states lie between them. What is commerce "among" them; and how is it to be conducted? Can a trading expedition between two adjoining states commence and terminate outside of each? And if the trading intercourse be between two states remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the states must, of necessity, be commerce with the states. In the regulation of trade with the Indian tribes, the action of the law, especially when the Constitution was made, was chiefly within a state. The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several states. . . .

We are now arrived at the inquiry, what is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. . . .

The power of Congress, then, comprehends navigation within the limits of every state in the Union, so far as that navigation may be, in any manner, connected with "commerce with foreign Nations, or among the several States, or with the Indian Tribes." It may, of consequence, pass the jurisdictional line of New York,

and act upon the very waters to which the prohibition now under consideration applies.

But it has been urged with great earnestness that, although the power of Congress to regulate commerce with foreign nations, and among the several states, be co-extensive with the subject itself, and have no other limits than are prescribed in the Constitution, yet the states may severally exercise the same power within their respective jurisdictions. In support of this argument, it is said that they possessed it as an inseparable attribute of sovereignty before the formation of the Constitution, and still retain it, except so far as they have surrendered it by that instrument; that this principle results from the nature of the government, and is secured by the Tenth Amendment; that an affirmative grant of power is not exclusive, unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description.

The appellant, conceding these postulates, except the last, contends that full power to regulate a particular subject implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it. . . .

In discussing the question whether this power is still in the states, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry because it has been exercised, and the regulations which Congress deemed it proper to make are now in full operation. The sole question is, Can a state regulate commerce with foreign nations and among the states while Congress is regulating it? . . .

The act passed in 1803, prohibiting the importation of slaves into any state which shall itself prohibit their importation, implies, it is said, an admission that the states possessed the power to exclude or admit them; from which it is inferred that they possess the same power with respect to other articles.

If this inference were correct; if this power was exercised, not under any particular clause in the Constitution, but in virtue of a general right over the subject of commerce, to exist as long as the Constitution itself, it might now be exercised. Any state might now import African slaves into its own territory. But it is obvious that the power of the states over this subject, previous to

the year 1808, constitutes an exception to the power of Congress to regulate commerce, and the exception is expressed in such words as to manifest clearly the intention to continue the pre-existing right of the states to admit or exclude for a limited period. The words are, "the migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808." The whole object of the exception is to preserve the power to those states which might be disposed to exercise it; and its language seems to the Court to convey this idea unequivocally. The possession of this particular power then, during the time limited in the Constitution, cannot be admitted to prove the possession of any other similar power.

It has been said that the act of August 7, 1789, acknowledges a concurrent power in the states to regulate the conduct of pilots, and hence is inferred an admission of their concurrent right with Congress to regulate commerce with foreign nations and amongst the states. But this inference is not, we think, justified by the fact. Although Congress cannot enable a state to legislate, Congress may adopt the provisions of a state on any subject. When the government of the Union was brought into existence, it found a system for the regulation of its pilots in full force in every state. The act which has been mentioned adopts this system, and gives it the same validity as if its provisions had been specially made by Congress. But the act, it may be said, is prospective also, and the adoption of laws to be made in future presupposes the right in the maker to legislate on the subject.

The act unquestionably manifests an intention to leave this subject entirely to the states until Congress should think proper to interpose; but the very enactment of such a law indicates an opinion that it was necessary; that the existing system would not be applicable to the new state of things unless expressly applied to it by Congress. . . .

These acts were cited at the bar for the purpose of showing an opinion in Congress that the states possess, concurrently with the legislature of the Union, the power to regulate commerce with foreign nations and among the states. Upon reviewing them, we think they do not establish the proposition they were intended to prove. They show the opinion that the states retain powers enabling them to pass the laws to which allusion has been made, not that those laws proceed from the particular power which has been delegated to Congress.

It has been contended by the counsel for the appellant that, as the word to "regulate" implies in its nature full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.

There is great force in this argument, and the Court is not satisfied that it has been refuted.

Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the states may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the Constitution, the Court will enter upon the inquiry whether the laws of New York, as expounded by the highest tribunal of that state, have, in their application to this case, come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate Commerce with foreign Nations and among the several States," or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of Congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous. . . .

The questions . . . whether the conveyance of passengers be a part of the coasting trade, and whether a vessel can be protected in that occupation by a coasting license, are not, and cannot be, raised in this case. The real and sole question seems to be, whether a steam machine, in actual use, deprives a vessel of the privileges conferred by a license.

In considering this question, the first idea which presents itself, is that the laws of Congress for the regulation of commerce do not look to the principle by which vessels are moved. That subject is left entirely to individual discretion; and in that vast and complex system of legislative enactment concerning it, which embraces everything which the legislature thought it necessary to notice, there is not, we believe, one word respecting the peculiar principle by which vessels are propelled through

the water, except what may be found in a single act, granting a particular privilege to steamboats. With this exception, every act, either prescribing duties, or granting privileges, applies to every vessel, whether navigated by the instrumentality of wind or fire, of sails or machinery. The whole weight of proof, then, is thrown upon him who would introduce a distinction to which the words of the law give no countenance.

If a real difference could be admitted to exist between vessels carrying passengers and others, it has already been observed that there is no fact in this case which can bring up that question. And, if the occupation of steamboats be a matter of such general notoriety that the Court may be presumed to know it, although not specially informed by the record, then we deny that the transportation of passengers is their exclusive occupation. It is a matter of general history, that, in our western waters, their principal employment is the transportation of merchandise; and all know that in the waters of the Atlantic they are frequently so employed.

But all inquiry into this subject seems to the Court to be put completely at rest, by the act already mentioned, entitled, "An Act for the Enrolling and Licensing of Steamboats."

This Act authorizes a steamboat employed, or intended to be employed, only in a river or bay of the United States, owned wholly or in part by an alien, resident within the United States, to be enrolled and licensed as if the same belonged to a citizen of the United States.

This Act demonstrates the opinion of Congress, that steamboats may be enrolled and licensed, in common with vessels using sails. They are, of course, entitled to the same privileges, and can no more be restrained from navigating waters, and entering ports which are free to such vessels, than if they were wafted on their voyage by the winds, instead of being propelled by the agency of fire. The one element may be as legitimately used as the other, for every commercial purpose authorized by the laws of the Union; and the act of a state inhibiting the use of either to any vessel having a license under the act of Congress, comes, we think, in direct collision with that act.

As this decides the cause, it is unnecessary to enter in an examination of that part of the Constitution which empowers Congress to promote the progress of science and the useful arts. . . .

Reversed.

Mr. Justice JOHNSON.

The judgment entered by the Court in this cause has my entire approbation; but having adopted my conclusions on views of the subject materially different from those of my brethren, I feel it incumbent on me to exhibit those views. I have, also, another inducement. In questions of great importance and great delicacy, I feel my duty to the public best discharged by an effort to maintain my opinions in my own way. . . .

. . . The power of a sovereign over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom necessarily implies the power to determine what shall remain unrestrained, it follows that the power must be exclusive; it can reside in but one potentate; and hence the grant of this power carries with it the whole subject, leaving nothing for the state to act upon. . . .

It is impossible, with the views which I entertain of the principle on which the commercial privileges of the people of the United States among themselves rests, to concur in the view which this Court takes of the effect of the coasting license in this cause. I do not regard it as the foundation of the right set up in behalf of the appellant. If there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the states free from all invidious and partial restraints. And I cannot overcome the conviction, that if the licensing act was repealed tomorrow, the rights of the appellant to a reversal of the decision complained of, would be as strong as it is under this license. . . .

Comment

Marshall's opinion is much longer than the above extract. Just as in McCulloch *v.* Maryland, he responded to the many points made in the argument at the bar, which had extended over six days. Attention should be focused, however, on a few controlling points. First, what is "commerce"? Counsel for the monopoly defined it as "the exchange of one thing for another, the interchange of commodities; trade or traffic." Their opponents said, "It always implies intercommunication and intercourse." Marshall gives the word its largest scope: traffic in commodities, yes; navigation, yes, certainly; but more than that, "commercial intercourse . . . in all its branches." And what commerce is "among the several states"? Note carefully Marshall's gloss on these words: it embraces "that commerce which concerns

more states than one." The Chief Justice is looking into the future; he does not purpose to restrain Congress by any artificially narrow construction. Congress is competent to deal with those concerns "which affect the states generally." And what is the power "to regulate"? Again Marshall takes care not to prejudice the future. It is the power "to prescribe the rule by which commerce is to be governed." The power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution." As to foreign commerce, our history from the days of the embargo and nonintercourse acts of the Napoleonic period has established a practical construction that the power to regulate foreign commerce includes the power to prohibit. But as to interstate commerce, the Justices have at times held that the power to regulate is a power to promote and foster—but not to prohibit the passage of child-made goods, or to prescribe a retirement system for workers employed by the railroads. Such qualifications as these are nowhere to be found in Marshall's exposition of what it means "to regulate."

Exclusive or concurrent power? One should scan the opinion, too, to see what Marshall said on that most controverted question, whether the commerce power is exclusive or concurrent. Was the New York monopoly bad simply because it operated to restrain interstate commerce, encroaching upon a field which belonged entirely to Congress? Or was it bad only because it collided with a coasting license granted under the Act of Congress of 1793? Here for once the Chief Justice's language becomes a little indefinite. But do not suppose for a moment that Marshall's mind was vague. He knew exactly what he was doing. Holding, as the majority did, that Gibbons' license under the act was positive authority to navigate freely the waters of the United States, it was unnecessary to rule upon the question whether the state exclusion would have been invalid as in conflict with the commerce clause had Congress remained silent. Nevertheless, Marshall did not wish by any narrow restriction of the Court's ruling to encourage the idea that the states had concurrent power over interstate commerce. So he runs over the contending arguments, admits that the states retain internal police powers which may have a considerable effect upon commerce, puts forward Webster's contention that as the power to regulate implies "full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing," and then stops short with the remark that "There is great force to this argument, and the Court is not satisfied that it has been refuted." Since, however, Congress had really occupied the field by its Act of 1793, the conclusion was placed on that ground. The Court's decree is explicit that the monopoly is bad because in conflict with the federal statute.

Justice Johnson's opinion. The concurring opinion of Justice John-

son is one of the most curious aspects of the case. William Johnson, Judge of the Supreme Court of South Carolina, had been appointed to the Supreme Court of the United States in 1804, his age then being only 32. This was Jefferson's first appointment, and he had taken care to select a Republican who would, he trusted, somewhat counteract Marshall's influence within the Court. Jefferson had encouraged Justice Johnson to write his own opinions, supposing that this would draw some strength away from the Chief Justice. Of all of Marshall's colleagues, Johnson seems to have been the one who most successfully maintained his own identity. And here we find him delivering a solo opinion which differs from that of Marshall—by explicitly taking the higher nationalist ground that the power of Congress is exclusive and that the state monopoly was invalid without invoking the Act of 1793! It is reasonable to suppose that the Chief was very well pleased with this result. Coming from a South Carolina Jeffersonian, the conclusion that Congress had exclusive power over interstate commerce (which seems to have been Marshall's own view) would be far more persuasive among strict constructionists than any pronouncement from a Chief Justice whose nationalism was notorious.

A welcome decision. For once Marshall had delivered a judgment which was received with acclaim by a grateful country. The prevalence of invidious state legislation had threatened a return to the commercial confusion which the Constitution was intended to correct. By the Court's decision these state barriers were struck down, special privilege was defeated, and the nation's commerce was instantly quickened.

COOLEY *v.* BOARD OF WARDENS OF THE PORT OF PHILADELPHIA

12 Howard 299, 13 L.Ed. 996 (1852).

On Writ of Error to the Supreme Court of Pennsylvania.

Introduction

The judgment in Gibbons *v.* Ogden had staked out a completely adequate field for the commerce power of Congress. It had not settled the question whether the states might legislate for any portion of that field which Congress had not actually occupied. That question was not a matter of a merely doctrinal difference between state rights and high-toned Federalism. It was involved in a number

of very practical problems. Were the states free to construct local improvements in navigable waters? What of a bridge over one of the great rivers? While land travel, presently by railroad, would be facilitated, the upper reaches of the stream would be barred to all boats which could not clear the bridge. Take a state such as New York, containing a great port of entry—what measures of self-protection might it impose upon the stream of immigrants as they landed on the dock? New England states were passing legislation to restrict the traffic in liquor—could they apply their prohibition laws to liquor shipped from out of state? These issues proved somewhat perplexing, and, though the Justices might even be agreed in their results, they differed widely in their reasoning. Some, like Story, J., insisted that the commerce power belonged exclusively to Congress. Some, like Justice Daniel of Virginia, would give a maximum scope to state laws. Some would say that the state law in question could be sustained because it was not really a regulation of commerce but rather a measure of local police which affected commerce only incidentally. The Justices were badly in need of a sound principle. It was not until 1852, when Justice Curtis wrote his great opinion in the Cooley Case, that the Court finally arrived at a satisfactory analysis of this major public problem.

Marshall had had an opportunity to work out a solution, but for some reason had let it pass. In Willson *v.* Blackbird Creek Marsh Co., 2 Pet. 245 (1829), the Delaware legislature had authorized the owners of marshland to dam Blackbird Creek; Willson's sloop broke the dam, and when he was sued for damages he replied that the dam had obstructed a navigable waterway and, consistently with the commerce clause, could not validly have been authorized by Delaware. He relied upon Gibbons *v.* Ogden as affording a conclusive defense. If constitutional law were merely a matter of formal logic, unaffected by considerations of magnitude and degree, it would sound persuasive to say, If New York may not close a waterway by a paper barrier, may Delaware do so by logs and stone? But on the other hand, must the state stand idly by until the Congress at Washington gets around to draining its swamps? If the purpose of the state's legislation were a material consideration, the New York monopoly was aimed at restricting commerce between the states, whereas Delaware was merely seeking a local improvement. Marshall could have made this little incident the occasion for another great opinion; but he chose to treat it in a few short paragraphs in which he said as little as possible. He took notice of the marshy shores of Delaware, and observed that no doubt the dam had benefited property and health.

> If Congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small nav-

> igable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern states, we should feel not much difficulty in saying that a state law coming in conflict with such act would be void. But Congress has passed no such act.

"Under all the circumstances of the case," the Court did not think that Delaware's action could "be considered as repugnant to the power to regulate commerce in its dormant state." Why not? The Chief did not see fit to explain. He did not even mention the fact that the same act of Congress on which the monopoly was broken in Gibbons *v.* Ogden was present too in this case: Willson's sloop also had been licensed under the federal law.

No doubt it is well that Marshall attempted no rationale. For in 1829 the Justices had not yet thought their way through this problem of federalism. When the answer was worked out, in 1852, it was certainly wiser than anything that could have been produced in Marshall's day.

Opinion

Mr. Justice CURTIS delivered the opinion of the Court.

These cases are . . . actions to recover half-pilotage fees under the 29th section of the act of the legislature of Pennsylvania, passed on the second day of March, 1803. The plaintiff in error alleges that the highest court of the state has decided against a right claimed by him under the Constitution of the United States. That right is to be exempted from the payment of the sums of money demanded, pursuant to the state law above referred to, because that law contravenes several provisions of the Constitution of the United States.

The particular section of the state law drawn in question is as follows: "That every ship or vessel arriving from or bound to any foreign port or place, and every ship or vessel of the burden of seventy-five tons or more, sailing from or bound to any port not within the river Delaware, shall be obliged to receive a pilot. And it shall be the duty of the master of every such ship or vessel, within thirty-six hours next after the arrival of such ship or vessel at the city of Philadelphia, to make report to the master-warden of the name of such ship or vessel, her draught of water, and the name of the pilot who shall have conducted her to the port. And when any such vessel shall be outward-bound, the master of such vessel shall make known to the wardens the name of such vessel, and of the pilot who is to con-

duct her to the capes, and her draught of water at that time. And it shall be the duty of the wardens to enter every such vessel in a book to be by them kept for that purpose, without fee or reward. And if the master of any ship or vessel shall neglect to make such report, he shall forfeit and pay the sum of sixty dollars. And if the master of any such ship or vessel shall refuse or neglect to take a pilot, the master, owner or consignee of such vessel shall forfeit and pay to the warden aforesaid a sum equal to the half-pilotage of such ship or vessel, to the use of the Society for the Relief, etc., to be recovered as pilotage in the manner hereinafter directed: Provided always, that where it shall appear to the warden that, in case of an inward-bound vessel, a pilot did not offer before she had reached Reedy Island; or, in case of an outward-bound vessel, that a pilot could not be obtained for twenty-four hours after such vessel was ready to depart, the penalty aforesaid, for not having a pilot, shall not be incurred." It constitutes one section of "An Act to Establish a Board of Wardens for the Port of Philadelphia, and for the Regulation of Pilots and Pilotages, &c.," and the scope of the Act is, in conformity with the title, to regulate the whole subject of the pilotage of that port.

We think this particular regulation concerning half-pilotage fees is an appropriate part of a general system of regulations of this subject. Testing it by the practice of commercial states and countries legislating on this subject, we find it has usually been deemed necessary to make similar provisions. Numerous laws of this kind are cited in the learned argument of the counsel for the defendant in error; and their fitness, as part of a system of pilotage, in many places, may be inferred from their existence in so many different states and countries. . . .

It remains to consider the objection that it is repugnant to the third clause of the eighth section of the first Article. "The Congress shall have Power . . . to regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes."

That the power to regulate commerce includes the regulation of navigation, we consider settled. And when we look to the nature of the service performed by pilots, to the relations which that service and its compensations bear to navigation between the several states, and between the ports of the United States and foreign countries, we are brought to the conclusion, that the regulation of the qualifications of pilots, of the modes and

times of offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they may demand, and of the penalties by which their rights and duties may be enforced, do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the Constitution.

The power to regulate navigation is the power to prescribe rules in conformity with which navigation must be carried on. It extends to the persons who conduct it, as well as to the instruments used. Accordingly, the first Congress assembled under the Constitution passed laws requiring the masters of ships and vessels of the United States to be citizens of the United States, and established many rules for the government and regulation of officers and seamen. 1 Stat. at L. 55, 131. These have been from time to time added to and changed, and we are not aware that their validity has been questioned. . . .

. . . a majority of the Court are of opinion that a regulation of pilots is a regulation of commerce, within the grant to Congress of the commercial power, contained in the third clause of the eighth section of the first Article of the Constitution.

It becomes necessary, therefore, to consider whether this law of Pennsylvania, being a regulation of commerce, is valid.

The Act of Congress of the 7th of August, 1789, section 4, is as follows:

"That all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the states, respectively, wherein such pilots may be, or with such laws as the states may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress."

If the law of Pennsylvania, now in question, had been in existence at the date of this Act of Congress, we might hold it to have been adopted by Congress, and thus made a law of the United States, and so valid. Because this Act does, in effect, give the force of an act of Congress, to the then existing state laws on this subject, so long as they should continue unrepealed by the state which enacted them.

But the law on which these actions are founded was not enacted till 1803. What effect then can be attributed to so much of the Act of 1789, as declares, that pilots shall continue to be regulated in conformity "with such laws as the states may re-

spectively hereafter enact for the purpose, until further legislative provision shall be made by Congress?"

If the states were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this Act could not confer upon them power thus to legislate. If the Constitution excluded the states from making any law regulating commerce, certainly Congress cannot regrant, or in any manner re-convey to the states that power. And yet this Act of 1789 gives its sanction only to laws enacted by the states. This necessarily implies a constitutional power to legislate; for only a rule created by the sovereign power of a state acting in its legislative capacity, can be deemed a law enacted by a state; and if the state has so limited its sovereign power that it no longer extends to a particular subject, manifestly it cannot, in any proper sense, be said to enact laws thereon. Entertaining these views, we are brought directly and unavoidably to the consideration of the question, whether the grant of the commercial power to Congress, did *per se* deprive the states of all power to regulate pilots. This question has never been decided by this Court, nor, in our judgment, has any case depending upon all the considerations which must govern this one, come before this Court. The grant of commercial power to Congress does not contain any terms which expressly exclude the states from exercising an authority over its subject matter. If they are excluded, it must be because the nature of the power, thus granted to Congress, requires that a similar authority should not exist in the states. If it were conceded on the one side, that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the states, probably no one would deny that the grant of the power to Congress, as effectually and perfectly excludes the states from all future legislation on the subject, as if express words had been used to exclude them. And on the other hand, if it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the states, then it would be in conformity with the contemporary exposition of the Constitution (*Federalist*, No. 32), and with the judicial construction, given from time to time by this Court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress, did not imply a prohibition on the states to exercise the same power; that it is not the mere existence of such a power,

but its exercise by Congress, which may be incompatible with the exercise of the same power by the states, and that the states may legislate in the absence of congressional regulations.

The diversities of opinion, therefore, which have existed on this subject, have arisen from the different views taken of the nature of this power. But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity which alone can meet the local necessities of navigation.

Either absolutely to affirm, or deny, that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain. The Act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such that until Congress should find it necessary to exert its power, it should be left to the legislation of the states; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulation, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits.

Viewed in this light, so much of this Act of 1789 as declares that pilots shall continue to be regulated "by such laws as the states may respectively hereafter enact for that purpose," instead of being held to be inoperative, as an attempt to confer on the states a power to legislate, of which the Constitution had deprived them, is allowed an appropriate and important signification. It manifests the understanding of Congress, at the outset of the government, that the nature of this subject is not

such as to require its exclusive legislation. The practice of the states, and of the national government, has been in conformity with this declaration, from the origin of the national government to this time; and the nature of the subject, when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants. How, then, can we say that, by the mere grant of power to regulate commerce, the states are deprived of all the power to legislate on this subject, because from the nature of the power the legislation of Congress must be exclusive. This would be to affirm that the nature of the power is, in this case, something different from the nature of the subject to which, in such case, the power extends, and that the nature of the power necessarily demands, in all cases, exclusive legislation by Congress, while the nature of one of the subjects of that power, not only does not require such exclusive legislation, but may be best provided for by many different systems enacted by the states, in conformity with the circumstances of the ports within their limits. In construing an instrument designed for the formation of a government, and in determining the extent of one of its important grants of power to legislate, we can make no such distinction between the nature of the power and the nature of the subject on which that power was intended practically to operate, nor consider the grant more extensive by affirming of the power, what is not true of its subject now in question.

It is the opinion of a majority of the Court that the mere grant to Congress of the power to regulate commerce did not deprive the states of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several states. To these precise questions, which are all we are called on to decide, this opinion must be understood to be confined. It does not extend to the question what other subjects, under the commercial power, are within the exclusive control of Congress, or may be regulated by the states in the absence of all congressional legislation; nor to the general question, how far any regulation of a subject by Congress, may be deemed to operate as an exclusion of all legislation by the states upon the same subject. We decide the precise questions before us, upon what we deem sound principles, applicable to

this particular subject in the state in which the legislation of Congress has left it. We go no further.

We have not adverted to the practical consequences of holding that the states possess no power to legislate for the regulation of pilots, though in our apprehension these would be of the most serious importance. For more than sixty years this subject has been acted on by the states, and the systems of some of them created and of others essentially modified during that period. To hold that pilotage fees and penalties demanded and received during that time, have been illegally exacted, under color of void laws, would work an amount of mischief which a clear conviction of constitutional duty, if entertained, must force us to occasion, but which could be viewed by no just mind without deep regret. Nor would the mischief be limited to the past. If Congress were now to pass a law adopting the existing state laws, if enacted without authority, and in violation of the Constitution, it would seem to us to be a new and questionable mode of legislation.

If the grant of commercial power in the Constitution has deprived the states of all power to legislate for the regulation of pilots, if their laws on this subject are mere usurpations upon the exclusive power of the general government, and utterly void, it may be doubted whether Congress could, with propriety, recognize them as laws, and adopt them as its own acts; and how are the legislatures of the states to proceed in future, to watch over and amend these laws, as the progressive wants of a growing commerce will require, when the members of those legislatures are made aware that they cannot legislate on this subject without violating the oaths they have taken to support the Constitution of the United States?

We are of opinion that this state law was enacted by virtue of a power, residing in the state to legislate; that it is not in conflict with any law of Congress; that it does not interfere with any system which Congress has established by making regulations, or by intentionally leaving individuals to their own unrestricted action; that this law is therefore valid, and the judgment of the Supreme Court of Pennsylvania in each case must be affirmed.

Mr. Justice McLEAN and Mr. Justice WAYNE dissented; and Mr. Justice DANIEL, although he concurred in the judgment of the Court, yet dissented from its reasoning.

Mr. Justice McLEAN: . . .

That a state may regulate foreign commerce, or commerce among the states, is a doctrine which has been advanced by individual judges of this Court; but never before, I believe, has such a power been sanctioned by the decision of this Court. In this case, the power to regulate pilots is admitted to belong to the commercial power of Congress; and yet it is held, that a state, by virtue of its inherent power, may regulate the subject, until such regulation shall be annulled by Congress. This is the principle established by this decision. Its language is guarded, in order to apply the decision only to the case before the Court. But such restrictions can never operate, so as to render the principle inapplicable to other cases. And it is in this light that the decision is chiefly to be regretted. . . .

From this race of legislation between Congress and the states, and between the states, if this principle be maintained, will arise a conflict similar to that which existed before the adoption of the Constitution. . . .

. . . Congress, to whom the subject peculiarly belongs, should have been applied to, and no doubt it would have adopted the act of the state.

Mr. Justice DANIEL: . . .

The true question here is, whether the power to enact pilot laws is appropriate and necessary, or rather more appropriate and necessary to the state or the federal governments. It being conceded that this power has been exercised by the states from their very dawn of existence; that it can be practically and beneficially applied by the local authorities only; it being conceded, as it must be, that the power to pass pilot laws, as such, has not been in any express terms delegated to Congress, and does not necessarily conflict with the right to establish commercial regulations, I am forced to conclude that this is an original and inherent power in the states, and not one to be merely tolerated, or held subject to the sanction of the federal government.

Comment

One notes at once the point about delegation of powers. If the Constitution stripped the states of the power to legislate on pilotage, Congress cannot give it back to them. So we cannot say that Pennsylvania had power to pass its Act of 1803 because Congress had conferred it by the Act of 1789.

Higher and lower branches of commerce. When Justice Curtis united a majority of the Justices on the view that the power over interstate and foreign commerce embraces various subjects, some of a nature to demand a single uniform rule, others susceptible of local control, he was developing a theme which had already been heard in the Supreme Court chamber. Daniel Webster, in arguing Gibbons *v.* Ogden, had said:

> It should be repeated, that the words used in the Constitution, "to regulate commerce," are so very general and extensive that they might be construed to cover a vast field of legislation, part of which has always been occupied by state laws; and therefore the words must have a reasonable construction, and the power should be considered as exclusively vested in Congress, so far, and so far only, as the nature of the power requires.

Webster contended that New York's monopoly law had reached into the "higher branches of commercial regulation" which "must be exclusively committed to a single hand." 9 Wheat. 1, 14. Justice Woodbury, who was Justice Curtis' immediate predecessor on the Court, had developed the idea in separate opinions in the License Cases, 5 How. 504, 624 (1847), and the Passenger Cases, 7 How. 283, 559 (1849).

The Court's problem is one of deciding what to do in the silence of Congress. For if Congress has exerted its constitutional power to regulate a particular matter, that regulation prevails, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Constitution, Art. VI, sec. 2. But if Congress has not spoken, and a state enacts some law which amounts to a regulation of interstate or foreign commerce, what then? Well, the Court looks to the nature of the thing regulated: is this the sort of matter which is national in scope, which calls for a single rule, a uniform system or plan of regulation? If so, then the state regulation must fall. Looking back, we see that the New York steamboat monopoly presented just such a situation. Evidently, the free movement of ships from port to port was a matter of the highest national concern. But if, on the other hand, the state is making a reasonable effort to meet some local necessity, and it appears to the Court that "superior fitness and propriety" is on the side of "different systems of regulation, drawn from local knowledge and experience, and conformed to local wants," then the state regulation will be sustained—until, of course, Congress breaks its silence. Of this the dam on Blackbird Creek is an excellent example.

Justice Curtis did not produce a calculating machine for deciding cases automatically. What he worked out was a method of analysis. Justices continue to differ as to whether a given matter would better be classed in the "higher branch" of commerce or in the lower. Decisions thenceforth were to turn, however, not on dogma about state

rights or exclusive powers, but on an appreciation of the elements in the particular type of situation.

State bridge laws. Let us apply the analysis to some specific problems. Take first the question of a state bridge over a navigable waterway. The Court had had much trouble with cases concerning Virginia's bridge over the Ohio at Wheeling, New York's bridge over the Hudson at Albany, and two bridges over the Passaic River at Newark, N. J. In 1866 it decided Gilman *v.* Philadelphia, 3 Wall. 713, wherein the state's action in authorizing a bridge over the Schuylkill was challenged by the owner of an upstream wharf. The majority of the Court observed that perhaps the traffic on the bridge would be greater than would ever be transported on the water. It could well be left to the municipal power to weigh the relative advantages, subject always to the paramount authority of Congress. This conclusion stood the test of time and became the settled view of the Court. Willamette Iron Bridge Co. *v.* Hatch, 125 U.S. 1 (1888). But as commerce develops, matters which once seemed to be primarily of local interest will come to have a substantial national importance. So it has proved with bridges and dams. The power of Congress, once dormant, has been awakened. By a series of acts, beginning in 1890, Congress forbade any obstruction of the navigable waters until the plans have been approved by the Chief of Engineers and the Secretary of War.

State regulation of railroads. Consider now some of the problems presented by the railroads. In a number of cases decided together in 1877, the Court had sustained the power of the state to fix rates. Munn *v.* Illinois, 94 U.S. 113, and cases decided with it. Among the early abuses was one whereby a railroad would set its charges unduly low at points served by some competing carrier and make up by exorbitant rates at points where there was no competition; thus the charge might be more for a short than for a long haul. Illinois forbade this practice, its statute applying to interstate as well as intrastate hauls. Could the act be sustained? Certainly the evil was great, and Congress had done nothing about it. In Wabash, St. L. & P. Ry. *v.* Illinois, 118 U.S. 557 (1886), the majority, per Justice Miller, felt clear, however, that this was a matter of "a general and national character" which could not "be safely and wisely remitted to local rules"; the problem called for the action of Congress, "whose enlarged view of the interests of all the states, and of the railroads concerned, better fits it to establish just and equitable rules." As we look back it seems clear that the majority were right: it would not be good government to allow the several states each to give commands about transportation extending over other states. The Court announced this decision on October 25, 1886. Congress, which had long been debating what it ought to do, promptly rose to its responsibility and passed the Interstate Commerce Act of February 4, 1887—the first of a series of statutes which have brought more and more aspects of

interstate transportation under federal control administered by the Interstate Commerce Commission. (The development of this legislation is traced in Swisher, *American Constitutional Development.*)

The operation of the national transportation system involves many "matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress." So spoke Justice Stone in California *v.* Thompson, 313 U.S. 109 (1941), where the state was upheld in requiring agents for transportation over the highways to procure a license and give bond for the performance of the contracts they negotiated. It seemed an apt measure for protecting the public from fraud. In an early case the state was sustained in licensing trainmen in order to test their skill and fitness. Smith *v.* Alabama, 124 U.S. 465 (1888). It may impose measures for the safety of its inhabitants, as by limiting reasonably the speed of trains within city limits, Erb *v.* Morasch, 177 U.S. 584 (1900), cf. Seaboard Air Line Ry. *v.* Blackwell, 244 U.S. 310 (1917), and by requiring that grade crossings be eliminated, Erie R. Co. *v.* Board of Public Utility Commissioners, 254 U.S. 394 (1921). Full-train-crew laws have been sustained where the burden seemed not to be excessive—even though the Justices may have surmised that the legislature was seeking to please the railway brotherhoods as much as to promote safety. Missouri Pacific R. Co. *v.* Norwood, 283 U.S. 249 (1931). But the Court is mindful that, "where Congress has not acted, this Court, and not the state legislature, is the final arbiter of the competing demands of state and national interests." Stone, C.J., in Southern Pacific Co. *v.* Arizona, 325 U.S. 761 (1945). Arizona's Train Limit Law of 1912 restricted railroad trains to 14 passenger or 70 freight cars. Well over 90 percent of the traffic in Arizona was interstate. In many ways the law impeded efficient operation of an interstate system—increasingly so in the period of national emergency. The Southern Pacific had to haul 30 percent more trains than would otherwise have been necessary. The trial court found that the tendency was actually to increase the number of accidents. This law was a far greater burden to interstate commerce than the full-train-crew laws. "Here examination of all the relevant factors makes it plain that the state interest is outweighed by the interest of the nation in an adequate, economical, and efficient railway transportation system, which must prevail," the Chief Justice concluded. Justices Black and Douglas dissented.

Interstate motor traffic. It is a universal observation that commercial activities once primarily local in nature tend to develop into matters of national concern over which Congress presently establishes some administrative control. Motor transport is an example. As national highways came into being, motor carriers both of passengers and of freight began to operate in interstate commerce. The states were

permitted to impose fees with a view to meeting the cost of supervising and maintaining the highways. Hendrick *v.* Maryland, 235 U.S. 610 (1915); Interstate Transit, Inc. *v.* Lindsey, 283 U.S. 183 (1931)—$500 per year for each motorbus seating more than 20 passengers; Morf *v.* Bingaman, 298 U.S. 407 (1936)—$5 to $7.50 each for cars transported across state for sale. But charges which were far in excess of the cost of services rendered, Ingles *v.* Morf, 300 U.S. 290 (1937)—another "caravan" tax of $15 per car—or which bore no fair relationship to the use of the highways, have been struck down as undue burdens on interstate commerce, McCarroll *v.* Dixie Greyhound Lines, 309 U.S. 176 (1940). An interstate carrier might be refused permission to operate over a certain highway if the state authority found the road already congested to the point of hazard. Bradley *v.* Public Utilities Commission, 289 U.S. 92 (1933). But where the state authority's refusal of a permit was based not upon safety but upon the view that existing facilities were adequate to the public need, its action was held obnoxious to the commerce clause. Buck *v.* Kuykendall, 267 U.S. 307 (1925). In that case Buck wished to operate a bus line from Seattle to Portland. Oregon granted a license; Washington refused in order to prevent further competition. The Court thought that while the state might prescribe how the highways were to be used, it ought not to be allowed to say who might use them in interstate commerce.

If, then, interstate motor carriage was to be limited to operations as to which there was a public convenience and necessity, Congress must establish some control. By the Motor Carrier Act of 1935, passed after ten years of agitation, the Interstate Commerce Commission was given authority to grant licenses upon a proper showing by the applicant, to fix maximum and minimum rates, and to establish requirements with respect to qualifications and maximum hours of service of employees, and safety of operation and equipment. One significant difference between transportation by motor vehicle and by rail is that the former flows over highways which the state builds, owns and maintains, and for whose safe and economical administration it has a primary concern. It was in consideration of this fact that the Court sustained South Carolina in excluding from its highways all trucks of a width greater than 90 inches or whose loaded weight exceeded ten tons. South Carolina State Highway Dept. *v.* Barnwell Bros., 303 U.S. 177 (1938).

Accommodation of state to federal regulations. The Motor Carrier Act gave the ICC power to make regulations for ". . . safety of operation and equipment"; then it authorized it to "investigate and report on the need for federal regulation of the sizes and weight of motor vehicles . . ." Had Congress so far occupied the field as to exclude Pennsylvania from enforcing its statute against motor vehicles carrying any other vehicle over the head of the driver? Clearly, Con-

gress excepted "sizes and weight" from the scope of the ICC's authority to make regulations for safety. And, thought the Court, Pennsylvania's statute limited height and regulated the distribution of weight, and so touched a matter of "sizes and weight" over which Congress had refrained from assuming control until it should be better informed. Local regulations for the safety of the highways were to be sustained until Congress showed a clear intention of displacing them; so Pennsylvania's law stood. Maurer *v.* Hamilton, 309 U.S. 598 (1940).

This illustration is recounted because it is typical of a problem which arises with increasing frequency—the accommodation of state regulation with a federal statute which only partially occupies the field. It is a "salutary principle," said Chief Justice Stone, "that Congress, in enacting legislation within its constitutional authority, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless the state act, in terms or in its practical administration, conflicts with the act of Congress or plainly and palpably infringes its policy." Cloverleaf Butter Co. *v.* Patterson, 315 U.S. 148, 170 (1942), where the Chief Justice spoke for four dissenters. But the principle itself is firmly established. Of all the great opinions on the commerce clause, Professor Wechsler tells us in his study of "Stone and the Constitution," that in the Cooley Case came closest to expressing the Chief Justice's own thought. [46 *Columbia Law Review* (September 1946) 764, 785.]

Freedom of passage from state to state. One might not suppose that a discussion of the commerce clause would be the appropriate context in which to record that the Court held invalid a California statute which forbade the bringing into the state of any nonresident indigent person. A number of states had adopted so-called "anti-Okie" statutes of this sort. The Court directed that the case be reargued, to make sure that everything that could be said in favor of such legislation was heard. Then by a unanimous decision the act was held unconstitutional. Edwards *v.* State of California, 314 U.S. 160 (1941). Five of the Justices, per Byrnes, J., objected to the law as an unconstitutional burden on interstate commerce; Douglas, Black, Murphy, and Jackson, JJ., thought it more accurate to say that it was a denial of one of the privileges of federal citizenship, as guaranteed by the Fourteenth Amendment. The Court took note of California's contention that the huge influx of migrants had produced staggering problems of health, morals, and especially finance. Justice Byrnes said:

> It is frequently the case that a state might gain a momentary respite from the pressure of events by the simple expedient of shutting its gates to the outside world. But, in the words of Mr. Justice Cardozo: "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was

framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." Baldwin *v.* Seelig, 294 U.S. 511, 523.

NATIONAL LABOR RELATIONS BOARD *v.* JONES & LAUGHLIN STEEL CORPORATION

301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937).

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Introduction

The triumph of the Union in the Civil War enhanced tremendously the authority of the federal government and set the country upon a course of expanding national action. Litigation over the commerce clause, prior to that time and indeed throughout the nineteenth century, dealt largely with the validity of state regulations and taxes. But as Congress came to preside with more and more assurance over commerce among the states, the constitutionality of its measures was raised before the Supreme Court.

The Lottery Case and beyond. We may note at the outset a line of decisions sustaining Congress in forbidding the use of the channels of interstate commerce for the accomplishment of evil. The parent case is Champion *v.* Ames, 188 U.S. 321 (1903), sustaining an act of 1895 which penalized the sending of lottery tickets in interstate commerce or through the post. The Court heard argument three times, and divided five to four. The Court was unanimous in sustaining the Mann Act of 1910, prohibiting the interstate transportation of women for immoral purposes. Hoke *v.* United States, 227 U.S. 308 (1913). This statute has been given a wide construction to reach private doings in which there was no element of commercialized vice, Caminetti *v.* United States, 242 U.S. 470 (1917), and even to the case of polygamous Fundamentalists who took their plural wives across a state line, Cleveland *v.* United States, 329 U.S. 14 (1946). The power to ban the interstate shipment of adulterated food and drugs, Hipolite Egg Co. *v.* United States, 220 U.S. 45 (1911), and prizefight films, Weber *v.* Freed, 239 U.S. 325 (1915), was easily sustained. The National Motor Vehicle Theft Act of 1919, making it

a federal offense to take a stolen car across a state line, was upheld in Brooks *v.* United States, 267 U.S. 432 (1925), as was the comparable "Lindbergh Act" of 1932 against kidnapers in Gooch *v.* United States, 297 U.S. 124 (1936). This type of federal legislation has become so familiar that it would seem immaterial at this date to make the point that the activities which Congress has forbidden would not in themselves do injury to the channels of interstate transportation, as might a defective brake or coupler or an improperly prepared shipment of explosives. Congress is using its commerce power to keep people safe and good, and these regulations of commerce are regarded as none the worse because it invoked its commerce power for that single purpose. Looking back, one may surmise that the Puritan tradition assisted greatly in establishing this construction of the commerce clause.

Doctrine of the Shreveport Case. The Interstate Commerce Act provided that the ICC was not to regulate traffic wholly within a state. But it is impossible in practice to maintain a rigid dichotomy between interstate and intrastate commerce, as the following incident illustrates. Shreveport, La., and Houston and Dallas, Tex., were business competitors in the area which lies between them. The freight rate on wagons from Dallas to Marshall, Tex., as fixed by the state railroad commission, was 36.8 cents for the distance of 147.7 miles. To ship wagons from Shreveport to Marshall, 42 miles, the charge was 56 cents, as fixed by the ICC. The first-class rate from Houston to Lufkin, Tex., was 50 cents per 100 pounds; the interstate rate for the shorter haul from Shreveport to Lufkin was 69 cents. Obviously, the lower rates fixed by the Texas commission operated exactly as a protective tariff and placed interstate commerce between Shreveport and points in Texas at a serious disadvantage. Is it within the power of the federal government to control interstate rates to the extent necessary to remove such unjust differences? Hughes, J., speaking for the Court, said:

> Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the state, and not the nation, would be supreme within the national field. The Shreveport Case, 234 U.S. 342 (1914).

The case just cited establishes a very important principle, applicable in a wide variety of situations: when the interstate and the intrastate aspects of commerce "are so mingled together that the supreme authority, the Nation, cannot exercise complete effective control over interstate commerce without incidental regulation of intrastate com-

merce, such incidental regulation is not an invasion of state authority . . ." Taft, C.J., in Railroad Commission of Wis. *v.* Chicago, B. & Q. R. Co., 257 U.S. 563, 588 (1922). Recall in this connection that the Cooley Case permitted state legislation to operate within the inferior branch of interstate commerce until Congress occupies the field. As we have just seen, Congress may to some extent regulate local commerce. In accommodating constitutional doctrine to the practical necessities of our federal system, the Justices have stuck "not to the letter, but to the spirit; for the letter killeth, but the spirit giveth life."

Early antitrust cases. "Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business." So spoke Justice Holmes in Swift & Company *v.* United States, 196 U.S. 375 (1905), where the Court held the Sherman Anti-Trust Act of 1890 applicable to a combination of packers to monopolize commerce in fresh meat. In the first great case under that statute, charging a combination to monopolize the business of refining sugar, the Court had expressed the narrow view that "The relief of the citizens of each state from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left [by the Constitution] with the states to deal with . . . Commerce succeeds to manufacture, and is not a part of it." United States *v.* E. C. Knight Co., 156 U.S. 1 (1895), per Fuller, C.J.; Harlan, J., dissented vigorously. This disappointing decision (and other illiberal rulings made at the same term) produced a storm of protest from the country. In subsequent cases, notably Addystone Pipe & Steel Company *v.* United States, 175 U.S. 211 (1899), the Court took pains to explain that the E. C. Knight Case was to be confined to its peculiar facts, nothing having been shown there of any "transaction in the nature of interstate commerce."

The "stream of commerce." Since 1877, when Munn *v.* Illinois, 94 U.S. 113, and the other "Granger Cases" were decided, it had been clear that grain elevators, railroads, and comparable businesses such as stockyards were subject to state regulation as to their rates and practices. But the state might fail to take effective action to correct the public abuses which a concentration of economic power made possible. Perhaps the concentration was a combination of activities so far-flung that no single state could reach out to cope with the phenomenon. However this might be, the farmer or rancher who committed his grain or cattle to the eastbound stream of commerce, presently to find himself shortchanged by the practices prevailing in the stockyard or on the board of trade at some focal point on the route, looked to Congress to assure him a square deal. The interest of the consuming public was in accord. Congress reacted to impose federal regulation by the Packers and Stockyards Act of 1921 and the Grain Futures Act of 1922, sustained by the Supreme Court in Stafford *v.*

Wallace, 258 U.S. 495 (1922), and Board of Trade *v.* Olsen, 262 U.S. 1 (1923), respectively. Going back to the Swift Case cited above, the Court recognized "the great central fact that such streams of commerce from one part of the country to another, which are ever flowing, are in their very essence the commerce among the states and with foreign nations, which historically it was one of the chief purposes of the Constitution to bring under national protection and control." The Court would not defeat that purpose "by a nice and technical inquiry into the non-interstate character of some of its necessary incidents and facilities, when considered alone and without reference to their association with the movement of which they were an essential but subordinate part." 258 U.S. at 518, 519.

The commerce power and the Depression. The Great Depression which began in 1929 gave poignant meaning to Marshall's phrase, "that commerce which concerns more states than one." Our entire economy was rapidly engulfed, and no state could close its bulkheads and work out its own salvation. Baldwin *v.* Seelig, 294 U.S. 511 (1935). Only the national government had power and resources adequate to executing a plan for recovery or for administering relief to the victims. The National Industrial Recovery Act of 1933 was the major feature in the great plan. It was not the fantastic dream of a "brain trust." It was, rather, a fusion of a number of ideas which had for some time been current. One element was the trade-association movement which, with the blessing of the Department of Commerce, had rapidly developed after World War I. Members in a given line of trade would form an association to deal with the government and the public, to promote trade through market research and advertising, to standardize and simplify products, to establish trade practices and stigmatize certain methods of competition as "unfair," etc. Another idea was the relaxation of the antitrust law so that men of business could unite to maintain prices. This objective of the Chamber of Commerce of the United States and the National Association of Manufacturers gained in acceptability as paralysis crept through the economy. And if these measures were taken to benefit business, comparable provisions should be made for labor. Out of this thinking sprang the Act of 1933, with its scheme of "codes of fair competition" and price fixing administered by a National Recovery Administration, its lifting of the threat of the antitrust law, and, for labor, minimum wages, maximum hours, and the guarantee of collective bargaining. The nation's business, big and little, was caught up within the scheme.

The government was not precipitate in seeking a test of the constitutionality of the Act. By the time the Supreme Court was ready to render judgment in the Schechter Case, 295 U.S. 495 (1935), the NRA was overtaken by mounting infirmities. Evidently the country had no clear notion as to where it wanted to go with this movement toward trade cartelization; and our capacity for so tremendous an

administration proved unequal to the demands of the occasion. Perhaps the Court was not unaware of these trends when, on May 27, 1935, it unanimously held the Act invalid. Undue delegation of legislative power and a reach beyond the uttermost limits of interstate commerce were the vices for which it was struck down.

The National Labor Relations Act. On July 5, 1935, Congress passed the National Labor Relations Act. It declared that employees have the right to self-organization and to collective bargaining and made it an offense for an employer to interfere with this right, to dominate any labor organization, to discriminate because of union membership, or to refuse to bargain collectively. Thus the Act preserved and carried forward some of the rights which labor had enjoyed under NIRA so long as that Act had been enforced.

The "yellow-dog" contract. The National Labor Relations (or Wagner) Act was sustained by the Supreme Court in the Jones & Laughlin judgment, set out below. Before coming to that, however, one further element in the problem should be explained—the matter of the "yellow-dog" contract. That is—or was—an agreement whereby the worker was required to bind himself not to be a member of a trade union while remaining in the employment. How this worked in practice is illustrated in the Hitchman Case, 245 U.S. 229 (1917). The Hitchman Company operated coal mines in West Virginia. It did not like the United Mine Workers and would not employ any miner unless he agreed not to join that union so long as he remained in Hitchman's employ. Almost all West Virginia mines were nonunion. The entire industry in Ohio, Indiana, and Illinois was completely unionized. The unorganized condition in West Virginia kept down labor costs there and in consequence limited what the union could obtain from their employers in the North, who had to meet West Virginia competition. Quite naturally, the union had a direct interest in unionizing the West Virginia field to put an end to this undercutting. The union's representatives knew that Hitchman's employees had accepted the employer's yellow-dog stipulation. But the employment was from day to day: Hitchman was free to discharge without notice, and the miner was free to quit whenever he chose. What the UMW organizer asked was that they agree that at a future date, when a sufficient number of miners had decided to make that choice, they would exercise their right to quit and thereupon exercise their right to join the union. After twice hearing argument and then holding the case under advisement for a whole year, the Supreme Court, per Pitney, J., held that the conduct of the UMW representatives was unlawful. Justice Brandeis wrote a strong dissent in which Holmes and Clarke, JJ., concurred. No question of the Constitution or of an Act of Congress was involved: the case came before federal judges only by reason of diversity of citizenship. The decision had great influence upon state courts. In this state of affairs, the employers' power to impose the

"yellow-dog" contract proved an effective means of keeping workers unorganized.

Legislation against "yellow-dog" contracts. Legislation, federal and state, to put labor unions in a less vulnerable position in this respect had been held unconstitutional. In Adair *v.* United States, 208 U.S. 161 (1908), the Court struck down a federal statute making it an offense for an interstate carrier to discharge an employee because of union membership. The Court said this took the carrier's liberty without due process of law, and moreover was no proper regulation of interstate commerce. McKenna and Holmes, JJ., dissented. In Coppage *v.* Kansas, 236 U.S. 1 (1915), the Court pronounced a like judgment upon a state statute making it an offense to require an agreement not to join a union as a condition of employment. The Court, speaking through Justice Pitney, held this a taking of the employer's "freedom of contract." Holmes, Day, and Hughes, JJ., dissented. The employer's "freedom" thus protected was, of course, freedom to require that those who worked for him should not be free to join a union.

The Norris-La Guardia Act, passed by Congress with only a few adverse votes and signed by President Hoover on March 23, 1932, made "yellow-dog" contracts unenforceable in the federal courts; also it greatly limited the use of the injunction in labor disputes, another grievance of which organized labor had justly complained.

Sustaining of the Railway Labor Act. As a means toward securing uninterrupted railroad service, Congress passed the Railway Labor Act of 1926, and strengthened its terms in 1934. That legislation required railroad management to bargain collectively with the authorized representatives of their employees. Its provisions were sustained by the Court, without dissent, in Texas & N.O.R. Co. *v.* Brotherhood of Railway and Steamship Clerks, 281 U.S. 548 (1930), and Virginian Ry. Co. *v.* System Federation No. 40, 300 U.S. 515 (1937). The Court brushed aside the Adair and Coppage Cases as "inapplicable." In the Virginian Railway Case the Court held that the Act was constitutionally applicable to "back shop" workers who repaired the locomotives and cars which moved in interstate commerce: the preservation of good labor relations there had a substantial relation to the uninterrupted movement of transportation.

A fortnight after the Virginian Railway Case, the Court decided the Jones & Laughlin Case, upholding the National Labor Relations Act in its provision for collective bargaining.

Opinion

Mr. Chief Justice HUGHES delivered the opinion of the Court.

In a proceeding under the National Labor Relations Act of 1935 the National Labor Relations Board found that the respond-

ent, Jones & Laughlin Steel Corporation, had violated the Act by engaging in unfair labor practices affecting commerce. The proceeding was instituted by the Beaver Valley Lodge No. 200, affiliated with the Amalgamated Association of Iron, Steel and Tin Workers of America, a labor organization. The unfair labor practices charged were that the corporation was discriminating against members of the union with regard to hire and tenure of employment, and was coercing and intimidating its employees in order to interfere with their self-organization. The discriminatory and coercive action alleged was the discharge of certain employees.

The National Labor Relations Board, sustaining the charge, ordered the corporation to cease and desist from such discrimination and coercion, to offer reinstatement to ten of the employees named, to make good their losses in pay, and to post for 30 days notices that the corporation would not discharge or discriminate against members, or those desiring to become members, of the labor union. As the corporation failed to comply, the Board petitioned the Circuit Court of Appeals to enforce the order. The court denied the petition, holding that the order lay beyond the range of federal power. 83 F.(2d) 998. We granted certiorari.

The scheme of the National Labor Relations Act—which is too long to be quoted in full—may be briefly stated. The first section sets forth findings with respect to the injury to commerce resulting from the denial by employers of the right of employees to organize and from the refusal of employers to accept the procedure of collective bargaining. There follows a declaration that it is the policy of the United States to eliminate these causes of obstruction to the free flow of commerce. The Act then defines the terms it uses, including the terms "commerce" and "affecting commerce." It creates the National Labor Relations Board and prescribes its organization. It sets forth the right of employees to self-organization and to bargain collectively through representatives of their own choosing. It defines "unfair labor practices." It lays down rules as to the representation of employees for the purpose of collective bargaining. The Board is empowered to prevent the described unfair labor practices affecting commerce and the Act prescribes the procedure to that end. The Board is authorized to petition designated courts to secure the enforcement of its orders. The findings of the Board as to the facts, if supported by evidence, are to be conclusive. If either party on

application to the court shows that additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearings before the Board, the court may order the additional evidence to be taken. Any person aggrieved by a final order of the Board may obtain a review in the designated courts with the same procedure as in the case of an application by the Board for the enforcement of its order. The Board has broad powers of investigation. Interference with members of the Board or its agents in the performance of their duties is punishable by fine and imprisonment. Nothing in the Act is to be construed to interfere with the right to strike. There is a separability clause to the effect that, if any provision of the Act or its application to any person or circumstances shall be held invalid, the remainder of the Act or its application to other persons or circumstances shall not be affected. The particular provisions which are involved in the instant case will be considered more in detail in the course of the discussion.

The procedure in the instant case followed the statute. The labor union filed with the Board its verified charge. The Board thereupon issued its complaint against the respondent alleging that its action in discharging the employees in question constituted unfair labor practices affecting commerce within the meaning of section 8, subdivisions (1) and (3), and section 2, subdivisions (6) and (7), of the Act. Respondent, appearing specially for the purpose of objecting to the jurisdiction of the Board, filed its answer. Respondent admitted the discharges, but alleged that they were made because of inefficiency or violation of rules or for other good reasons and were not ascribable to union membership or activities. As an affirmative defense respondent challenged the constitutional validity of the statute and its applicability in the instant case. Notice of hearing was given and respondent appeared by counsel. The Board first took up the issue of jurisdiction, and evidence was presented by both the Board and the respondent. Respondent then moved to dismiss the complaint for lack of jurisdiction and, on denial of that motion, respondent in accordance with its special appearance withdrew from further participation in the hearing. The Board received evidence upon the merits and at its close made its findings and order.

Contesting the ruling of the Board, the respondent argues (1) that the Act is in reality a regulation of labor relations and not of interstate commerce; (2) that the Act can have no application

to the respondent's relations with its production employees because they are not subject to regulation by the federal government; and (3) that the provisions of the Act violate section 2 of Article III and the Fifth and Seventh Amendments of the Constitution of the United States.

The facts as to the nature and scope of the business of the Jones & Laughlin Steel Corporation have been found by the Labor Board, and, so far as they are essential to the determination of this controversy, they are not in dispute. The Labor Board has found: The corporation is organized under the laws of Pennsylvania and has its principal office at Pittsburgh. It is engaged in the business of manufacturing iron and steel in plants situated in Pittsburgh and near-by Aliquippa, Pa. It manufactures and distributes a widely diversified line of steel and pig iron, being the fourth largest producer of steel in the United States. With its subsidiaries—19 in number—it is a completely integrated enterprise, owning and operating ore, coal and limestone properties, lake and river transportation facilities, and terminal railroads located at its manufacturing plants. It owns or controls mines in Michigan and Minnesota. It operates four ore steamships on the Great Lakes, used in the transportation of ore to its factories. It owns coal mines in Pennsylvania. It operates towboats and steam barges used in carrying coal to its factories. It owns limestone properties in various places in Pennsylvania and West Virginia. It owns the Monongahela connecting railroad which connects the plants of the Pittsburgh works and forms an interconnection with the Pennsylvania, New York Central, and Baltimore & Ohio Railroad systems. It owns the Aliquippa & Southern Railroad Company, which connects the Aliquippa works with the Pittsburgh & Lake Erie, part of the New York Central system. Much of its product is shipped to its warehouses in Chicago, Detroit, Cincinnati, and Memphis—to the last two places by means of its own barges and transportation equipment. In Long Island City, New York, and in New Orleans it operates structural steel fabricating shops in connection with the warehousing of semifinished materials sent from its works. Through one of its wholly owned subsidiaries it owns, leases, and operates stores, warehouses, and yards for the distribution of equipment and supplies for drilling and operating oil and gas wells and for pipe lines, refineries, and pumping stations. It has sales offices in 20 cities in the United States and a wholly owned subsidiary which is devoted exclusively to distributing its product in

Canada. Approximately 75 percent of its product is shipped out of Pennsylvania.

Summarizing these operations, the Labor Board concluded that the works in Pittsburgh and Aliquippa "might be likened to the heart of a self-contained, highly integrated body. They draw in the raw materials from Michigan, Minnesota, West Virginia, Pennsylvania in part through arteries and by means controlled by the respondent; they transform the materials and then pump them out to all parts of the nation through the vast mechanism which the respondent has elaborated."

To carry on the activities of the entire steel industry, 33,000 men mine ore, 44,000 men mine coal, 4000 men quarry limestone, 16,000 men manufacture coke, 343,000 men manufacture steel, and 83,000 men transport its product. Respondent has about 10,000 employees in its Aliquippa plant, which is located in a community of about 30,000 persons. . . .

First. The scope of the Act.—The Act is challenged in its entirety as an attempt to regulate all industry, thus invading the reserved powers of the states over their local concerns. It is asserted that the references in the Act to interstate and foreign commerce are colorable at best; that the Act is not a true regulation of such commerce or of matters which directly affect it but on the contrary has the fundamental object of placing under the compulsory supervision of the federal government all industrial labor relations within the nation. The argument seeks support in the broad words of the preamble (section 1) and in the sweep of the provisions of the Act, and it is further insisted that its legislative history shows an essential universal purpose in the light of which its scope cannot be limited by either construction or by the application of the separability clause.

If this conception of terms, intent and consequent inseparability were sound, the Act would necessarily fall by reason of the limitation upon the federal power which inheres in the constitutional grant, as well as because of the explicit reservation of the Tenth Amendment. The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several States" and the internal concerns of a state. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system. . . .

We think it clear that the National Labor Relations Act may

be construed so as to operate within the sphere of constitutional authority. The jurisdiction conferred upon the Board, and invoked in this instance, is found in section 10 (*a*), which provides:

"Sec. 10 (*a*). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce."

The critical words of this provision, prescribing the limits of the Board's authority in dealing with the labor practices, are "affecting commerce." The Act specifically defines the "commerce" to which it refers (section 2 (6)):

"The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several states, or between the District of Columbia or any territory of the United States and any state or other territory, or between any foreign country and any state, territory, or the District of Columbia, or within the District of Columbia or any territory, or between points in the same state but through any other state or any territory or the District of Columbia or any foreign country."

There can be no question that the commerce thus contemplated by the Act (aside from that within a territory or the District of Columbia) is interstate and foreign commerce in the constitutional sense. The Act also defines the term "affecting commerce" (section 2 (7)):

"The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes. It is the effect upon commerce, not the source of the injury, which is the criterion. Whether or not particular action does affect commerce in such a close and intimate fashion as to

be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise. We are thus to inquire whether in the instant case the constitutional boundary has been passed.

Second. The unfair labor practices in question.—The unfair labor practices found by the Board are those defined in section 8, subdivisions (1) and (3). These provide:

"Sec. 8. It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

"(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . ."

Section 8, subdivision (1), refers to section 7, which is as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Thus, in its present application, the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.

That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority. Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer. . . . Fully recognizing the legality of collective action on the part of employees in order to safeguard their proper

interests, we said that Congress was not required to ignore this right but could safeguard it. Congress could seek to make appropriate collective action of employees an instrument of peace rather than of strife. We said that such collective action would be a mockery if representation were made futile by interference with freedom of choice. Hence the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, "instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both." . . .

Third. The application of the Act to employees engaged in production.—The principle involved.—Respondent says that whatever may be said of employees engaged in interstate commerce, the industrial relations and activities in the manufacturing department of respondent's enterprise are not subject to federal regulation. The argument rests upon the proposition that manufacturing in itself is not commerce. [Citing cases.]

The government distinguishes these cases. The various parts of respondent's enterprise are described as interdependent and as thus involving "a great movement of iron ore, coal and limestone along well-defined paths to the steel mills, thence through them, and thence in the form of steel products into the consuming centers of the country—a definite and well-understood course of business." It is urged that these activities constitute a "stream" or "flow" of commerce, of which the Aliquippa manufacturing plant is the focal point, and that industrial strife at that point would cripple the entire movement. Reference is made to our decision sustaining the Packers and Stockyards Act. Stafford *v.* Wallace, 258 U.S. 495. The Court found that the stockyards were but a "throat" through which the current of commerce flowed and the transactions which there occurred could not be separated from that movement. Hence the sales at the stockyards were not regarded as merely local transactions, for while they created "a local change of title" they did not "stop the flow," but merely changed the private interests in the subject of the current. . . . Applying the doctrine of Stafford *v.* Wallace, the Court sustained the Grain Futures Act of 1922 with respect to transactions on the Chicago Board of Trade, although these transactions were "not in and of themselves interstate commerce." Congress had found that they had become "a constantly recurring burden and obstruction to that commerce." Board of Trade *v.* Olsen, 262 U.S. 1, 32.

Respondent contends that the instant case presents material distinctions. Respondent says that the Aliquippa plant is extensive in size and represents a large investment in buildings, machinery and equipment. The raw materials which are brought to the plant are delayed for long periods and after being subjected to manufacturing processes, "are changed substantially as to character, utility and value." The finished products which emerge "are to a large extent manufactured without reference to pre-existing orders and contracts and are entirely different from the raw materials which enter at the other end." Hence respondent argues that "If importation and exportation in interstate commerce do not singly transfer purely local activities into the field of congressional regulation, it should follow that their combination would not alter the local situation."

We do not find it necessary to determine whether these features of defendant's business dispose of the asserted analogy to the "stream of commerce" cases. The instances in which that metaphor has been used are but particular, and not exclusive, illustrations of the protective power which the government invokes in support of the present Act. The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation" for "its protection and advancement" . . . ; to adopt measures "to promote its growth and insure its safety" . . . ; "to foster, protect, control and restrain." . . . That power is plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it." . . . Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national

and what is local and create a completely centralized government. The question is necessarily one of degree. . . .

That intrastate activities, by reason of close and intimate relation to interstate commerce, may fall within federal control is demonstrated in the case of carriers who are engaged in both interstate and intrastate transportation. There federal control has been found essential to secure the freedom of interstate traffic from interference or unjust discrimination and to promote the efficiency of the interstate service. Shreveport Case (Houston, E. & W. T. R. Co. *v.* United States) 234 U.S. 342; Railroad Commission *v.* Chicago, B. & Q. R. Co., 257 U.S. 563. It is manifest that intrastate rates deal *primarily* with a local activity. But in rate-making they bear such a close relation to interstate rates that effective control of the one must embrace some control over the other. Under the Transportation Act, 1920, Congress went so far as to authorize the Interstate Commerce Commission to establish a state-wide level of intrastate rates in order to prevent an unjust discrimination against interstate commerce. . . .

The close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local. This has been abundantly illustrated in the application of the Federal Anti-Trust Act. In the Standard Oil Co. Case, 221 U.S. 1, and American Tobacco Co. Case, 221 U.S. 106, that statute was applied to combinations of employers engaged in productive industry. . . .

Upon the same principle, the Anti-Trust Act has been applied to the conduct of employees engaged in production. . . .

It is thus apparent that the fact that the employees here concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practice involved. In the Schechter Case we found that the effect there was so remote as to be beyond the federal power. To find "immediacy or directness" there was to find it "almost everywhere," a result inconsistent with the maintenance of our federal system. In the Carter Case, 298 U.S. 238, [wherein the Bituminous Coal Conservation Act of 1935 was struck down] the Court was of the opinion that the provisions of the statute relating to production were invalid upon several grounds,—that there was improper delegation of legislative power, and that the requirements not only went beyond any sustainable measure of

protection of interstate commerce but were also inconsistent with due process. These cases are not controlling here.

Fourth. Effects of the unfair labor practice in respondent's enterprise.—Giving full weight to respondent's contention with respect to a break in the complete continuity of the "stream of commerce" by reason of respondent's manufacturing operations, the fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern. When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience.

Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances. The opinion in the case of Virginian Railway Co. *v.* System Federation No. 40, points out that, in the case of carriers, experience has shown that before the amendment, of 1934, of the Railway Labor Act, "when there was no dispute as to the organizations authorized to represent the employees and when there was a willingness of the employer to

meet such representative for a discussion of their grievances, amicable adjustment of differences had generally followed and strikes had been avoided." That, on the other hand, "a prolific source of dispute had been the maintenance by the railroads of company unions and the denial by railway management of the authority of representatives chosen by their employees." The opinion in that case also points to the large measure of success of the labor policy embodied in the Railway Labor Act. But with respect to the appropriateness of the recognition of self-organization and representation in the promotion of peace, the question is not essentially different in the case of employees in industries of such a character that interstate commerce is put in jeopardy from the case of employees of transportation companies. And of what avail is it to protect the facility of transportation, if interstate commerce is throttled with respect to the commodities to be transported!

These questions have frequently engaged the attention of Congress and have been the subject of many inquiries. The steel industry is one of the great basic industries of the United States, with ramifying activities affecting interstate commerce at every point. The government aptly refers to the steel strike of 1919-1920 with its far-reaching consequences. The fact that there appears to have been no major disturbance in that industry in the more recent period did not dispose of the possibilities of future and like dangers to interstate commerce which Congress was entitled to foresee and to exercise its protective power to forestall. It is not necessary again to detail the facts as to respondent's enterprise. Instead of being beyond the pale, we think that it presents in a most striking way the close and intimate relation which a manufacturing industry may have to interstate commerce and we have no doubt that Congress had constitutional authority to safeguard the right of respondent's employees to self-organization and freedom in the choice of representatives for collective bargaining.

Fifth. The means which the Act employs.—Questions under the due process clause and other constitutional restrictions.—Respondent asserts its right to conduct its business in an orderly manner without being subjected to arbitrary restraints. What we have said points to the fallacy in the argument. Employees have their correlative right to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. Restraint for the

purpose of preventing an unjust interference with that right cannot be considered arbitrary or capricious. . . .

The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer "from refusing to make a collective contract and hiring individuals on whatever terms" the employer "may by unilateral action determine." The Act expressly provides in section 9 (*a*) that any individual employee or a group of employees shall have the right at any time to present grievances to their employer. The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel. . . . The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion. The true purpose is the subject of investigation with full opportunity to show the facts. It would seem that when employers freely recognize the right of their employees to their own organizations and their unrestricted right of representation there will be much less occasion for controversy in respect to the free and appropriate exercise of the right of selection and discharge.

The Act has been criticized as one-sided in its application; that it subjects the employer to supervision and restraint and leaves untouched the abuses for which employees may be responsible; that it fails to provide a more comprehensive plan,—with better assurances of fairness to both sides and with increased chances of success in bringing about, if not compelling, equitable solutions of industrial disputes affecting interstate commerce. But we are dealing with the power of Congress, not with a particular policy or with the extent to which policy should go. We have frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach. The Constitution does not forbid "cautious advance, step by step," in dealing with the evils which are exhibited in activities within the range of legislative power. The question in such cases is whether

the legislature, in what it does prescribe, has gone beyond constitutional limits.

The procedural provisions of the Act are assailed. But these provisions, as we construe them, do not offend against the constitutional requirements governing the creation and action of administrative bodies. . . .

Respondent complains that the Board not only ordered reinstatement but directed the payment of wages for the time lost by the discharge, less amounts earned by the employee during that period. . . . It is argued that the requirement is equivalent to a money judgment and hence contravenes the Seventh Amendment with respect to trial by jury. The Seventh Amendment provides that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." . . .

The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit.

Our conclusion is that the order of the Board was within its competency and that the Act is valid as here applied. . . .

Reversed and remanded.

Mr. Justice MCREYNOLDS (Mr. Justice VAN DEVANTER, Mr. Justice SUTHERLAND, and Mr. Justice BUTLER concurring with him) dissented. . . .

Comment

Decision followed in other NLRB cases. On the same day the Court held the National Labor Relations Act constitutionally applicable to certain other types of commerce, on authority of the Jones & Laughlin decision: to the Fruehauf Trailer Company, 301 U.S. 49, whose factory was in Detroit and whose assembly, purchase, sale, and distribution operations extended far outside Michigan; and to the Friedman-Harry Marks Clothing Company of Virginia, 301 U.S. 58, which bought 99.57 percent of its raw materials outside that state and sold 82.8 percent of the garments it manufactured to out-of-state customers. No doubt the Court found it much easier, in steering past such close perils as the Schechter Case, to put Jones & Laughlin in the lead, with Fruehauf next, pulling Friedman-Harry Marks along

in their wake. Also decided on April 12, 1937, was Associated Press *v.* NLRB, 301 U.S. 103, holding the Act applicable to an instrumentality which gathers news throughout the world and distributes it to newspapers all over the United States and in foreign countries. A further contention based on the freedom of the press was rejected: that guarantee in the Bill of Rights did not protect the AP in discharging an editorial employee for exercising his right to join the American Newspaper Guild.

Subsequent adjudications have given the National Labor Relations Act a very wide application: Santa Cruz Packing Co. *v.* NLRB, 303 U.S. 453 (1938) where about 37 percent of the fruit and vegetables packed were shipped in interstate or foreign commerce; Consolidated Edison Co. *v.* NLRB, 305 U.S. 197 (1938), where a utility company in New York City provided electric current for interstate trains, passenger and freight terminals, interstate tunnels, telegraph and radio companies, steamship piers, lighthouses and beacons, and federal buildings; NLRB *v.* Fainblatt, 306 U.S. 601 (1939), where a "contract shop" manufactured garments for a clothing company doing interstate business in another state, the raw materials being supplied by the clothing company; NLRB *v.* Bradford Dyeing Assn., 310 U.S. 318 (1940), another processor, who dyed cloth for manufacturers mostly out-of-state; and Polish National Alliance *v.* NLRB, 322 U.S. 643 (1944), a life insurance business extending over many states.

UNITED STATES *v.* DARBY

312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941).

Appeal from the District Court of the United States for the Southern District of Georgia.

Introduction

The problem. This case illustrates a fundamental problem of government—Is it possible for the American people to establish desired standards of labor conditions throughout the nation-wide economy? In our constitutional system, this touches a matter which belongs to each state to handle in the first instance. Each state has set its own standards as to child labor, the protection of women in industry, safety in mines and factories, workmen's compensation for accidents, etc. But the industries in the several states are all competing in one great national market, so that low standards in one state give its industries an advantage over their rivals in other states. Shall the greater part

of America be prevented from having the labor conditions it desires because a few states are willing to allow their people to be exploited? For many years it appeared that we were caught in an impasse; much ingenious constitutional engineering was directed to a search for some escape, not excluding the possibility of constitutional amendment.

Freedom of trade throughout the United States. We start with the observation that this country, thanks to its Constitution as judicially expounded, is one great free trade area. As Mr. Justice Frankfurter remarked in Freeman *v.* Hewitt, 329 U.S. 252 (1946):

> . . . [By a] course of adjudication unbroken through the Nation's history, [the Court] applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the states, but by its own force created an area of trade free from interference by the states. . . . A state is . . . precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between states.

Drummers who go about selling goods in interstate commerce may not be taxed on their occupation. Robbins *v.* Shelby County, 120 U.S. 489 (1887); Nippert *v.* City of Richmond, 327 U.S. 416 (1946). Goods moving in interstate commerce do not pay the local property tax. Coe *v.* Errol, 116 U.S. 517 (1886); Champlain Co. *v.* Brattleboro, 260 U.S. 366 (1922). Goods held for the moment in storage at some halt in the course of their transportation, as for example where they are accumulated awaiting the arrival of a ship, are not liable to state taxation. Carson Petroleum Co. *v.* Vial, 279 U.S. 95 (1929). The Court has been astute in striking down trade barriers however camouflaged—such as Florida's "inspection fee" on imported cement, Hale *v.* Bimco Trading, Inc., 306 U.S. 375 (1939); Minnesota's requirement that all meat sold be inspected by a Minnesota inspector within 24 hours of slaughter, Minnesota *v.* Barber, 136 U.S. 313 (1890); and Louisiana's shrimp shell "conservation" law that shrimp caught in her waters must be shelled there before being shipped, Foster-Fountain Packing Co. *v.* Haydel, 278 U.S. 1 (1928). Questions of the validity of state legislation, especially tax measures, have proved difficult and have produced a confusing body of case law; but as Mr. Justice Frankfurter pointed out in the passage quoted above, the Justices have always been at one on the ultimate principle that there must be no parochial restraints upon the flow of commerce.

Differing standards of social legislation. Historically, the Northern, and particularly the New England, states were the nation's workshop. The South was devoted to agriculture. The New South that arose after the Civil War began to develop industries. Labor was

cheap, and docile. Public administration remained rudimentary. The Northern states, as their industrialism became mature, enacted and enforced relatively high standards of labor legislation. In part this was an expression of what the community regarded as fair and decent and humane. In part it was attributable to the growing solidarity of the workers and to the increasing importance of the labor vote in politics. Presently capital began to flow to the South to exploit the advantages of cheap labor, low taxation, and slack factory laws.

An illustration. A simple tale will serve to illustrate. In the latter 1920's the writer traveled by car from Massachusetts to an industrial section of the South. It was a moment when New England was generally alarmed over whether it could maintain its standards of administration without at the same time killing off its industries. As the writer approached the Mason-Dixon line he observed on a billboard a huge advertisement placed there by a Southern chamber of commerce: "Come South" it urged. In one corner was a spirited colonial scene, a party of cavaliers looking out from a summit in the Appalachians; on the other side was a contemporary view, new factories throwing smoke across the sky. The attractions held out to industrial management were listed—among them, "Enthusiastic Labor." The writer continued southward and a few days later was winding through the hills of the back country. Slowing at a sharp bend in the road, he was accosted by a pitiable figure, the semblance of a man, who offered for sale a little basket of gnarled apples. How did this creature come to be in this remote place? His story was that he had worked as a hand in a Southern mill; he had been crippled in an industrial accident, and when he had gotten out of the hospital he came up here and sold apples picked in an abandoned orchard. Did he receive no compensation under the employers' liability law? No, he had never heard of such a thing. He had been crippled and then turned out upon the world and that was the end of his story. Labor such as this was cheap, even "enthusiastic." Now an industrial civilization involves much wear and tear on its human stock; pretty evidently, reasonable measures of conservation and reparation should be enforced, and the cost passed along to the consuming public. Putting the matter in less than its highest terms, the nation should conserve its human resources at least as carefully as its natural resources; it should include in the ultimate price of the product the economic value of wasted lives as well as the allowance for depreciation of plant and equipment. This is simply prudent long-range accounting if nothing more.

Federal child-labor statute before the Court. In 1916 Congress enacted that commodities produced in factories where children under 14 were employed, or in mines employing children under 16, should not be shipped in interstate or foreign commerce. Dagenhart, the father of two minor sons employed in a cotton mill in North Carolina, chal-

lenged the constitutionality of the Act. (It takes no stretch of the imagination to surmise that some interest far more substantial than the nominal litigant bore the burden of this suit.) In Hammer *v.* Dagenhart, 247 U.S. 251 (1918), the Supreme Court held the statute invalid as not within the commerce power of the Congress. "The grant of power to Congress over the subject of interstate commerce," said Justice Day for the majority, "was . . . not to give it authority to control the states in their exercise of the police power over local trade and manufacture"; it was "not intended to destroy the local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution," or "to give to Congress a general authority to equalize . . . conditions" with respect to labor legislation. [For the chronology of the insinuations and dicta of certain Justices, and the doubts inspired by certain writers, leading to the denial, for a season, that the power to regulate interstate commerce includes the power to prohibit it, see Professor Edward S. Corwin, *The Commerce Power versus States Rights,* Princeton University Press (1936). Mr. Corwin's argument, relevant to the judicial doctrine prevailing at the moment he wrote, was this: let us turn away from judge-made negation and go "back to the Constitution."]

Justice Holmes' dissenting opinion. Justice Holmes dissented in an opinion in which McKenna, Brandeis, and Clarke, JJ., concurred. They thought the question was governed by Champion *v.* Ames, 188 U.S. 321 (1903), where a prohibition on the interstate movement of lottery tickets had been sustained, and by cases upholding similar statutes aimed at the movement of women for immoral purposes, of liquor, of adulterated food and drugs, etc.

> . . . if there is any matter upon which civilized countries have agreed—far more unanimously than they have with regard to intoxicants and some other matters over which this country is now emotionally aroused—it is the evil of premature and excessive child labor. . . . It is not for this Court to pronounce when prohibition is necessary—to say that it is permissible as against strong drink but not as against the product of ruined lives. . . . The Act does not meddle with anything belonging to the states. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the states but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the states. Instead of being encountered by a prohibitive tariff at her boundaries the state encounters the public policy of

> the United States which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the nation as a whole. . . . The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking state. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command.

Critique. North Carolina, as the law then stood, permitted its children to go to work at the age of 12. As the majority of the Justices saw it, Congress intruded to say that they must wait until they were 14. In repelling this intrusion, the Court thought it struck a blow for the freedom of the people in the various states to work out their own local affairs. Was this an accurate analysis? Look away from North Carolina to the many other states which, with at least equal propriety, kept their children out of the factories until a later age. Yet North Carolina's child-made goods flowed into the vast national market, competing with the goods of other states which chose to maintain higher standards. Pretty clearly those other states would be under some economic compulsion to hold down their legislation to meet North Carolina's competition. (The problem, of course, was larger than the case of child labor; convict-made goods furnished another example.) If Congress could not lift North Carolina, then Massachusetts and New York were held down. In the light of a realistic analysis, the doctrine of Hammer *v.* Dagenhart results in frustration rather than liberation of the greater part of the country. Of course, Massachusetts and New York and Ohio may not erect barriers to exclude North Carolina's products even from their own limits: that would be a patently invalid regulation of interstate commerce.

The situation after Hammer *v.* Dagenhart was rather marvelous. The states might not exclude goods from other states: that would invade the field which belongs to Congress. Congress might not forbid interstate shipment of child-made goods: that would invade the field which belongs to the states. Twenty-two years later, Hammer *v.* Dagenhart was overruled in United States *v.* Darby. But in the meantime much thought was given to solving the resulting constitutional problem.

The liquor cases. Years earlier Iowa had enacted, as a part of a scheme of prohibition, that carriers should not bring liquor into the state. This was held invalid under the commerce clause. Bowman *v.* Chicago & N.W. Ry. Co., 125 U.S. 465 (1888). Iowa also forbade the sale of liquor within the state. Some patriotic citizens of Keokuk, being of German background and wishing to celebrate the Fourth of July, 1888, in a fitting manner, placed an order with John Leisy to procure $540 worth of beer from the Leisy brewery at Peoria, Ill. Constable Hardin seized the consignment on its arrival in Keokuk.

The Supreme Court said that the Iowa law was constitutionally inapplicable to the original packages until after their first sale within the state. Leisy *v.* Hardin, 135 U.S. 100 (1890). By the Wilson Act of 1890, Congress promptly declared that liquor shipped into any state for use therein should upon arrival be subject to the local law. (In the silence of Congress, the Court had thought that state regulations should not be allowed to operate on original packages from out-of-state until they had been sold; now Congress had broken its silence and declared its will that the state laws should operate upon liquor as soon as it had arrived within the state for use there.) The Wilson Act was upheld. *In re* Rahrer, 140 U.S. 545 (1891). In the Webb-Kenyon Act of 1913, Congress went further and actually prohibited the shipment of liquor into any state to be used in violation of state law. It was held that Congress had not exceeded its power. Clark Distilling Co. *v.* Western Maryland R. Co., 242 U.S. 311 (1917).

Cases on convict-made goods. Why could Congress not take the same steps to enable the states to protect their local markets from the economic menace of goods made under substandard labor conditions in other states? Take the case of prison-made goods. Some states used their convicts to make commodities which were then sold into the interstate market. Twenty-one states, containing well over half the nation's total population, sought to protect their free labor from such competition. (299 U.S. at 352.) Congress came to the aid of the greater number by passing the Hawes-Cooper Act of 1929, which was a Wilson Act on the subject of prison-made goods: it subjected them on arrival to the state law. This was sustained in Whitfield *v.* Ohio, 297 U.S. 431 (1936), where Ohio was punishing Whitfield for selling shirts made by convicts in Alabama. Congress went further and actually prohibited the shipment of convict-made goods into any state to be used in violation of state law. This was the Ashurst-Sumners Act of 1935 (modeled on the Webb-Kenyon Act of 1913). Again it was held that Congress had not exceeded its power. This was Kentucky Whip & Collar Co. *v.* Illinois Central R. Co., 299 U.S. 334 (1937), dealing with harness manufactured with convict labor in Kentucky.

By this time Congress had discovered a path through the constitutional maze. Doubtless child-made goods could have been reached in the same way as liquor and convict-made goods. But by the time the convict-made goods cases had been decided, the entire outlook on labor standards had changed.

The Depression brings a floor under labor conditions. The Great Depression turned the world upside down. When jobs were few and employers asked their employees to share the work, a limitation of hours and a ban on child labor needed no argument. The fixing of minimum wages won approbation as a means of increasing purchasing power and so creating a demand for goods. (Management wished to

fix prices, too.) The NRA codes of 1933 to 1935 contained all of these features. After the NRA was laid low by the Schechter decision, Congress attacked the problem from the point of view of the government as a purchaser: the Walsh-Healy Act of 1936 laid down a whole labor code which must be observed by all who accepted contracts from the government. This in itself protected perhaps 2,000,000 workers. The National Labor Relations Act of 1935 had made a frontal attack through the commerce clause to establish collective bargaining in industry; and this was sustained by the Supreme Court in the Jones & Laughlin Case on April 12, 1937. On March 27, 1937, the Court had decided, overruling evil precedents of many years' standing, that minimum wage legislation could be sustained against the challenge that, by limiting "freedom of contract," it denied due process of law. West Coast Hotel Co. *v.* Parrish, 300 U.S. 379. It now seemed constitutionally feasible to establish fair labor standards by a carefully drafted statute based upon the commerce power.

This was done by the Fair Labor Standards Act of 1938, which the Darby Case sustains. Observe that the Court clearly establishes the view that the power to regulate commerce is not merely a power to promote and foster, but is also—as Holmes, J., had argued in the Child Labor Case—a power to prohibit.

Opinion

Mr. Justice STONE delivered the opinion of the Court.

The two principal questions raised by the record in this case are, first, whether Congress has constitutional power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum, and, second, whether it has power to prohibit the employment of workmen in the production of goods "for interstate commerce" at other than prescribed wages and hours. A subsidiary question is whether in connection with such prohibitions Congress can require the employer subject to them to keep records showing the hours worked each day and week by each of his employees including those engaged "in the production and manufacture of goods to wit, lumber, for 'interstate commerce.'" . . .

The Fair Labor Standards Act set up a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions as respects wages and hours which fail to conform to standards set up by the Act. Its purpose, as we

judicially know from the declaration of policy in section 2(*a*) of the Act, and the reports of Congressional committees proposing the legislation, is to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard labor conditions among the workers of the several states. The Act also sets up an administrative procedure whereby those standards may from time to time be modified generally as to industries subject to the Act or within an industry in accordance with specified standards, by an administrator acting in collaboration with "Industry Committees" appointed by him. . . .

The indictment charges that appellees are engaged, in the state of Georgia, in the business of acquiring raw materials, which they manufacture into finished lumber with the intent, when manufactured, to ship it in interstate commerce to customers outside the state, and that they do in fact so ship a large part of the lumber so produced. There are numerous counts charging appellees with the shipment in interstate commerce from Georgia to points outside the state of lumber in the production of which, for interstate commerce, appellees have employed workmen at less than the prescribed minimum wage or more than the prescribed maximum hours without payment to them of any wage for overtime. Other counts charge the employment by appellees of workmen in the production of lumber for interstate commerce at wages of less than 25 cents an hour or for more than the maximum hours per week without payment to them of the prescribed overtime wage. Still another count charges appellees with failure to keep records showing the hours worked each day a week by each of their employees as required by section 11(*c*) and the regulation of the administrator, Title 29, Ch. 5, Code of Federal Regulations, Part 516, and also that appellees unlawfully failed to keep such records of employees engaged "in the production and manufacture of goods, to-wit lumber, for interstate commerce." . . .

The case comes here on assignments by the Government that the district court erred in so far as it held that Congress was without constitutional power to penalize the acts set forth in the indictment, and appellee seeks to sustain the decision below on

the grounds that the prohibition by Congress of those acts is unauthorized by the commerce clause and is prohibited by the Fifth Amendment. . . . we . . . confine our decision to the validity and construction of the statute.

The prohibition of shipment of the proscribed goods in interstate commerce. Section 15(*a*) (1) prohibits, and the indictment charges, the shipment in interstate commerce, of goods produced for interstate commerce by employees whose wages and hours of employment do not conform to the requirements of the Act. Since this section is not violated unless the commodity shipped has been produced under labor conditions prohibited by section 6 and section 7, the only question arising under the commerce clause with respect to such shipments is whether Congress has the constitutional power to prohibit them.

While manufacture is not of itself interstate commerce, the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce. The power to regulate commerce is the power "to prescribe the rule by which commerce is to be governed." Gibbons *v.* Ogden, 9 Wheat. 1, 196. It extends not only to those regulations which aid, foster, and protect the commerce, but embraces those which prohibit it. It is conceded that the power of Congress to prohibit transportation in interstate commerce includes noxious articles, Lottery Case, 188 U.S. 321; stolen articles, Brooks *v.* United States, 267 U.S. 432; kidnaped persons, Gooch *v.* United States, 297 U.S. 124; and articles such as intoxicating liquor or convict made goods, traffic in which is forbidden or restricted by the laws of the state of destination. Kentucky Whip & Collar Co. *v.* Illinois Central R. Co., 299 U.S. 334.

But it is said that the present prohibition falls within the scope of none of these categories; that while the prohibition is nominally a regulation of the commerce its motive or purpose is regulation of wages and hours of persons engaged in manufacture, the control of which has been reserved to the states and upon which Georgia and some of the states of destination have placed no restriction; that the effect of the present statute is not to exclude the prescribed articles from interstate commerce in aid of state regulation as in Kentucky Whip & Collar Co. *v.* Illinois Central R. Co., *supra,* but instead, under the guise of a regulation of interstate commerce, it undertakes to regulate wages and hours

within the state contrary to the policy of the state which has elected to leave them unregulated.

The power of Congress over interstate commerce "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." Gibbons *v.* Ogden, *supra.* That power can neither be enlarged nor diminished by the exercise or non-exercise of state power. Kentucky Whip & Collar Co. *v.* Illinois Central R. Co., *supra.* Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use.

Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states of destination; and is not prohibited unless by other constitutional provisions. It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states.

The motive and purpose of the present regulation are plainly to make effective the congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows. The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. McCray *v.* United States, 195 U.S. 27; Sonzinsky *v.* United States, 300 U.S. 506, 513. "The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged power." Veazie Bank *v.* Fenno, 8 Wall. 533, 548. Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the commerce clause. Subject only to that limitation, presently to be considered, we conclude that the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions is within the constitutional authority of Congress.

In the more than a century which has elapsed since the decision of Gibbons *v.* Ogden, these principles of constitutional interpretation have been so long and repeatedly recognized by this Court as applicable to the commerce clause, that there would be little occasion for repeating them now were it not for the decision of this Court 22 years ago in Hammer *v.* Dagenhart, 247 U.S. 251. In that case it was held by a bare majority of the Court over the powerful and now classic dissent of Mr. Justice Holmes setting forth the fundamental issues involved, that Congress was without power to exclude the products of child labor from interstate commerce. The reasoning and conclusion of the Court's opinion there cannot be reconciled with the conclusion which we have reached, that the power of Congress under the commerce clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution.

Hammer *v.* Dagenhart has not been followed. The distinction on which the decision was rested that congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property—a distinction which was novel when made and unsupported by any provision of the Constitution—has long since been abandoned. Brooks *v.* United States, 267 U.S. 432; Kentucky Whip & Collar Co. *v.* Illinois C. R. Co., 299 U.S. 334; Mulford *v.* Smith, 307 U.S. 38. The thesis of the opinion that the motive of the prohibition or its effect to control in some measure the use or production within the states of the article thus excluded from the commerce can operate to deprive the regulation of its constitutional authority has long since ceased to have force. And finally we have declared "The authority of the federal government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce." United States *v.* Rock Royal Co-operative, 307 U.S. 533, 569.

The conclusion is inescapable that Hammer *v.* Dagenhart was a departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled.

Validity of the wage and hour requirements. Section 15(*a*) (2) and sections 6 and 7 require employers to conform to the wage and hour provisions with respect to all employees engaged in the production of goods for interstate commerce. As appellee's em-

ployees are not alleged to be "engaged in interstate commerce" the validity of the prohibition turns on the question whether the employment, under other than the prescribed labor standards, of employees engaged in the production of goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the power of Congress to regulate it.

To answer this question we must at the outset determine whether the particular acts charged in the counts which are laid under section 15(*a*) (2) as they were construed below, constitute "production for commerce" within the meaning of the statute. As the government seeks to apply the statute in the indictment, and as the court below construed the phrase "produced for interstate commerce," it embraces at least the case where an employer engaged, as is appellee, in the manufacture and shipment of goods in filling orders of extrastate customers, manufactures his product with the intent or expectation that according to the normal course of his business all or some part of it will be selected for shipment to those customers.

Without attempting to define the precise limits of the phrase, we think the acts alleged in the indictment are within the sweep of the statute. The obvious purpose of the Act was not only to prevent the interstate transportation of the proscribed product, but to stop the initial step toward transportation, production with the purpose of so transporting it. Congress was not unaware that most manufacturing businesses shipping their product in interstate commerce make it in their shops without reference to its ultimate destination and then after manufacture select some of it for shipment interstate and some intrastate according to the daily demands of their business, and that it would be practically impossible, without disrupting manufacturing businesses, to restrict the prohibited kind of production to the particular pieces of lumber, cloth, furniture or the like which later move in interstate rather than intrastate commerce.

The recognized need of drafting a workable statute and the well-known circumstances in which it was to be applied are persuasive of the conclusion, which the legislative history supports, that the "production for commerce" intended includes at least production of goods, which, at the time of production, the employer, according to the normal course of his business, intends or expects to move in interstate commerce although, through the exigencies of the business, all of the goods may not thereafter actually enter interstate commerce.

There remains the question whether such restriction on the production of goods for commerce is a permissible exercise of the commerce power. The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See McCulloch *v.* Maryland, 4 Wheat. 316, 421.

While this Court has many times found state regulation of interstate commerce, when uniformity of its regulation is of national concern, to be incompatible with the commerce clause even though Congress has not legislated on the subject, the Court has never implied such restraint on state control over matters intrastate not deemed to be regulations of interstate commerce or its instrumentalities even though they affect the commerce. In the absence of congressional legislation on the subject state laws which are not regulations of the commerce itself or its instrumentalities are not forbidden even though they affect interstate commerce.

But it does not follow that Congress may not by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce. See Santa Cruz Fruit Packing Co. *v.* National Labor Relations Board, 303 U.S. 453, 466. A recent example is the National Labor Relations Act for the regulation of employer and employee relations in industries in which strikes, induced by unfair labor practices named in the Act, tend to disturb or obstruct interstate commerce. See National Labor Relations Board *v.* Jones & Laughlin Steel Corp., 301 U.S. 1, 38. But long before the adoption of the National Labor Relations Act this Court had many times held that the power of Congress to regulate interstate commerce extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce or the exercise of the congressional power over it.

In such legislation Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act. It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect, as in the case of the Interstate Commerce Act

and the National Labor Relations Act, or whether they come within the statutory definition of the prohibited act, as in the Federal Trade Commission Act. And sometimes Congress itself has said that a particular activity affects the commerce, as it did in the present Act, the Safety Appliance Act and the Railway Labor Act. In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power.

Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. . . . A familiar like exercise of power is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled. Shreveport Case, 234 U.S. 342. Similarly Congress may require inspection and preventive treatment of all cattle in a disease-infected area in order to prevent shipment in interstate commerce of some of the cattle without the treatment. Thornton *v.* United States, 271 U.S. 414. It may prohibit the removal, at destination, of labels required by the Pure Food & Drugs Act to be affixed to articles transported in interstate commerce. McDermott *v.* Wisconsin, 228 U.S. 115. And we have recently held that Congress in the exercise of its power to require inspection and grading of tobacco shipped in interstate commerce may compel such inspection and grading of all tobacco sold at local auction rooms from which a substantial part but not all of the tobacco sold is shipped in interstate commerce. Currin *v.* Wallace, 306 U.S. 11. . . .

We think also that section 15(*a*) (2), now under consideration, is sustainable independently of section 15(*a*) (1), which prohibits shipment or transportation of the proscribed goods. As we have said the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions; and the consequent dislocation of the commerce itself caused by the impairment or destruction of local businesses by competition made effective through interstate commerce. The Act is thus directed at the suppression of a method or kind of competition in interstate

commerce which it has in effect condemned as "unfair," as the Clayton Act, 38 Stat. 730, has condemned other "unfair methods of competition" made effective through interstate commerce.

The Sherman Act and the National Labor Relations Act are familiar examples of the exertion of the commerce power to prohibit or control activities wholly intrastate because of their effect on interstate commerce. . . .

The means adopted by section 15(*a*) (2) for the protection of interstate commerce by the suppression of the production of the condemned goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the commerce power. Congress, to attain its objective in the suppression of nation-wide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great. See H. Rept. No. 2182, 75th Cong. 1st Sess., p. 7. The legislation aimed at a whole embraces all its parts. Cf. National Labor Relations Board *v.* Fainblatt, 306 U.S. 601, 606. . . .

Our conclusion is unaffected by the Tenth Amendment which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the Amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

From the beginning and for many years the Amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. Whatever doubts may have arisen of the soundness of that conclusion they have been put at rest by the decisions under the Sherman Act and the National Labor Relations Act which we have cited.

Validity of the requirement of records of wages and hours. Section 15(*a*) (5) and section 11(*c*). These requirements are incidental to those for the prescribed wages and hours, and hence validity of the former turns on validity of the latter. Since, as we have held, Congress may require production for interstate commerce to conform to those conditions, it may require the employer, as a means of enforcing the valid law, to keep a record showing whether he has in fact complied with it. The requirement for records even of the intrastate transaction is an appropriate means to the legitimate end.

Validity of the wage and hour provisions under the Fifth Amendment. Both provisions are minimum wage requirements compelling the payment of a minimum standard wage with a prescribed increased wage for overtime . . . Since our decision in West Hotel Co. *v.* Parrish, 300 U.S. 379, it is no longer open to question that the fixing of a minimum wage is within the legislative power and that the bare fact of its exercise is not a denial of due process under the Fifth more than under the Fourteenth Amendment. Nor is it any longer open to question that it is within the legislative power to fix maximum hours. Similarly the statute is not objectionable because applied alike to both men and women.

The Act is sufficiently definite to meet constitutional demands. One who employs persons, without conforming to the prescribed wage and hour conditions, to work on goods which he ships or expects to ship across state lines, is warned that he may be subject to the criminal penalties of the Act. No more is required. . . .

Reversed.

Comment

Function of the Wage and Hour Law. In the bulwarks which the nation has thrown about its system of private economy, the National Labor Relations Act and the Fair Labor Standards Act each have a distinct place. The former protects that portion of the working population which has had the solidarity to form unions, assuring it the right to collective bargaining. Whatever the future of legislation on labor relations, it is safe to predict that we will preserve and build upon this element. The Fair Labor Standards Act was designed to safeguard a different mass of workers:

> The legislative debates indicate that the prime purpose of the legislation was to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage. Reed, J., in Brooklyn Savings Bank *v.* O'Neil, 324 U.S. 697, 707 note (1945).

The sweep of the statute. The Act opens with what is now a familiar feature of statutory drafting, a "Finding and Declaration of Policy." Congress sets out its determination of the causal relation between poor labor conditions and the free flow of goods in commerce; it declares the policy through the commerce power to correct and eliminate these bad conditions. The sweep of the Act is wide, though Congress did not attempt to reach the constitutional limit. Just what activities are embraced one would learn from the "Interpretative Bulletins" issued by the Wage and Hour Administrator, and by his rulings on specific situations as they arise. Some questions on the coverage of the statute have been carried to the courts. Among the cases which the Supreme Court thought merited its own consideration, the following decisions illustrate how far the statute has penetrated into the national economy: employees of a company which repairs motors for customers producing goods for interstate commerce, Roland Electrical Co. *v.* Walling, 326 U.S. 657 (1946); members of a drilling crew digging holes to produce oil, Warren-Bradshaw Drilling Co. *v.* Hall, 317 U.S. 88 (1942); the night watchman in a plant producing goods for interstate commerce, Walton *v.* Southern Package Corporation, 320 U.S. 540 (1944); maintenance employees in buildings used for manufacture for commerce, Kirschbaum *v.* Walling, 316 U.S. 517 (1942), and even in a building owned by an interstate producer and predominantly occupied for its offices, Borden Co. *v.* Borella, 325 U.S. 679 (1945). All have been held within the benefit of the Act.

There is no "abstract formula," no "dependable touchstone by which to determine whether employees are 'engaged in commerce or in the production of goods for commerce,' " said Frankfurter, J., for the Court in the Kirschbaum Case. "To a considerable extent the task is one of accommodation as between assertions of new federal authority over economic enterprise and historic functions of the individual states. The expansion of our industrial economy has inevitably been reflected in the extension of federal authority over economic enterprise and its absorption of authority previously possessed by the states." He repeated as to the Fair Labor Standards Act what Hughes, C.J., had said of the National Labor Relations Act:

> . . . the criterion is necessarily one of degree . . . This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as "interstate commerce," "due process,"

"equal protection." In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion. Santa Cruz Fruit Packing Co. *v.* NLRB, 303 U.S. 453, 467 (1938).

WICKARD, Secretary of Agriculture *v.* FILBURN

317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942).

On Appeal from the District Court of the United States for the Southern District of Ohio.

Introduction

Justice Bradley on the farm. Justice Bradley, one of the greatest among the judges who have sat on the Supreme Court, was born on a farm near Albany, N. Y., in 1813. In 1871, the year after he went on the bench, he wrote a short autobiographical sketch, in which he recalled what a self-contained unit a farm family had been in his boyhood:

> The primeval simplicity and independence of country life at this period, as viewed in the experience of the present day, seems really wonderful. We raised all our breadstuffs—wheat, rye, barley, oats, Indian corn, buckwheat, peas, beans, potatoes, turnips, etc.; and we raised our cattle, horses, sheep, swine, poultry, etc. From these we were supplied with beef and pork which were regularly put away in the cellar. We made our own harness and shoes. We sheared our sheep, spun the wool, wove it into flannel and cloth of various textures—sent it to the fuller's, it is true, but my mother used to cut it, and make it up, and the garments were very warm, strong, and not uncomely. I wore them in college. The cloth we also generally colored at home. We raised our own flax, which the men broke, swingled, and hackled, and the women spun and wove into linen and tow-cloth for summer wear. I still preserve the family spinning wheel and loom. Our sugar was made in the forest—several hundred pounds a year. At this work I often spent weeks in my boyhood. Of course such a variety of employment occupied almost every hour of the year, and gave but small time for reading or study. To myself who was ever filled with a burning thirst for knowledge it was an irksome life.

This is a typical scene from America of the 1820's. If the people of this country had been content to go on in such straitened circumstances it would have been possible to do without the Agricultural Adjustment Act of 1938, and the problem of Wickard *v.* Filburn need never have been presented to the Supreme Court. Life today is rich and varied because men have specialized, and specialization means interdependence. Each man's security is dependent upon circumstances far beyond his own immediate control.

The dairy industry and the Depression. Look at New York's agriculture in the Depression, just a century after Bradley left the farm. No longer did the farmer produce everything and buy nothing; he specialized in a line for which his farm was best adapted, such as dairying. "The production and distribution of milk is a paramount industry of the state," wrote Roberts, J., in Nebbia *v.* New York, 291 U.S. 502, 517 (1934), "and largely affects the health and prosperity of its people. Dairying yields fully one half of the total income from all farm products. Dairy farm investment amounts to approximately $1,000,000,000. Curtailment or destruction of the dairy industry would cause a serious economic loss to the people of the state." The industry was peculiarly vulnerable to the Depression. Milk is perishable and cannot be stored. When consumption fell off sharply in response to unemployment, prices plummeted. Then price cutting demoralized the industry. Farmers who made nothing had nothing to spend, so other industries felt the impact. The New York legislature, after very careful study, established a milk control board with authority to fix wholesale and retail prices with a view to stabilizing the industry. The price fixing was sustained in the Nebbia Case, as against the charge that it denied due process of law in violation of the Fourteenth Amendment. But of course New York could not protect its dairy farmers if distributors were free to go over into Vermont and buy milk there at prices more advantageous than the New York minimum. So the legislature said this: It shall be unlawful to sell in New York milk purchased out-of-state at a price lower than the New York minimum. Seelig, a dealer, was in the practice of buying cheaper milk in the unregulated market of Vermont. He challenged the New York statute as to its extraterritorial application, and the Supreme Court agreed that this was an unconstitutional interference with interstate commerce; ". . . one state in its dealings with another may not place itself in a position of economic isolation," said Cardozo, J., for the Court. "If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." Baldwin *v.* Seelig, 294 U.S. 511, 527, 522 (1935).

New York had acted with care and moderation; and yet, for all its

wisdom and power, it found itself unable to protect its own people. The experience seemed to demonstrate that the milk industry was a part of "that commerce which concerns more states than one."

Federal measures to balance production and consumption. Congress undertook to meet the milk problem by the Agriculture Marketing Agreement Act of 1937, which was based upon the Agricultural Adjustment Act of 1933 as amended. The Secretary of Agriculture was directed to establish and maintain prices (after public hearings and a referendum to producers and handlers), which would give the producers the same purchasing power they had had in the selected base period—1919 to 1929. The price order was to be applicable to "only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof." This was sustained in United States *v.* Rock Royal Co-Op., 307 U.S. 533 (1939), a case which arose in New York, and in which the state milk authorities had participated with the Secretary of Agriculture in working out the price order. United States *v.* Wrightwood Dairy Company, 315 U.S. 110 (1942), sustained the Act as applied to milk produced in Illinois and sold intrastate for distribution in the Chicago marketing area. Mr. Justice Stone, for the Court, said that "the marketing of a local product in competition with that of a like commodity moving interstate may so interfere with interstate commerce or its regulation as to afford a basis for congressional regulation of the intrastate activity. It is the effect upon the interstate commerce or its regulation, regardless of the particular form which the competition may take, which is the test of federal power," citing the Shreveport Case, Jones & Laughlin *v.* NLRB, and the Darby Case.

The Agricultural Adjustment Act of 1938, enacted in the light of experience with earlier measures for stabilizing agriculture, sought to maintain an "ever-normal granary" and to protect farmers from violent price fluctuations; each farm was assigned its market quota, and a penalty laid upon any excess the farmer brought into the market. This was sustained under the commerce power in Mulford *v.* Smith, 307 U.S. 38 (1939), Butler and McReynolds, JJ., dissenting.

Wickard *v.* Filburn arose out of this statute, as amended. The specific question was this: Was there a valid constitutional objection to counting the wheat that Farmer Filburn consumed on his own farm, and which therefore never entered into commerce at all, as a part of the quota assigned to him?

Opinion

Mr. Justice JACKSON delivered the opinion of the Court.

The appellee filed his complaint against the Secretary of Agri-

culture of the United States, three members of the County Agricultural Conservation Committee for Montgomery County, Ohio, and a member of the State Agricultural Conservation Committee for Ohio. He sought to enjoin enforcement against himself of the marketing penalty imposed by the amendment of May 26, 1941, to the Agricultural Adjustment Act of 1938, upon that part of his 1941 wheat crop which was available for marketing in excess of the marketing quota established for his farm. He also sought a declaratory judgment that the wheat marketing quota provisions of the Act as amended and applicable to him were unconstitutional because not sustainable under the commerce clause or consistent with the due process clause of the Fifth Amendment. . . .

The appellee for many years past has owned and operated a small farm in Montgomery County, Ohio, maintaining a herd of dairy cattle, selling milk, raising poultry, and selling poultry and eggs. It has been his practice to raise a small acreage of winter wheat, sown in the Fall and harvested in the following July; to sell a portion of the crop; to feed part to poultry and livestock on the farm, some of which is sold; to use some in making flour for home consumption; and to keep the rest for the following seeding. The intended disposition of the crop here involved has not been expressly stated.

In July of 1940, pursuant to the Agricultural Adjustment Act of 1938, as then amended, there was established for the appellee's 1941 crop a wheat acreage allotment of 11.1 acres and a normal yield of 20.1 bushels of wheat an acre. He was given notice of such allotment in July of 1940 before the Fall planting of his 1941 crop of wheat, and again in July of 1941, before it was harvested. He sowed, however, 23 acres, and harvested from his 11.9 acres of excess acreage 239 bushels, which under the terms of the Act as amended on May 26, 1941, constituted farm marketing excess, subject to a penalty of 49 cents a bushel, or $117.11 in all. The appellee has not paid the penalty and he has not postponed or avoided it by storing the excess under regulations of the Secretary of Agriculture, or by delivering it up to the Secretary. The Committee, therefore, refused him a marketing card, which was, under the terms of regulations promulgated by the Secretary, necessary to protect a buyer from liability to the penalty and upon its protecting lien.

The general scheme of the Agricultural Adjustment Act of 1938 as related to wheat is to control the volume moving in inter-

state and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce. Within prescribed limits and by prescribed standards the Secretary of Agriculture is directed to ascertain and proclaim each year a national acreage allotment for the next crop of wheat, which is then apportioned to the states and their counties, and is eventually broken up into allotments for individual farms. Loans and payments to wheat farmers are authorized in stated circumstances.

The Act provides further that whenever it appears that the total supply of wheat as of the beginning of any marketing year, beginning July 1, will exceed a normal year's domestic consumption and export by more than 35 percent, the Secretary shall so proclaim not later than May 15 prior to the beginning of such marketing year; and that during the marketing year a compulsory national marketing quota shall be in effect with respect to the marketing of wheat. Between the issuance of the proclamation and June 10, the Secretary must, however, conduct a referendum of farmers who will be subject to the quota to determine whether they favor or oppose it; and if more than one third of the farmers voting in the referendum do oppose, the Secretary must prior to the effective date of the quota by proclamation suspend its operation. . . .

It is urged that under the commerce clause of the Constitution, Article I, section 8, clause 3, Congress does not possess the power it has in this instance sought to exercise. The question would merit little consideration since our decision in United States *v.* Darby, 312 U.S. 100, sustaining the federal power to regulate production of goods for commerce except for the fact that this Act extends federal regulation to production not intended in any part for commerce, but wholly for consumption on the farm. The Act includes a definition of "market" and its derivatives so that as related to wheat in addition to its conventional meaning it also means to dispose of "by feeding (in any form) to poultry or livestock which, or the products of which, are sold, bartered, or exchanged, or to be so disposed of." Hence, marketing quotas not only embrace all that may be sold without penalty but also what may be consumed on the premises. Wheat produced on excess acreage is designated as "available for marketing" as so defined and the penalty is imposed thereon. Penalties do not depend upon whether any part of the wheat either within or without the quota is sold or intended to be sold. The sum of this is

that the federal government fixes a quota including all that the farmer may harvest for sale or for his own farm needs, and declares that wheat produced on excess acreage may neither be disposed of nor used except upon payment of the penalty or except it is stored as required by the Act or delivered to the Secretary of Agriculture.

Appellee says that this is a regulation of production and consumption of wheat. Such activities are, he urges, beyond the reach of congressional power under the commerce clause, since they are local in character, and their effects upon interstate commerce are at most "indirect." In answer the government argues that the statute regulates neither production nor consumption, but only marketing; and, in the alternative, that if the Act does go beyond the regulation of marketing it is sustainable as a "necessary and proper" implementation of the power of Congress over interstate commerce.

The government's concern lest the Act be held to be a regulation of production or consumption rather than of marketing is attributable to a few dicta and decisions of this Court which might be understood to lay it down that activities such as "production," "manufacturing," and "mining" are strictly "local" and, except in special circumstances which are not present here, cannot be regulated under the commerce power because their effects upon interstate commerce are, as matter of law, only "indirect." Even today, when this power has been held to have great latitude, there is no decision of this Court that such activities may be regulated where no part of the product is intended for interstate commerce or intermingled with the subjects thereof. We believe that a review of the course of decision under the commerce clause will make plain, however, that questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as "production" and "indirect" and foreclose consideration of the actual effects of the activity in question upon interstate commerce.

At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded. Gibbons *v.* Ogden, 9 Wheat. 1, 194, 195. He made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than from judicial processes. 9 Wheat. at page 197.

For nearly a century, however, decisions of this Court under

the commerce clause dealt rarely with questions of what Congress might do in the exercise of its granted power under the clause and almost entirely with the permissibility of state activity which it was claimed discriminated against or burdened interstate commerce. During this period there was perhaps little occasion for the affirmative exercise of the commerce power, and the influence of the clause on American life and law was a negative one, resulting almost wholly from its operation as a restraint upon the powers of the states. In discussion and decision the point of reference instead of being what was "necessary and proper" to the exercise by Congress of its granted power, was often some concept of sovereignty thought to be implicit in the status of statehood. Certain activities such as "production," "manufacturing," and "mining" were occasionally said to be within the province of state governments and beyond the power of Congress under the commerce clause.

It was not until 1887 with the enactment of the Interstate Commerce Act that the interstate commerce power began to exert positive influence in American law and life. This first important federal resort to the commerce power was followed in 1890 by the Sherman Anti-Trust Act and, thereafter, mainly after 1903, by many others. These statutes ushered in new phases of adjudication, which required the Court to approach the interpretation of the commerce clause in the light of an actual exercise by Congress of its power thereunder.

When it first dealt with this new legislation, the Court adhered to its earlier pronouncements, and allowed but little scope to the power of Congress. United States *v.* E. C. Knight Co., 156 U.S. 1. These earlier pronouncements also played an important part in several of the five cases in which this Court later held that acts of Congress under the commerce clause were in excess of its power.

Even while important opinions in this line of restrictive authority were being written, however, other cases called forth broader interpretations of the commerce clause destined to supersede the earlier ones, and to bring about a return to the principles first enunciated by Chief Justice Marshall in Gibbons *v.* Ogden, *supra.*

Not long after the decision of United States *v.* E. C. Knight Co., *supra,* Mr. Justice Holmes, in sustaining the exercise of national power over intrastate activity, stated for the Court that "commerce among the states is not a technical legal conception,

but a practical one, drawn from the course of business." Swift & Co. *v.* United States, 196 U.S. 375, 398. It was soon demonstrated that the effects of many kinds of intrastate activity upon interstate commerce were such as to make them a proper subject of federal regulation. In some cases sustaining the exercise of federal power over intrastate matters the term "direct" was used for the purpose of stating, rather than of reaching, a result; in others it was treated as synonymous with "substantial" or "material"; and in others it was not used at all. Of late its use has been abandoned in cases dealing with questions of federal power under the commerce clause.

In the Shreveport Rate Cases (Houston, E. & W. T. R. Co. *v.* United States), 234 U.S. 342, the Court held that railroad rates of an admittedly intrastate character and fixed by authority of the state might, nevertheless, be revised by the federal government because of the economic effects which they had upon interstate commerce. The opinion of Mr. Justice Hughes found federal intervention constitutionally authorized because of "matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of the conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance." 234 U.S. at page 351.

The Court's recognition of the relevance of the economic effects in the application of the commerce clause exemplified by this statement has made the mechanical application of legal formulas no longer feasible. Once an economic measure of the reach of the power granted to Congress in the commerce clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be "production" nor can consideration of its economic effects be foreclosed by calling them "indirect." The present Chief Justice has said in summary of the present state of the law: "The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. . . . The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges

no limitations other than are prescribed in the Constitution. . . . It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power." United States *v.* Wrightwood Dairy Co., 315 U.S. 110, 119.

Whether the subject of the regulation in question was "production," "consumption," or "marketing" is, therefore, not material for purposes of deciding the question of federal power before us. That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it. The same consideration might help in determining whether in the absence of congressional action it would be permissible for the state to exert its power on the subject matter, even though in so doing it to some degree affected interstate commerce. But even if appellant's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

The parties have stipulated a summary of the economics of the wheat industry. Commerce among the states in wheat is large and important. Although wheat is raised in every state but one, production in most states is not equal to consumption. Sixteen states on average have had a surplus of wheat above their own requirements for feed, seed, and food. Thirty-two states and the District of Columbia, where production has been below consumption, have looked to these surplus-producing states for their supply as well as for wheat for export and carryover.

The wheat industry has been a problem industry for some years. Largely as a result of increased foreign production and import restrictions, annual exports of wheat and flour from the United States during the ten-year period ending in 1940 averaged less than 10 percent of total production, while during the 1920's they averaged more than 25 percent. The decline in the export trade has left a large surplus in production which in connection with an abnormally large supply of wheat and other grains in recent years caused congestion in a number of markets; tied up railroad cars; and caused elevators in some instances to turn

away grains, and railroads to institute embargoes to prevent further congestion.

Many countries, both importing and exporting, have sought to modify the impact of the world market conditions on their own economy. Importing countries have taken measures to stimulate production and self-sufficiency. The four large exporting countries of Argentina, Australia, Canada, and the United States have all undertaken various programs for the relief of growers. Such measures have been designed in part at least to protect the domestic price received by producers. Such plans have generally evolved towards control by the central government.

In the absence of regulation the price of wheat in the United States would be much affected by world conditions. During 1941 producers who cooperated with the Agricultural Adjustment program received an average price on the farm of about $1.16 a bushel as compared with the world market price of 40 cents a bushel.

Differences in farming conditions, however, make these benefits mean different things to different wheat growers. There are several large areas of specialization in wheat, and the concentration on this crop reaches 27 percent of the crop land, and the average harvest runs as high as 155 acres. Except for some use of wheat as stock feed and for seed, the practice is to sell the crop for cash. Wheat from such areas constitutes the bulk of the interstate commerce therein.

On the other hand, in some New England states less than 1 percent of the crop land is devoted to wheat, and the average harvest is less than five acres per farm. In 1940 the average percentage of the total wheat production that was sold in each state as measured by value ranged from 29 percent thereof in Wisconsin to 90 percent in Washington. Except in regions of large-scale production, wheat is usually grown in rotation with other crops; for a nurse crop for grass seeding; and as a cover crop to prevent soil erosion and leaching. Some is sold, some kept for seed, and a percentage of the total production much larger than in areas of specialization is consumed on the farm and grown for such purpose. Such farmers, while growing some wheat, may even find the balance of their interest on the consumer's side.

The effect of consumption of home-grown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop. Consumption on

the farm where grown appears to vary in an amount greater than 20 percent of average production. The total amount of wheat consumed as food varies but relatively little, and use as seed is relatively constant.

The maintenance by government regulation of a price for wheat undoubtedly can be accomplished as effectively by sustaining or increasing the demand as by limiting the supply. The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial. National Labor Relations Board *v.* Fainblatt, 306 U.S. 601, 606, *et seq.*, 307 U.S. 609; United States *v.* Darby, *supra*, 312 U.S. at page 123.

It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. One of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices. . . .

Reversed.

Comment

The Commerce Clause and water power. Navigation, flood control, and the generation of water power are so interrelated as to produce in practice a single public problem, which Congress, in the exercise of its plenary authority over commerce, is able to dominate. In Oklahoma *v.* Guy F. Atkinson Co., 313 U.S. 508, 525 (1941), the Court said:

> There is no constitutional reason why Congress cannot under the commerce power treat the watersheds as a key to flood control on navigable streams and their tributaries. Nor is there a constitutional necessity for viewing each reservoir project in isolation from a comprehensive plan covering the entire basin of a particular river. We need no survey to know that the Mississippi is a navigable river. We need no survey to know that the tributaries are generous contributors to the floods of the Mississippi. And it is common knowledge that Mississippi floods have paralyzed commerce in the affected areas and have impaired navigation itself. We have recently recognized that "Flood protection, watershed development, recovery of the cost of improvements through utilization of power are . . . parts of commerce control." United States *v.* Appalachian Power Co., 311 U.S. 377, 426 (1940). And we now add that the power of flood control extends to the tributaries of navigable streams. For just as control over the nonnavigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries. As repeatedly recognized by this Court from McCulloch *v.* Maryland, 4 Wheat. 316, to United States *v.* Darby, 312 U.S. 100, the exercise of the granted power of Congress to regulate interstate commerce may be aided by appropriate and needful control of activities and agencies which, though intrastate, affect that commerce.

Insurance as commerce. The proposition that "insurance is not commerce" had been said so often and so unvaryingly that it was to be classed with the things that "every schoolboy knows." But Congress had never actually sought to exert federal supervision over the insurance business, and in laying down the proposition above the Court was sustaining the right of the states to protect the public interest in this matter. The states had risen to the responsibility and developed elaborate regulatory authorities headed by a state insurance commissioner. Then the federal Department of Justice believed that it had evidence to show that the South-Eastern Underwriters Association with its membership of nearly 200 fire insurance companies had conspired to fix premium rates and to carry out other

monopolistic practices. So an indictment was obtained, charging violations of the Sherman Anti-Trust Act. The insurance companies demurred, which is lawyer's language for replying "So what? Since 'insurance is not commerce,' even if we did combine as you charge, we would not be a combination in restraint of interstate commerce."

In United States *v.* South-Eastern Underwriters Association, 322 U.S. 533 (1944), the Supreme Court declared for the first time that insurance companies which conduct their activities across state lines are engaged in interstate commerce, and are within the scope of the Anti-Trust Act. Only seven Justices participated. Mr. Justice Black spoke for a majority of four. Stone, C.J., and Frankfurter, J., dissenting, pointed out ways in which Congress could reach the insurance business if it so desired and made the point that almost certainly the Congress that passed the Sherman Act in 1890 had no idea that it was including insurance within its scope. Jackson, J., also dissented. he agreed that as a matter of fact modern insurance business conducted across state lines is interstate commerce; but he would not, by overruling earlier decisions to the contrary, suddenly thrust upon Congress the necessity for framing a plan for nationalization of insurance control.

The immediate result of the Court's action was to create some confusion. The states found themselves regulating a matter which now belonged to Congress—and Congress had no experience or administrative support for meeting its new responsibility. It quickly passed the McCarran Act, which in effect said, "Carry on." It declared that the continued regulation and taxation by the several states of the insurance business is in the public interest, and that the silence of Congress shall not be construed to impose any barrier to such regulation or taxation. In Prudential Insurance Co. *v.* Benjamin, 328 U.S. 408 (1946) and Robertson *v.* California, 328 U.S. 440 (1946), the Court applied the Act to uphold continued taxation and regulation by the states.

CHARLES C. STEWARD MACHINE CO. *v.* DAVIS

301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279 (1937).

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Introduction

Taxing and spending powers. The taxing and spending powers come first among the various grants enumerated in section 8 of

Article I of the Constitution. Mark the words: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; . . ." The clause is not an omnibus power to provide for the general welfare—that might embrace almost everything. Neither does it say—as Madison long ago argued—that Congress can tax and spend only in aid of the other functions with which Congress is specifically invested—national defense, post office, maintenance of the federal courts, and the like. It is a separate and distinct power to tax to provide for the general welfare.

Taxation need not be for revenue. That Congress may tax for other than revenue purposes has been the practical construction of the power since the very beginning of the government. The second act which the first Congress adopted began with a recital that "it is necessary for the support of government, for the discharge of the debts of the United States, and the encouragement and protection of manufactures, that duties be laid on goods, wares and merchandises imported. . . ." The constitutional permissibility of such use of the taxing power is clear beyond argument, said Taft, C.J., in J. W. Hampton, Jr., & Co. *v.* United States, 276 U.S. 394, 411 (1928).

When Congress lays a tax good in itself, let the consequences fall where they may. So said the Court in Veazie Bank *v.* Fenno, 8 Wall. 533 (1869), after Congress had laid a 10 percent excise on the circulation of notes by state banks. The effect was to put an end to such issues. ". . . The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers," said Chase, C.J., for the Court. "The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected."

When Congress laid an excise on oleomargarine—10 cents a pound on that colored to imitate butter, .25 cent a pound on uncolored—was Congress trying to help the Treasury or to help the butter men? Evidently the latter; yet the Court declined to venture into psychoanalysis and sustained the tax. McCray *v.* United States, 195 U.S. 27 (1904). When Congress laid a tax of $1 per annum on dealers in narcotics, and then prescribed an elaborate system of records which must be executed whenever a prescription or order was given, was Congress endeavoring (as with income tax forms) to assure a faithful payment of this trifling tax? Or was it, rather, endeavoring to police the traffic in drugs? Again, no matter; the tax with its accompanying paper work was sustained. United States *v.* Doremus, 249 U.S. 86 (1919); Nigro *v.* United States, 276 U.S. 332 (1928). The National Firearms Act defined "firearm" in such a way as to exclude pistols, revolvers, and guns of a type used in sport, and then piled heavy excises on importing, on

dealing in, and on transferring "firearms." Sonzinsky dealt in "firearms," but omitted to pay the $200 tax on dealers. The Court declined "to speculate as to the motives which moved Congress to impose it, or as to the extent to which it may operate to restrict the activities taxed," and sustained the conviction. Sonzinsky *v.* United States, 300 U.S. 506 (1937). Congress imposed an inheritance tax, and then allowed a deduction of any inheritance tax paid to the state, not to exceed 80 percent of the federal tax. Florida had laid no inheritance taxation. It thus found itself in a position where either it imposed such taxation or saw the money taken from Florida estates for the benefit of the United States. It sought to make out a case of the federal taxing power being used unconstitutionally to impose upon Florida. Its contention was found to be completely without merit. Florida *v.* Mellon, 273 U.S. 12 (1927).

This is enough to show that from the first Congress, in which sat many of the Founders, the power to tax has been regarded as a substantive power, not merely as an adjunct to the other powers enumerated. Just as the commerce power has been exercised to forbid the taking of prostitutes, of stolen cars, and of kidnaped persons from state to state, for reasons alien to the transportation, so too has the taxing power been used as a means to divers ends which in themselves seemed desirable to Congress.

Why we have few cases on the spending power. If this is the case with taxing, what is the situation as to spending? Many appropriations are, of course, in aid of functions vested in Congress. The river and harbors appropriation aids commerce; expenditures to carry out the GI Bill of Rights may be explained as incidental to the power to wage war; and so on. But what of aid to expectant mothers or lunches for schoolchildren—may Congress authorize expenditures for non-federal concerns such as these? There are few adjudications on the spending power, for a reason that Massachusetts and Mrs. Frothingham learned in their suits against Secretary Mellon. Those two plaintiffs sought to restrain the Secretary of the Treasury from disbursing funds which the Maternity Act of 1921 made payable to such states as would comply with its provisions and use the aid in protecting the health of mothers and infants. Both suits were dismissed, and for the reason that neither plaintiff had any standing even to raise the issue. Not Mrs. Frothingham: the only interest she could claim was the infinitesimal portion of the taxes she paid that went out as maternity benefits. Her interest was comparable to that of any other of the millions of taxpayers and was too trivial to be the basis for a suit. Massachusetts was scarcely in a better position: if it did not wish its freedom of action to be limited by federal conditions, it had only to decline the grant in aid and remain unbound. To its contention that it spoke on behalf of the totality of the interests of its millions of citizens, the answer was that "It can-

not be conceded that a state, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof." Massachusetts *v.* Mellon, 262 U.S. 447 (1923).

Federal aid for municipal utilities. The federal emergency administrator of public works, in purported execution of an act of Congress, made loans and grants to Alabama cities to enable them to build municipal electric-distribution systems. The Alabama Power Company was unhappy about this competition, and sought an injunction on the contention that the statute under which the administrator purported to act was unconstitutional. It was told, per Sutherland, J., that it had no standing to make the objection. The power company was not entitled to live without competitors; no injury had been done it, and accordingly it was in no position to challenge the federal government's use of federal funds. And merely as a taxpayer it was on no firmer ground than had been Mrs. Frothingham. Alabama Power Co. *v.* Ickes, 302 U.S. 464 (1938). These instances suggest why we have no large body of adjudications on the constitutionality of federal expenditures: ordinarily there is no one who can so much as raise the issue, much less obtain a judgment of invalidity.

The AAA Case. At this point United States *v.* Butler, 297 U.S. 1 (1936), should be briefly mentioned. The Agricultural Adjustment Act of 1933 sought to lift and stabilize the prices received by farmers. Its plan was for the government to make agreements with those farmers who were willing to reduce production and, in return, the participating farmers would be compensated out of funds to be raised by a tax on processors. Note that the taxing and the spending were provided in the same statute; the tax could be traced to the specific expenditure. Butler, a processor, resisted the tax. Unlike Mrs. Frothingham, he could follow the money taken from him to the specific use to which it was put. He was thus in a position to challenge the AAA plan. And while the Court accepted the proposition that the power to spend for the general welfare extended to more than spending merely for the accomplishment of the other enumerated powers, yet in 1936 a majority of the Justices were not prepared to concede to Congress a power to stabilize agricultural production. The situation, then, was that (1) a majority held the object in view to be unconstitutional, and (2) the processing tax was imposed in respect of that unconstitutional object. The conclusion was that the tax was unconstitutional. Stone, Brandeis, and Cardozo, JJ., dissented. The power to spend, said Justice Stone, is "a substantive power," "standing on a parity with the other powers specifically granted." He continued:

> The suggestion that it must now be curtailed by judicial fiat because it may be abused by unwise use hardly rises to the dignity of argument. So may judicial power be abused. . . .

> fied by recourse to extreme examples of reckless congressional spending which might occur if courts could not prevent expenditures which, even if they could be thought to effect any national purpose, would be possible only by action of a legislature lost to all sense of public responsibility. Such suppositions are addressed to the mind accustomed to believe that it is the business of courts to sit in judgment on the wisdom of legislative action. Courts are not the only agency of government that must be assumed to have capacity to govern. Congress and the courts both unhappily may falter or be mistaken in the performance of their constitutional duty. But interpretation of our great charter of government which proceeds on any assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of the three branches of government, or that it alone can save them from destruction is far more likely, in the long run, "to obliterate the constituent members" of "an indestructible union of indestructible states" than the frank recognition that language, even of a constitution, may mean what it says: that the power to tax and spend includes the power to relieve a nation-wide economic maladjustment by conditional gifts of money.

All this is now ancient history. The stabilization of agricultural production, which the Butler Case would not allow to be achieved by taxing and spending, has now been fully accomplished through the commerce power. Mulford *v.* Smith, 307 U.S. 38 (1939); Wickard *v* Filburn, 317 U.S. 111 (1942). And the Social Security Case, Steward Machine Co. *v.* Davis—decided, one may note, on May 24, 1937, three and a half months after the President's proposal for enlarging the Supreme Court—sustained a use of the taxing and spending powers for the purpose of aiding a program which presumably Congress could not directly have established.

The Social Security Act. The scheme of unemployment insurance is briefly this. Congress laid a tax on employers, but the employer was granted a credit up to 90 percent of the tax for any contributions he may have made to a state unemployment fund, provided that the state system satisfied certain minimum standards imposed by the federal government. Certain sums were to be appropriated to aid the states in administering their unemployment compensation laws. It would be a great mistake to regard this as compulsion of the states rather than as cooperation with them to make possible the attainment of necessary goals. A state which sought to establish a social security plan alone would place its trade and industry at a serious disadvantage in the competition of the national market. The only practicable solution is for the federal government—which, as experience shows, would have to bear the cost of any major depression—to take the initiative by

providing a framework within which the several states may create and administer their own separate systems.

In Helvering *v.* Davis, 301 U.S. 619 (1937), decided at the same time as Steward Machine Co. *v.* Davis, the system of old age benefits of the Social Security Act was sustained. This was financed by an excise on employers and an income tax on employees.

Opinion

Mr. Justice CARDOZO delivered the opinion of the Court.

The validity of the tax imposed by the Social Security Act on employers of eight or more is here to be determined. . . .

The Social Security Act (Act of August 14, 1935) is divided into 11 separate titles, of which only titles IX and III are so related to this case as to stand in need of summary.

The caption of title IX is "Tax on Employers of Eight or More." Every employer (with stated exceptions) is to pay for each calendar year "an excise tax, with respect to having individuals in his employ," the tax to be measured by prescribed percentages of the total wages payable by the employer during the calendar year with respect to such employment. One is not, however, an "employer" within the meaning of the Act unless he employs eight persons or more. There are also other limitations of minor importance. The term "employment" too has its special definition, excluding agricultural labor, domestic service in a private home, and some other smaller classes. The tax begins with the year 1936, and is payable for the first time on January 31, 1937. During the calendar year 1936 the rate is to be 1 percent, during 1937 2 percent, and 3 percent thereafter. The proceeds, when collected, go into the Treasury of the United States like internal revenue collections generally. They are not earmarked in any way. In certain circumstances, however, credits are allowable. If the taxpayer has made contributions to an unemployment fund under a state law, he may credit such contributions against the federal tax, provided, however, that the total credit allowed to any taxpayer shall not exceed 90 percentum of the tax against which it is credited, and provided also that the state law shall have been certified to the Secretary of the Treasury by the Social Security Board as satisfying certain minimum criteria. . . . Some of the conditions thus attached to the allowance of a credit are designed to give assurance that the state unemployment compensation law shall be one in substance as well as name. Others are designed to give assurance that the contribu-

tions shall be protected against loss after payment to the state. To this last end there are provisions that before a state law shall have the approval of the board it must direct that the contributions to the state fund be paid over immediately to the Secretary of the Treasury to the credit of the "Unemployment Trust Fund." For the moment it is enough to say that the fund is to be held by the Secretary of the Treasury, who is to invest in government securities any portion not required in his judgment to meet current withdrawals. He is authorized and directed to pay out of the fund to any competent state agency such sums as it may duly requisition from the amount standing to its credit.

Title III, which is also challenged as invalid, has the caption "Grants to States for Unemployment Compensation Administration." Under this title, certain sums of money are "authorized to be appropriated" for the purpose of assisting the states in the administration of their unemployment compensation laws, the maximum for the fiscal year ending June 30, 1936 to be $4,000,000, and $49,000,000 for each fiscal year thereafter. No present appropriation is made to the extent of a single dollar. All that the title does is to authorize future appropriations. . . . The appropriations when made were not specifically out of the proceeds of the employment tax, but out of any moneys in the Treasury. Other sections of the title prescribe the method by which the payments are to be made to the state and also certain conditions to be established to the satisfaction of the Social Security Board before certifying the propriety of a payment to the Secretary of the Treasury. They are designed to give assurance to the federal government that the moneys granted by it will not be expended for purposes alien to the grant, and will be used in the administration of genuine unemployment compensation laws.

The assault on the statute proceeds on an extended front. Its assailants take the ground that the tax is not an excise; that it is not uniform throughout the United States as excises are required to be; that its exceptions are so many and arbitrary as to violate the Fifth Amendment; that its purpose was not revenue, but an unlawful invasion of the reserved powers of the states; and that the states in submitting to it have yielded to coercion and have abandoned governmental functions which they are not permitted to surrender.

The objections will be considered seriatim with such further explanation as may be necessary to make their meaning clear.

First. The tax, which is described in the statute as an excise, is

laid with uniformity throughout the United States as a duty, an impost or an excise upon the relation of employment.

1. We are told that the relation of employment is one so essential to the pursuit of happiness that it may not be burdened with a tax. Appeal is made to history. From the precedents of colonial days we are supplied with illustrations of excises common in the colonies. They are said to have been bound up with the enjoyment of particular commodities. Appeal is also made to principle or the analysis of concepts. An excise, we are told, imports a tax upon a privilege; employment, it is said, is a right, not a privilege, from which it follows that employment is not subject to an excise. Neither the one appeal nor the other leads to the desired goal.

As to the argument from history: Doubtless there were many excises in colonial days and later that were associated, more or less intimately, with the enjoyment or the use of property. This would not prove, even if no others were then known, that the forms then accepted were not subject to enlargement. . . . But in truth other excises *were* known, and known since early times. . . . [Examples are cited.] Our colonial forebears knew more about ways of taxing than some of their descendants seem to be willing to concede.

The historical prop failing, the prop or fancied prop of principle remains. We learn that employment for lawful gain is a "natural" or "inherent" or "inalienable" right, and not a "privilege" at all. But natural rights, so called, are as much subject to taxation as rights of less importance. An excise is not limited to vocations or activities that may be prohibited altogether. It is not limited to those that are the outcome of a franchise. It extends to vocations or activities pursued as of common right. What the individual does in the operation of a business is amenable to taxation just as much as what he owns, at all events if the classification is not tyrannical or arbitrary. "Business is as legitimate an object of the taxing powers as property." . . .

. . . The statute books of the states are strewn with illustrations of taxes laid on occupations pursued of common right. We find no basis for a holding that the power in that regard which belongs by accepted practice to the legislatures of the states, has been denied by the Constitution to the Congress of the nation.

2. The tax being an excise, its imposition must conform to the canon of uniformity. There has been no departure from this re-

quirement. According to the settled doctrine the uniformity exacted is geographical, not intrinsic. . . .

Second. The excise is not invalid under the provisions of the Fifth Amendment by force of its exemptions.

The statute does not apply, as we have seen, to employers of less than eight. It does not apply to agricultural labor, or domestic service in a private home, or to some other classes of less importance. Petitioner contends that the effect of these restrictions is an arbitrary discrimination vitiating the tax.

The Fifth Amendment unlike the Fourteenth has no equal protection clause. But even the states, though subject to such a clause, are not confined to a formula of rigid uniformity in framing measures of taxation. They may tax some kinds of property at one rate, and others at another, and exempt others altogether. They may lay an excise on the operations of a particular kind of business, and exempt some other kind of business closely akin thereto. If this latitude of judgment is lawful for the states, it is lawful, *a fortiori,* in legislation by the Congress, which is subject to restraints less narrow and confining.

The classifications and exemptions directed by the statute now in controversy have support in considerations of policy and practical convenience that cannot be condemned as arbitrary. The classifications and exemptions would therefore be upheld if they had been adopted by a state and the provisions of the Fourteenth Amendment were invoked to annul them. . . . The Act of Congress is therefore valid, so far at least as its system of exemptions is concerned, and this though we assume that discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment.

Third. The excise is not void as involving the coercion of the states in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government.

The proceeds of the excise when collected are paid into the Treasury at Washington, and thereafter are subject to appropriation like public moneys generally. No presumption can be indulged that they will be misapplied or wasted. Even if they were collected in the hope or expectation that some other and collateral good would be furthered as an incident, that without more would not make the Act invalid. This indeed is hardly questioned. The case for the petitioner is built on the contention that here an ulterior aim is wrought into the very structure of the Act, and what is even more important that the aim is not only ul-

terior, but essentially unlawful. In particular, the 90-percent credit is relied upon as supporting that conclusion. But before the statute succumbs to an assault upon these lines, two propositions must be made out by the assailant. There must be a showing in the first place that separated from the credit the revenue provisions are incapable of standing by themselves. There must be a showing in the second place that the tax and the credit in combination are weapons of coercion, destroying or impairing the autonomy of the states. The truth of each proposition being essential to the success of the assault, we pass for convenience to a consideration of the second, without pausing to inquire whether there has been a demonstration of the first.

To draw the line intelligently between duress and inducement there is need to remind ourselves of facts as to the problem of unemployment that are now matters of common knowledge. The relevant statistics are gathered in the brief of counsel for the government. Of the many available figures a few only will be mentioned. During the years 1929 to 1936, when the country was passing through a cyclical depression, the number of the unemployed mounted to unprecedented heights. Often the average was more than 10 million; at times a peak was attained of 16 million or more. Disaster to the breadwinner meant disaster to dependents. Accordingly the roll of the unemployed, itself formidable enough, was only a partial roll of the destitute or needy. The fact developed quickly that the states were unable to give the requisite relief. The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare. The nation responded to the call of the distressed. Between January 1, 1933, and July 1, 1936, the states (according to statistics submitted by the government) incurred obligations of $689,291,802 for emergency relief; local subdivisions an additional $775,675,366. In the same period the obligations for emergency relief incurred by the national government were $2,929,307,125, or twice the obligations of states and local agencies combined. According to the President's budget message for the fiscal year 1938, the national government expended for public works and unemployment relief for the three fiscal years 1934, 1935, and 1936, the stupendous total of $8,681,-

000,000. The *parens patriae* has many reasons—fiscal and economic as well as social and moral—for planning to mitigate disasters that bring these burdens in their train.

In the presence of this urgent need for some remedial expedient, the question is to be answered whether the expedient adopted has overleapt the bounds of power. The assailants of the statute say that its dominant end and aim is to drive the state legislatures under the whip of economic pressure into the enactment of unemployment compensation laws at the bidding of the central government. Supporters of the statute say that its operation is not constraint, but the creation of a larger freedom, the states and the nation joining in a cooperative endeavor to avert a common evil. Before Congress acted, unemployment compensation insurance was still, for the most part, a project and no more. Wisconsin was the pioneer. Her statute was adopted in 1931. At times bills for such insurance were introduced elsewhere, but they did not reach the stage of law. In 1935, four states (California, Massachusetts, New Hampshire, and New York) passed unemployment laws on the eve of the adoption of the Social Security Act, and two others did likewise after the federal act and later in the year. The statutes differed to some extent in type, but were directed to a common end. In 1936, 28 other states fell in line, and eight more the present year. But if states had been holding back before the passage of the federal law, inaction was not owing, for the most part, to the lack of sympathetic interest. Many held back through alarm lest in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors. See House Report, No. 615, 74th Congress, 1st session, p. 8; Senate Report, No. 628, 74th Congress, 1st session, p. 11. Two consequences ensued. One was that the freedom of a state to contribute its fair share to the solution of a national problem was paralyzed by fear. The other was that in so far as there was failure by the states to contribute relief according to the measure of their capacity, a disproportionate burden, and a mountainous one, was laid upon the resources of the government of the nation.

The Social Security Act is an attempt to find a method by which all these public agencies may work together to a common end. Every dollar of the new taxes will continue in all likelihood to be used and needed by the nation as long as states are unwilling, whether through timidity or for other motives, to do what

can be done at home. At least the inference is permissible that Congress so believed, though retaining undiminished freedom to spend the money as it pleased. On the other hand fulfillment of the home duty will be lightened and encouraged by crediting the taxpayer upon his account with the Treasury of the nation to the extent that his contributions under the laws of the locality have simplified or diminished the problem of relief and the probable demand upon the resources of the fisc. Duplicated taxes, or burdens that approach them, are recognized hardships that government, state or national, may properly avoid. If Congress believed that the general welfare would better be promoted by relief through local units than by the system then in vogue, the cooperating localities ought not in all fairness to pay a second time.

Who then is coerced through the operation of this statute? Not the taxpayer. He pays in fulfillment of the mandate of the local legislature. Not the state. Even now she does not offer a suggestion that in passing the unemployment law she was affected by duress. For all that appears she is satisfied with her choice, and would be sorely disappointed if it were now to be annulled. The difficulty with the petitioner's contention is that it confuses motive with coercion. "Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed." In like manner every rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems. The wisdom of the hypothesis has illustration in this case. Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation. Even on that assumption the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree,—at times, perhaps, of fact. The point had not been reached when Alabama made her choice. We cannot say that she was acting, not of her unfettered will, but under the strain of a persuasion equivalent to undue influence, when she chose to have relief administered

under laws of her own making, by agents of her own selection, instead of under federal laws, administered by federal officers, with all the ensuing evils, at least to many minds, of federal patronage and power. There would be a strange irony, indeed, if her choice were now to be annulled on the basis of an assumed duress in the enactment of a statute which her courts have accepted as a true expression of her will. We think the choice must stand.

In ruling as we do, we leave many questions open. We do not say that a tax is valid, when imposed by act of Congress, if it is laid upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power. No such question is before us. In the tender of this credit Congress does not intrude upon fields foreign to its function. . . .

United States *v.* Butler is cited by petitioner as a decision to the contrary. There a tax was imposed on processors of farm products, the proceeds to be paid to farmers who would reduce their acreage and crops under agreements with the Secretary of Agriculture, the plan of the Act being to increase the prices of certain farm products by decreasing the quantities produced. The Court held (1) that the so-called tax was not a true one, the proceeds being earmarked for the benefit of farmers complying with the prescribed conditions, (2) that there was an attempt to regulate production without the consent of the state in which production was affected, and (3) that the payments to farmers were coupled with coercive contracts, unlawful in their aim and oppressive in their consequences. The decision was by a divided Court, a minority taking the view that the objections were untenable. None of them is applicable to the situation here developed.

(*a*) The proceeds of the tax in controversy are not earmarked for a special group.

(*b*) The unemployment compensation law which is a condition of the credit has had the approval of the state and could not be a law without it.

(*c*) The condition is not linked to an irrevocable agreement, for the state at its pleasure may repeal its unemployment law, terminate the credit, and place itself where it was before the credit was accepted.

(*d*) The condition is not directed to the attainment of an un-

lawful end, but to an end, the relief of unemployment, for which nation and state may lawfully cooperate.

Fourth. The statute does not call for a surrender by the states of powers essential to their quasi-sovereign existence.

Argument to the contrary has its source in two sections of the Act. One section defines the minimum criteria to which a state compensation system is required to conform if it is to be accepted by the [Social Security] Board as the basis for a credit. The other section rounds out the requirement with complementary rights and duties. Not all the criteria or their incidents are challenged as unlawful. We will speak of them first generally, and then more specifically in so far as they are questioned.

A credit to taxpayers for payments made to a state under a state unemployment law will be manifestly futile in the absence of some assurance that the law leading to the credit is in truth what it professes to be. An unemployment law framed in such a way that the unemployed who look to it will be deprived of reasonable protection is one in name and nothing more. What is basic and essential may be assured by suitable conditions. The terms embodied in these sections are directed to that end. A wide range of judgment is given to the several states as to the particular type of statute to be spread upon their books. . . . What they may not do, if they would earn the credit, is to depart from those standards which in the judgment of Congress are to be ranked as fundamental. Even if opinion may differ as to the fundamental quality of one or more of the conditions, the difference will not avail to vitiate the statute. In determining essentials Congress must have the benefit of a fair margin of discretion. One cannot say with reason that this margin has been exceeded, or that the basic standards have been determined in any arbitrary fashion. In the event that some particular condition shall be found to be too uncertain to be capable of enforcement, it may be severed from the others, and what is left will still be valid.

We are to keep in mind steadily that the conditions to be approved by the board as the basis for a credit are not provisions of a contract, but terms of a statute, which may be altered or repealed. The state does not bind itself to keep the law in force. It does not even bind itself that the moneys paid into the federal fund will be kept there indefinitely or for any stated time. On the contrary, the Secretary of the Treasury will honor a requisition for the whole or any part of the deposit in the fund whenever

one is made by the appropriate officials. The only consequence of the repeal or excessive amendment of the statute, or the expenditure of the money, when requisitioned, for other than compensation uses or administrative expenses, is that approval of the law will end, and with it the allowance of a credit, upon notice to the state agency and an opportunity for hearing.

These basic considerations are in truth a solvent of the problem. Subjected to their test, the several objections on the score of abdication are found to be unreal.

Thus, the argument is made that by force of an agreement the moneys when withdrawn must be "paid through public employment offices in the state or through such other agencies as the board may approve." But in truth there is no agreement as to the method of disbursement. There is only a condition which the state is free at pleasure to disregard or to fulfill. Moreover, approval is not requisite if public employment offices are made the disbursing instruments. Approval is to be a check upon resort to "other agencies" that may, perchance, be irresponsible. A state looking for a credit must give assurance that her system has been organized upon a base of rationality.

There is argument again that the moneys when withdrawn are to be devoted to specific uses, the relief of unemployment, and that by agreement for such payment the quasi-sovereign position of the state has been impaired, if not abandoned. But again there is confusion between promise and condition. Alabama is still free, without breach of an agreement, to change her system overnight. No officer or agency of the national government can force a compensation law upon her or keep it in existence. No officer or agency of that government, either by suit or other means, can supervise or control the application of the payments.

Finally and chiefly, abdication is supposed to follow from section 904 of the statute and the parts of section 903 that are complementary thereto. By these the Secretary of the Treasury is authorized and directed to receive and hold in the Unemployment Trust Fund all moneys deposited therein by a state agency for a state unemployment fund and to invest in obligations of the United States such portion of the fund as is not in his judgment required to meet current withdrawals. We are told that Alabama in consenting to that deposit has renounced the plenitude of power inherent in her statehood.

The same pervasive misconception is in evidence again. All that the state has done is to say in effect through the enactment

of a statute that her agents shall be authorized to deposit the unemployment tax receipts in the Treasury at Washington. The statute may be repealed. The consent may be revoked. The deposits may be withdrawn. The moment the state commission gives notice to the depositary that it would like the moneys back, the Treasurer will return them. To find state destruction there is to find it almost anywhere. With nearly as much reason one might say that a state abdicates its functions when it places the state moneys on deposit in a national bank.

There are very good reasons of fiscal and governmental policy why a state should be willing to make the Secretary of the Treasury the custodian of the fund. His possession of the moneys and his control of investments will be an assurance of stability and safety in times of stress and strain. . . . Nor is there risk of loss or waste. The credit of the Treasury is at all times back of the deposit, with the result that the right of withdrawal will be unaffected by the fate of any intermediate investments, just as if a checking account in the usual form had been opened in a bank.

The inference of abdication thus dissolves in thinnest air when the deposit is conceived of as dependent upon a statutory consent, and not upon a contract effective to create a duty. By this we do not intimate that the conclusion would be different if a contract were discovered. Even sovereigns may contract without derogating from their sovereignty. The states are at liberty, upon obtaining the consent of Congress, to make agreements with one another. We find no room for doubt that they may do the like with Congress if the essence of their statehood is maintained without impairment. Alabama is seeking and obtaining a credit of many millions in favor of her citizens out of the Treasury of the nation. Nowhere in our scheme of government—in the limitations express or implied of our federal Constitution—do we find that she is prohibited from assenting to conditions that will assure a fair and just requital for benefits received.

Fifth. Title III of the Act is separable from title IX and its validity is not at issue.

The essential provisions of that title have been stated in the opinion. As already pointed out, the title does not appropriate a dollar of the public moneys. It does no more than authorize appropriations to be made in the future for the administration of their laws, if Congress shall decide that appropriations are desirable. The title might be expunged, and title IX would stand intact. Without a severability clause we should still be led to that

conclusion. The presence of such a clause (sec. 1103) makes the conclusion even clearer.

The judgment is affirmed.

Mr. Justice MCREYNOLDS dissented. [He held the legislation under review to be in excess of the power granted to Congress.]

Mr. Justice SUTHERLAND (Mr. Justice VAN DEVANTER concurring with him), dissented. [Their disagreement was limited to the administrative provisions of the statute, which were thought to invade the powers reserved to the states by the Tenth Amendment.]

Mr. Justice BUTLER dissented. [He held the statutory scheme invalid, agreeing with both the other dissenting opinions.]

DUNCAN *v.* KAHANAMOKU
WHITE *v.* STEER

327 U.S. 304, 66 S.Ct. 606, 90 L.Ed. 688 (1946).

On Writs of Certoriari to the United States Circuit Court of Appeals for the Ninth Circuit.

Introduction

The war power. The power to wage war, observed Mr. Chief Justice Hughes, "is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation." Home Building and Loan Assn. *v.* Blaisdell, 290 U.S. 398, 426 (1934). More than once the Court has had occasion to reaffirm that proposition. The Court is also mindful, as Chief Justice Stone said in the Saboteurs' Case, of its duty, "in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty." *Ex parte* Quirin, 317 U.S. 1, 19 (1942).

Power over men and things. It is not to be doubted that our constitutional system contains within itself all the legal power needed for its own preservation. That proposition would seem to be the very beginning of statesmanship. Chief Justice Taney (who was completely

out of accord with President Lincoln's Administration) demonstrated to his own satisfaction, in an opinion which he never had occasion to use, that conscription was unconstitutional; but when the question actually came before the Court in 1918 the objections were found to be almost "too frivolous for further notice." Arver *v.* United States, 245 U.S. 366, 377. [On Taney's opinion, see Swisher, *Roger B. Taney,* The Macmillan Co., New York (1936), at 570. The opinion in the Selective Draft Law Cases was written by Chief Justice White, once a soldier in the Confederate Army.] We know that the government may be authorized to take over the control of essential facilities, such as railroads, telephones and telegraphs, thereby coordinating all their activities for the realization of the supreme imperative that the nation shall not perish. Northern Pacific Ry. Co. *v.* North Dakota, 250 U.S. 135 (1919); Dakota Central Telephone Co. *v.* South Dakota, 250 U.S. 163 (1919). "The complete and undivided character of the war power of the United States is not disputable." 250 U.S. 149. A statute forbidding the wartime manufacture and sale of intoxicants in order to promote the nation's efficiency in men, munitions, and supplies was easily sustained as an exercise of the war power. Jacob Ruppert *v.* Caffey, 251 U.S 264 (1920). Where instantly needed to avert some overpowering danger, private property may be taken summarily for the public service, compensation being made thereafter. United States *v.* Russell, 13 Wall. 623 (1871). In a word, the power to take things requisite in the war effort is solidly established. There will be matters of payments and adjustments to settle, but these are problems of accounting rather than of constitutional power, whose solution can stand over to the time when victory has been won.

Economic controls. Legislation establishing such price controls over commodities and rents as emergency may require has been sustained. Yakus *v.* United States, 321 U.S. 414 (1944); Bowles *v.* Willingham, 321 U.S. 503 (1944). The power of Congress to give the quality of legal tender to paper currency issued on the credit of the United States—which for a moment after the Civil War was in part denied by a majority of the Court, Hepburn *v.* Griswold, 8 Wall. 603 (1870)—has long since been placed beyond dispute. The Legal Tender Cases, 12 Wall. 547 (1871); Juillard *v.* Greenman, 110 U.S. 421 (1884). In this latter case the authority was found not merely in the grant of power "to coin Money, regulate the Value thereof, and of foreign Coin," but also in related powers conferred on Congress and appropriate to achieve the great objects for which the government was framed, a "national government, with sovereign powers." Indeed the Court has sustained a further measure—congressional action invalidating gold clauses in existing contracts—which was found to be an appropriate means to the legitimate end of preventing interference with the monetary policy of Congress. Norman *v.* Baltimore & O. R. Co., 294 U.S. 240 (1935). It seems safe to conclude that our Constitution, rightly in-

terpreted, permits the national government to take all those measures which the exigencies of an atomic age may present. (Whether the existing structure of government is entirely adequate is well worth consideration; that, however, is a problem of organization rather than of power.)

The Prize Cases. War is declared by act of Congress. But the Court, realistically and sensibly, has recognized that war may exist in fact without any declaration on either side. Think of Pearl Harbor. In April 1861, when the functioning of the government of the United States was resisted with armed force, President Lincoln used armed force to suppress the resistance. Congress was not convened and did not by enactment determine the existence of a war until July. May the President on his own authority take warlike measures against a belligerent—e.g., blockade his coasts—or must he wait until Congress makes a solemn declaration? Did war begin in April, or only in July 1861? Here is the answer of the Supreme Court, in the Prize Cases, 2 Black 635 (1862):

> If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or states organized in rebellion, it is none the less a war, although the declaration of it be "unilateral." . . .
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> Whether the President in fulfilling his duties, as Commander in Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions, as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the government to which this power was intrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.

Milligan's Case. We come now to some problems of military jurisdiction, and of war power as it touches civil liberties. And first a word on *Ex parte* Milligan, 4 Wall. 2 (1866). Milligan was a "major general" in the Sons of Liberty, a "Copperhead" organization. He was arrested in Indiana in 1864, tried before a military commission at Indianapolis on a charge of conspiracy to overthrow the government, and sentenced to death. President Lincoln put off acting on the record, hoping to grant mercy when the war was over. After Lincoln's assassination, President Johnson commuted the sentence to life imprison-

ment at hard labor. Remember, Milligan had undoubtedly committed serious offenses against the United States.

By Act of March 3, 1863, Congress had authorized the President to suspend the writ of habeas corpus, provided, however, that political prisoners, if not indicted by the next federal grand jury, would be entitled to discharge on taking an oath of allegiance. As soon as the war was over, Milligan sought a writ of habeas corpus to test the validity of his sentence by military commission. When the case was heard in the Supreme Court in 1866 all the Justices were agreed that he was entitled to be released. He had been tried in a place where hostilities were not being carried on. The Act of March 3, 1863, applied to his situation. Congress had made no attempt to subject to military trial the inhabitants of places outside the theater of operations.

Opinion of the Court. That would have sufficed for a decision. But Justice Davis and four other Justices went further and declared that even if it had sought to do so, Congress could not constitutionally have authorized the trial of civilians forming no part of the army, by tribunals other than the judicial courts. Said Davis, J., for the Court:

> If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theater of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.

The test of whether or not the courts were open was drawn from English constitutional law of the time of the Stuarts.

Minority view. Four Justices were unwilling to lay down so much for an indefinite future. Speaking through Chief Justice Chase, they said:

> We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists.
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> Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the

> trial of crimes and offenses against the discipline or security of the army or against the public safety.

The majority laid down a hard and fast rule; the minority would judge the propriety of what might be done in the light of the actual necessities which war might bring.

Three kinds of military jurisdiction. Quite aside from this difference in emphasis, Chief Justice Chase's opinion set down the following definitions, which have become classic:

> There are under the Constitution three kinds of military jurisdiction. one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the national government, when the public danger requires its exercise. The first of these may be called jurisdiction under *Military Law*, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as *Military Government*, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated *Martial Law* proper, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.

To recapitulate: military law is the system which the GI found when he entered the service; military government is the jurisdiction exercised over occupied territory abroad, as in Italy, Germany, and Japan; "martial law proper," or better still, "martial rule" as Justice Davis called it, is the control which Grant, Sherman, and the rest had exercised in the vicinity of their lines during the Civil War.

Case of the saboteurs. Early in World War II the Court had occasion to recognize that there is a fourth type of military jurisdiction—over persons accused of violations of the laws of war. This was in the case of the saboteurs, *Ex parte* Quirin, 317 U.S. 1 (1942). In June 1942 Quirin and seven other Germans were landed by submarine on the Atlantic coast. They buried their German uniforms, donned civilian clothes, and set forth on their mission to commit warlike acts.

They were apprehended, and brought before a military commission convened by the President, on charges of violating the laws of war. Had they remained in uniform and borne arms openly they would, on capture, have been entitled to be held as prisoners of war. Going about within our lines in civil disguise, they forfeited their status as lawful belligerents and became liable to punishment upon conviction by a military tribunal. Cases of that sort had been familiar in the Union and Confederate armies. What was novel about the case of the saboteurs was that they were not picked up at a place subject to "military government," such as Anzio or Bastogne, not at a place subject to "martial rule," such as Atlanta and New Orleans had been, but at a place remote from hostilities where it seemed at first surprising to convene a law of war tribunal. But Quirin and the others were charged with no offense against the Criminal Code of the United States; their offense was not that they had violated the immigration laws, for example. An indictment in a judicial court, charging a violation of the rules of land warfare, would have had to be thrown out as stating no offense within the jurisdiction of the court. All branches of the government recognize that there is a law of war, violations whereof are triable in military tribunals (but not in the judicial courts save as Congress may have declared some particular breach to be also a federal crime).

Ex parte *Quirin*. The saboteurs were assigned very able counsel. Col. Kenneth C. Royall, later Secretary of the Army. On behalf of seven of the eight he applied for writs of habeas corpus in a federal district court and, from an adverse ruling there, sought a review in the Supreme Court. (An attempt to bring the case directly before the Supreme Court failed—for reasons which recall Marbury *v.* Madison. The Court did a very unusual thing, it convened in a special term, in July 1942, to hear the case argued. Why? Almost certainly it was not because of any doubt as to the legality of the trial by the military commission. Presumably the Court thought, and no doubt very wisely, that it was in the public interest that the legality of what was being done should be settled, authoritatively and promptly, and that a striking demonstration be given that the courts were open to alien enemies who invoked their protection. Upon a full hearing the military jurisdiction was sustained. Six of the defendants were executed, two were sentenced to life imprisonment.

P.L. 503 on the Pacific Coast. Measures taken in the Western Defense Command raised grave constitutional problems. The disaster at Pearl Harbor, which left us in a more vulnerable position than the country then knew, braced those in responsible positions toward taking no chances. By executive order of February 19, 1942, the President authorized the military authorities to designate military areas, from which persons might be excluded and wherein the right to remain might be subjected to restrictions. It is, ordinarily, no crime to

violate an executive order or a direction of a military commander. If such exclusions and restrictions were made, how could they be sanctioned? On March 21 Congress enacted Public Law 503, which made it an offense, punishable in a federal court, to disregard such measures of control. The question in the Western Defense Command was the attitude of the Japanese and of the citizens of Japanese ancestry,—for one born in this country, though of alien parents, is a citizen. There was no legal objection to requiring alien enemies, Germans, Italians, or Japanese to remove to a designated place. Of course governments may take such elementary measures of prudence in time of war. But the evacuation of American citizens of Japanese ancestry was a very different matter. Individual investigations of loyalty, to be reliable, would have taken a long time. The evacuation order was made. (It may be interjected here that many Nisei later fought in a separate organization on the Italian front, with conspicuous bravery.)

The curfew. Litigation to test the military measures was taken, very properly, to the Supreme Court. Hirabayashi *v.* United States, 320 U.S. 81 (1943), sustained curfew regulations imposed on all persons of Japanese ancestry. It was not disputed that a curfew was an appropriate measure against sabotage. The principal attack was upon the discrimination. Mr. Chief Justice Stone said this:

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. Yick Wo *v.* Hopkins, 118 U.S. 356. We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas. Because racial discriminations are in most circumstances irrelevant and therefore prohibited, it by no means follows that, in dealing with the perils of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances which are relevant to measures for our national defense and for the successful prosecution of the war, and which may in fact place citizens of one ancestry in a different category from others. . . . The fact alone that attack on our shores was threatened by Japan rather than another enemy power set these citizens apart from others who have no particular associations with Japan. . . .

Evacuation. In Korematsu *v.* United States, 323 U.S. 214 (1944), the Court sustained the conviction of an American citizen for violating

the Act of February 21, 1942, by failing to obey an exclusion order. Mr. Justice Black, speaking for the Court, said, in part:

> It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.
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> We uphold the exclusion order as of the time it was made and when the petitioner violated it. In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direct emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

Roberts, Murphy, and Jackson, JJ., dissented. No one on the Court, we may be sure, was very happy over this case. Only an extreme and critical danger to the nation justified the action taken by the government.

Detention. Ex parte Endo, 323 U.S. 283 (1944), decided the same day, held that an American citizen of Japanese ancestry, concededly loyal to the United States, could not be detained in a relocation center. Detention in a specific place was, of course, something more than exclusion from a military area.

Hawaii after Pearl Harbor. We come now to problems of military control in Hawaii, culminating in Duncan *v.* Kahanamoku. Patently, unusual measures of control were imperative after Pearl Harbor. Here in a distant outpost were a civil governor, whose line of authority ran

back through the Department of the Interior to the President, and a commanding general, responsible for defense, whose line ran back through the War Department to the same central source. With a very high degree of mutual confidence, it is conceivable that they might have worked in complete co-ordination. That condition was never present.

Another conceivable solution was for the commanding general to act through Public Law 503, *supra*, imposing such regulations as were requisite and looking to the civil courts to punish violators. That was not attempted.

Instead the territorial governor, as authorized by section 67 of the Organic Act, declared "martial law" and then called upon the commanding general to assume the entire government. The general's orders became the law of the islands, and military commissions and provost courts administered the law. Duncan, while intoxicated, got into an altercation with a marine sentry. White, a stockbroker, was charged with embezzlement. Both were tried by provost court and sentenced to confinement. They sought release in habeas corpus proceedings, which reached the Supreme Court after the close of hostilities.

From time to time various civil functions were given back to the civil authorities. A proclamation of February 8, 1943, restored to the civil courts the exercise of their normal jurisdiction with certain exceptions. The provost courts continued to sit to punish violations of military orders.

General Richardson, the commanding general, operated on a theory that all governmental authority centered in himself, as an incident to his responsibility for the defense of the islands. This led him into various conflicts with local authorities. These views entered into the record of the case and may well have influenced the Court to react violently in its opinion. Very evidently they influenced Justice Murphy in the writing of his specially concurring opinion.

Opinion

Mr. Justice BLACK delivered the opinion of the Court.

The petitioners in these cases were sentenced to prison by military tribunals in Hawaii. Both are civilians. The question before us is whether the military tribunals had power to do this. The United States District Court for Hawaii in habeas corpus proceedings held that the military tribunals had no such power and ordered that they be set free. The Circuit Court of Appeals reversed, and ordered that the petitioners be returned to prison. 146 F. 2d 576. Both cases thus involve the rights of individuals charged with crime and not connected with the armed forces to

have their guilt or innocence determined in courts of law which provide established procedural safeguards, rather than by military tribunals which fail to afford many of these safeguards. Since these judicial safeguards are prized privileges of our system of government we granted certiorari.

The following events led to the military tribunals' exercise of jurisdiction over the petitioners. On December 7, 1941, immediately following the surprise air attack by the Japanese on Pearl Harbor, the governor of Hawaii by proclamation undertook to suspend the privilege of the writ of habeas corpus and to place the Territory under "martial law." Section 67 of the Hawaiian Organic Act, 31 Stat. 141, 153, authorizes the territorial governor to take this action "in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it . . ." His action was to remain in effect only "until communication can be had with the President and his decision thereon made known." The President approved the governor's action on December 9. The governor's proclamation also authorized and requested the commanding general, "during the . . . emergency and until danger of invasion is removed, to exercise all the powers normally exercised" by the governor and by "the judicial officers and employees of the Territory."

Pursuant to this authorization the commanding general immediately proclaimed himself military governor and undertook the defense of the Territory and the maintenance of order. On December 8, both civil and criminal courts were forbidden to summon jurors and witnesses and to try cases. The commanding general established military tribunals to take the place of the courts. These were to try civilians charged with violating the laws of the United States and of the Territory, and rules, regulations, orders or policies of the military government. Rules of evidence and procedure of courts of law were not to control the military trials. In imposing penalties the military tribunals were to be "guided by, but not limited to the penalties authorized by the court martial manual, the laws of the United States, the Territory of Hawaii, the District of Columbia, and the customs of war in like cases." The rule announced was simply that punishment was to be "commensurate with the offense committed" and that the death penalty might be imposed "in appropriate cases." Thus the military authorities took over the government of Hawaii. They could and did, by simply promulgating orders, govern the day to day activities of civilians who lived,

worked, or were merely passing through there. The military tribunals interpreted the very orders promulgated by the military authorities and proceeded to punish violators. The sentences imposed were not subject to direct appellate court review, since it had long been established that military tribunals are not part of our judicial system. *Ex parte* Vallandigham, 1 Wall. 243. The military undoubtedly assumed that its rule was not subject to any judicial control whatever, for by orders issued on August 25, 1943, it prohibited even accepting of a petition for writ of habeas corpus by a judge or judicial employee or the filing of such a petition by a prisoner or his attorney. Military tribunals could punish violators of these orders by fine, imprisonment, or death.

White, the petitioner in No. 15, was a stockbroker in Honolulu. Neither he nor his business was connected with the armed forces. On August 20, 1942, more than eight months after the Pearl Harbor attack, the military police arrested him. The charge against him was embezzling stock belonging to another civilian in violation of chapter 183 of the Revised Laws of Hawaii. Though by the time of White's arrest the courts were permitted "as agents of the military governor" to dispose of some non-jury civil cases, they were still forbidden to summon jurors and to exercise criminal jurisdiction. On August 22, White was brought before a military tribunal designated as a "provost court." The "court" orally informed him of the charge. He objected to the tribunal's jurisdiction but the objection was overruled. He demanded to be tried by a jury. This request was denied. His attorney asked for additional time to prepare the case. This was refused. On August 25 he was tried and convicted. The tribunal sentenced him to five years' imprisonment. Later the sentence was reduced to four years.

Duncan, the petitioner in No. 14, was a civilian shipfitter employed in the Navy Yard at Honolulu. On February 24, 1944, more than two years and two months after the Pearl Harbor attack, he engaged in a brawl with two armed Marine sentries at the yard. He was arrested by the military authorities. By the time of his arrest the military had to some extent eased the stringency of military rule. Schools, bars and motion picture theaters had been reopened. Courts had been authorized to "exercise their normal jurisdiction." They were once more summoning jurors and witnesses and conducting criminal trials. There were important exceptions, however. One of these was that only

military tribunals were to try "Criminal prosecutions for violations of military orders." As the record shows, these military orders still covered a wide range of day to day civilian conduct. Duncan was charged with violating one of these orders, paragraph 8.01, title 8, of General Order No. 2, which prohibited assault on military or naval personnel with intent to resist or hinder them in the discharge of their duty. He was therefore tried by a military tribunal rather than the territorial court, although the general laws of Hawaii made assault a crime. Revised L.H.1935, ch. 166. A conviction followed and Duncan was sentenced to six months imprisonment.

Both White and Duncan challenged the power of the military tribunals to try them by petitions for writs of habeas corpus filed in the District Court for Hawaii on March 14 and April 14, 1944, respectively. Their petitions urged both statutory and constitutional grounds. The court issued orders to show cause. Returns to these orders contended that Hawaii had become part of an active theater of war constantly threatened by invasion from without; that the writ of habeas corpus had therefore properly been suspended, and martial law had validly been established in accordance with the provisions of the Organic Act; that consequently the district court did not have jurisdiction to issue the writ; and that the trials of petitioners by military tribunals pursuant to orders by the military governor issued because of military necessity were valid. . . . The district court, after separate trials, found in each case, among other things, that the courts had always been able to function but for the military orders closing them, and that consequently there was no military necessity for the trial of petitioners by military tribunals rather than regular courts. It accordingly held the trials void and ordered the release of the petitioners.

The circuit court of appeals, assuming without deciding that the district court had jurisdiction to entertain the petitions, held the military trials valid and reversed the ruling of the district court. 146 F. 2d 576. It held that the military orders providing for military trials were fully authorized by section 67 of the Organic Act and the governor's actions taken under it. . . . [The Government pointed out that since the privilege of the writ was restored and martial law terminated by Presidential proclamation on October 24, 1944, petitioners were entitled to their liberty if the military tribunals were without jurisdiction to try them. The Court therefore did not pass upon the validity of the order

suspending the privilege of habeas corpus or the power of the military to detain persons under other circumstances and conditions.] The petitioners contend that "martial law" as provided for by section 67 did not authorize the military to try and punish civilians such as petitioners and urge further that if such authority should be inferred from the Organic Act, it would be unconstitutional. We need decide the constitutional question only if we agree with the Government that Congress did authorize what was done here.

Did the Organic Act during the period of martial law give the armed forces power to supplant all civilian laws and to substitute military for judicial trials under the conditions that existed in Hawaii at the time these petitioners were tried? The relevant conditions, for our purposes, were the same when both petitioners were tried. The answer to the question depends on a correct interpretation of the Act. But we need not construe the Act, in so far as the power of the military might be used to meet other and different conditions and situations. The boundaries of the situation with reference to which we do interpret the scope of the Act can be more sharply defined by stating at this point some different conditions which either would or might conceivably have affected to a greater or lesser extent the scope of the authorized military power. We note first that at the time the alleged offenses were committed the dangers apprehended by the military were not sufficiently imminent to cause them to require civilians to evacuate the area or even to evacuate any of the buildings necessary to carry on the business of the courts. In fact, the buildings had long been open and actually in use for certain kinds of trials. Our question does not involve the well-established power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, or enemy belligerents, prisoners of war, or others charged with violating the laws of war. We are not concerned with the recognized power of the military to try civilians in tribunals established as a part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function. For Hawaii since annexation has been held by and loyal to the United States. Nor need we here consider the power of the military simply to arrest and detain civilians interfering with a necessary military function at a time of turbulence and danger from insurrection or war. And finally, there was no specialized effort of the

military, here, to enforce orders which related only to military functions, such as, for illustration, curfew rules or blackouts. For these petitioners were tried before tribunals set up under a military program which took over all government and superseded all civil laws and courts. If the Organic Act, properly interpreted, did not give the armed forces this awesome power, both petitioners are entitled to their freedom.

First. In interpreting the Act we must first look to its language. Section 67 makes it plain that Congress did intend the governor of Hawaii, with the approval of the President, to invoke military aid under certain circumstances. But Congress did not specifically state to what extent the army could be used or what power it could exercise. It certainly did not explicitly declare that the governor in conjunction with the military could for days, months, or years close all the courts and supplant them with military tribunals. Cf. Coleman *v.* Tennessee, 97 U.S. 509, 514. If a power thus to obliterate the judicial system of Hawaii can be found at all in the Organic Act, it must be inferred from section 67's provision for placing the Territory under "martial law." But the term "martial law" carries no precise meaning. The Constitution does not refer to "martial law" at all, and no act of Congress has defined the term. It has been employed in various ways by different people and at different times. By some it has been identified as "military law" limited to members of, and those connected with, the armed forces. Others have said that the term does not imply a system of established rules but denotes simply some kind of day to day expression of a general's will dictated by what he considers the imperious necessity of the moment. See United States *v.* Diekelman, 92 U.S. 520, 526. In 1857 the confusion as to the meaning of the phrase was so great that the Attorney General in an official opinion had this to say about it: "The common law authorities and commentators afford no clue to what martial law, as understood in England, really is . . . In this country it is still worse." 8 Op. Atty. Gen. 365, 367, 368. What was true in 1857 remains true today. The language of section 67 thus fails to define adequately the scope of the power given to the military and to show whether the Organic Act provides that courts of law be supplanted by military tribunals.

Second. Since the Act's language does not provide a satisfactory answer, we look to the legislative history for possible further aid in interpreting the term "martial law" as used in the statute.

[The legislative history is found to disclose no key as to the meaning which Congress attached to that term.]

Third. Since both the language of the Organic Act and its legislative history fail to indicate that the scope of "martial law" in Hawaii includes the supplanting of courts by military tribunals, we must look to other sources in order to interpret that term. We think the answer may be found in the birth, development and growth of our governmental institutions up to the time Congress passed the Organic Act. Have the principles and practices developed during the birth and growth of our political institutions been such as to persuade us that Congress intended that loyal civilians in loyal territory should have their daily conduct governed by military orders substituted for criminal laws, and that such civilians should be tried and punished by military tribunals? Let us examine what those principles and practices have been, with respect to the position of civilian government and the courts and compare that with the standing of military tribunals throughout our history.

People of many ages and countries have feared and unflinchingly opposed the kind of subordination of executive, legislative and judicial authorities to complete military rule which, according to the government, Congress has authorized here. In this country that fear has become part of our cultural and political institutions. The story of that development is well known and we see no need to retell it all. [The Court selects a few episodes.]

Courts and their procedural safeguards are indispensable to our system of Government. They were set up by our founders to protect the liberties they valued. *Ex parte* Quirin, 317 U.S. 1, 19. Our system of government clearly is the antithesis of total military rule, and the founders of this country are not likely to have contemplated complete military dominance within the limits of a territory made part of this country and not recently taken from an enemy. They were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws. Their philosophy has been the people's throughout our history. For that reason we have maintained legislatures chosen by citizens or their representatives and courts and juries to try those who violate legislative enactments. We have always been especially concerned about the potential evils of summary criminal trials and have guarded against them by provisions embodied in the Constitution itself. See *Ex parte* Milligan,

4 Wall. 2; Chambers *v.* Florida, 309 U.S. 227. Legislatures and courts are not merely cherished American institutions; they are indispensable to our government.

Military tribunals have no such standing. For as this Court has said before: ". . . the military should always be kept in subjection to the laws of the country to which it belongs, and that he is no friend to the Republic who advocates the contrary. The established principle of every free people is that the law shall alone govern; and to it the military must always yield." Dow *v.* Johnson, 100 U.S. 158, 169. Congress prior to the time of the enactment of the Organic Act had only once authorized the supplanting of the courts by military tribunals. Legislation to that effect was enacted immediately after the South's unsuccessful attempt to secede from the Union. In so far as that legislation applied to the Southern states after the war was at an end it was challenged by a series of Presidential vetoes as vigorous as any in the country's history. And in order to prevent this Court from passing on the constitutionality of this legislation Congress found it necessary to curtail our appellate jurisdiction. [*Ex parte* McCardle, 6 Wall. 318. See also Warren, *The Supreme Court in United States History,* Little, Brown & Co., Boston (1928), vol. 2, 464, 484.] Indeed, prior to the Organic Act, the only time this Court had ever discussed the supplanting of courts by military tribunals in a situation other than that involving the establishment of a military government over recently occupied enemy territory, it had emphatically declared that "civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish." *Ex parte* Milligan, 4 Wall. 2, 124-125.

We believe that when Congress passed the Hawaiian Organic Act and authorized the establishment of "martial law" it had in mind and did not wish to exceed the boundaries between military and civilian power, in which our people have always believed, which responsible military and executive officers had heeded, and which had become part of our political philosophy and institutions prior to the time Congress passed the Organic Act. The phrase "martial law" as employed in that Act, therefore, while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the Islands against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals. Yet the Government seeks to justify the

punishment of both White and Duncan on the ground of such supposed congressional authorization. We hold that both petitioners are now entitled to be released from custody.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of these cases.

Mr. Justice MURPHY, concurring.

The Court's opinion, in which I join, makes clear that the military trials in these cases were unjustified by the martial law provisions of the Hawaiian Organic Act. Equally obvious, as I see it, is the fact that these trials were forbidden by the Bill of Rights of the Constitution of the United States, which applies in both spirit and letter to Hawaii. . . .

Mr. Chief Justice STONE, concurring.

I concur in the result.

I do not think that "martial law," as used in section 67 of the Hawaiian Organic Act, is devoid of meaning. This Court has had occasion to consider its scope and has pointed out that martial law is the exercise of the power which resides in the executive branch of the government to preserve order and insure the public safety in times of emergency, when other branches of the government are unable to function, or their functioning would itself threaten the public safety. Luther *v.* Borden, 7 How. 1, 45. It is a law of necessity to be prescribed and administered by the executive power. Its object, the preservation of the public safety and good order, defines its scope, which will vary with the circumstances and necessities of the case. The exercise of the power may not extend beyond what is required by the exigency which calls it forth. Mitchell *v.* Harmony, 13 How. 115, 133; United States *v.* Russell, 13 Wall. 623, 628; Raymond *v.* Thomas, 91 U.S. 712, 716; Sterling *v.* Constantin, 287 U.S. 378, 400, 401. Any doubts that might be entertained that such is the true limit of martial law in this case are put at rest by section 67 of the Hawaiian Organic Act, which, "in case of rebellion or invasion, or imminent danger thereof," authorizes martial law only "when the public safety requires it . . ."

The Executive has broad discretion in determining when the public emergency is such as to give rise to the necessity of mar-

tial law, and in adapting it to the need. Cf. Hirabayashi *v.* United States, 320 U.S. 81. But executive action is not proof of its own necessity, and the military's judgment here is not conclusive that every action taken pursuant to the declaration of martial law was justified by the exigency. In the substitution of martial law controls for the ordinary civil processes, "what are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." Sterling *v.* Constantin, *supra*, 287 U.S. at page 401.

. . . The military authorities themselves testified and advanced no reason which has any bearing on public safety or good order for closing the civil courts to the trial of these petitioners, or for trying them in military courts. I can only conclude that the trials and the convictions upon which petitioners are now detained, were unauthorized by the statute, and without lawful authority. . . .

Mr. Justice BURTON, with whom Mr. Justice FRANKFURTER concurs, dissenting.

With the rest of this Court I subscribe unreservedly to the Bill of Rights. I recognize the importance of the civil courts in protecting individual rights guaranteed by the Constitution. I prefer civil to military control of civilian life and I agree that in war our Constitution contemplates the preservation of the individual rights of all of our people in accordance with a plan of constitutional procedure fitted to the needs of a self-governing republic at war.

Our Constitution expressly provides for waging war, and it is with the constitutional instruments for the successful conduct of war that I am concerned. . . .

The conduct of war under the Constitution is largely an executive function. Within the field of military action in time of war, the Executive is allowed wide discretion. While, even in the conduct of war, there are many lines of jurisdiction to draw between the proper spheres of legislative, executive and judicial action, it seems clear that at least on an active battlefield, the executive discretion to determine policy is there intended by the Constitution to be supreme. The question then arises: What is a battlefield and how long does it remain one after the first barrage? . . .

One way to test the soundness of a decision today that the trial of petitioner White on August 25, 1942, before a provost

court on a charge of embezzlement and the trial of petitioner Duncan on March 2, 1944, before a similar court on a charge of maliciously assaulting marine sentries were unconstitutional procedures, is to ask ourselves whether or not on those dates, with the war against Japan in full swing, this Court would have, or should have, granted a writ of habeas corpus, an injunction or a writ of prohibition to release the petitioners or otherwise to oust the provost courts of their claimed jurisdiction. Such a test emphasizes the issue. I believe that this Court would not have been justified in granting the relief suggested at such times. Also I believe that this Court might well have found itself embarrassed had it ordered such relief and then had attempted to enforce its order in the theater of military operations, at a time when the area was under martial law and the writ of habeas corpus was still suspended, all in accordance with the orders of the President of the United States and the governor of Hawaii issued under their interpretation of the discretion and responsibility vested in them by the Constitution of the United States and by the Organic Act of Hawaii enacted by Congress. . . .

Comment

Note Mr. Justice Burton's observation that the Court's opinion might have been different had hostilities still been raging in the Pacific. Duncan's Case, like Milligan's, came on for decision when the danger was at an end. In each instance the Court thought fit to stress a note of constitutional restraint.

Justice Black's opinion for the Court. Note that the majority disclaimed any intent to pass upon "the power of the military simply to arrest and detain civilians interfering with a necessary military function" at a time of danger. The commander had assumed all the functions of government, and even in permitting the ordinary courts to function had regarded them as "agents of the military governor." This unitary theory the Court rejects.

Note too that Justice Black's opinion deals with the meaning of section 67 of the Organic Act and finds that insufficient to justify what the general had done. He avoids pronouncing upon what the Constitution would say if Congress had attempted specifically to authorize the measures which the "military governor" took. Justice Murphy went further and asserted that the trials of Duncan and White had violated the Bill of Rights. He wished to reassert the doctrine of *Ex parte* Milligan.

Different views. Chief Justice Stone says, in effect, "What the Executive may do to protect the public safety is commensurate with the

danger; here the general evidently went a good deal beyond the needs of the occasion, and these military trials were *ultra vires.*" Justices Burton and Frankfurter say that there must be a considerable range of tolerance, and they are not prepared to hold that the military measures were clearly beyond the bounds of reason.

"Martial law" a dangerous expression. "Martial law" is a very dangerous expression, because it permits people to believe that there really is some such "law" which may be invoked by the Executive in time of war or insurrection, whereas the truth of the matter is simply that our constitutional law commands that the peace be maintained, the laws executed, the enemy repelled, and such extraordinary measures of force as may really be necessary to those ends will be justified. Sometimes state governors have made a very free, even careless use of this dangerous phrase as a supposed justification for extreme measures in handling industrial disorders. This confused thinking is repudiated by Chief Justice Hughes' great opinion in Sterling *v.* Constantin, 287 U.S. 378 (1932). The governor of Texas, in an effort to enforce prorationing in the oil industry, had declared "martial law" at each oil well. He found that, so far as the law of the United States Constitution is concerned, he had not improved his position. His proclamation of martial law was no "avenue of escape from the paramount authority of the federal Constitution." While the Executive has "a permitted range of honest judgment as to the measures to be taken in meeting force with force," still all state action must be tested by the Fourteenth Amendment's broad standard of reasonableness in the light of the circumstances. The duty to suppress insurrection carries with it authority to apply such restraint as may then and there seem necessary, extending even to temporary detention. This was the holding in Moyer *v.* Peabody, 212 U.S. 78 (1909), per Holmes, J., though some of the language there used was toned down by Hughes, C.J., in Sterling *v.* Constantin, where he stressed that "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." "Martial law" is not a magic incantation which avails to make lawful that which would otherwise be wrongful.

Yamashita's Case. Let us return for a moment to *Ex parte* Quirin, which recognized that a military commission is a tribunal competent to try alleged violations of the law of war. The Application of Yamashita, 327 U.S. 1 (1946), presented the case of a Japanese general who had been tried and convicted, by military commission in Manila, for war crimes in the Philippines. His military counsel had sought relief in the Supreme Court of the Philippines [that was before Philippine independence] and thence in the Supreme Court of the United States. They contended that the trial had violated various provisions of the Articles of War as well as of the Geneva Prisoner of War Convention. These matters were all quite technical. Suffice it to say that

the Court held otherwise on every point. Broadly the decision shows this: that it belongs to the judicial courts to determine whether military tribunals (like other administrative agencies) have acted *intra vires*. Here the Court found that the commission had had jurisdiction and had proceeded without violating any provision of law, statutory or treaty, binding upon it. Thus the Court found no basis for interference.

Justices Murphy and Rutledge, dissenting, held, among other things, that the trial had lacked certain elements of fairness and thus was inconsistent with the due process clause of the Fifth Amendment. The majority held that the Fifth Amendment had nothing to say in Yamashita's case, and declined "to consider what, in other situations, [it] might require." If we have problems of foreign occupation for some years to come we may hear more of that problem. Just what is the relation of the Court to the action of the executive branch of the government in respect of the action it takes in conducting our foreign policy in places overseas?

War crimes trials. Though the Court found no basis for interfering with the military jurisdiction, certainly Yamashita's trial was not set up and conducted in a manner of which we may be particularly proud —as Justice Rutledge's opinion demonstrates. Other war crimes trials have, it is believed, generally met a much higher standard of fairness and competence. The United Nations War Crimes Commission, in London, is publishing some of these cases in its *Law Reports of Trials of War Criminals.*

VI

CONSTITUTIONAL LIMITATIONS

SLAUGHTER-HOUSE CASES

16 Wallace 36, 21 L.Ed. 394 (1873).

On Writ of Error to the Supreme Court of the State of Louisiana.

Introduction

A full comprehension of this case yields the key to perhaps a good third of the entire constitutional law of the United States. Here it was that the Court gave its initial construction to the Fourteenth Amendment, which had emerged as one of the major consequences of the Civil War. The Justices divided, five to four, Justice Miller speaking for the majority and Justice Field being the head and front of the dissenters. Looking back in 1908, Justice Moody said "Criticism of this case has never entirely ceased, nor has it ever received universal assent by members of this Court." Twining *v.* New Jersey, 211 U.S. 78. Coming down to the differences which separated the so-called "liberals" from the "conservatives" in the Court over which Taft and Hughes presided, we find it is essentially true that Miller anticipated Holmes and Brandeis and Stone and Cardozo, while Field laid the ground for Sutherland and Butler and those who stood with them.

The federal Bill of Rights does not limit state action. Let the case be viewed, first, against its constitutional background. The Founders saw fit to lay certain Thou Shalt Nots upon the states, particularly in section 10 of Article I. Some were laid upon the federal government,

particularly in section 9 of the same Article. Apprehension that the federal government might turn upon the people who created it led to the early addition of the first ten Amendments, the federal Bill of Rights. Congress shall make no law prohibiting the free exercise of religion or the freedom of speech, of the press, and of assembly; the rights to grand jury and trial jury are secured; life, liberty, or property shall not be taken without due process of law; and so forth. These are limitations on federal, not on state, action. As Chief Justice Marshall recalled:

> In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments. In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This Court cannot so apply them.

This was in Barron *v.* Baltimore, 7 Pet. 243, 250 (1833), where a citizen aggrieved by the action of the city vainly invoked the Fifth Amendment. The Court dismissed his appeal for want of jurisdiction.

The triumph of the Union. The winning of the Civil War altered the way people thought of state and nation. No longer did the United States government seem remote, a thing to be viewed jealously—not to men who had paid so dearly for its preservation. Hence it appeared perfectly appropriate to write into the federal Constitution amendments which would establish and fortify certain of the principles resulting from the war, national principles to which the states must henceforth conform.

Reconstruction Amendments. The Thirteenth Amendment declares that there shall be no slavery. This was proposed in January 1865 and ratified by the following December. Next the Fourteenth, infinitely the most significant for the future. It was proposed in June 1866, and became a part of the Constitution in July 1868. It declares who are citizens of the United States, in terms large enough to embrace the former slaves. No state shall abridge the privileges or immunities of citizens of the United States; nor deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Whatever the rights which these words secure, they are civil as distinguished from political. Then follows a provision which, in substance, says that if any state shall deny the vote to adult inhabitants (thinking primarily of course of Negroes) its representation in Congress shall

be proportionately reduced:—this is the deadest letter in the Constitution. The function of the Fifteenth Amendment was to place the freedmen in a position where, by their votes, they could defend the civil rights which the Fourteenth Amendment had placed on paper: it declared that the right to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude. This was proposed in February 1869, and ratification was completed in February 1870.

Reconstruction. In the South, where these Amendments were to find their immediate application, the state of affairs was pleasing from no point of view. The Republicans, who dominated the national government, had as their adherents the Negroes, the carpetbaggers who had moved in after the war, and a few long-suffering Southern Unionists—a combination which was weak, inexperienced, often corrupt. Arrayed against them stood the Old South, resentful, refractory, "unreconstructed." President Lincoln and, after his assassination, President Johnson worked for a moderate reconstruction and a rapid restoration of the Southern states to their normal relations within the Union. But Southern intransigence, particularly toward the freedman, found its reaction in the mounting "radicalism" of the Northern Republicans. In the outcome Congress established a military government in the South, and the state governments which finally emerged were thoroughly Republican and quite malodorous.

Justice Miller on Reconstruction. Justice Miller, the strongest man on the Supreme Court and a stanch but moderate Republican, deplored "the passion which governs the hour in all parties and all persons who have controlling influence. In this the Supreme Court is as fully involved as the President or the House of Representatives." That was in 1868. "We are risking," he had been thinking for some time, "the eventual destruction of some of the best principles of our existing Constitution. . . . The struggle is demoralizing us worse than the war did." He would confide his thoughts quite freely in letters to his brother-in-law, a moderate Democrat in Texas. In August 1869 he wrote:

> It is not to be denied, that the leaders of the radical party in the Gulf states since the Rebellion have many of them been men of bad character, and without principle, and that still more of them have been ignorant, and unused to the exercise of political power.
>
> It has been a sore thing to me and to most of the Republican Party that it is so. Yet there is this to be said. The experiment in reconstruction made under Johnson's invitation and influence, in which it was hoped that the Southern people would exhibit some self-restraint, and would recognize in some shape the existence of legal rights and citizenship in the slaves freed by the

war, proved precisely the reverse. Just so far as Mr. Johnson made concession, a *sine qua non* to *his* acceptance of their reformed legislation they went and not an inch further. I do verily believe today that if those states had not framed their black codes, by which Negroes were substantially enslaved to the state instead of to the individual and if they could so far have restrained their fiendish hatred (which many not all of them had) for the Negro, as to have forborne the Massacre of Memphis and New Orleans, the Johnson policy would have prevailed and Reconstruction would have been peacefully carried out under a system which left the white man and the rebel in control of the state governments. [Reprinted by permission of the publishers from Charles Fairman, *Mr. Justice Miller and the Supreme Court*, 1862-1890, Cambridge, Mass.: Harvard University Press, 1939, at 140, 191, 193.]

Southern background of Slaughter-House Cases. It was not the freedman or the white Unionist who first invoked the Fourteenth Amendment. It was Southerners who were aroused over a particularly odious piece of carpetbag administration. Here is how it came about. In 1869 the Republican legislature of Louisiana passed an act "to protect the health of the city of New Orleans," which incorporated a slaughter-house company and gave it for twenty-five years a monopoly on the business within the city. All other butchers must come to it and pay for the use of its abattoir. The Supreme Court of Louisiana sustained the statute, as one would expect, and the butchers made a case before the Supreme Court of the United States.

It was John A. Campbell who laid out their case. Campbell had been a Justice of the Supreme Court from 1853 until 1861 when he resigned and went South, becoming an officer in the Confederate government. It seems strange indeed that a Southern Democrat should be asking the Supreme Court to grant a federal remedy against state action! The explanation is, of course, that the one-time ruling class of the South found itself hopelessly under the domination of the Republican state governments. Campbell himself had explained the temper of this group in a letter to Justice Clifford in 1871:

> The Southern communities will be a desolation until there is a thorough change of affairs in all the departments of the government. There is now no responsibility—and we are fast losing all of our ancient notions of what is becoming & fit in administration. The public are tolerant of corruption, maladministration, partiality in courts, worthlessness in juries, & regard government only as a means of exploitation. Indifference to anything wrong, is the common Sentiment. Hope is disappearing from the motives to exertion.

> Discontent, dissatisfaction, murmurings, complaints, even insurrection would be better than the insensibility that seems to prevail— . . . [*Ibid.*, p. 180.]

Campbell's argument. It occurred to Campbell to grasp the Thirteenth and particularly the Fourteenth Amendment and use their provisions as a shield for the protection of the very elements whom they had originally been meant to restrain. It was the butchers of New Orleans who claimed "the privileges and immunities of citizens of the United States" against the carpetbaggers' monopoly. "The purpose is manifest," Campbell told the Court, "to establish through the whole jurisdiction of the United States one people, and that every member of the empire shall understand and appreciate the constitutional fact, that his privileges and immunities cannot be abridged by state authority." He contended that it was a part of the citizen's "privileges and immunities," his right to "liberty and property," to live under a system of economic *laissez faire*. If a state imposed a restraint upon the citizen's normal freedom to engage in business, a federal question was presented; and if the judges found the regulation to be unreasonable (as was the monopoly on butchering at New Orleans), the state's action should be held a violation of the Fourteenth Amendment. Thus an Amendment whose occasion was a belief that black Republicans needed further protection against Southern whites was first invoked by the latter against the former; and, if Campbell's argument should persuade the Court, provisions which had been ratified in a context of Reconstruction politics would become a charter for the freedom of economic enterprise from public control. Campbell's effort was indeed a mighty one.

Carpenter's reply. Arguing on the opposite side was Senator Matt Carpenter, Republican of Wisconsin, who had borne an active part when the Amendment was debated in Congress. Take heed, Your Honors, he said in substance. Consider the consequences of the step now urged upon you. The Court would find itself passing upon the reasonableness of a host of laws which in the public interest regulated the manner in which business activities were carried on, such as the licensing of public callings, the control of dangerous occupations, and "all existing laws regulating and fixing the hours of labor, and prohibiting the employment of children, women, and men in any particular occupations or places for more than a certain number of hours per day." The theory advanced by the other side, he warned, would "bring within the jurisdiction of this Court all questions relating to any of these kindred subjects, and deprive the legislatures and state courts of the several states from regulating and settling their internal affairs."

Here was another great case, like Gibbons *v.* Ogden, where the Court must enter upon a tremendously important new field. The lines first laid down would inevitably run far into the future.

Opinion

Mr. Justice MILLER delivered the opinion of the Court.

The plaintiffs in error . . . allege that the Statute is a violation of the Constitution of the United States in these several particulars:

That it creates an involuntary servitude forbidden by the Thirteenth Article of Amendment;

That it abridges the privileges and immunities of citizens of the United States;

That it denies to the plaintiffs the equal protection of the laws; and,

That it deprives them of their property without due process of law; contrary to the provisions of the first section of the Fourteenth Article of Amendment.

This Court is thus called upon for the first time to give construction to these Articles.

We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States and of the several states to each other, and to the citizens of the states and of the United States, have been before this Court during the official life of any of its present members. . . .

The first section of the Fourteenth Article, to which our attention is more specially invited, opens with a definition of citizenship—not only citizenship of the United States, but citizenship of the states. No such definition was previously found in the Constitution, nor had any attempt been made to define it by act of Congress. It had been the occasion of much discussion in the courts, by the executive departments, and in the public journals. It had been said by eminent judges that no man was a citizen of the United States except as he was a citizen of one of the states composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not citizens. Whether this proposition was sound or not had never been judicially decided. But it had been held by this Court, in the celebrated Dred Scott case, only a few years before the outbreak of the Civil War, that a man of African descent, whether a slave or not, was not and could not be a citizen of a state or of the United States. This de

cision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled; and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the Negro race who had recently been made freemen, were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution.

To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a state, the first clause of the first section was framed.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The first observation we have to make on this clause is that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their citizenship of a particular state, and it overturns the Dred Scott decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the Negro can admit of no doubt. The phrase "subject to its jurisdiction" was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states born within the United States.

The next observation is more important in view of the arguments of counsel in the present case. It is, that the distinction between citizenship of the United States and citizenship of a state is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a state, but an important element is necessary to convert the former into the latter. He must reside within the state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a state, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.

We think this distinction and its explicit recognition in this Amendment of great weight in this argument, because the next

paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several states. The argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.

The language is, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It is a little remarkable, if this clause was intended as a protection to the citizen of a state against the legislative power of his own state, that the word citizen of the state should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the state, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the Amendment.

If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the state as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the Amendment.

The first occurrence of the words "privileges and immunities" in our constitutional history, is to be found in the fourth of the articles of the old Confederation.

It declares "that the better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to

the same duties, impositions, and restrictions as the inhabitants thereof respectively."

In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision is found in section two of the Fourth Article, in the following words: "The Citizens of each State shall be entitled to all the Privileges and Immunities of Citizens of the several States."

There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the article of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.

Fortunately we are not without judicial construction of this clause of the Constitution. The first and the leading case on the subject is that of Corfield *v.* Coryell, decided by Mr. Justice Washington in the Circuit Court for the District of Pennsylvania in 1823, 4 Washington's Circuit Court, 371.

"The inquiry," he says, "is, what are the privileges and immunities of citizens of the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole." . . .

The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the states. It threw around them in that clause no security for the citizen of the state in which they were claimed or exercised. Nor did it profess to control the power of the state governments over the rights of its own citizens.

Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their

exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction.

It would be the vainest show of learning to attempt to prove by citation of authority, that up to the adoption of the recent amendments, no claim or pretense was set up that those rights depended on the federal government for their existence or protection, beyond the very few express limitations which the federal Constitution imposed upon the states—such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the states, as above defined, lay within the constitutional and legislative power of the states, and without that of the federal government. Was it the purpose of the Fourteenth Amendment, by the simple declaration that no state should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the states to the federal government? And where it is declared that Congress shall have the power to enforce that Article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the states?

All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by state legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the states, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this Court a perpetual censor upon all legislation of the states, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this Amendment. The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions;

when the effect is to fetter and degrade the state governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the state and federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

We are convinced that no such results were intended by the Congress which proposed these Amendments, nor by the legislatures of the states which ratified them.

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the states as such, and that they are left to the state governments for security and protection, and not by this Article placed under the special care of the federal government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no state can abridge, until some case involving those privileges may make it necessary to do so.

But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the federal government, its National character, its Constitution, or its laws.

One of these is well described in the case of Crandall *v.* Nevada, 6 Wall. 36. It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several states." And quoting from the language of Chief Justice Taney in another case, it is said "that for all the great purposes for which the federal government was established, we are one people, with one common country, we are all citizens of the United States"; and it is, as such citizens, that their rights are supported in this Court in Crandall *v.* Nevada.

Another privilege of a citizen of the United States is to de-

mand the care and protection of the federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several states, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a state. One of these privileges is conferred by the very Article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any state of the Union by a bona fide residence therein, with the same rights as other citizens of that state. To these may be added the rights secured by the Thirteenth and Fifteenth Articles of Amendment, and by the other clause of the Fourteenth, next to be considered.

But it is useless to pursue this branch of the inquiry, since we are of opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of the clause of the Fourteenth Amendment under consideration.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its [the] laws."

The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law. The first of these paragraphs has been in the Constitution since the adoption of the Fifth Amendment, as a restraint upon the federal power. It is also to be found in some form of expression in the constitutions of nearly all the states, as a restraint upon the power of the states. This law, then, has practically been the same as it now is during the existence of the government, except so far as the present Amendment may place

the restraining power over the states in this matter in the hands of the federal government.

We are not without judicial interpretation, therefore, both state and national, of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the state of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.

"Nor shall any State deny to any person within its jurisdiction the equal protection of the laws."

In the light of the history of these Amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the states where the newly emancipated Negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

If, however, the states did not conform their laws to its requirements, then by the fifth section of the Article of Amendment Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a state not directed by way of discrimination against the Negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. But as it is a state that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of state oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before us, and do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the Amendment.

In the early history of the organization of the government, its statesmen seem to have divided on the line which should separate the powers of the national government from those of the state governments, and though this line has never been very well defined in public opinion, such a division has continued from that day to this.

The adoption of the first eleven Amendments to the Constitution so soon after the original instrument was accepted, shows a

prevailing sense of danger at that time from the federal power. And it cannot be denied that such jealousy continued to exist with many patriotic men until the breaking out of the late Civil War. It was then discovered that the true danger of the perpetuity of the Union was in the capacity of the state organizations to combine and concentrate all the powers of the state, and of contiguous states, for a determined resistance to the general government.

Unquestionably this has given great force to the argument, and added largely to the number, of those who believe in the necessity of a strong National government.

But, however pervading this sentiment, and however it may have contributed to the adoption of the Amendments we have been considering, we do not see in those Amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the states with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government, though they may have thought proper to impose additional limitations on the states, and to confer additional power on that of the Nation. . . .

The judgments of the Supreme Court of Louisiana in these cases are affirmed.

Mr. Justice FIELD (Mr. Chief Justice CHASE, Mr. Justice SWAYNE, and Mr. Justice BRADLEY joining with him), dissenting. . . .

No one will deny the abstract justice which lies in the position of the plaintiffs in error; and I shall endeavor to show that the position has some support in the fundamental law of the country.

It is contended in justification for the Act in question that it was adopted in the interest of the city, to promote its cleanliness and protect its health, and was the legitimate exercise of what is termed the police power of the state. That power undoubtedly extends to all regulations affecting the health, good order, morals, peace, and safety of society, and is exercised on a great variety of subjects, and in almost numberless ways. All sorts of restrictions and burdens are imposed under it, and when these are not in conflict with any constitutional prohibitions, or fundamental

principles, they cannot be successfully assailed in a judicial tribunal. With this power of the state and its legitimate exercise I shall not differ from the majority of the Court. But under the pretense of prescribing a police regulation the state cannot be permitted to encroach upon any of the just rights of the citizen, which the Constitution intended to secure against abridgment.

In the law in question there are only two provisions which can properly be called police regulations: the one which requires the landing and slaughtering of animals below the City of New Orleans, and the other which requires the inspection of the animals before they are slaughtered. . . . The pretense of sanitary regulations for the grant of the exclusive privileges is a shallow one . . .

What, then, are the privileges and immunities which are secured against abridgment by state legislation? . . .

. . . The immortal document which proclaimed the independence of the country declared as self-evident truths that the Creator had endowed all men "with certain inalienable Rights, [and] that among these are Life, Liberty and the pursuit of Happiness.—[and] That to secure these rights, Governments are instituted among Men."

. . . That [Fourteenth] Amendment was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator; which the law does not confer, but only recognizes. . . .

[The opinion then quotes from a decision of Justice Bradley in the circuit court, as well as from three state courts holding that a city council had exceeded its authority under the law of the state when it had, as was found in each case, unreasonably excluded citizens from the pursuit of some business enterprise.]

In all these cases there is a recognition of the equality of right among citizens in the pursuit of the ordinary avocations of life, and a declaration that all grants of exclusive privileges, in contravention of this equality, are against common right, and void.

This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex and condition. The state may prescribe such regulations for every pursuit and calling of life as will promote the public health,

secure the good order and advance the general prosperity of society, but when once prescribed, the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations. This is the fundamental idea upon which our institutions rest, and unless adhered to in the legislation of the country our government will be a republic only in name. The Fourteenth Amendment, in my judgment, makes it essential to the validity of the legislation of every state that this equality of right should be respected. How widely this equality has been departed from, how entirely rejected and trampled upon by the Act of Louisiana, I have already shown. And it is to me a matter of profound regret that its validity is recognized by a majority of this Court, for by it the right of free labor, one of the most sacred and imprescriptible rights of man, is violated. . . . grants of exclusive privileges, such as is made by the Act in question, are opposed to the whole theory of free government, and it requires no aid from any bill of rights to render them void. That only is a free government, in the American sense of the term, under which the inalienable right of every citizen to pursue his happiness is unrestrained, except by just, equal, and impartial laws.

Mr. Justice BRADLEY (Mr. Justice SWAYNE joining with him), dissenting. . . .

Mr. Justice SWAYNE, dissenting. . . .

Comment

The question was not whether the monopoly was wise legislation. Of course all the Justices knew it was not. The question was whether the Supreme Court of the United States should hold it unconstitutional—which is a very different thing.

Justice Field's opinion. Placing ourselves for the moment in Justice Field's position, the gist of what he is saying can be put in the following free paraphrase. I don't think that monopoly was merely unwise; it was wrong, WRONG, WRONG—so wrong that it must be classed as violating one of those "inalienable rights" that Thomas Jefferson wrote about in the Declaration of Independence. He believed that there were some principles of right so basic, so ultimate, that they should be regarded as "the laws of Nature and of Nature's God." I agree with him. I think the citizen has a right to pursue any lawful business or calling, to develop his capacities, and give them their

highest enjoyment; and any law which limits that freedom unreasonably—in the opinion of the Justices of the Supreme Court—should be struck down as unconstitutional. [Cf. Field, dissenting in Munn *v.* Illinois, 94 U.S. 113 (1877).] In the past, to be sure, if a state legislature acted arbitrarily there might, perhaps, be nothing that the federal Supreme Court could do about it; for the federal Constitution as it stood until recently laid down only a few things which states were forbidden to do. For protection from unwise legislation the citizen looked primarily to the state constitution and the state courts. But now there is a new Amendment, which declares that the state must not deny the "privileges and immunities of citizens of the United States." I think these "privileges and immunities" which we Justices may henceforth enforce against the states are to be interpreted very broadly to include the "inalienable rights," the "life, liberty and the pursuit of happiness" which the Declaration said were fundamental to any just government.

What Justice Miller thought. Justice Miller, as he dunked soda crackers in his evening glass of Bourbon, might have commented on the decision somewhat as follows. Of course that New Orleans monopoly smells to Heaven. It has every appearance of a corrupt job by the Republican legislature. And I'm not debating with Brother Field, either, about those "inalienable rights" of which he wrote with his customary energy. I, too, believe that "There are limitations on such [political] power which grow out of the essential nature of all free governments; implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name." [Miller's language in Loan Association *v.* Topeka, 20 Wall. 655 (1875).] But I don't think the "privileges and immunities" clause or any other part of the Fourteenth Amendment was intended or should be construed to read into the federal Constitution any such vague and indefinite limitation upon state governments. Anyone who felt aggrieved by the legislation of his state, especially as it regulated his way of doing business, could make a federal question out of it and bring it up to our Court. What a "strange misconception" that would be! [Miller in Davidson *v.* New Orleans, 96 U.S. 97 (1878).] And by what nebulous and subjective criteria would we be judging the validity of state laws—whether the regulations seemed to us to be "unjust," "unequal," "partial," or "arbitrary"! As I said in my opinion, it would make our Court "a perpetual censor upon all legislation of the states." Such a pervasive centralized control by the Justices of the Supreme Court would inevitably degrade and enfeeble the state legislatures in the exercise of their own proper authority; it would undermine, too, the responsibility of the people of the state for securing their well-being through their own political and constitutional processes.

What is more, I would have very grave misgivings if the Justices

of the Supreme Court were to have power to give the force of constitutional law to their own ideas of "rights which are the gift of the Creator"—a pontifical authority which Judge Field was so eager to assume. Throughout the late war and now in this more trying period of Reconstruction, "I have been striving to keep the Court in what seems to me the wise course. I have earnestly worked to make it a court of law, and of justice. I hope not altogether without success. There is not much talent in it. There is much prejudice, or rather preoccupation. There is much political feeling of which perhaps I have my share." [Letter in 1870. Reprinted by permission of the publishers from Fairman, *Mr. Justice Miller and the Supreme Court*, 1862-1890, Cambridge, Mass.: Harvard University Press, 1939, p. 60.] The strain upon constitutional government during the last few years has been threatening to destroy the machine. [Cf. letter of 1867. *Ibid.*, p. 138.] I think the Supreme Court should stick scrupulously to its own appointed function, teaching by example that all other elements in our complicated federal system should discharge their respective duties with restraint and sobriety.

Not a partisan decision. The division in the Court was not along party lines: both the Republicans and the Democrats separated as evenly as possible in a group of nine. Field, a Democrat, was not opposed to the monopoly because it had been created by a Republican legislature; it was not Miller's object to sustain his own party. The Justices were all alive to the fact that the action taken would operate long after Reconstruction should be at an end.

An "almost forgotten" clause. The decision fairly well devitalized the privileges and immunities clause—so much so that in 1935 Justice Stone described it as an "almost forgotten" provision. Dissenting in Colgate *v.* Harvey, 296 U.S. 404, 443. He went on to explain

> The reason for this reluctance to enlarge the scope of the clause has been well understood since the decision of the Slaughter-House Cases. If its restraint upon state action were extended more than is needful to protect relationships between the citizen and the national government, and it did more than duplicate the protection of liberty and property secured to persons and citizens by the other provisions of the Constitution, it would enlarge judicial control of state action and multiply restrictions upon it to an extent difficult to define, but sufficient to cause serious apprehension for the rightful independence of local government. That was the issue fought out in the Slaughter-House Cases, with the decision against the enlargement.

The Court, said Mr. Justice Jackson in 1941, "has always hesitated to give any real meaning to the privileges and immunities clause lest it improvidently give too much." That was in Edwards *v.* California,

314 U.S. 160, 183, where he thought that that would have been the most appropriate provision on which to invalidate California's "anti-Okie" law.

Justice Field wins the campaign. Justice Field's dissent in the Slaughter-House Cases, and that which he filed in Munn *v.* Illinois, 94 U.S. 113 (1877), where the majority upheld the state in fixing rates for grain elevators and railroads, contained the materials out of which to build the doctrine that economic *laissez faire* was a part of the Constitution. Though the original attack through the privileges and immunities clause had been repulsed, the attempt was renewed through the clause which says that liberty and property shall not be taken without due process of law. Bit by bit the Court moved over to Field's views. One may say that this position was definitely established in 1905, when the Court, by a vote of five to four, struck down the New York statute limiting employment in bakeries to 60 hours per week and 10 hours per day. Lochner *v.* New York, 198 U.S. 45. "Liberty" came to have a particular meaning, "liberty of contract"; "property" covered courses of business conduct, including the matter of rates which public utilities were allowed to charge; and "without due process of law" could be described with substantial accuracy as signifying "in any manner which a majority of the Supreme Court regard as unreasonable."

Indeed the due process and equal protection clauses had one advantage over privileges and immunities as a means of justifying judicial interference with public control of economic enterprise: a corporation is not a "citizen of the United States" within the protection of the privileges and immunities clause, but it was early held that the word "person" in the Fourteenth Amendment extends to corporations. Santa Clara County *v.* Southern Pacific R. Co., 118 U.S. 394, 396 (1886).

In Lochner *v.* New York the battle had rolled on to somewhat different terrain; but Peckham, J., in upholding the new "liberty of contract," carried on where Field once led, and Holmes, dissenting, fought for the values which Miller had defended.

A postscript. Presently the Democrats re-established their supremacy in Louisiana. By the new constitution of 1879 monopolies were abolished. And then it was the carpetbag slaughterhouse company which came running to court to complain that the state had impaired the obligation of a contract, in violation of Article I, section 10, clause 1 of the United States Constitution. Again Justice Miller spoke for the Court, holding that the legislature's power to protect the public health and morals is not a thing to be bargained away. So the 25-year monopoly was always subject to reconsideration and was never a "contract" within the protection of the contract clause. Butchers' Union Co. *v.* Crescent City Co., 111 U.S. 746 (1884).

LOCHNER *v.* NEW YORK

198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905).

On Writ of Error to the County Court of Oneida County, State of New York.

Introduction

In 1898 the Supreme Court sustained a Utah statute fixing an 8-hour day in mines and smelters against a charge that it violated the Fourteenth Amendment. Holden *v.* Hardy, 169 U.S. 366. Justice Brown, who spoke for the Court, was an even-minded and urbane judge, and he wrote a balanced opinion. "The law," he said, "is, to a certain extent, a progressive science." Many ancient ways had been swept aside by statute and "other changes of no less importance may be made in the future." The Constitution ought not to be so construed as to deprive the states of power to amend their laws to conform to the wishes of the citizens as they may deem best for the public welfare. The states passed laws for the public safety, and there was no less reason for protecting health and morals. Moreover, employers and their workers do not stand upon an equality:

> The latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority.

Justice Brown made it clear, however, that the Court was not expressing approval of a general limitation of hours of labor.

Justices Brewer and Peckham dissented without opinion.

Personalia. Since decisions on the constitutionality of social legislation have been decisively influenced by the philosophy and experience of life of the various Justices, some brief personal introductions will be in order as we go along. Brown and Brewer were college classmates (Yale '56) and indeed had sat in the same pew at chapel. The former held in all things to "the golden mean"—he was an Epicurean who never became too desperately aroused over anything, not even the Civil War. (He concluded that a soldier's life is *not* the life for him, and hired a substitute for $850—gaining exemption and an enlist-

ment bounty of $175.) Brewer on the other hand was a man of sanguine nature who expressed himself in inspirational literary outpourings. He moved to "bleeding Kansas" and wrote fervid stanzas against the Slave Power, and, as was the case with Brown, paid uninterrupted attention to his profession and was soon on the way to success. Whatever the views he espoused throughout his life—the menace of "social idiots" and "conceited cranks," the "Good Time Coming" when arbitration should take the place of war, the comforts of religion, better opportunities for the humbler classes, or the triumph of righteousness in the relations of capital and labor—Justice Brewer's mind was ever free from haunting doubt. Brewer, it will be recalled, was Justice Field's nephew.

Justice Peckham, before coming to the Court, was distinguished in a family of distinguished New York lawyers. In politics he had been a leader among conservative Democrats, displaying an independence which put him at odds with the party machine. Unlike the expansive Brewer, Peckham stuck very strictly to his judging. Justice Harlan said of him that "He was absolutely pure in mind and thought and free from everything that would prevent him from rendering an honest judgment in any case brought before him." [*New York Daily Tribune*, Oct. 24, 1909.] When he announced as the voice of the Constitution that "There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker," it was not to be doubted that this was an utterly sincere conviction, albeit one born of experience in a somewhat privileged sector of American life.

The 10-hour day for bakers. New York had a statute which declared that "No employee shall be required or permitted to work in a biscuit, bread, or cake bakery or confectionery establishment more than 60 hours in any one week, or more than 10 hours in any one day, unless for the purpose of making a shorter work day on the last day of the week . . ." Lochner was convicted, and brought to the Supreme Court the contention that the statute was in violation of the Fourteenth Amendment.

Opinion

Mr. Justice PECKHAM delivered the opinion of the Court. . . .

The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the federal Constitution. Under that provision no state can deprive any person of life, liberty, or

property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this Amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere.

The state, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the federal Constitution offers no protection. If the contract be one which the state, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment. Contracts in violation of a statute, either of the federal or state government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the federal Constitution, as coming under the liberty of person or of free contract. Therefore, when the state, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are *sui juris* ["of his own right" —i.e., of full age and not under the control of another] (both employer and employee), it becomes of great importance to determine which shall prevail,—the right of the individual to labor for such time as he may choose, or the right of the state to prevent the individual from laboring, or from entering into any contract to labor, beyond a certain time prescribed by the state. . . .

It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without

foundation the claim might be. The claim of the police power would be a mere pretext,—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this Court, therefore, where legislation of this character is concerned, and where the protection of the federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

This is not a question of substituting the judgment of the court for that of the legislature. If the Act be within the power of the state it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the state? and that question must be answered by the court.

The question whether this Act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action. They are in no sense wards of the state. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but 10 hours per day or only 60 hours a week.

The limitation of the hours of labor does not come within the police power on that ground.

It is a question of which of two powers or rights shall prevail,—the power of the state to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor. . . .

We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employee, to make contracts for the labor of the latter under the protection of the provisions of the federal Constitution, there would seem to be no length to which legislation of this nature might not go.

We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or of any other trade as a remedy for ill health. Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the government. It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible

existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry-goods clerk, a bank's, a lawyer's, or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family.

In our large cities there are many buildings into which the sun penetrates for but a short time in each day, and these buildings are occupied by people carrying on the business of bankers, brokers, lawyers, real estate, and many other kinds of business, aided by many clerks, messengers, and other employees. Upon the assumption of the validity of this Act under review, it is not possible to say that an act, prohibiting lawyers' or bank clerks, or others, from contracting to labor for their employers more than 8 hours a day would be invalid. It might be said that it is unhealthy to work more than that number of hours in an apartment lighted by artificial light during the working hours of the day; that the occupation of the bank clerk, the lawyer's clerk, the real-estate clerk, or the broker's clerk, in such offices is therefore unhealthy, and the legislature in its paternal wisdom must, therefore, have the right to legislate on the subject of, and to limit, the hours for such labor, and, if it exercises that power, and its validity be questioned, it is sufficient to say, it has reference to the public health; it has reference to the health of the employees condemned to labor day after day in buildings where the sun never shines; it is a health law, and therefore it is valid, and cannot be questioned by the courts.

It is also urged, pursuing the same line of argument, that it is to the interest of the state that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the federal Constitution from undue interference with

liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature. Not only the hours of employees, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the state be impaired. We mention these extreme cases because the contention is extreme.

We do not believe in the soundness of the views which uphold this law. On the contrary, we think that such a law as this, although passed in the assumed exercise of the police power, and as relating to the public health, or the health of the employees named, is not within that power, and is invalid. The Act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health, or to the health of the employees, if the hours of labor are not curtailed. . . .

It was further urged on the argument that restricting the hours of labor in the case of bakers was valid because it tended to cleanliness on the part of the workers, as a man was more apt to be cleanly when not overworked, and if cleanly then his "output" was also more likely to be so. . . . The connection, if any exist, is too shadowy and thin to build any argument for the interference of the legislature. If the man works 10 hours a day it is all right, but if 10½ or 11 his health is in danger and his bread may be unhealthful, and, therefore, he shall not be permitted to do it. This, we think, is unreasonable and entirely arbitrary. . . .

It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed

to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. . . .

. . . It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men, *sui juris*), in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the federal Constitution.

The judgment of the Court of Appeals of New York as well as that of the Supreme Court and of the County Court of Oneida County must be reversed and the case remanded to the County Court for further proceedings not inconsistent with this opinion.

Mr. Justice HARLAN (Mr. Justice WHITE and Mr. Justice DAY joining with him), dissented.

. . . I find it impossible, in view of common experience, to say that there is here no real or substantial relation between the means employed by the state and the end sought to be accomplished by its legislation. . . .

[He quotes expert opinion that work under the conditions prevailing in bakeshops is highly injurious to health.]

We judicially know that the question of the number of hours during which a workman should continuously labor has been, for a long period, and is yet, a subject of serious consideration among civilized peoples, and by those having special knowledge of the laws of health. Suppose the statute prohibited labor in bakery and confectionery establishments in excess of 18 hours each day. No one, I take it, could dispute the power of the state to enact such a statute. But the statute before us does not embrace extreme or exceptional cases. It may be said to occupy a middle ground in respect of the hours of labor. What is the true ground for the state to take between legitimate protection, by legislation, of the public health and liberty of contract is not a question easily solved, nor one in respect of which there is or can be absolute certainty. There are very few, if any, questions in political economy about which entire certainty may be predicated. . . .

I do not stop to consider whether any particular view of this

economic question presents the sounder theory. What the precise facts are it may be difficult to say. It is enough for the determination of this case, and it is enough for this Court to know, that the question is one about which there is room for debate and for an honest difference of opinion. There are many reasons of a weighty, substantial character, based upon the experience of mankind, in support of the theory that, all things considered, more than 10 hours steady work each day, from week to week, in a bakery or confectionery establishment, may endanger the health and shorten the lives of the workmen, thereby diminishing their physical and mental capacity to serve the state and to provide for those dependent upon them.

If such reasons exist that ought to be the end of this case, for the state is not amenable to the judiciary, in respect of its legislative enactments, unless such enactments are plainly, palpably, beyond all question, inconsistent with the Constitution of the United States. . . . Let the state alone in the management of its purely domestic affairs, so long as it does not appear beyond all question that it has violated the federal Constitution. This view necessarily results from the principle that the health and safety of the people of a state are primarily for the state to guard and protect. . . .

The judgment, in my opinion, should be affirmed.

Mr. Justice HOLMES dissented.

I regret sincerely that I am unable to agree with the judgment in this case, and I think it my duty to express my dissent.

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this Court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others

to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the post office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.

The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day we sustained the Massachusetts vaccination law. Jacobson *v.* Massachusetts, 197 U.S. 11. United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this Court. Northern Securities Co. *v.* United States, 193 U.S. 197. Two years ago we upheld the prohibition of sales of stock on margins or for future delivery in the constitution of California. Otis *v.* Parker, 187 U.S. 606. The decision sustaining an 8-hour law for miners is still recent. Holden *v.* Hardy, 169 U.S. 366. Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word "liberty" in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first installment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.

Comment

We do not believe in the soundness of this law; statutes which seriously limit freedom to contract are mere meddlesome interferences. That is the pith of Justice Peckham's opinion, in which Fuller, C.J., Brewer, Brown, and McKenna, JJ., concurred.

The statute makes a moderate rule, supported by expert opinion, in a field where men reasonably may differ. The rule not being palpably unreasonable, judges have no basis for holding it forbidden by the federal Constitution; it is a matter for state law and policy. This is the way three of the dissenting Justices put it.

If one were to select a list of the most significant of Justice Holmes' opinions, the dissent on the Lochner Case must have a place, however brief the list. An entire philosophy is compressed into three paragraphs. Many men know those sentences by heart. A number of Holmes' best remembered opinions in later years were but the application of the Lochner dissent to the circumstances of the particular case. His point of view has now become a part of the accepted doctrine of the Court.

The reasonable man. Consider the mode of thought by which he would apply the Fourteenth Amendment to legislation challenged as lacking "due process of law." Whether I would agree with the statute if I were a legislator, he says, has nothing to do with the case. I think the question we judges should ask is this: Would any rational and fair man have to admit that this statute is beyond the bounds of reason? Unless the answer must be Yes, then we ought not to hold it invalid.

This hypothetical reasonable person whom Holmes would consult is the law's ubiquitous handy man. For instance, take an automobile negligence case. The judge does not say: Members of the jury, each of you will consider what he himself would have done in these circumstances, and then judge the defendant accordingly. No, the law strives to judge impersonally, to judge by objective standards. The instruction would be like this: Consider what a reasonably prudent man would have done under the circumstances of road, weather, etc., which prevailed in this case; judge by that test whether the defendant was at fault.

Statutes should be tested by standards external to the individual judge, and in the light of the social needs which they were intended to meet. Each of us has his own deep-seated preferences and, perhaps, blind spots. How can the judge immunize himself against these personal limitations? Holmes' answer was to look away from himself to consider whether any fair man must call the act unreasonable. To be sure, if Justice Peckham had consulted this hypothetical fellow the response might have been not uninfluenced by the economic opinions of Peckham himself; still it should have enabled him to do better

than to say "We do not believe in the soundness of the views which uphold this law." The fact that four of the Justices thought the statute not unreasonable should have given pause to the five.

Holmes' insight. In 1897, while sitting on the Massachusetts bench, Holmes said he thought that some courts were reading into the Constitution new principles "which may be generalized into acceptance of the economic doctrines which prevailed about 50 years ago, and a wholesale prohibition of what a tribunal of lawyers does not think about right." By a momentous development in judicial decision over the decades prior to the Lochner Case, the constitutional provision that life, liberty, and property shall not be taken without due process of law had come to be construed as though it said that state regulatory laws must be reasonable. And judicial notions of what was reasonable were apt to be largely subjective.

Holmes kept warning that the judges should perform their functions from a more removed position:

> It is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half his fellow men to be wrong. . . . When twenty years ago a vague terror went over the earth and the word socialism began to be heard, I thought and still think that fear was translated into doctrines that had no proper place in the Constitution or the common law. [*Speeches,* Little, Brown & Co., Boston, 1934, p. 101.]

This is from a decision sustaining California's declaration that contracts for selling corporate stocks on margin should be void—an attempt to discourage speculation:

> While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this Court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus.* [Otis *v.* Parker, 187 U.S. 606, 608 (1903), Brewer and Peckham, JJ., dissenting.]

"Granite rocks and barberry bushes." Consider this from a little essay written in 1918:

> Certitude is not the test of certainty. We have been cock-sure of many things that were not so. . . . One can not be wrenched from the rocky crevices into which one has grown for many years without feeling that one is attacked in one's life. What we most love and revere generally is determined by early associations. I love granite rocks and barberry bushes, no doubt because with them were my earliest joys that reach back through the past eternity of my life. But while one's experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else. And this again means scepticism. ["Natural Law," in 32 *Harvard Law Review* 40 (1918); *Collected Legal Papers*, Harcourt, Brace & Howe, New York, 1920, p. 311.]

Justice Holmes was a man of doubt, but also a man of faith. In the essay just quoted he went on to say that he was content to believe "That the universe has in it more than we understand, that the private soldiers have not been told the plan of campaign, or even that there is one, rather than some vaster unthinkable to which every predicate is an impertinence . . ." A judge who had attained this philosophic calm was willing to let democracy learn by its own mistakes, so long as the mistakes were not irreparable. Moreover, as was abundantly illustrated in the history of the Court's reaction to democratic movements, the popular impulse has at times proved sounder than the apprehensions of the judges.

Ten-hour day for women. In 1908 the Court heard Muller *v.* Oregon, 208 U.S. 412, testing the validity of Oregon's maximum of 10 hours a day for women in factories and laundries. Louis D. Brandeis argued the constitutionality of the law. The idea on which a "Brandeis brief" was based was this: if the Justices are going to apply the due process clause as meaning "reasonable," then certainly they should know the statute in its context of fact, experience, and sense of public need. Accordingly Mr. Brandeis set out the prevalence of this type of legislation, also the reports of legislative committees, factory inspectors, commissioners of hygiene, and the like, at home and abroad, all going to show how generally it was believed that long hours in industry are injurious to women. The statute was sustained. Brewer, J., for a unanimous Court dwelt upon "woman's physical structure and the performance of maternal functions"; also, "history discloses the fact that woman has always been dependent upon man."

Ten-hour day in factories. Then came Bunting *v.* Oregon, 243 U.S. 426 (1917), which grew out of an Oregon enactment that no person should be employed in mill or factory for more than 10 hours a day —with an allowance, however, for up to three hours overtime at time and one half. McKenna, Holmes, Day, Pitney, and Clarke, JJ., sus-

tained the statute. Justice McKenna's opinion did not make much difficulty out of the matter: if there were some blemishes in the law, he said, it should be remembered that "New policies are usually tentative in their beginnings . . . Time may be necessary to fashion them to precedent customs and conditions, and as they justify themselves or otherwise they pass from militancy to triumph or from question to repeal." White, C.J., McReynolds, and Van Devanter dissented without opinion. Mr. Justice Brandeis, having been engaged in the case at the time of his appointment, took no part in its decision. (Professor Frankfurter argued the case for the statute.)

Minimum wage cases. On the same day, April 9, 1917, the case of Stettler *v.* O'Hara, 243 U.S. 629, where the Oregon court had sustained the minimum wage law, was affirmed by an equally divided court. This meant that on this question McKenna, J., had joined the three who dissented in the Bunting Case, and that Brandeis, J., did not participate. (When the Court is evenly divided it can only affirm the judgment below.) We see now that if a properly drawn minimum wage statute had come up before the Court as it then stood, in a case where Justice Brandeis was free to participate, the decision would have been in favor of its constitutionality.

Such a statute did come up in Adkins *v.* Children's Hospital, 261 U.S. 525 (1923), testing the validity of the District of Columbia minimum wage law for women and minors. (Since this was an act of Congress, it was the due process clause of the Fifth Amendment which was invoked.) Professor Frankfurter argued another elaborate factual brief. But the statute was held invalid by a five-to-three division. Justice Sutherland, speaking also for McKenna, Van Devanter, McReynolds and Butler, held the act bad. Taft, C.J., Holmes and Sanford voted to sustain. Again Justice Brandeis did not participate, his daughter having been on the staff of the minimum wage board. The case illustrates how constitutional determinations may turn on adventitious circumstances. Briefly, the Court of Appeals of the District sustained, reheard, and then invalidated, consuming a good deal of time because of the absence and return of a judge who was opposed to the statute. These doings delayed the appeal to the Supreme Court; and when the case finally came up, President Harding had made four new appointments with a net loss of one vote, it appears, for the validity of minimum wage legislation. Justice Sutherland took his stand on the Lochner Case—sometimes distinguished but never disapproved, he declared. The law requires the employer to pay more for services than they are worth; there is no reasonable relation between women's wages and morals: these were some of the propositions laid down by the opinion. I had supposed that Lochner *v.* New York would be allowed a deserved repose, said Holmes, J.; I had supposed it was overruled *sub silentio,* said Chief Justice Taft.

When Taft openly differed with the solid block of "conservatives,"

and wrote a dissenting opinion to say so, that was news indeed. Somewhat later he reminded Justice Stone that "the continuity and weight of our opinions on important questions of law should not be broken any more than we can help by dissents." [Pringle, *The Life and Times of William Howard Taft,* Farrar & Rinehart, Inc., 1939, II, 1049.]

The majority on the right. Justice Sutherland now became the accepted spokesman for the majority of the Court in a memorable series of decisions which returned a flat No to various legislative attempts to control economic enterprise in the public interest. Starting from the postulates of an unregulated economy, he would proceed as though proving a proposition in Euclid to demonstrate that the statute interfered with freedom of contract and so was unconstitutional. In Tyson & Bro. *v.* Banton, 273 U.S. 418 (1927), New York had limited theater ticket brokers to a price of not over 50 cents in advance of the price printed on the ticket. This was struck down, Holmes, Brandeis, Sanford and Stone, JJ., dissenting. A year later came Ribnik *v.* McBride, 277 U.S. 350, where the majority, again through Justice Sutherland, held invalid a New Jersey statute regulating the fees charged by employment agencies. ". . . that business," he said, "does not differ in substantial character from the business of a real-estate broker, ship broker, merchandise broker, or ticket broker." Justice Stone, in a dissenting opinion in which Holmes and Brandeis, JJ., concurred, dwelt upon the gross abuses found to be prevalent in this activity which lived upon the unemployed. When the country plunged, a year later, into a great depression, Justice Sutherland's assertion that "An employment agency is essentially a private business" sounded like a counterfeit coin. (We may look ahead for a moment to note that in Olsen *v.* Nebraska, 313 U.S. 236 (1941), a case where the state had limited the charges of employment agencies, a unanimous Court pointed out that price fixing had subsequently been sustained in a number of instances and that the notions of public policy which Tyson *v.* Banton and Ribnik *v.* McBride had read into the Constitution had now been repudiated.)

Term after term, with mounting assurance, the majority of the Court denied to states the right to try new measures. The magnitude of the consequences cannot be judged merely by counting the statutes struck down. One should think, too, of the statutes which, though never brought before the Court, were rendered unenforceable because indistinguishable from one held invalid. Further than that, there was the incalculable effect upon legislatures of this persistent negation of essential powers. Chief Justice Taft, who frowned upon dissents and sought to "mass the court," said that he counted upon "Van" and "Mac" and Sutherland and Butler and Sanford to steady the boat (Holmes, Brandeis and Stone were the boat rockers). Holmes, he said, was "a very poor constitutional lawyer"; Stone he did not "altogether consider safe." [*Ibid.* II, 969, 1044.]

"The culmination of the constitutional restraints." This ultraconservative movement was sustained to the point where the Court had lost all touch with the dominant thought of the country. The turning point came in 1937, when a number of constitutional dams gave way. Justice Van Devanter retired, soon to be followed by Justice Sutherland. In memorial proceedings on Justice Sutherland, held in the Supreme Court in 1944, Chief Justice Stone observed:

> The period from the close of the Civil War to the time of Justice Sutherland's retirement constitutes an epoch in our constitutional history and in the history of this Court. That period saw the adoption of the Fourteenth Amendment, the expansion and, so far as we can now see, the culmination of the constitutional restraints of due process on state action in the field of business and economics. We already know that during the 16 years when Justice Sutherland served on this Court he exercised a profound influence on the development of constitutional law, and especially on the interpretation of the Fourteenth Amendment. But only when that period is viewed with the perspective which time alone can give to historic trends and events, will it be possible to appraise the permanence and the extent of that influence.

Sutherland and Brandeis on experiment. Justice Sutherland used to say that his was a type of mind "to put a great deal of faith in experience and very little in mere experiment." A case in point is New State Ice Co. *v.* Liebmann, 285 U.S. 262 (1932). Oklahoma, with a view to stabilizing the ice business, enacted that no one might start a new ice plant until he had obtained from the Corporation Commission a certificate of convenience and necessity. This, said Sutherland, J., was an unreasonable and arbitrary interference which could not be saved from the condemnation of the Fourteenth Amendment by calling it an experiment. Justice Brandeis (and Justice Stone) dissented. We may surmise that Brandeis himself did not regard this particular control as a very brilliant experiment in social planning. But he pointed out that the long-continued depression had threatened our economic structure, and that some thoughtful men of wide business experience believed that stabilization was impossible without some control on the embarking of new capital in industries which already had a capacity in excess of demand. Justice Brandeis—whose mastery of industrial problems was far greater than that of any of his colleagues—thought the experiment should have a chance. He said:

> Whether that view is sound nobody knows. The objections to the proposal are obvious and grave. The remedy might bring evils worse than the present disease. The obstacles to success

seem insuperable. The economic and social sciences are largely uncharted seas. We have been none too successful in the modest essays in economic control already entered upon. The new proposal involves a vast extension of the area of control. Merely to acquire the knowledge essential as a basis for the exercise of this multitude of judgments would be a formidable task; and each of the thousands of these judgments would call for some measure of prophecy. Even more serious are the obstacles to success inherent in the demands which execution of the project would make upon human intelligence and upon the character of men. Man is weak and his judgment is at best fallible.

Yet the advances in the exact sciences and the achievements in invention remind us that the seemingly impossible sometimes happens. There are many men now living who were in the habit of using the age-old expression: "It is as impossible as flying." The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation. In those fields experimentation has, for two centuries, been not only free but encouraged. Some people assert that our present plight is due, in part, to the limitations set by courts upon experimentation in the fields of social and economic science; and to the discouragement to which proposals for betterment there have been subjected otherwise. There must be power in the states and the nation to remold, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the Fourteenth Amendment, or the states which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the useful arts.

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

WEST COAST HOTEL CO. *v.* PARRISH

300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937).

Appeal from the Supreme Court of the State of Washington.

Introduction

The New York legislature enacted in 1933 a minimum wage law for women in industry. Two elements were to be considered: the reasonable value of the services and the minimum requirements for health. Morehead *v.* Tipaldo, 298 U.S. 587 (1936), was brought to determine whether the statute would pass muster with the Court. It was evident at the outset that there were four votes against and three to sustain; Chief Justice Hughes could be expected to uphold the Act; Justice Roberts, on whichever side he voted, would surely be with the majority. Six states appeared as *amici curiae* to urge that minimum wage legislation be sustained. Naturally enough, counsel defending the Act wished to make it easy for a majority to sustain it in spite of the Adkins precedent, and so stressed the point that this law took account of value as well as need.

Justice Roberts went with Justices Van Devanter, McReynolds, Sutherland and Butler. In an opinion which was less than candid, Butler, J., said substantially this: You have argued that this statute is better than that in the Adkins Case; we think it is not; and, taking the view that you did not ask us to reconsider the Adkins judgment but only to say that this statute is distinguishable, we hold New York's act invalid without examining anew the underlying constitutional question. This was not candid because counsel had made it very clear that they were urging that the Act be upheld either by distinguishing or by overruling the Adkins Case.

Morehead *v.* Tipaldo was decided on June 1, 1936, the last day of the term. It came as very bad news, for it implied that a federal statute to put a floor under wages would likewise be invalid in the eyes of a majority of the Court.

On February 5, 1937, President Roosevelt sent to Congress his message proposing a reorganization of the federal judicial system. The central feature of the plan was the addition of one judge for every judge who having attained the age of 70 did not resign or retire within six months.

The Court at that time had under advisement the case of West Coast Hotel Co. *v.* Parrish, involving the constitutionality of a mini-

mum wage law from the state of Washington. On March 29 a decision was announced sustaining the statute, Justice Roberts coming over to join the four Justices who had dissented in Morehead *v.* Tipaldo. Chief Justice Hughes wrote an opinion in which he did his best to preserve the appearance of consistency in the shift.

On the same day certain features of the Railway Labor Act were sustained in Virginian Ry. Co. *v.* System Federation No. 40. A fortnight later the Court sustained in the National Labor Relations Act. In May the Social Security Act was held constitutional.

At the close of the term in June, Justice Van Devanter retired. Like Justice Sutherland, he had "made his own something of the tradition and outlook of the pioneer West." These words of Chief Justice Stone, from the bench, indicate in a measure why the conceptions of public policy which Justice Van Devanter held so firmly were out of accord with the needs of a complex industrial society in the throes of its worst economic dislocation:

> He saw and was a part of the expansion of free enterprise in the development of the new world lying beyond the Mississippi. It was a period when, more than any other in our history, men were the masters of their fate. They sought the great West to build homes, acquire property, and establish orderly communities. As good citizens they were zealous to put down the lawlessness of the frontier and to establish laws and courts which would insure the safety of persons and property. Beyond that they asked only for that most natural and characteristic of privileges in a thinly settled country—the right to be let alone. Theirs was the philosophy that that government governs best which governs least, a philosophy not without its effect upon Justice Van Devanter's appraisal of the functions of government under the restraints of a written constitution.

Opinion

Mr. Chief Justice HUGHES delivered the opinion of the Court.

This case presents the question of the constitutional validity of the minimum wage law of the state of Washington [enacted in 1913]. . . . It provides:

"Sec. 1. The welfare of the state of Washington demands that women and minors be protected from conditions of labor which have a pernicious effect on their health and morals. The state of Washington, therefore, exercising herein its police and sovereign power declares that inadequate wages and unsanitary conditions of labor exert such pernicious effect.

"Sec. 2. It shall be unlawful to employ women or minors in

any industry or occupation within the state of Washington under conditions of labor detrimental to their health or morals; and it shall be unlawful to employ women workers in any industry within the state of Washington at wages which are not adequate for their maintenance.

"Sec. 3. There is hereby created a commission to be known as the 'Industrial Welfare Commission' for the state of Washington, to establish such standards of wages and conditions of labor for women and minors employed within the state of Washington, as shall be held hereunder to be reasonable and not detrimental to health and morals, and which shall be sufficient for the decent maintenance of women." [Further provisions established the procedure, by hearing and conference, whereby minimum wages were to be fixed for various occupations.]

The appellant conducts a hotel. The appellee Elsie Parrish was employed as a chambermaid and (with her husband) brought this suit to recover the difference between the wages paid her and the minimum wage fixed pursuant to the state law. The minimum wage was $14.50 per week of 48 hours. The appellant challenged the Act as repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States. The Supreme Court of the state, reversing the trial court, sustained the statute and directed judgment for the plaintiffs. . . .

The appellant relies upon the decision of this Court in Adkins *v.* Children's Hospital, 261 U.S. 525, which held invalid the District of Columbia Minimum Wage Act, which was attacked under the due process clause of the Fifth Amendment. . . . [The court considers the ground on which the majority placed the decision in Morehead *v.* Tipaldo, and concludes that the constitutional question not deemed to be open in that case is open and necessarily presented here. It reviews the history of the minimum wage question in the Supreme Court.]

The principle which must control our decision is not in doubt. The constitutional provision invoked is the due process clause of the Fourteenth Amendment governing the states, as the due process clause invoked in the Adkins case governed Congress. In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting

that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

This essential limitation of liberty in general governs freedom of contract in particular. More than 25 years ago we set forth the applicable principle in these words, after referring to the cases where the liberty guaranteed by the Fourteenth Amendment had been broadly described:

"But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." Chicago, B. & Q. R. Co. *v.* McGuire, 219 U.S. 549, 567.

This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable. Thus statutes have been sustained limiting employment in underground mines and smelters to 8 hours a day; in requiring redemption in cash of store orders or other evidences of indebtedness issued in the payment of wages; in forbidding the payment of seamen's wages in advance; in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine; in prohibiting contracts limiting liability for injuries to employees; in limiting hours of work of employees in manufacturing establishments; and in maintaining workmen's compensation laws. In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good

order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression.

The point that has been strongly stressed that adult employees should be deemed competent to make their own contracts was decisively met nearly 40 years ago in Holden *v.* Hardy, 169 U.S. 366, where we pointed out the inequality in the footing of the parties. We said:

"The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority."

And we added that the fact "that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself." "The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer."

It is manifest that this established principle is peculiarly applicable in relation to the employment of women in whose protection the state has a special interest. That phase of the subject received elaborate consideration in Muller *v.* Oregon (1908), 208 U.S. 412, where the constitutional authority of the state to limit the working hours of women was sustained. We emphasized the consideration that "woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence" and that her physical well being "becomes an object of public interest and care in order to preserve the strength and vigor of the race." We emphasized the need of protecting women against oppression despite her possession of contractual rights. We said that "though limitations upon personal and contractual rights may be removed by legislation, there

is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right." Hence she was "properly placed in a class by herself, and legislation designed for her protection may be sustained even when like legislation is not necessary for men and could not be sustained." We concluded that the limitations which the statute there in question "placed upon her contractual powers, upon her right to agree with her employer as to the time she shall labor" were "not imposed solely for her benefit, but also largely for the benefit of all." . . .

This array of precedents and the principles they applied were thought by the dissenting justices in the Adkins Case to demand that the minimum wage statute be sustained. The validity of the distinction made by the Court between a minimum wage and a maximum of hours in limiting liberty of contract was especially challenged. 261 U.S. at p. 564. That challenge persists and is without any satisfactory answer. As Chief Justice Taft observed: "In absolute freedom of contract the one term is as important as the other, for both enter equally into the consideration given and received; a restriction as to one is not any greater in essence than the other, and is of the same kind. One is the multiplier and the other the multiplicand." And Mr. Justice Holmes, while recognizing that "the distinctions of the law are distinctions of degree," could "perceive no difference in the kind or degree of interference with liberty, the only matter with which we have any concern, between the one case and the other. The bargain is equally affected whichever half you regulate." . . .

The minimum wage to be paid under the Washington statute is fixed after full consideration by representatives of employers, employees and the public. It may be assumed that the minimum wage is fixed in consideration of the services that are performed in the particular occupations under normal conditions. Provision is made for special licenses at less wages in the case of women who are incapable of full service. The statement of Mr. Justice Holmes in the Adkins Case is pertinent: "This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirement of health and right living. It is safe to assume that women will not be employed at even the lowest wages allowed unless they earn them, or unless the employer's business can sustain the burden. In short the law in its character and operation is like hundreds

of so-called police laws that have been upheld." 261 U.S. at p. 570. And Chief Justice Taft forcibly pointed out the consideration which is basic in a statute of this character: "Legislatures which adopt a requirement of maximum hours or minimum wages may be presumed to believe that when sweating employers are prevented from paying unduly low wages by positive law they will continue their business, abating that part of their profits, which were wrung from the necessities of their employees, and will concede the better terms required by the law; and that while in individual cases hardship may result, the restriction will enure to the benefit of the general class of employees in whose interest the law is passed and so to that of the community at large." *Ibid.* at p. 563.

We think that the views thus expressed are sound and that the decision in the Adkins Case was a departure from the true application of the principles governing the regulation by the state of the relation of employer and employed. Those principles have been reinforced by our subsequent decisions. . . . In Nebbia *v.* New York, 291 U.S. 502, dealing with the New York statute providing for minimum prices for milk, the general subject of the regulation of the use of private property and of the making of private contracts received an exhaustive examination, and we again declared that if such laws "have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied"; that "with the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal"; that "times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power." *Ibid.* 291 U.S. 502, at pp. 537, 538.

With full recognition of the earnestness and vigor which characterize the prevailing opinion in the Adkins Case, we find it impossible to reconcile that ruling with these well-considered declarations. What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly

fixed in order to meet the very necessities of existence is not an admissible means to that end? The legislature of the state was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. The legislature was entitled to adopt measures to reduce the evils of the "sweating system," the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition. The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many states evidences a deep-seated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment.

There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well-being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land. While in the instant case no factual brief has been presented, there is no reason to doubt that the state of Washington has encountered the same social problem that is present elsewhere. The community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its lawmaking power to correct the abuse which springs from their selfish disregard of the public interest. The argument that the legislation in question constitutes an arbitrary discrimination,

because it does not extend to men, is unavailing. This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The legislature "is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest." If "the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied." There is no "doctrinaire requirement" that the legislation should be couched in all embracing terms. . . .

Our conclusion is that the case of Adkins *v.* Children's Hospital, 261 U.S. 525, should be, and it is, overruled. The judgment of the Supreme Court of the State of Washington is affirmed.

Mr. Justice SUTHERLAND (Mr. Justice VAN DEVANTER, Mr. Justice MCREYNOLDS, and Mr. Justice BUTLER concurring with him), dissented. . . .

VILLAGE OF EUCLID *v.* AMBLER REALTY CO.

272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

Appeal from the District Court of the United States for the Northern District of Ohio.

Introduction

When we look about us today and observe the many public problems incident to urban development—the control of automobile traffic, for example—the necessity for municipal zoning seems so evident as to need no defense. How could we ever have managed if the Euclid Case, sustaining the constitutionality of a zoning ordinance, had been decided the other way? The fact is that a majority of the Court originally voted to hold the ordinance invalid under the Fourteenth Amendment. Justice Sutherland was assigned the task of preparing the opinion. But the dissenting Justices, notably Stone, J., persisted in their arguments and for once shook Justice Sutherland's convictions. He asked that a reargument be had and eventually changed his mind. [McCormack, "A Law Clerk's Recollections," 46 *Columbia Law Review* 710, 712. This is the Harlan Fiske Stone memorial number of September 1946.] In the end the Court held that zoning was consti-

tutionally permissible, Van Devanter, McReynolds, and Butler, JJ., dissenting without opinion. It was a close call!

Opinion

Mr. Justice SUTHERLAND delivered the opinion of the Court.

The Village of Euclid is an Ohio municipal corporation. It adjoins and practically is a suburb of the city of Cleveland. Its estimated population is between 5000 and 10,000, and its area from 12 to 14 square miles, the greater part of which is farm lands or unimproved acreage. It lies, roughly, in the form of a parallelogram measuring approximately 3½ miles each way. East and west it is traversed by three principal highways: Euclid Avenue, through the southerly border, St. Clair Avenue, through the central portion, and Lake Shore Boulevard, through the northerly border, in close proximity to the shore of Lake Erie. The Nickel Plate railroad lies from 1500 to 1800 feet north of Euclid Avenue, and the Lake Shore railroad 1600 feet farther to the north. The three highways and the two railroads are substantially parallel.

Appellee is the owner of a tract of land containing 68 acres, situated in the westerly end of the village, abutting on Euclid Avenue to the south and the Nickel Plate railroad to the north. Adjoining this tract, both on the east and on the west, there have been laid out restricted residential plats upon which residences have been erected.

On November 13, 1922, an ordinance was adopted by the village council, establishing a comprehensive zoning plan for regulating and restricting the location of trades, industries, apartment houses, two-family houses, single family houses, etc., the lot area to be built upon, the size and height of buildings, etc.

The entire area of the village is divided by the ordinance into six classes of use districts, denominated U—1 to U—6, inclusive; three classes of height districts, denominated H—1 to H—3, inclusive; and four classes of area districts, denominated A—1 to A—4, inclusive. The use districts are classified in respect of the buildings which may be erected within their respective limits, as follows: U—1 is restricted to single family dwellings, public parks, water towers and reservoirs, suburban and interurban electric railway passenger stations and rights of way, and farming, noncommercial greenhouse nurseries, and truck gardening; U—2 is extended to include two-family dwellings; U—3 is further ex-

tended to include apartment houses, hotels, churches, schools, public libraries, museums, private clubs, community-center buildings, hospitals, sanitariums, public playgrounds, and recreation buildings, and a city hall and courthouse; [and so on, U—6 admitting of the most general use.] . . .

Appellee's tract of land comes under U—2, U—3, and U—6. . . .

Before proceeding to a consideration of the case, it is necessary to determine the scope of the inquiry. The bill alleges that the tract of land in question is vacant and has been held for years for the purpose of selling and developing it for industrial uses, for which it is especially adapted, being immediately in the path of progressive industrial development; that for such uses it has a market value of about $10,000 per acre, but if the use be limited to residential purposes the market value is not in excess of $2500 per acre; that the first 200 feet of the parcel back from Euclid Avenue, if unrestricted in respect of use, has a value of $150 per front foot, but if limited to residential uses, and ordinary mercantile business be excluded therefrom, its value is not in excess of $50 per front foot. . . .

The record goes no farther than to show, as the lower court found, that the normal and reasonably to be expected use and development of that part of appellee's land adjoining Euclid Avenue is for general trade and commercial purposes, particularly retail stores and like establishments, and that the normal and reasonably to be expected use and development of the residue of the land is for industrial and trade purposes. . . .

. . . The effect of the allegations of the bill is that the ordinance of its own force operates greatly to reduce the value of appellee's lands and destroy their marketability for industrial, commercial, and residential uses, and the attack is directed, not against any specific provision or provisions, but against the ordinance as an entirety. Assuming the premises, the existence and maintenance of the ordinance in effect constitutes a present invasion of appellee's property rights and a threat to continue it. Under these circumstances, the equitable jurisdiction is clear. . . .

Building zone laws are of modern origin. They began in this country about 25 years ago. Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of

private lands in urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall.

The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. In solving doubts, the maxim "*sic utere tuo ut alienum non laedas*" ["so use your own property as not to harm that of another"], which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power. Thus the question whether the power to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for

zoning purposes be fairly debatable, the legislative judgment must be allowed to control. Radice *v.* New York, 264 U.S. 292, 294.

There is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of overcrowding and the like, and excluding from residential sections offensive trades, industries, and structures likely to create nuisances. See Welch *v.* Swasey, 214 U.S. 91; Hadacheck *v.* Los Angeles, 239 U.S. 394; Reinman *v.* Little Rock, 237 U.S. 171; Cusack Co. *v.* City of Chicago, 242 U.S. 526, 529, 530.

Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect of many practice-forbidding laws which this Court has upheld, although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. Hebe Co. *v.* Shaw, 248 U.S. 297, 303; Pierce Oil Corp. *v.* City of Hope, 248 U.S. 498, 500. The inclusion of a reasonable margin, to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation. In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the proscribed class. It cannot be said that the ordinance in this respect "passes the bounds of reason and assumes the character of a merely arbitrary fiat." Purity Extract Co. *v.* Lynch, 226 U.S. 192, 204. Moreover, the restrictive provisions of the ordinance in this particular may be sustained upon the principles applicable to the broader exclusion from residential districts of all business and trade structures, presently to be discussed. . . .

We find no difficulty in sustaining restrictions of the kind thus far reviewed. The serious question in the case arises over the provisions of the ordinance excluding from residential districts

apartment houses, business houses, retail stores and shops, and other like establishments. This question involves the validity of what is really the crux of the more recent zoning legislation—namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded. Upon that question this Court has not thus far spoken. The decisions of the state courts are numerous and conflicting; but those which broadly sustain the power greatly outnumber those which deny it altogether or narrowly limit it, and it is very apparent that there is a constantly increasing tendency in the direction of the broader view. We shall not attempt to review these decisions at length, but content ourselves with citing a few as illustrative of all. . . .

The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life, greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc. With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, en-

joyed by those in more favored localities—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.

It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable. But where the equitable remedy of injunction is sought, as it is here, not upon the ground of a present infringement or denial of a specific right, or of a particular injury in process of actual execution, but upon the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury, the Court will not scrutinize its provisions, sentence by sentence, to ascertain by a process of piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration, or not shown to contribute to the injury complained of, which, if attacked separately, might not withstand the test of constitutionality. In respect of such provisions, of which specific complaint is not made, it cannot be said that the landowner has suffered or is threatened with an injury which entitles him to challenge their constitutionality. . . .

. . . What would be the effect of a restraint imposed by one or more of the innumerable provisions of the ordinance, considered apart, upon the value or marketability of the lands, is neither disclosed by the bill nor by the evidence, and we are afforded no basis, apart from mere speculation, upon which to rest a conclusion that it or they would have any appreciable

effect upon those matters. Under these circumstances, therefore, it is enough for us to determine, as we do, that the ordinance in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority, leaving other provisions to be dealt with as cases arise directly involving them.

And this is in accordance with the traditional policy of this Court. In the realm of constitutional law, especially, this Court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted. This process applies with peculiar force to the solution of questions arising under the due process clause of the Constitution as applied to the exercise of the flexible powers of police, with which we are here concerned.

Decree reversed.

Mr. Justice VAN DEVANTER, Mr. Justice MCREYNOLDS, and Mr. Justice BUTLER dissent.

Comment

Earlier cases reflect the development from ordinances excluding specific kinds of objectionable establishments to comprehensive plans for achieving conveniently ordered communities. Fertilizing Co. *v.* Hyde Park, 97 U.S. 659 (1878), upheld an ordinance which forbade the carrying on of any offensive or unwholesome business within the village. (Constitutional law in America has been very sensitive to bad smells.) No difficulty was experienced in sustaining an exclusion of livery stables and brickyards from designated areas. Reinman *v.* Little Rock, 237 U.S. 171 (1915), Hadacheck *v.* Sebastian, 239 U.S. 394 (1915). Massachusetts imposed a differentiated limitation on the height of buildings in Boston, which was challenged as being an esthetic measure "designed purely to preserve architectural symmetry and regular sky lines." But the Court took the view that a reduction of fire hazards might have been the purpose of the regulations; "that . . . considerations of an esthetic nature also entered into the reasons for their passage, would not invalidate them." The point was stressed that the Court "in cases of this kind, feels the greatest reluctance in interfering with the well-considered judgments of the courts of the

state whose people are to be affected by the operation of the law." This was Welch *v.* Swasey, 214 U.S. 91 (1909), wherein Justice Peckham spoke for a unanimous Court. The diffidence of the opinion, and the Court's eagerness to believe that the statute looked primarily to protection from fire (which was an eminently proper purpose) rather than to preserving the beauty of certain quarters in Boston (on which the Justices would have felt constrained to frown) is in marked contrast with the self-assured tone of Justice Peckham's opinion in Lochner *v.* New York, where the 10-hour day in bakeries was struck down.

The abatement of billboards has been sustained—having regard to the view that they are fire hazards, shield criminals, and conceal immoral practices. Cusack Co. *v.* Chicago, 242 U.S. 526 (1917). While it was once held that a city may lay down a billboard regulation, and authorize it to be lifted in any particular block by the consent of the lot owners, very certainly it may not do the converse thing, establish a setback line which shall become operative if a portion of the lot owners in a block so desire. Cf. Cusack Case with Eubank *v.* Richmond, 226 U.S. 137 (1912).

Public power and popularity contests. The aspiration for "a government of laws and not of men" has been one of the toughest strands in our national tradition. As Justice Matthews said in Yick Wo *v.* Hopkins, 118 U.S. 356 (1886), it seems intolerable that a man should hold any public right at the pleasure of another. The Court has been vigilant to preserve this value, as is illustrated in Washington *ex rel.* Seattle Trust Co. *v.* Roberge, 278 U.S. 116 (1928). Seattle enacted a comprehensive zoning ordinance. Then it adopted an amendment saying that a philanthropic home for children or for the aged might be built in the first residence district, provided the owners of two thirds of the property within 400 feet of the proposed site gave their consent. The Court held that public authority to say what use an owner may make of his property could not constitutionally be handed over to the uncontrolled pleasure of his neighbors. The amendment showed that a home for the aged was not regarded as inconsistent with the general welfare, and the owner was therefore free to build such a home without seeking the consent of the neighborhood.

Details of zoning. Euclid *v.* Ambler Realty Co. was a suit for an injunction to keep the zoning ordinance from being put into effect at all. In denying this remedy Justice Sutherland's opinion observed that when such an ordinance came to be applied, particular situations might arise where some provision appeared unreasonable. The Court found such a situation in Nectow *v.* City of Cambridge, 277 U.S. 183 (1928). A corner lot had been limited to residential use. The tract out of which it was cut was unrestricted; an automobile assembling plant was adjacent, and a soap factory and railroad tracks were close by. The Court thought it evident that in this detail the zoning plan was clearly unreasonable and to that extent invalid.

The law and eyesores. In 1918 Massachusetts adopted a constitutional amendment to this effect: "Advertising on public ways, in public places and on private property within public view may be regulated and restricted by law." In General Outdoor Advertising Co. *v.* Department of Public Works, 289 Mass. 149 (1935), the Supreme Judicial Court of the state sustained regulations made in pursuance of this amendment. The court said: "It is, in our opinion, within the reasonable scope of the police power to preserve from destruction the scenic beauties bestowed on the commonwealth by nature in conjunction with the promotion of safety of travel on the public ways and the protection of travellers from the intrusion of unwelcome advertising." The advertising company took an appeal to the Supreme Court; then for some reason thought better of it and asked that their appeal be dismissed. 297 U.S. 725 (1936).

The weighing of interests. When the courts pass upon restrictions on the use of property they are driven to make an analysis of the various interests involved. When, for example, coal mine operators are required to leave a wall of coal along the line of adjoining property, which, with the wall on the other side of the line, would be a barrier sufficient for the safety of the workers in either mine if the other should be abandoned, one recognizes that there is an average reciprocity of advantage which makes the regulation seem obviously just. The petroleum industry has posed unprecedented difficulties "of adjustment among private interests and in the reconciliation of all these private interests with the underlying public interest in such a vital source of energy for our day as oil." Petroleum is fugacious, so the man who drills first may scoop up the wealth beneath his neighbor's land. Natural gas is used to lift the oil and, until conservation was imposed for the public good, the gas was often wasted. The accommodation of these conflicting interests is "as thorny a problem as has challenged the ingenuity and wisdom of legislatures." Frankfurter, J., in Railroad Commission of Texas *v.* Rowan & Nichols Oil Co., 310 U.S. 573 (1940).

A less intricate complex of interests will better serve as an illustration. Apple growing is one of the principal agricultural pursuits in Virginia. Millions of dollars have been invested in the orchards, which furnish employment to many; railroad and cold storage facilities have developed to meet the business. Cedar rust ruins the apples. The red cedar tree is the "host plant" where the cedar rust develops. Red cedar trees are ornamental and have practically no commercial use. May the state decree the destruction of such red cedars as are close enough to infect the orchards? This was the problem in Miller *v.* Schoene, 276 U.S. 272 (1928). Where it is merely a question of Peter and Paul, the legislature may not appropriate the property of the one to promote the comfort of the other. But it was more than that,

since the apple industry was for Virginia a major public interest. Said Mr. Justice Stone for a unanimous Court:

> On the evidence we may accept the conclusion of the Supreme Court of Appeals that the state was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity. It would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go on unchecked. When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public. It will not do to say that the case is merely one of a conflict of two private interests and that the misfortune of apple growers may not be shifted to cedar owners by ordering the destruction of their property; for it is obvious that there may be, and that here there is, a preponderant public concern in the preservation of the one interest over the other. And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property. [Citing Euclid *v.* Ambler Realty Co., Fertilizing Co. *v.* Hyde Park, Reinman *v.* Little Rock, Hadacheck *v.* Sebastian, and other cases.]

BUCK *v.* BELL

274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927).

On Writ of Error to the Supreme Court of Appeals of the State of Virginia.

Opinion

Mr. Justice HOLMES delivered the opinion of the Court.

This is a writ of error to review a judgment of the Supreme Court of Appeals of the State of Virginia, affirming a judgment of the Circuit Court of Amherst County, by which the defendant in error, the superintendent of the State Colony for Epileptics and Feeble Minded, was ordered to perform the operation of

salpingectomy upon Carrie Buck, the plaintiff in error, for the purpose of making her sterile. 143 Va. 310. The case comes here upon the contention that the statute authorizing the judgment is void under the Fourteenth Amendment as denying to the plaintiff in error due process of law and the equal protection of the laws.

Carrie Buck is a feeble-minded white woman who was committed to the State Colony above mentioned in due form. She is the daughter of a feeble-minded mother in the same institution, and the mother of an illegitimate feeble-minded child. She was 18 years old at the time of the trial of her case in the circuit court in the latter part of 1924. An act of Virginia approved March 20, 1924 (Laws 1924, ch. 394), recites that the health of the patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives, under careful safeguard, etc.; that the sterilization may be effected in males by vasectomy and in females by salpingectomy, without serious pain or substantial danger to life; that the Commonwealth is supporting in various institutions many defective persons who if now discharged would become a menace but if incapable of procreating might be discharged with safety and become self-supporting with benefit to themselves and to society; and that experience has shown that heredity plays an important part in the transmission of insanity, imbecility, etc. The Statute then enacts that whenever the superintendent of certain institutions including the above-named State Colony shall be of opinion that it is for the best interest of the patients and of society that an inmate under his care should be sexually sterilized, he may have the operation performed upon any patient afflicted with hereditary forms of insanity, imbecility, etc., on complying with the very careful provisions by which the Act protects the patients from possible abuse.

The superintendent first presents a petition to the special board of directors of his hospital or colony, stating the facts and the grounds for his opinion, verified by affidavit. Notice of the petition and of the time and place of the hearing in the institution is to be served upon the inmate, and also upon his guardian, and if there is no guardian the superintendent is to apply to the circuit court of the county to appoint one. If the inmate is a minor notice also is to be given to his parents, if any, with a copy of the petition. The board is to see to it that the inmate may attend the hearings if desired by him or his guardian. The evidence is

all to be reduced to writing, and after the board has made its order for or against the operation, the superintendent, or the inmate, or his guardian, may appeal to the circuit court of the county. The circuit court may consider the record of the board and the evidence before it and such other admissible evidence as may be offered, and may affirm, revise, or reverse the order of the board and enter such order as it deems just. Finally any party may apply to the Supreme Court of Appeals, which, if it grants the appeal, is to hear the case upon the record of the trial in the circuit court and may enter such order as it thinks the circuit court should have entered. There can be no doubt that so far as procedure is concerned the rights of the patient are most carefully considered, and as every step in this case was taken in scrupulous compliance with the statute and after months of observation, there is no doubt that in that respect the plaintiff in error has had due process of law.

The attack is not upon the procedure but upon the substantive law. It seems to be contended that in no circumstances could such an order be justified. It certainly is contended that the order cannot be justified upon the existing grounds. The judgment finds the facts that have been recited and that Carrie Buck "is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization," and thereupon makes the order. In view of the general declarations of the legislature and the specific findings of the court, obviously we cannot say as matter of law that the grounds do not exist, and if they exist they justify the result. We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the state for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Jacobson *v.* Massachusetts, 197 U.S. 11. Three generations of imbeciles are enough.

But, it is said, however it might be if this reasoning were

applied generally, it fails when it is confined to the small number who are in the institutions named and is not applied to the multitudes outside. It is the usual last resort of constitutional arguments to point out shortcomings of this sort. But the answer is that the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow. Of course so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached.

Judgment affirmed.

Mr. Justice BUTLER dissents.

Comment

As Chief Justice Hughes observed in his opinion in West Coast Hotel Co. *v.* Parrish. "the Constitution does not recognize an absolute and uncontrollable liberty. . . . The liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people." Our society, then, is not constitutionally inhibited from taking such measures as experience and man's expanding knowledge indicate to be essential to its well-being. Buck *v.* Bell is an example somewhat out of the ordinary. But we should not presume from the easy brevity of Justice Holmes' opinion that government may experiment with groups of the socially inadequate without encountering certain constitutional limitations. There was no challenge in Buck *v.* Bell to the process which Virginia had established nor to the manner in which proceedings had been conducted in the particular case of Carrie Buck: the main contention, which the Court rejected, was that sterilization was beyond the lawful power of government. Other cases dealing with this and somewhat comparable measures of social control will serve to illustrate some of the points in which state action must meet the standards set by the Fourteenth Amendment.

Equal protection of the laws. A minor objection in Buck *v.* Bell, which the Court brushed aside, pointed to the partial nature of the statute: it fell upon the inmates of state asylums and ignored mental defectives not so confined. Justice Holmes gave what has come to be the stock response to that sort of contention—that the law does all that is needed when it does all that it can, and so forth. But the next sterilization statute to be considered by the Court was held invalid

on the ground that its classification lacked any adequate rational basis.

In Skinner *v.* Oklahoma, 316 U.S. 535 (1942), the state had decreed that "habitual criminals" should be sterilized if the court or jury found that the operation could be performed without detriment to general health. An "habitual criminal" was defined as one who was convicted for a third time of a felony involving moral turpitude. "Offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses, shall not come or be considered within the terms of this Act." Skinner had been convicted once of stealing chickens and then twice of robbery with firearms. When the Act was invoked against him he challenged its constitutionality.

The Court held the statute unconstitutional. It did not choose to teach the legislature a lesson in genetics by saying that there is no scientific basis for the statute's assumption that felonious tendencies are transmitted in the germ cells. Rather the majority placed their decision on the ground that the classification was too loose for so serious a business. Those who stole were sterilized, those who embezzled went untouched. The difference between the two crimes is historical. The common law regarded a wrongful "taking" as essential to larceny. If a bailee (such as a carrier) fraudulently converted to his own use goods which had been entrusted to him, he did not "take" and so did not steal; he committed the newer crime of embezzlement. But if he had the fraudulent intent at the moment he was entrusted with possession, Oklahoma called it larceny by fraud. On such nice distinctions, then, might turn the criminal's liability to sterilization. The Court said that a classification which admitted of such inconsistencies as this was not good enough for the matter at hand. Justice Douglas quoted a number of comments in other cases, as that legislation need not produce "abstract symmetry," that it might recognize "degrees of evil" and hit at the worst, that "the machinery of government" must be "allowed a little play in its joints," and, finally, Justice Holmes' remark in Buck *v.* Bell, beginning with the words "the law does all that is needed when it does all that it can. . . ." Douglas, J., continued:

> But the instant legislation runs afoul of the equal protection clause, though we give Oklahoma that large deference which the rule of the foregoing cases requires. We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any

> experiment which the state conducts is to his irreparable injury. He is forever deprived of a basic liberty. We mention these matters not to re-examine the scope of the police power of the states. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a state makes in a sterilization law is essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws. The guaranty of "equal protection of the laws is a pledge of the protection of equal laws." Yick Wo *v.* Hopkins, 118 U.S. 356, 369. When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. Yick Wo *v.* Hopkins, supra; Gaines *v.* Canada, 305 U.S. 337. Sterilization of those who have thrice committed grand larceny with immunity for those who are embezzlers is a clear, pointed, unmistakable discrimination. Oklahoma makes no attempt to say that he who commits larceny by trespass or trick or fraud has biologically inheritable traits which he who commits embezzlement lacks. Oklahoma's line between larceny by fraud and embezzlement is determined, as we have noted, "with reference to the time when the fraudulent intent to convert the property to the taker's own use" arises. We have not the slightest basis for inferring that that line has any significance in eugenics nor that the inheritability of criminal traits follows the neat legal distinctions which the law has marked between those two offenses. In terms of fines and imprisonment the crimes of larceny and embezzlement rate the same under the Oklahoma code. Only when it comes to sterilization are the pains and penalties of the law different. The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn. . . .

Some examples of classification. Pretty clearly the Court has at times sustained classifications as rough as this in matters of less moment. As Holmes, J., once said, "it is established by repeated decisions that a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the Court can see." Keokee Consolidated Coke Co. *v.* Taylor, 234 U.S. 224 (1914), (where those engaged in mining and manufacture were forbidden to pay employees in orders on the company store). The Court had gone along when Pennsylvania enacted that unnaturalized foreign-born residents might not kill game and, to that end, might not own a shot-

gun or rifle. The Court could not say that Pennsylvania had no basis for the belief that the danger to wild life was characteristic of the alien class. Patsone *v.* Pennsylvania, 232 U.S. 138 (1914). New York was sustained in making it criminal for a junk dealer to buy stolen wire without a diligent search, though other buyers were under no such duty. Rosenthal *v.* New York, 226 U.S. 260 (1912).

Chief Justice Stone cited these cases in his concurring opinion in Skinner *v.* Oklahoma. He said:

> If Oklahoma may resort generally to the sterilization of criminals on the assumption that their propensities are transmissible to future generations by inheritance, I seriously doubt that the equal protection clause requires it to apply the measure to all criminals in the first instance, or to none.

He would have struck down the statute because it condemned a class wholesale and provided no individual inquiry whether the criminal tendencies of the person in question were of an inheritable type.

No doubt the Court is very right in tolerating no looseness in such a matter as sterilization. More typical rulings on classification are the following. New York's statute against employing women in restaurants after 10 P.M. was upheld, though it applied only to cities of the first and second class, and though exceptions were made for singers and performers, for cloakroom attendants, and for women employed in the dining rooms and kitchens of hotels. Radice *v.* New York, 264 U.S. 292 (1924). Agricultural labor may be excepted from the coverage of an employers' liability act. New York Central RR. *v.* White, 243 U.S. 188 (1917). Kansas' regulation of fire insurance rates was not vitiated by the fact that it exempted farmers' mutual insurance companies insuring only farm property. German Alliance Ins. Co. *v.* Lewis, 233 U.S. 389 (1914). The Court has sustained a Texas antitrust law which restrained industrial and commercial combinations but excepted the producers of agricultural products and livestock. "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same," said Frankfurter, J., for the Court. Tigner *v.* Texas, 310 U.S. 141 (1940).

The Court looks to what actually happens. A denial of equal protection may lurk in the practical administration of a statute even if not required by its words. In Yick Wo *v.* Hopkins, 118 U.S. 356 (1886), a San Francisco ordinance made it unlawful to carry on a laundry, except in a brick or stone building, without a permit from the supervisors. Reasonable regulations to protect the city from fire would have been sustained. Barbier *v.* Connolly, 113 U.S. 27 (1884). But here was an ordinance which laid down no criteria by which fitness was to be tested: the supervisors' discretion was uncontrolled. The actual administration of the ordinance disclosed the following facts: of a total of 320 laundries, 310 were in wooden buildings; of

some 200 Chinese laundrymen, not one had been granted permission; of all the white applicants, only one had been denied a permit. Said Justice Matthews for the Court: ". . . the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails. . . ." The following statement has become classic:

> Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Justice Matthews had breadth of view and, as these words suggest, a distinguished literary style. When, as in this case, the Court looks through the statute to observe how it actually works, and extends its hand to protect members of a racial minority from the injustices of those who operate the machinery of government, the Fourteenth Amendment in its primary meaning is being realized.

Procedure. Although the due process clauses of the Fifth and Fourteenth Amendments have come to be applied as limitations upon the *substantive content* of legislation—as was illustrated by the "liberty of contract" cases—their basic idea is that the *procedure* by which government is administered must in every instance meet the law's standards of what is rational and just and appropriate. In seeking to convey what "due process" means, the courts have often quoted words of Daniel Webster in his argument in the Dartmouth College Case, 4 Wheat. 518, 581 (1819): ". . . a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. . . ." Justice Field once said:

> . . . by due process of law is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and whenever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means therefore that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights. Hagar *v.* Reclamation District, 111 U.S. 701, 708 (1884).

A mode of proceeding appropriate to one type of problem may be quite unsuited to another. The Constitution itself recognizes that

"cases arising in the land and naval forces" are not to be tried in exactly the same way as ordinary criminal cases. A less formal method may be provided for determining whether an alien is to be deported for having entered the country illegally than would be requisite if anyone were being punished for a crime. The determination whether animals are diseased or whether food is unfit for consumption must needs be summary; the fixing of rates in public utility cases, on the other hand, must be carried out with a high degree of refinement. It is essential to the operation of a modern government that many kinds of determination be made by administrative authorities, such as regulatory commissions. But administrative action is always carried on within a framework of judicial control. How far administrative determinations may be made conclusive, and what on the other hand is the proper scope of judicial action in scrutinizing the process of administrative adjudication, is a very large and complex problem of constitutional law and government.

The procedure which Virginia established in its sterilization statute amply satisfied the constitutional standards. Care was taken that there should be someone to see to the interest of the inmate; there was a complete record in writing; either side might appeal from the administrative body to the circuit court, where a full hearing would take place; appeal lay from there to the highest court. Oklahoma's statute provided a very different procedure. The statute itself said flatly what group should be sterilized. There was a trial, to be sure, but its scope was limited to considering (*a*) whether the individual in question was an "habitual criminal" as defined, and (*b*) whether the operation could be performed without danger to health. Said Chief Justice Stone in his concurring opinion (Jackson, J., agreeing with him in this respect):

> . . . while the state may protect itself from the demonstrably inheritable tendencies of the individual which are injurious to society, the most elementary notions of due process would seem to require it to take appropriate steps to safeguard the liberty of the individual by affording him, before he is condemned to an irreparable injury in his person, some opportunity to show that he is without such inheritable tendencies.

Reasonable certainty is another requisite of due process. New Jersey enacted that any person not engaged in a lawful occupation who had been convicted of a crime or thrice convicted of being disorderly and who was known to be a member of any gang of two or more persons was a gangster and liable to $10,000 fine or imprisonment for not exceeding 20 years or both. What is a "gang"? The question itself discloses the fatal defect of the statute. The Court had no difficulty in holding that it was "so vague, indefinite and un-

certain that it must be condemned as repugnant to the due process clause." Lanzetta *v.* New Jersey, 306 U.S. 451 (1939).

Several of the problems considered above are discussed in the opinion of Chief Justice Hughes in Minnesota *ex rel.* Pearson *v.* Probate Court, 309 U.S. 270 (1940), sustaining the state's statute for committing persons of "psychopathic personality" to an asylum. A "psychopathic personality" was defined as meaning "the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts, or a combination of any such conditions, as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons." The state supreme court, construing the statute, had sharpened the definition by interpreting it to mean persons who "have evidenced an utter lack of power to control their sexual impulses . . ." and not so sweeping as to extend "to every person guilty of sexual misconduct nor even to persons having strong sexual propensities." The statute thus construed was proof against the objection that it failed to satisfy the Fourteenth Amendment as to certainty, said Chief Justice Hughes. Equally without merit was the contention that the statute denied equal protection by selecting a group which was part of a larger class. The Court had no doubt that there was a rational basis for making a class of the group which was selected, and, quoting familiar language, that if the law "presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied." The mode of determining whether one was a "psychopathic personality" was substantially that for determining insanity and appeared quite adequate. Pearson had challenged this procedure before it had actually been carried out in his case. Hughes, C.J., recognized that this was a type of proceeding where the courts should be especially vigilant to see that the substantial rights of the persons charged were adequately safeguarded at every stage; but, applying familiar principle, there was no occasion to talk of abuses where the statute was not defective and no abuse had occurred.

The topics discussed above—the constitutionally permissible range of legislation, equal protection and classification, the adequacy of procedure, and the requisite of certainty—are matters of universal importance. Here they have been developed with respect to simply one somewhat special type of public problem.

As to the equal protection clause, recall Justice Miller's remark in the Slaughter-House Cases, "We doubt very much whether any action of a state not directed by way of discrimination against the Negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." Herein the judge proved a poor prophet.

CHAMBERS *et al. v.* FLORIDA

309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716 (1940).

On Writ of Certiorari to the Supreme Court of the State of Florida.

Opinion

Mr. Justice BLACK delivered the opinion of the Court.

The grave question presented . . . is whether proceedings in which confessions were utilized, and which culminated in sentences of death upon four young Negro men in the state of Florida, failed to afford the safeguard of that due process of law guaranteed by the Fourteenth Amendment. . . .

. . . The record shows—

About 9 o'clock on the night of Saturday, May 13, 1933, Robert Darcy, an elderly white man, was robbed and murdered in Pompano, Fla., a small town in Broward County about 20 miles from Fort Lauderdale, the county seat. . . .

Between 9:30 and 10 o'clock after the murder, petitioner Charlie Davis was arrested, and within the next 24 hours from 25 to 40 Negroes living in the community, including petitioners Williamson, Chambers and Woodward, were arrested without warrants and confined in the Broward county jail at Fort Lauderdale. On the night of the crime, attempts to trail the murderers by bloodhounds brought J. T. Williams, a convict guard, into the proceedings. From then until confessions were obtained and petitioners were sentenced, he took a prominent part. About 11 P.M. on the following Monday, May 15, the sheriff and Williams took several of the imprisoned Negroes, including Williamson and Chambers, to the Dade county jail at Miami. The sheriff testified that they were taken there because he felt a possibility of mob violence and "wanted to give protection to every prisoner . . . in jail." Evidence of petitioners was that on the way to Miami a motorcycle patrolman drew up to the car in which the men were riding and the sheriff "told the cop that he had some Negroes that he [was] taking down to Miami to escape a mob." This statement was not denied by the sheriff in his

testimony and Williams did not testify at all; Williams apparently has now disappeared. Upon order of Williams, petitioner Williamson was kept in the death cell of the Dade county jail. The prisoners thus spirited to Miami were returned to the Fort Lauderdale jail the next day, Tuesday.

It is clear from the evidence of both the state and petitioners that from Sunday, May 14, to Saturday, May 20, the 30 to 40 Negro suspects were subjected to questioning and cross questioning (with the exception that several of the suspects were in Dade county jail over one night). From the afternoon of Saturday, May 20, until sunrise of the 21st, petitioners and possibly one or two others underwent persistent and repeated questioning. The Supreme Court of Florida said the questioning "was in progress several days and all night before the confessions were secured" and referred to the last night as an "all night vigil." The sheriff who supervised the procedure of continued interrogation testified that he questioned the prisoners "in the daytime all the week," but did not question them during any night before the all night vigil of Saturday, May 20, because after having "questioned them all day . . . [he] was tired." Other evidence of the state was "that the officers of Broward county were in that jail almost continually during the whole week questioning these boys, and other boys, in connection with this" case.

The process of repeated questioning took place in the jailer's quarters on the fourth floor of the jail. During the week following their arrests and until their confessions were finally acceptable to the state's attorney in the early dawn of Sunday, May 21, petitioners and their fellow prisoners were led one at a time from their cells to the questioning room, quizzed, and returned to their cells to await another turn. So far as appears, the prisoners at no time during the week were permitted to see or confer with counsel or a single friend or relative. When carried singly from his cell and subjected to questioning, each found himself, a single prisoner, surrounded in a fourth floor jail room by four to ten men, the county sheriff, his deputies, a convict guard, and other white officers and citizens of the community.

The testimony is in conflict as to whether all four petitioners were continually threatened and physically mistreated until they finally, in hopeless desperation and fear of their lives, agreed to confess on Sunday morning just after daylight. Be that as it may, it is certain that by Saturday, May 20, five days of con-

tinued questioning had elicited no confession. Admittedly, a concentration of effort—directed against a small number of prisoners including petitioners—on the part of the questioners, principally the sheriff and Williams, the convict guard, began about 3:30 that Saturday afternoon. From that hour on, with only short intervals for food and rest for the questioners—"They all stayed up all night." "They bring one of them at a time backwards and forwards . . . until they confessed." And Williams was present and participating that night, during the whole of which the jail cook served coffee and sandwiches to the men who "grilled" the prisoners.

Sometime in the early hours of Sunday, the 21st, probably about 2:30 A.M., Woodward apparently "broke"—as one of the state's witnesses put it—after a 15 or 20 minute period of questioning by Williams, the sheriff, and the constable "one right after the other." The state's attorney was awakened at his home and called to the jail. He came, but was dissatisfied with the confession of Woodward which he took down in writing at that time, and said something like "tear this paper up, that isn't what I want, when you get something worth while call me." This same state's attorney conducted the state's case in the circuit court below and also made himself a witness but did not testify as to why Woodward's first alleged confession was unsatisfactory to him. The sheriff did, however:

"A. No, it wasn't false, part of it was true and part of it wasn't; Mr. Maire [the state's attorney] said there wasn't enough. It wasn't clear enough.

". . .

"Q. . . . Was that voluntarily made at that time? A. Yes, sir.

"Q. It was voluntarily made that time. A. Yes, sir.

"Q. You didn't consider it sufficient? A. Mr. Maire.

"Q. Mr. Maire told you that it wasn't sufficient, so you kept on questioning him until the time you got him to make a free and voluntary confession of other matters that he hadn't included in the first? A. No, sir, we questioned him there and we caught him in lies.

"Q. Caught all of them telling lies? A. Caught every one of them lying to us that night, yes, sir.

"Q. Did you tell them they were lying? A. Yes, sir.

"Q. Just how would you tell them that? A. Just like I am talking to you.

"Q. You said 'Jack, you told me a lie'? A. Yes, sir."

After one week's constant denial of all guilt, petitioners "broke."

Just before sunrise, the state officials got something "worthwhile" from petitioners which the state's attorney would "want"; again he was called; he came; in the presence of those who had carried on and witnessed the all night questioning, he caused his questions and petitioners' answers to be stenographically reported. These are the confessions utilized by the state to obtain the judgments upon which petitioners were sentenced to death. No formal charges had been brought before the confessions. Two days thereafter, petitioners were indicted, were arraigned, and Williamson and Woodward pleaded guilty; Chambers and Davis pleaded not guilty. Later the sheriff, accompanied by Williams, informed an attorney who presumably had been appointed to defend Davis that Davis wanted his plea of not guilty withdrawn. This was done, and Davis then pleaded guilty. When Chambers was tried, his conviction rested upon his confession and testimony of the other three confessors. The convict guard and the sheriff "were in the courtroom sitting down in a seat." And from arrest until sentenced to death, petitioners were never —either in jail or in court—wholly removed from the constant observation, influence, custody, and control of those whose persistent pressure brought about the sunrise confessions.

. . The scope and operation of the Fourteenth Amendment have been fruitful sources of controversy in our constitutional history. However, in view of its historical setting and the wrongs which called it into being, the due process provision of the Fourteenth Amendment—just as that in the Fifth—has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate, then and thereafter, to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority. Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny. The instruments of such governments were in the main, two. Conduct, innocent when engaged in, was subsequently made by fiat criminally punishable without legislation. And a liberty loving people won the principle that criminal punishments could not be inflicted save for that which proper legislative action had already by "the law of the land" forbidden when done. But even more was

needed. From the popular hatred and abhorrence of illegal confinement, torture, and extortion of confessions of violations of the "law of the land" evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power. Thus, as assurance against ancient evils, our country, in order to preserve "the blessings of liberty," wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed.

The determination to preserve an accused's right to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes. The testimony of centuries, in governments of varying kinds over populations of different races and beliefs, stood as proof that physical and mental torture and coercion had brought about the tragically unjust sacrifices of some who were the noblest and most useful of their generations. The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and the hangman's noose. And they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless.

This requirement—of conforming to fundamental standards of procedure in criminal trials—was made operative against the states by the Fourteenth Amendment. Where one of several accused had limped into the trial court as a result of admitted physical mistreatment inflicted to obtain confessions upon which a jury had returned a verdict of guilty of murder, this Court recently declared, Brown *v.* Mississippi [297 U.S. 278], that "It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process."

Here, the record develops a sharp conflict upon the issue of

physical violence and mistreatment, but shows, without conflict, the dragnet methods of arrest on suspicion without warrant, and the protracted questioning and cross questioning of these ignorant young colored tenant farmers by state officers and other white citizens, in a fourth floor jail room, where as prisoners they were without friends, advisers or counselors, and under circumstances calculated to break the strongest nerves and the stoutest resistance. Just as our decision in Brown *v.* Mississippi was based upon the fact that the confessions were the result of compulsion, so in the present case, the admitted practices were such as to justify the statement that "The undisputed facts showed that compulsion was applied."

For five days petitioners were subjected to interrogations culminating in Saturday's (May 20) all night examination. Over a period of five days they steadily refused to confess and disclaimed any guilt. The very circumstances surrounding their confinement and their questioning without any formal charges having been brought, were such as to fill petitioners with terror and frightful misgivings. Some were practically strangers in the community; three were arrested in a one-room farm tenant house which was their home; the haunting fear of mob violence was around them in an atmosphere charged with excitement and public indignation. From virtually the moment of their arrest until their eventual confessions, they never knew just when any one would be called back to the fourth floor room, and there, surrounded by his accusers and others, interrogated by men who held their very lives—so far as these ignorant petitioners could know—in the balance. The rejection of petitioner Woodward's first "confession," given in the early hours of Sunday morning, because it was found wanting, demonstrates the relentless tenacity which "broke" petitioners' will and rendered them helpless to resist their accusers further. To permit human lives to be forfeited upon confessions thus obtained would make of the constitutional requirement of due process of law a meaningless symbol.

We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. The Constitution proscribes such lawless means irrespective of the end. And this argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American court. Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of

tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed, or persuasion.

The Supreme Court of Florida was in error and its judgment is reversed.

Comment

As the Chambers Case serves to show, the Court is determined to vindicate the due process clause of the Fourteenth Amendment in that elementary significance—the promise of a fair trial. In a number of similar instances the Court has set aside the conviction in the state courts in a terse *per curiam* opinion which said, in effect, "Reversed. See Chambers *v.* Florida."

The particular forms and procedures by which criminal justice is administered in any state are matters to be settled by that state. What the due process clause of the Fourteenth Amendment requires is that state action "shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.'" Hebert *v.* Louisiana, 272 U.S. 312, 316 (1926). "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." Lisenba *v.* California, 314 U.S. 219, 236 (1941).

Local prejudice. "Mob law does not become due process of law by securing the assent of a terrorized jury," Justices Holmes and Hughes protested in Frank *v.* Magnum, 237 U.S. 309 (1915). The fact that the state courts may have averted their gaze and declared that all was well does not satisfy the United States Constitution. That was a case where the trial judge had advised that the accused and his counsel absent themselves when the verdict was brought in, as otherwise there might be violence. "This is not a matter for polite presumptions; we must look facts in the face. Any judge who has sat with juries knows that, in spite of forms, they are extremely likely to be impregnated by the environing atmosphere." To be sure, Holmes and

Hughes were dissenting in that case. But the view they expressed became the rule of action of the Court in a similar case, Moore *v.* Dempsey, 261 U.S. 86, which was decided eight years later.

Moore and four other Negroes had been convicted of murder—the outcome of a race riot—and awaited the execution of sentences of death. Their showing, in habeas corpus proceedings in the federal district court, was that the testimony on which they were convicted came from witnesses who had been whipped and tortured to induce them to say what was desired by the committee of whites who had taken charge. A white man whom the Negroes called to counsel them was arrested and driven away. On the day of trial—as the Supreme Court summarized their allegations:

> The court and neighborhood were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result. The counsel did not venture to demand delay or a change of venue, to challenge a juryman, or to ask for separate trials. He had had no preliminary consultation with the accused, called no witnesses for the defense, although they could have been produced, and did not put the defendants on the stand. The trial lasted about three quarters of an hour, and in less than five minutes the jury brought in a verdict of murder in the first degree. According to the allegations and affidavits there never was a chance for the petitioners to be acquitted; no juryman could have voted for an acquittal and continued to live in Phillips county, and if any prisoner, by any chance, had been acquitted by a jury, he could not have escaped the mob.

As corroborating their contention of local prejudice, petitioners asserted that leading civic groups had passed resolutions opposing any commutation of the sentences. Justice Holmes, now speaking for the Court, held that it was the duty of the federal court to determine whether these allegations were true; the fact that the courts of Arkansas had denied relief was no answer when the protection of the federal Constitution was invoked. McReynolds and Sutherland, JJ., dissented.

"*Pages torn from some medieval account.*" Brown *v.* Mississippi, 297 U.S. 278 (1936), set aside the conviction of three Negroes charged with murder. The record, as summarized by one of the dissenting judges in the state supreme court, showed that Brown and Shields "were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it." These thrashings were continued until "they changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers." The other defendant, Ellington, was twice hung up and twice whipped, and then confessed. In White *v.* Texas, 310 U.S.

530 (1940), the Court reversed a conviction obtained on a confession extracted after several nights of beating by the Rangers. In Ward *v.* Texas, 316 U.S. 547 (1942), the Court, speaking by Mr. Justice Byrnes, set aside the conviction of an ignorant Negro who had been arrested without warrant and spirited about from one strange place to another, told of threats of mob violence, and continuously questioned until he gave the confession on which his conviction was based.

In the first "Scottsboro Case," Powell *v.* Alabama, 287 U.S. 45 (1932), several grounds were presented on which the Supreme Court was asked to hold that the trial had been without due process. A single objection sufficed—the denial of the right to counsel. Here were several Negro youths, charged with rape, hurried to trial in a strange community. The judge of the trial court, in one spacious gesture, "appointed all the members of the bar for the purpose of arraigning them and then of course I anticipated them to continue to help them if no counsel appears." The Court, with Sutherland, J., as its spokesman, agreed with the dissenting judge in the state supreme court that this was "rather *pro forma* than zealous and active" representation which, coupled with the failure to afford reasonable opportunity to obtain counsel of their own, was "a clear denial of due process." Justices Butler and McReynolds dissented.

Justice McReynolds. When the circus came to Washington, Justice McReynolds would see to it that the Negro servants of the Court had tickets. When the contention would be raised in the Supreme Court that a trial in a state court had been vitiated by racial prejudice, Justice McReynolds was the least willing to go to the root of the matter. When a utility company raised the contention that the rates fixed by the state public service commission were confiscatory, Justice McReynolds led the way in announcing that the due process clause entitled the company to an independent judicial determination of the very truth of the contention. Ohio Valley Water Co. *v.* Ben Avon Borough, 253 U.S. 287 (1920). Cf. his dissent (Butler, J., concurring with him) in United Gas Public Service Co. *v.* Texas, 303 U.S. 123 (1938), where the Court sustained a Texas statute which gave utility companies a jury trial on the question whether rates fixed by the public service commission were reasonable.

"Those ultimate dignities of man which the United States Constitution assures." The due process clause imposes a standard of decency and fairness in trials in state courts; it leaves to the states procedural details for securing fair judgment. The Court has felt that it ought not to go so far as to declare that due process necessarily involves the assistance of counsel in every criminal case. It has said that it would appraise "the totality of facts in a given case" and refrain from formulating "a set of hard and fast rules." Betts *v.* Brady, 316 U.S. 455 (1942). In De Meerleer *v.* Michigan, 329 U.S. 663 (1947), where a boy of 17 had been convicted of first degree murder and sentenced

to life imprisonment without even a mention of his right to counsel, the conviction was reversed. In Carter *v.* Illinois, 329 U.S. 173 (1946), it appeared that the petitioner, an adult Negro, had been advised by the trial judge of his right to have a lawyer appointed to defend him and had waived the right. The majority of the Court declined to interfere. Justices Black, Douglas, Murphy, and Rutledge dissented, pointing out that a layman may not appreciate his own inability to cope with such a situation. We may expect the Justices just named to keep pressing for a stiffening of the requirements of federal due process.

Willie Francis, a Negro in Louisiana, was sentenced to death for murder. He was placed in the electric chair and the switch was thrown, but through some defect the current was broken so that death did not result. Would a subsequent execution of the sentence be so "repugnant to the conscience of mankind" as to transgress the Fourteenth Amendment? The Court declined to interfere, Burton, Douglas, Murphy and Rutledge, JJ., dissenting. Louisiana *ex rel.* Francis *v.* Resweber, 329 U.S. 459 (1947).

The "third degree." The Court has declared that it will not tolerate the "third degree." It declared this as to federal prosecutions in McNabb *v.* United States, 318 U.S. 332 (1943), where, as the Court understood, petitioners had not been taken before a magistrate for a hearing, commitment, or taking bail, as the federal statute requires; on the contrary, they had for two days been subjected to "those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use." The conviction was set aside. The Court pointed out that it was enforcing not a sentimental but a sturdy view of law enforcement: resort to brutality as a substitute for brains was in the end self-defeating. The Court did not put this on constitutional grounds; that was needless, for the result could be spelled out of the statutes. Moreover the Supreme Court has a responsibility in regard to the administration of criminal justice in the federal courts which is quite different from that very limited authority over state courts which it derives from the Fourteenth Amendment.

The Court went on to hold, at the next term, that the "third degree" is inconsistent with the due process clause of the Fourteenth Amendment. This was in Ashcraft *v.* Tennessee, 322 U.S. 143 (1944), where the petitioner had been subjected to a secret examination lasting 36 hours, with one respite of five minutes. Justice Black spoke for the majority. Justice Jackson, with whom Roberts and Frankfurter, JJ., concurred, dissenting, made the point that in his opinion the majority were using the due process clause to force upon the states their own views of what should be permissible in criminal procedure, "as dangerous and delicate a use of federal judicial power as to use it to disable them from social or economic experimentation."

NORRIS *v.* ALABAMA

294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1935).

On Writ of Certiorari to the Supreme Court of the State of Alabama.

Introduction

One of the petitioners' constitutional objections in Powell *v.* Alabama, the first "Scottsboro Case," was that "they were tried before juries from which qualified members of their own race were systematically excluded." The Court found it unnecessary to consider that contention since a more patent constitutional defect was found.

Norris *v.* Alabama is a sequel to the Powell Case.

Opinion

Mr. Chief Justice HUGHES delivered the opinion of the Court.

Petitioner, Clarence Norris, is one of nine Negro boys who were indicted in March 1931 in Jackson county, Ala., for the crime of rape. On being brought to trial in that county eight were convicted. This Court reversed the judgments of conviction upon the ground that the defendants had been denied due process of law in that the trial court had failed in the light of the circumstances disclosed, and of the inability of the defendants at that time to obtain counsel, to make an effective appointment of counsel to aid them in preparing and presenting their defense. Powell *v.* Alabama, 287 U.S. 45.

After the remand, a motion for change of venue was granted and the cases were transferred to Morgan county. Norris was brought to trial in November 1933. At the outset, a motion was made on his behalf to quash the indictment upon the ground of the exclusion of Negroes from juries in Jackson county where the indictment was found. A motion was also made to quash the trial venire in Morgan county upon the ground of the exclusion of Negroes from juries in that county. In relation to each county, the charge was of long continued, systematic and arbitrary exclusion of qualified Negro citizens from service on juries, solely because of their race and color, in violation of the Constitution

of the United States. . . . The trial . . . proceeded and resulted in the conviction of Norris who was sentenced to death. On appeal, the Supreme Court of the state considered and decided the federal question which Norris had raised and affirmed the judgment. We granted a writ of certiorari.

First. There is no controversy as to the constitutional principle involved. . . . Summing up precisely the effect of earlier decisions, this Court thus stated the principle in Carter *v.* Texas, 177 U.S. 442, 447, in relation to exclusion from service on grand juries: "Whenever by any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment." . . . The principle is equally applicable to a similar exclusion of Negroes from service on petit juries. And although the state statute defining the qualifications of jurors may be fair on its face, the constitutional provision affords protection against action of the state through its administrative officers in effecting the prohibited discrimination.

The question is of the application of this established principle to the facts disclosed by the record. That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. . . .

Second. The evidence on the motion to quash the indictment. In 1930, the total population of Jackson county, where the indictment was found, was 36,881, of whom 2688 were Negroes. The male population over 21 years of age numbered 8801, and of these 666 were Negroes.

The qualifications of jurors were thus prescribed by the state statute: "The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men, and are esteemed in the community for their integrity, good character and sound judgment, but no person must be selected who is

under 21 or over 65 years of age, or who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness, is unfit to discharge the duties of a juror, or who cannot read English, or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder, his name may be placed on the jury roll and in the jury box."

Defendant adduced evidence to support the charge of unconstitutional discrimination in the actual administration of the statute in Jackson county. The testimony, as the state court said, tended to show that "in a long number of years no Negro had been called for jury service in that county." It appeared that no Negro had served on any grand or petit jury in that county within the memory of witnesses who had lived there all their lives. Testimony to that effect was given by men whose ages ran from 50 to 76 years. Their testimony was uncontradicted. It was supported by the testimony of officials. The clerk of the jury commission and the clerk of the circuit court had never known of a Negro serving on a grand jury in Jackson county. The court reporter, who had not missed a session in that county in 24 years, and two jury commissioners testified to the same effect. One of the latter, who was a member of the commission which made up the jury roll for the grand jury which found the indictment, testified that he had "never known of a single instance where any Negro sat on any grand or petit jury in the entire history of that county."

That testimony in itself made out a prima facie case of the denial of the equal protection which the Constitution guarantees. . . . The case thus made was supplemented by direct testimony that specified Negroes, 30 or more in number, were qualified for jury service. Among these were Negroes who were members of school boards, or trustees, of colored schools, and property owners and householders. It also appeared that Negroes from that county had been called for jury service in the federal court. Several of those who were thus described as qualified were witnesses. While there was testimony which cast doubt upon the qualifications of some of the Negroes who had been named, and there was also general testimony by the editor of a local newspaper who gave his opinion as to the lack of "sound judgment" of the "good Negroes" in Jackson county, we think that the definite testimony as to the actual qualifications of individual Negroes,

which was not met by any testimony equally direct, showed that there were Negroes in Jackson county qualified for jury service. . . .

The state court rested its decision upon the ground that even if it were assumed that there was no name of a Negro on the jury roll, it was not established that race or color caused the omission. The court pointed out that the statute fixed a high standard of qualifications for jurors and that the jury commission was vested with a wide discretion. The court adverted to the fact that more white citizens possessing age qualifications had been omitted from the jury roll than the entire Negro population of the county, and regarded the testimony as being to the effect that "the matter of race, color, politics, religion or fraternal affiliations" had not been discussed by the commission and had not entered into their consideration, and that no one had been excluded because of race or color. . . .

We are of the opinion that the evidence required a different result from that reached in the state court. We think that the evidence that for a generation or longer no Negro had been called for service on any jury in Jackson county, that there were Negroes qualified for jury service, that according to the practice of the jury commission their names would normally appear on the preliminary list of male citizens of the requisite age but that no names of Negroes were placed on the jury roll, and the testimony with respect to the lack of appropriate consideration of the qualifications of Negroes, established the discrimination which the Constitution forbids. The motion to quash the indictment upon that ground should have been granted.

Third. The evidence on the motion to quash the trial venire. The population of Morgan county, where the trial was had, was larger than that of Jackson county, and the proportion of Negroes was much greater. The total population of Morgan county in 1930 was 46,176, and of this number 8311 were Negroes.

Within the memory of witnesses, long resident there, no Negro had ever served on a jury in that county or had been called for such service. Some of these witnesses were over 50 years of age and had always lived in Morgan county. Their testimony was not contradicted. A clerk of the circuit court, who had resided in the county for 30 years, and who had been in office for over four years, testified that during his official term approximately 2500 persons had been called for jury service and that not one of them was a Negro; that he did not recall "ever seeing any

single person of the colored race serve on any jury in Morgan county."

There was abundant evidence that there were a large number of Negroes in the county who were qualified for jury service. Men of intelligence, some of whom were college graduates, testified to long lists (said to contain nearly 200 names) of such qualified Negroes, including many businessmen, owners of real property, and householders. When defendant's counsel proposed to call many additional witnesses in order to adduce further proof of qualifications of Negroes for jury service, the trial judge limited the testimony, holding that the evidence was cumulative.

We find no warrant for a conclusion that the names of any of the Negroes as to whom this testimony was given, or of any other Negroes, were placed on the jury rolls. No such names were identified. The evidence that for many years no Negro had been called for jury service itself tended to show the absence of the names of Negroes from the jury rolls, and the state made no effort to prove their presence. . . .

For this long-continued, unvarying, and wholesale exclusion of Negroes from jury service we find no justification consistent with the constitutional mandate. We have carefully examined the testimony of the jury commissioners upon which the state court based its decision. . . .

We think that this evidence failed to rebut the strong prima facie case which defendant had made. That showing as to the long-continued exclusion of Negroes from jury service, and as to the many Negroes qualified for that service, could not be met by mere generalities. If, in the presence of such testimony as defendant adduced, the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of Negroes from jury service, the constitutional provision—adopted with special reference to their protection—would be but a vain and illusory requirement. . . .

We are concerned only with the federal question which we have discussed, and in view of the denial of the federal right suitably asserted, the judgment must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice McReynolds did not hear the argument and took no part in the consideration and decision of this case.

Comment

In Neal *v.* Delaware, 103 U.S. 370 (1881), the Court, summarizing the result of Strauder *v.* West Virginia, 100 U.S. 303 (1880), and Virginia *v.* Rives, 100 U.S. 313, said that

> . . . while a colored citizen . . . cannot claim, as matter of right, that his race shall have a representation on the jury, . . . it *is* a right to which he is entitled, "that in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race and no discrimination against them, because of their color."

(Justice Field insisted that the equal protection of the laws did not prevent an outright exclusion of Negroes. Cf. his views on equality of economic opportunity, in the Slaughter-House Cases.) Such was and is the constitutional rule. But, as a line of lost cases showed, it was difficult to present the claim of constitutional right in a form in which the Supreme Court could be induced to look to the substantial merits of the contention. As the Court declared in Thomas *v.* Texas, 212 U.S. 278 (1909), whether or not discrimination against Negroes because of their race was practiced by jury commissioners was a question of fact, the decision of which by the state courts was conclusive on the Supreme Court, "unless it could be held that these decisions constitute such abuse as amounted to an infraction of the federal Constitution . . ."

The appeals growing out of the Scottsboro trials disclosed a situation such that to indulge any "polite presumption" would have been an act of stultification of the part of the Supreme Court. [Cf. Patterson *v.* Alabama, 294 U.S. 600 (1935).] Chief Justice Hughes never appeared more effectively the highest judicial officer of the nation than in meeting the challenge of this situation and enforcing the guarantee of the Fourteenth Amendment firmly and uncompromisingly. Since the issue was forced in Norris *v.* Alabama, the Court has reiterated the stand there taken. In Pierre *v.* Louisiana, 306 U.S. 354 (1939), Smith *v.* Texas, 311 U.S. 128 (1940), and Hill *v.* Texas, 316 U.S. 400 (1942), convictions were reversed because of a showing that there had been a discrimination against Negroes in the selection of the grand jury. In Akins *v.* Texas, 325 U.S. 398 (1945) the state authorities had bowed to these Supreme Court holdings to the extent of selecting one Negro to serve on the grand jury of 12. A pro rata representation would have given 1.85 Negroes on the average. Each commissioner testified, however, that he had had no intention of placing more than one on a jury. The Court held that the Fourteenth Amendment had been satisfied, Stone, C.J., Black and Murphy, JJ., dissenting.

There is a saying that it is important not merely that justice be

done but that it seem to be done. In Tumey *v.* Ohio, 273 U.S. 510 (1927), the situation was this: the mayor had been given jurisdiction to try liquor cases; if he convicted and fined he was authorized to deduct a fee, but if he acquitted he received nothing. Said Taft, C.J.:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.

NEAR *v.* MINNESOTA

283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931).

Appeal from the Supreme Court of the State of Minnesota.

Introduction

When Blackstone stated a rule of the English constitution he was wont to adorn it with a complacent rationalization designed to show how admirable was the rule. Here is his explanation of the freedom of the press as understood in England in 1769:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press, but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the Revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion,—the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment. . . . [*Commentaries,* IV, p. 151.]

Previous restraints. Blackstone is a great name, and his literary style is attractive. Let us examine what he really said. By the absence of *previous* restraint he meant that it was no longer necessary to obtain the official *imprimatur* before a composition could lawfully be printed. The Crown, and even the Commonwealth, had required that books be licensed, and Parliament had continued the policy after the Restoration. But the last licensing act expired in 1694. After that the subject was free to lay what sentiments he pleased before the public.

Defamation and seditious libel. What might happen after that is quite another story. So far as a civil action for defamation—by speaking or writing—was concerned, the truth of the utterance was a defense. If A asserts that Magistrate B has taken a bribe and then proves it, B loses his action: he is entitled to no damages for the loss of a reputation to which he was in truth not entitled. The criminal law, however, regarded not the truth or falseness, but the tendency to a breach of the peace. Hence the saying, "The greater the truth the greater the libel." As was said in the Case *de Libellis Famosis* in 1605, if a libel is "against a magistrate, or other public person, it is a greater offense; for it concerns not only the breach of the peace, but also the scandal of government." An attack on the policy of the government of the day, an outcry against the system of rotten boroughs, or an exposé of the practice of flogging in the army—publications such as these fell within Blackstone's classification of "improper, mischievous, or illegal." It was immaterial in law that the author had a patriotic purpose to reform the government. An indictment charged that the writing was false, but as the judges advised the House of Lords in 1789, the word "false" was at most a word of form: "In point of substance the alteration in the description of the offense would hardly be felt if the epithet were *verus* instead of *falsus*." The judge determined whether the publication had a bad tendency; the function of the jury was merely to say whether the defendant had published. This was the "fair and impartial trial" to determine "pernicious tendency" which Blackstone regarded as necessary to the "solid foundations of civil liberty."

A procedural safeguard. Charles James Fox made a great reform in the law when he carried through Parliament his Libel Act of 1792. This really did not change the substantive law, but simply declared that the jury "may give a general verdict of guilty or not guilty upon the whole matter . . ." The result was that it became safe to publish anything which a jury of 12 shopkeepers would think it expedient to publish—to borrow Dicey's phrase. "Substantive law has at first the look of being gradually secreted in the interstices of procedure," observed Sir Henry Maine. [*Early Law and Custom*, p. 389.] "The history of liberty has largely been the history of observance of procedural safeguards," said Frankfurter, J., in McNabb *v.* United States, 318 U.S. 332, 347 (1943).

Tolerance in practice. Whatever the freedom of speech and of the press which we enjoy in the United States today, it is certainly not some ancient liberty which had been won prior to our separation from England. When we read the phrase in our Bill of Rights, let us not suppose that its function was simply to pass on to posterity the blessings of a liberty whose content was already well recognized. When we observe that the British nation today, without the protection of any formal constitution superior to the King in Parliament, actually practices a freedom of discussion which evidently is at least not inferior to our own, we find that the ultimate explanation lies in the sense of tolerance and fair play shared by the mass of individuals who make up the national community. To think of freedom of speech and of the press as some eighteenth-century heirloom, enshrined in the Constitution and guarded for us by the Supreme Court so that we have nothing to do about it but to enjoy it, is bad history and mischievous thinking.

Justice Story's view. The First Amendment solemnly commands that "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ." But what is the extent of those freedoms? And what federal protection is there against abridgment by one of the states? That there is an adequate authoritative response to each of these questions is largely the result of doctrines built up by the Supreme Court since World War I. Justice Story, in his *Commentaries on the Constitution,* which appeared in 1833, warned that "There is a good deal of loose reasoning on the subject"; the liberty was, in truth, far from absolute. As to the federal guarantee against abridgment by Congress, its meaning was to be found in Blackstone. State legislatures were in this matter restrained only by the law of their respective constitutions; and here, too, "The doctrine laid down by Mr. Justice Blackstone respecting the liberty of the press has not been repudiated (as far as is known) by any solemn decision of any of the state courts, in respect of their own municipal jurisprudence. On the contrary, it has been repeatedly affirmed in the several states . . ." Sec. 1889.

Two modern developments. We have, then, two major developments to record: how "freedom of speech and of the press" has come to mean more than was originally understood, and how the federal Constitution has been enlarged to forbid state abridgments of those freedoms. The former development will be traced in connection with Pennekamp *v.* Florida. (It need not be explained in Near *v.* Minnesota, since the statute there struck down imposed a *previous* restraint which offended even Blackstone's and Story's definition of freedom of the press.) For the moment let us see how the federal Constitution, and in particular the Fourteenth Amendment, has come to protect the individual from state interferences with the liberty of discussion.

Mere logical analysis. Barron *v.* Baltimore, 7 Pet. 243 (1833), made it a matter of explicit decision that the federal Bill of Rights does not operate on the states. After the Civil War came the Fourteenth Amendment, which did lay important restraints upon state action: in particular, the privileges and immunities clause, due process of law, and equal protection. Look to the federal Bill of Rights: it guarantees religious liberty, freedom of speech and of the press, no unreasonable searches and seizures, indictment by grand jury, no double jeopardy, no compulsory self-incrimination, due process of law, just compensation when private property is taken, trial by jury for federal crimes, right to counsel, and so on. Simply as a matter of textual analysis one would say that, unless the framers of the Bill of Rights were careless and repetitious in their drafting, each one of these clauses must mean something different from the others. Due process meant to them something quite distinct from freedom of speech and of the press, quite distinct from freedom of religion, and so on. Next, since the Fourteenth Amendment guarantees that the states shall not take life, liberty, or property without due process of law (but omits all the other items in the long catalogue of the federal Bill of Rights), one might say that those other items are not carried over into the Fourteenth Amendment. Such reasoning seems perfectly logical as a mere matter of construing the document. And the Court has often adopted that analysis. It has declared that, so far as the federal Constitution is concerned, the states need not maintain the grand jury, Hurtado *v.* California, 110 U.S. 516 (1884), or the trial jury of 12, Maxwell *v.* Dow, 176 U.S. 581 (1900); the prohibition against compulsory self-incrimination does not operate against them, Twining *v.* New Jersey, 211 U.S. 78 (1908). As late as 1922 the Court declared that "neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the states any restrictions about 'freedom of speech' . . ." Prudential Insurance Co. *v.* Cheek, 259 U.S. 530, 543.

The quality of liberty. Look away for a moment from this textual analysis and take a larger and more philosophical view. The states are forbidden to take life, liberty, or property without due process of law. What is "liberty" in this context? We know, from cases such as Lochner *v.* New York, that the Court (borrowing from the dissent of Field, J., in the Slaughter-House Cases) had read it very large to mean that in the sphere of economic activity each individual is a free actor. But surely it would be a lopsided conception of "liberty" which included a right to hire and fire and to drive hard bargains but contained no promise of freedom to discuss matters of public policy. "I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property," said Mr. Justice Brandeis in 1920. Gilbert *v.* Minnesota, 254 U.S. 325, 343. "Is not the life more than the food?" This, of course, is an ex-

pression of values far older than the Constitution. The French professor Lambert, in his American study *Le Gouvernement des Juges* (Paris, 1921), was struck to observe that "liberty" as protected by the judgments of the Court proved to be largely *liberté economique* and very little *liberté morale,* freedom of the spirit.

Freedom of discussion is read into the XIV Amendment. The Justices of the Supreme Court were not oblivious to these considerations. In 1907 Justice Harlan, in a lone dissent, had concluded "It is, I think, impossible to conceive of liberty as secured by the Constitution against hostile action, whether by the nation or by the states, which does not embrace the right to enjoy free speech and the right to have a free press." The majority said it left this question undecided. Patterson *v.* Colorado, 205 U.S. 454. The Court left it undecided again in Gilbert *v.* Minnesota, 254 U.S. 325 (1920). For in each case it was found that if such a federal right did exist it had not been invaded by the state. But, as Mr. Charles P. Curtis, Jr., says in his study of the Supreme Court, the water was slowly mounting until in 1925 it lapped quietly over the sill. [*Lions under the Throne*, Houghton Mifflin Co., Boston (1947), at 207.] In that year the Court decided Gitlow *v.* New York, 268 U.S. 652, wherein a New York communist invoked the Fourteenth Amendment as a protection against the state's "criminal anarchy" law. This time, instead of "leaving it undecided," the Court said:

> For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the states.

It went on to hold that the state statute in question was not an invasion of free speech.

Let us pause for a moment to observe that at times the Court states a momentous conclusion in the most casual and offhand manner. Another example is Chief Justice Waite's simple announcement from the bench in 1886 that the Court did not care to hear argument as to whether a corporation was a person within the meaning of the equal-protection clause: "We are all of the opinion that it does." Santa Clara County *v.* Southern Pacific R. Co., 118 U.S. 394, 396.

In several cases after Gitlow *v.* New York the proposition which the Court had there "assumed" became a matter of explicit decision. In Stromberg *v.* California, 283 U.S. 359 (1931) the state's "red flag" law was held invalid as permitting an abridgment of free political discussion. A fortnight later came the decision in Near *v.* Minnesota.

Opinion

Mr. Chief Justice HUGHES delivered the opinion of the Court.

Chapter 285 of the Session Laws of Minnesota for the year 1925 provides for the abatement, as a public nuisance, of a "malicious, scandalous and defamatory newspaper, magazine or other periodical." Section 1 of the Act is as follows:

"Section 1. Any person who, as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, shall be engaged in the business of regularly or customarily producing, publishing, or circulating, having in possession, selling or giving away

(*a*) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or

(*b*) a malicious, scandalous, and defamatory newspaper, magazine or other periodical,

is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided.

"Participation in such business shall constitute a commission of such nuisance and render the participant liable and subject to the proceedings, orders and judgments provided for in this Act. Ownership, in whole or in part, directly or indirectly, of any such periodical, or of any stock or interest in any corporation or organization which owns the same in whole or in part, or which publishes the same, shall constitute such participation. . . ."

[In actions under section 1 (*b*) it would be a defense to show that the truth was published with good motives and for justifiable ends.]

Section 2 provides that whenever any such nuisance is committed or exists, the county attorney of any county where any such periodical is published or circulated, or, in case of his failure or refusal to proceed upon written request in good faith of a reputable citizen, the attorney general, or upon like failure or refusal of the latter, any citizen of the county, may maintain an action in the district court of the county in the name of the state to enjoin perpetually the persons committing or maintaining any such nuisance from further committing or maintaining it. Upon such evidence as the court shall deem sufficient, a temporary injunction may be granted. The defendants have the right

to plead by demurrer or answer, and the plaintiff may demur or reply as in other cases.

The action, by section 3, is to be "governed by the practice and procedure applicable to civil actions for injunctions," and after trial the court may enter judgment permanently enjoining the defendants found guilty of violating the Act from continuing the violation and, "in and by such judgment, such nuisance may be wholly abated." The court is empowered, as in other cases of contempt, to punish disobedience to a temporary or permanent injunction by fine of not more than $1000 or by imprisonment in the county jail for not more than 12 months.

Under this statute, clause (*b*), the county attorney of Hennepin county brought this action to enjoin the publication of what was described as a "malicious, scandalous and defamatory newspaper, magazine and periodical," known as *The Saturday Press*, published by the defendants in the city of Minneapolis. . . .

Without attempting to summarize the contents of the voluminous exhibits attached to the complaint, we deem it sufficient to say that the articles charged in substance that a Jewish gangster was in control of gambling, bootlegging and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties. Most of the charges were directed against the chief of police; he was charged with gross neglect of duty, illicit relations with gangsters, and with participation in graft. The county attorney was charged with knowing the existing conditions and with failure to take adequate measures to remedy them. The mayor was accused of inefficiency and dereliction. One member of the grand jury was stated to be in sympathy with the gangsters. A special grand jury and a special prosecutor were demanded to deal with the situation in general, and, in particular, to investigate an attempt to assassinate one Guilford, one of the original defendants, who, it appears from the articles, was shot by gangsters after the first issue of the periodical had been published. There is no question but that the articles made serious accusations against the public officers named and others in connection with the prevalence of crimes and the failure to expose and punish them. . . .

[The district court granted a permanent injunction against further publishing a malicious, scandalous, or defamatory newspaper and against further conducting said nuisance under the name of *The Saturday Press* or any other name. The state supreme court sustained the injunction.]

From the judgment as thus affirmed, the defendant Near appeals to this Court.

This statute, for the suppression as a public nuisance of a newspaper or periodical, is unusual, if not unique, and raises questions of grave importance transcending the local interests involved in the particular action. It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property. In maintaining this guaranty, the authority of the state to enact laws to promote the health, safety, morals and general welfare of its people is necessarily admitted. The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise. . . . Liberty of speech, and of the press, is also not an absolute right, and the state may punish its abuse. Liberty, in each of its phases, has its history and connotation and, in the present instance, the inquiry is as to the historic conception of the liberty of the press and whether the statute under review violates the essential attributes of that liberty. . . .

First. The statute is not aimed at the redress of individual or private wrongs. Remedies for libel remain available and unaffected. The statute, said the state court, "is not directed at threatened libel but at an existing business which, generally speaking, involves more than libel." It is aimed at the distribution of scandalous matter as "detrimental to public morals and to the general welfare," tending "to disturb the peace of the community" and "to provoke assaults and the commission of crime." In order to obtain an injunction to suppress the future publication of the newspaper or periodical, it is not necessary to prove the falsity of the charges that have been made in the publication condemned. In the present action there was no allegation that the matter published was not true. It is alleged, and the statute requires the allegation, that the publication was "malicious." But, as in prosecutions for libel, there is no requirement of proof by the state of malice in fact as distinguished from malice inferred from the mere publication of the defamatory matter. The judgment in this case proceeded upon the mere proof of publication. The statute permits the defense, not of the truth alone, but only that the truth was published with good

motives and for justifiable ends. It is apparent that under the statute the publication is to be regarded as defamatory if it injures reputation, and that it is scandalous if it circulates charges of reprehensible conduct, whether criminal or otherwise, and the publication is thus deemed to invite public reprobation and to constitute a public scandal. The court sharply defined the purpose of the statute, bringing out the precise point, in these words: "There is no constitutional right to publish a fact merely because it is true. It is a matter of common knowledge that prosecutions under the criminal libel statutes do not result in efficient repression or suppression of the evils of scandal. Men who are the victims of such assaults seldom resort to the courts. This is especially true if their sins are exposed and the only question relates to whether it was done with good motives and for justifiable ends. This law is not for the protection of the person attacked nor to punish the wrongdoer. It is for the protection of the public welfare."

Second. The statute is directed not simply at the circulation of scandalous and defamatory statements with regard to private citizens, but at the continued publication by newspapers and periodicals of charges against public officers of corruption, malfeasance in office, or serious neglect of duty. Such charges by their very nature create a public scandal. They are scandalous and defamatory within the meaning of the statute, which has its normal operation in relation to publications dealing prominently and chiefly with the alleged derelictions of public officers.

Third. The object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical. The reason for the enactment, as the state court has said, is that prosecutions to enforce penal statutes for libel do not result in "efficient repression or suppression of the evils of scandal." Describing the business of publication as a public nuisance does not obscure the substance of the proceeding which the statute authorizes. It is the continued publication of scandalous and defamatory matter that constitutes the business and the declared nuisance. In the case of public officers, it is the reiteration of charges of official misconduct, and the fact that the newspaper or periodical is principally devoted to that purpose, that exposes it to suppression. In the present instance, the proof was that nine editions of the newspaper or periodical in question were published on successive dates, and that they were chiefly devoted to charges against public officers and in relation to the

prevalence and protection of crime. In such a case, these officers are not left to their ordinary remedy in a suit for libel, or the authorities to a prosecution for criminal libel. Under this statute, a publisher of a newspaper or periodical, undertaking to conduct a campaign to expose and to censure official derelictions, and devoting his publication principally to that purpose, must face not simply the possibility of a verdict against him in a suit or prosecution for libel, but a determination that his newspaper or periodical is a public nuisance to be abated, and that this abatement and suppression will follow unless he is prepared with legal evidence to prove the truth of the charges and also to satisfy the court that, in addition to being true, the matter was published with good motives and for justifiable ends.

This suppression is accomplished by enjoining publication and that restraint is the object and effect of the statute.

Fourth. The statute not only operates to suppress the offending newspaper or periodical but to put the publisher under an effective censorship. When a newspaper or periodical is found to be "malicious, scandalous and defamatory," and is suppressed as such, resumption of publication is punishable as a contempt of court by fine or imprisonment. Thus, where a newspaper or periodical has been suppressed because of the circulation of charges against public officers of official misconduct, it would seem to be clear that the renewal of the publication of such charges would constitute a contempt and that the judgment would lay a permanent restraint upon the publisher, to escape which he must satisfy the court as to the character of a new publication. Whether he would be permitted again to publish matter deemed to be derogatory to the same or other public officers would depend upon the court's ruling. In the present instance the judgment restrained the defendants from "publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law." The law gives no definition except that covered by the words "scandalous and defamatory," and publications charging official misconduct are of that class. While the court, answering the objection that the judgment was too broad, saw no reason for construing it as restraining the defendants "from operating a newspaper in harmony with the public welfare to which all must yield," and said that the defendants had not indicated "any desire to conduct their business in the usual and legitimate manner," the mani-

fest inference is that, at least with respect to a new publication directed against official misconduct, the defendant would be held, under penalty of punishment for contempt as provided in the statute, to a manner of publication which the court considered to be "usual and legitimate" and consistent with the public welfare.

If we cut though mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter—in particular that the matter consists of charges against public officers of official dereliction—and unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship.

The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity." 4 Bl. *Com.* 151, 152; see Story on the *Constitution,* §§ 1884, 1889. . . .

The criticism upon Blackstone's statement has not been because immunity from previous restraint upon publication has not been regarded as deserving of special emphasis, but chiefly because that immunity cannot be deemed to exhaust the conception of the liberty guaranteed by state and federal constitutions.

The point of criticism has been "that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions"; and that "the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a by-word, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications." 2 Cooley, *Const. Lim.* (8th ed.), p. 885. But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions. . . . In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment. For whatever wrong the appellant has committed or may commit, by his publications, the state appropriately affords both public and private redress by its libel laws. As has been noted, the statute in question does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint upon publication.

The objection has also been made that the principle as to immunity from previous restraint is stated too broadly, if ever such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right." Schenck *v.* United States, 249 U.S. 47, 52. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. . . . These limitations are not applicable here. . . .

The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the federal Constitution, has meant,

principally although not exclusively, immunity from previous restraints or censorship. The conception of the liberty of the press in this country had broadened with the exigencies of the colonial period and with the efforts to secure freedom from oppressive administration. That liberty was especially cherished for the immunity it afforded from previous restraint of the publication of censure of public officers and charges of official misconduct. . . . Madison, who was the leading spirit in the preparation of the First Amendment of the federal Constitution, thus described the practice and sentiment which led to the guaranties of liberty of the press in state constitutions:

"In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this footing it yet stands. . . . Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the states, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficent source the United States owe much of the lights which conducted them to the ranks of a free and independent nation, and which have improved their political system into a shape so auspicious to their happiness? Had 'Sedition Acts,' forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing at this day under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke?" [4 Madison's *Works* 544.]

The fact that for approximately 150 years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints

would violate constitutional right. Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals. The general principle that the constitutional guaranty of the liberty of the press gives immunity from previous restraints has been approved in many decisions under the provisions of state constitutions.

The importance of this immunity has not lessened. While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege. . . .

The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends. If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details) and required to produce proof of the truth of his publication, or of what he intended to publish, and of his motives, or stand enjoined. If this can be done, the legis-

lature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be but a step to a complete system of censorship. The recognition of authority to impose previous restraint upon publication in order to protect the community against the circulation of charges of misconduct, and especially of official misconduct, necessarily would carry with it the admission of the authority of the censor against which the constitutional barrier was erected. The preliminary freedom, by virtue of the very reason for its existence, does not depend, as this Court has said, on proof of truth.

Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends to disturb the public peace and to provoke assaults and the commission of crime. Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication. . . . There is nothing new in the fact that charges of reprehensible conduct may create resentment and the disposition to resort to violent means of redress, but this well-understood tendency did not alter the determination to protect the press against censorship and restraint upon publication. . . . The danger of violent reactions becomes greater with effective organization of defiant groups resenting exposure, and if this consideration warranted legislative interference with the initial freedom of publication, the constitutional protection would be reduced to a mere form of words.

For these reasons we hold the statute, so far as it authorized the proceedings in this action under clause (*b*) of section 1, to be an infringement of the liberty of the press guaranteed by the Fourteenth Amendment. We should add that this decision rests upon the operation and effect of the statute, without regard to the question of the truth of the charges contained in the particular periodical. The fact that the public officers named in this case, and those associated with the charges of official dereliction, may be deemed to be impeccable, cannot affect the conclusion that the statute imposes an unconstitutional restraint upon publication.

Judgment reversed.

Mr. Justice BUTLER (Mr. Justice VAN DEVANTER, Mr. Justice MCREYNOLDS, and Mr. Justice SUTHERLAND joining with him), dissented. . . .

PENNEKAMP *et al. v.* FLORIDA

328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946).

On Writ of Certiorari to the Supreme Court of the State of Florida.

Introduction

In the light of his subsequent stand on the meaning of freedom of speech and of the press, it is surprising to find Mr. Justice Holmes saying, in 1907, that "the main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publications as had been practiced by the other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." Patterson *v.* Colorado, 205 U.S. 454. But there it is, a remark which, later on, Justice Holmes was rather inclined to sweep under the carpet. Schenck *v.* United States, 249 U.S. 47, 51 (1919).

Speech in time of war. World War I caused the problem of free speech to be considered as never before. By the Espionage Act of 1917 Congress forbade the willful making of false reports with intent to interfere with the operations of the forces, the willful causing of insubordination, etc., and the willful obstructing of enlistments. The Sedition Act of 1918 added several new categories, such as uttering any disloyal language or language intended to cause scorn as regards the form of government or the Constitution of the United States or the flag or the uniform of the armed forces. Now the great danger with this sort of legislation is that even if the statute is carefully drawn (which the Sedition Act was not) it tends to get out of hand in administration. Prosecutors became overzealous. Even staid federal judges lost their balance—like the district judge who instructed a jury, "These are not times for fooling. The times are serious. . . . Out West they are hanging men for saying such things as this man is accused of saying." And the juries: a federal judge of wide experience recalled that men who were ordinarily candid, sober, and intelligent "during that period looked back into my eyes with the savagery of wild animals, saying by their manner, 'Away

with this twiddling, let us get at him.'" On all this, see Zechariah Chafee, Jr., *Free Speech in the United States,* Harvard University Press, Cambridge, Mass., 1941—a really memorable book.

Canons of decision. There was need for the Supreme Court to establish principles. This it did, speaking by Mr. Justice Holmes, in Schenck *v.* United States, *supra.* Schenck had been indicted under the Espionage Act of 1917; it was proved that he had sent leaflets to men who had passed exemption boards, urging them in impassioned language to "Assert Your Rights" and resist the draft. Were these utterances protected by the First Amendment? Said Justice Holmes:

> We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . *The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.* When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by a constitutional right. (Italics supplied.)

The nation through its Congress has power to wage war and, by necessary implication, to wage war successfully. The individual is promised freedom of expression—in war as well as in peace. Where shall the line be drawn? At the place, says the opinion, where the expression creates a clear and present danger of bringing about some actual evil which Congress is entitled to prevent. It is no business of the judges to consider whether they happen to agree or disagree with the sentiments expressed. The test is an objective one: did the utterance create a clear and present danger, etc.? One might say things in an old ladies' sewing circle which would be punishable if uttered to troops awaiting embarkation. Schenck had been convicted for sending pamphlets urging men in the draft to resist, which was regarded as falling within the "clear and present danger" test.

Holmes, J., in the Abrams Case. Abrams *v.* United States, 250 U.S. 616 (1919), involved the Sedition Act of 1918. The defendants had been convicted for scattering leaflets which, in the intemperate vernacular of the Marxists, urged the Workers of the World to unite to stop the undeclared war of America and her Allies against the Bolsheviki. The leaflet closed with a statement that "It is absurd to call us pro-German. We hate and despise German militarism more than do your hypocritical tyrants. . . ." Nice questions of statutory construction and of constitutional law were involved, too difficult for

brief summary. What is most of value is Justice Holmes' dissenting opinion (Brandeis, J., concurring), from which the following extracts may be taken as expressing a philosophy which is now accepted by the entire Court:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798 (Act July 14, 1798, ch. 73, 1 Stat. 596), by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law abridging the freedom of speech." Of course I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States.

Gitlow's Case. We come now to Gitlow *v.* New York, 268 U.S. 652 (1925). The New York legislature had enacted, shortly after the as-

sassination of President McKinley, that anyone who taught the overthrow of government by violence should be punished. Gitlow, a prominent left-wing Socialist, had been convicted of publishing a doctrinaire manifesto in 34 tedious pages, the gist of which was that "Humanity can be saved from its [capitalism's] last excesses only by the Communist Revolution." He asked the Supreme Court to say that he had been deprived of his liberty in violation of the due process clause of the Fourteenth Amendment.

Free speech enters the Fourteenth Amendment. Here is what the majority of the Court replied: We assume that freedom of speech and of the press are among the fundamental "liberties" protected against state action by the due process clause of the Fourteenth Amendment. But here the state legislature has found that for anyone to utter sentiments in favor of "criminal anarchy" constitutes a danger to New York—the mere utterance, regardless of any immediate prospect of violence. Was this conclusion so arbitrary and unreasonable that we Justices should say that it goes beyond the permissible limits and is unconstitutional? No. We must give "great weight" to the legislature's judgment; we must indulge "every presumption" in favor of the statute. Holmes (and Brandeis), dissenting, said: There was really no "clear and present danger" that New York's government would be overthrown by Gitlow's "redundant discourse," and *that* is the criterion by which we should determine whether this conviction was consistent with the Constitution. (Of course no one supposed that the government of New York was in any danger of toppling.)

Holmes v. the majority. Examine these two points of view. The majority say it is not a question whether we agree with New York's statute or not: unless it is clearly beyond the bounds of reason we must sustain it. That sounds like Holmes' dissent in Lochner *v.* New York. Holmes says I have my own test to apply to state laws, and by that test I find New York's law unconstitutional. That sounds like Peckham's opinion in the Lochner Case. Remember that Holmes, chiding Peckham and the majority in that case, had said, I would ask whether any rational and fair man could think this statute reasonable; if so, I would sustain it, no matter what my own view might be. Certainly we could not say that *all* rational and fair men would have to admit that New York's anarchy law was unreasonable. Was Justice Holmes inconsistent? Was he doing for freedom of speech just what he had criticized Justice Peckham for doing for freedom of contract?

Was Holmes inconsistent? On the face of things Justice Holmes appears inconsistent. If we can justify him in each of his two stands, it must be because a Justice has a different duty in regard to free speech from what he has in regard to freedom in economic affairs. And on reflection, surely this is the case. If the popular majority of the moment are allowed to impose controls upon economic activity, their action can be undone if a later popular majority comes to take a

different view. The majority have their way, but the minority remain free to protest and to argue for a repeal. Not so with legislation controlling utterances. If the majority suppress those with whom they disagree, the minority are prevented from even arguing that a mistake has been made. Where the intolerance of the majority interferes with the free working of the democratic process, the evil is not self-corrective. So there is a very good reason for saying that a judge ought to intervene to preserve a free discussion of possible improvements, though he should not intervene to insist upon what is no more than one school of economic thought.

For whose benefit is free speech? It is probably a faulty analysis to think of Gitlow's interest in having his say as the major consideration on the side of freedom of speech. To be sure that, like any other human desire, is a matter of some weight. But surely the greater value to be safeguarded is the benefit which comes to the public from a free exchange of views as to the policies we should adopt. When a majority declare that Socrates has spoken with impiety and condemn him to death, that to be sure inflicts a great hurt upon Socrates. But we may think that in the long run a greater harm has fallen upon the society, which by its own intolerance has deprived itself forever of the possible benefits of hearing Socrates' opinions. However sure we may be of the correctness of our own views, history reminds us that thousands of men, just as self-assured as we, are now seen to have been dead wrong. However certain we may feel on the subject of Gitlow, we must in candor admit that so too, no doubt, were the majority who condemned Socrates.

What the majority are entitled to do. This does not mean that we may not act on the basis of our present beliefs. If Gitlow starts his revolution, he and those who give him aid and comfort will be liable on conviction to the penalty for treason. More than this, if he utters words of incitement which come close to amounting to a clear and present danger, such acts, too, may be made punishable. But it was Justice Holmes' philosophy, which has now become the doctrine of the Court, that the judge should intervene when public power is exerted, not against present evils or words which may reasonably be regarded as productive thereof, but against the mere "bad tendency" of unpopular opinions. It is consequences in the world of physical events, not the intrinsic error of utterances, which the legislature may take as its target.

Red flags and "dangerous tendency." When Yetta Stromberg led the flag-raising exercises in a communist camp for children and displayed the red flag "as a symbol of opposition to organized government," was her conviction under a California statute consistent with the "liberty" of the Fourteenth Amendment? No, said Hughes, C.J., for the Court:

> The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. Stromberg *v.* California, 283 U.S. 359, 369 (1931).

Oregon's Criminal Syndicalism Act made it unlawful, *inter alia,* to assist in conducting a meeting of any group or organization which advocates criminal syndicalism. De Jonge was convicted of presiding at a meeting under the auspices of the Communist Party, where the discussion was on conditions in the county jail, police action against strikers, the activities of the Party, and other permissible topics. The statute as thus applied was unconstitutional: "consistently with the federal Constitution, peaceable assembly for lawful discussion cannot be made a crime." De Jonge *v.* Oregon, 299 U.S. 353, 365 (1937). "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government." Thus spoke Roberts, J., for the Court in Herndon *v.* Lowry, 301 U.S. 242, 258 (1937). Herndon, a Negro, had distributed communist literature in Georgia, and the criminal code, as interpreted by the state court, permitted a conviction for "utterances advocating the overthrow of organized government by force," if the jury thought the accused intended his utterances to have influence in bringing an insurrection at any future time. The state urged the Court to adopt the "dangerous tendency" rather than the "clear and present danger" test of the state's power. But the majority held that the Georgia law set such "vague and indeterminate" boundaries to the freedom of speech and assembly as to offend the Fourteenth Amendment's guarantee of liberty.

Pickets and handbills. The city fathers may not say that no one shall call an assembly in a public place except by the grace of some officer—as Mayor Hague learned when he tried to keep the CIO from holding a meeting in Jersey City. Hague *v.* CIO, 307 U.S. 496 (1939). Freedom of the press extends to pamphlets and handbills as well as newspapers and magazines, and an ordinance which forbids distribution without a permit from some city officer is void on its face. Lovell *v.* Griffin, 303 U.S. 444 (1938). Peaceful picketing in a labor dispute is embraced within the freedom of discussion, so that legislation which forbids that means of informing the public goes down before the Fourteenth Amendment. Thornhill *v.* Alabama, 310 U.S. 88 (1940), Carlson *v.* California, 310 U.S. 106 (1940). As Mr. Justice Douglas accurately observed, "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since

the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation." Concurring in Bakery and Pastry Drivers etc. *v.* Wohl, 315 U.S. 769, 776 (1942). See too Professor Edward S. Corwin, *The Constitution and What It Means Today* (9th ed.), Princeton University Press, Princeton, N. J. (1947), at 195-197. The right by public address to urge men to join a trade union—exactly like the right to urge men to adopt any other lawful course—is protected by the due process clause. Thomas *v.* Collins, 323 U.S. 516 (1945).

Shift in presumption. The Thornhill Case picked up the point which Stone, J., had previously intimated: that freedom of discussion is a unique good, essential to the effective correction of error through the processes of popular government, so that legislative restraints of that freedom are to be denied the presumption of validity which is accorded to other types of state regulation. "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation," said Rutledge, J., in Thomas *v.* Collins.

The weighing of social interests. Judicial statesmanship calls for a wise evaluating of competing interests. Sound judgment is a work for even minds; penchants and ardent enthusiasms tend to disturb the balance. A case which called for an especially nice weighing of social advantages was Bridges *v.* California, 314 U.S. 252 (1941). How far does freedom of speech and of the press protect one who uses his freedom to influence a court of justice in a matter pending before it? Harry Bridges of the Longshoremen's Union and the publishers of *The Los Angeles Times* had both been adjudged guilty of contempt of the superior court—though stranger bedfellows could hardly have been found. Bridges was responsible for the publication of a telegram in which he declared that an attempt to enforce a decision which the court had just made against his union would result in a tie-up along the entire Pacific Coast. *The Times,* on its part, had published an editorial which said that the judge would make a serious mistake if he granted probation to two offenders of a labor "goon squad" who were awaiting sentence. "This community needs the example of their assignment to the jute mill." Bridges and *The Times* respectively asserted their freedom of expression, and, of course, the entire community had an interest in maintaining a free discussion of matters of such importance as labor relations and law enforcement. On the other hand it is also a matter of major public interest that judges should reach impartial decisions, undisturbed by menaces from the press, labor leaders, or anyone else. And then there is the individual interest of the parties before the court, who are entitled to a calm decision. The majority of five Justices, led by Mr. Justice Black, expressed the view that "History affords no support for the conclusion that the criteria applicable under the Constitution to other types of utterances

are not applicable, in contempt proceedings, to out-of-court publications pertaining to a pending case." So in speaking of pending cases, just as in any other context, the principle to be applied was that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." Frankfurter, J. (speaking also for Stone, C.J., and Roberts and Byrnes, JJ.), dissenting, said:

> The Constitution was not conceived as a doctrinaire document, nor was the Bill of Rights intended as a collection of popular slogans. We are dealing with instruments of government. We cannot read into the Fourteenth Amendment the freedom of speech and of the press protected by the First Amendment and at the same time read out age-old means employed by states for securing the calm course of justice.

When a similar problem was presented in Pennekamp *et al. v.* Florida in 1946, the majority evidently concluded that they had not reached a sound balance in the Bridges Case. To Justice Reed was assigned the task of restating the Court's doctrine in such a way that the public good of freedom to criticize the conduct of judicial officers should be adjusted to that other public good, an impartial administration of justice.

Opinion

Mr. Justice Reed delivered the opinion of the Court.

This proceeding brings here for review a judgment of the Supreme Court of Florida, 156 Fla. 227, 22 So. 2d 875, which affirmed a judgment of guilt in contempt of the Circuit Court of Dade county, Florida, on a citation of petitioners by that Circuit Court.

The individual petitioner was the associate editor of the *Miami Herald,* a newspaper of general circulation, published in Dade county, Florida, and within the jurisdiction of the trial court. The corporate petitioner was the publisher of the *Miami Herald.* Together petitioners were responsible for the publication of two editorials charged by the citation to be contemptuous of the circuit court and its judges in that they were unlawfully critical of the administration of criminal justice in certain cases then pending before the court.

Certiorari was granted to review petitioners' contention that the editorials did not present "a clear and present danger of high imminence to the administration of justice by the court' or judges who were criticized and therefore the judgment of

contempt was invalid as violative of the petitioners' right of free expression in the press. The importance of the issue in the administration of justice at this time in view of this Court's decision in Bridges *v.* California, 314 U.S. 252, three years prior to this judgment in contempt, is apparent.

Bridges *v.* California fixed reasonably well-marked limits around the power of courts to punish newspapers and others for comments upon or criticism of pending litigation. The case placed orderly operation of courts as the primary and dominant requirement in the administration of justice. This essential right of the courts to be free of intimidation and coercion was held to be consonant with a recognition that freedom of the press must be allowed in the broadest scope compatible with the supremacy of order. A theoretical determinant of the limit for open discussion was adopted from experience with other adjustments of the conflict between freedom of expression and maintenance of order. This was the clear and present danger rule. The evil consequence of comment must be "extremely serious and the degree of imminence extremely high before utterances can be punished." It was, of course, recognized that this formula, as would any other, inevitably had the vice of uncertainty, but it was expected that from a decent self-restraint on the part of the press and from the formula's repeated application by the courts standards of permissible comment would emerge which would guarantee the courts against interference and allow fair play to the good influences of open discussion. As a step toward the marking of the line, we held that the publications there involved were within the permissible limits of free discussion. . . .

The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principles of the First Amendment, as adopted by the due process clause of the Fourteenth Amendment, protect. When the highest court of a state has reached a determination upon such an issue, we give most respectful attention to its reasoning and conclusion but its authority is not final. Were it otherwise the

constitutional limits of free expression in the Nation would vary with state lines.

While there was a division of the Court in the Bridges Case as to whether some of the public expressions by editorial comment transgressed the boundaries of a free press and as to the phrasing of the test, there was unanimous recognition that California's power to punish for contempt was limited by this Court's interpretation of the extent of protection afforded by the First Amendment. Whether the threat to the impartial and orderly administration of justice must be a clear and present or a grave and immediate danger, a real and substantial threat, one which is close and direct or one which disturbs the court's sense of fairness depends upon a choice of words. Under any one of the phrases, reviewing courts are brought in cases of this type to appraise the comment on a balance between the desirability of free discussion and the necessity for fair adjudication, free from interruption of its processes. . . .

It is not practicable to comment at length on each of the challenged items. To make our decision as clear as possible, we shall refer in detail only to the comments concerning the "Rape Cases." These we think fairly illustrate the issues and are the most difficult comments for the petitioners to defend.

As to these cases, the editorial said: "This week the people, through their grand jury, brought into court eight indictments for rape. Judge Paul D. Barns agreed with the defense that the indictments were not properly drawn. Back they went to the grand jury for re-presentation to the court." We shall assume that the statement, "judicial instance and interpretative procedure . . . even go out to find, every possible technicality of the law to protect the defendant . . . and nullify prosecution," refers to the quashing of the rape indictments as well as other condemned steps. The comment of the last two paragraphs evidently includes these dismissals as so-called legal technicalities.

The citation charged that the prosecuting officer in open court agreed that the indictments were so defective as to make reindictment advisable. Reindictments were returned the next day and before the editorial. It was charged that these omissions were a wanton withholding of the full truth.

As to this charge, the petitioners made this return: "That as averred in the citation, a motion was made to quash the indictment in Case 856, the ruling upon which would control in the other cases mentioned. Whereupon the representative of the

State Attorney's Office stated in effect that he believed the original indictment was in proper form, but to eliminate any question he would have these defendants immediately re-indicted by the Grand Jury which was still then in session. And thereupon, the Judge of said Court did sustain the motion to quash with respect to Case No. 856." The record of the criminal division of the circuit court, set out in the findings of fact at the hearing on the citation in contempt, shows that in Case No. 856 the court upheld the defendants' motion to quash "with the approval of the assistant state attorney" and quashed the remaining indictments on his recommendation. Reindictment of the accused on the next day, prompt arraignment and setting for trial also appears. We accept the record as conclusive of the facts.

We read the circuit court's judgment to find that the comment on the "Rape Cases" contained only "half-truths," that it did not "fairly report the proceedings" of the court, that it contained "misinformation." The judgment said: "To report on court proceedings is a voluntary undertaking but when undertaken the publisher who fails to fairly report does so at his own peril.

• • •

"We find the facts recited and the charges made in the citation to be true and well founded; . . ." This finding included the fact that reindictments were then pending in the "Rape Cases." Defendant's assignments of error challenged the ruling that the matters referred to in the editorials were pending and the Supreme Court of Florida ruled that the cases were pending.

"We also agree that publications about a case that is closed no matter how scandalous, are not punishable as contempt. This is the general rule but the Florida statute is more liberal than the rule." . . .

In Bridges *v.* California, this Court looked upon cases as pending following completed interlocutory actions of the courts but awaiting other steps. In one instance it was sentence after verdict. In another, a motion for a new trial.

Pennekamp was fined $250 and the corporation $1,000.00.

The Supreme Court of Florida restated the facts as to the "Rape Cases" from the record. It then reached a conclusion as to all of the charges and so as to the "Rape Cases" in the words set out below. After further discussion of the facts, the court said: "In the light of this factual recitation, it is utter folly to suggest that the object of these publications was other than to abase and destroy the efficiency of the court." To focus atten-

tion on the critical issue, we quote below from the decision of the Supreme Court of Florida certain excerpts which we believe fairly illustrate its position as to the applicable law.

From the editorials, the explanations of the petitioners, and the records of the court, it is clear that the full truth in regard to the quashing of the indictments was not published. We agree with the supreme court that the "Rape Cases" were pending at the time of the editorials. We agree that the editorials did not state objectively the attitude of the judges. We accept the statement of the supreme court that under Florida law, "There was no judgment that could have been entered in any of them except the one that was entered." And, although we may feel that this record scarcely justifies the harsh inference that the truth was willfully or wantonly or recklessly withheld from the public or that the motive behind the publication was to abase and destroy the efficiency of the courts, we may accept in this case that conclusion of the Florida courts upon intent and motive as a determination of fact. While the ultimate power is here to ransack the record for facts in constitutional controversies, we are accustomed to adopt the result of the state court's examination. It is the findings of the state courts on undisputed facts or the undisputed facts themselves which ordinarily furnish the basis for our appraisal of claimed violations of federal constitutional rights.

The acceptance of the conclusion of a state court as to the facts of a situation leaves open to this Court the determination of federal constitutional rights in the setting of those facts. When the Bridges case was here, there was necessarily involved a determination by the California state court that all of the editorials had, at least, a tendency to interfere with the fair administration of criminal justice in pending cases in a court of that state. Yet this Court was unanimous in saying that two of those editorials had no such impact upon a court as to justify a conviction of contempt in the face of the principles of the First Amendment. We must, therefore, weigh the right of free speech which is claimed by the petitioners against the danger of the coercion and intimidation of courts in the factual situation presented by this record.

Free discussion of the problems of society is a cardinal principle of Americanism—a principle which all are zealous to preserve. Discussion that follows the termination of a case may be inadequate to emphasize the danger to public welfare of sup-

posedly wrongful judicial conduct. It does not follow that public comment of every character upon pending trials or legal proceedings may be as free as a similar comment after complete disposal of the litigation. Between the extremes there are areas of discussion which an understanding writer will appraise in the light of the effect on himself and on the public of creating a clear and present danger to fair and orderly judicial administration. Courts must have power to protect the interests of prisoners and litigants before them from unseemly efforts to pervert judicial action. In the borderline instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases. Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.

While a disclaimer of intention does not purge a contempt, we may at this point call attention to the sworn answer of petitioners that their purpose was not to influence the court. An excerpt appears below. For circumstances to create a clear and present danger to judicial administration, a solidity of evidence should be required which it would be difficult to find in this record.

The comments were made about judges of courts of general jurisdiction—judges selected by the people of a populous and educated community. They concerned the attitude of the judges toward those who were charged with crime, not comments on evidence or rulings during a jury trial. Their effect on juries that might eventually try the alleged offenders against the criminal laws of Florida is too remote for discussion. Comment on pending cases may affect judges differently. It may influence some judges more than others. Some are of a more sensitive fiber than their colleagues. The law deals in generalities and external standards and cannot depend on the varying degrees of moral courage or stability in the face of criticism which individual judges may possess any more than it generally can depend on the personal equations or individual idiosyncrasies of the tort-feasor. We are not willing to say under the circumstances of this case that these editorials are a clear and present danger to the fair administration of justice in Florida. Cf. Near *v.* Minnesota, 283 U.S. 697, 714, 715.

What is meant by clear and present danger to a fair adminis-

tration of justice? No definition could give an answer. Certainly this criticism of the judges' inclinations or actions in these pending non-jury proceedings could not directly affect such administration. This criticism of their actions could not affect their ability to decide the issues. Here there is only criticism of judicial action already taken, although the cases were still pending on other points or might be revived by rehearings. For such injuries, when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants.

It is suggested, however, that even though his intellectual processes cannot be affected by reflections on his purposes, a judge may be influenced by a desire to placate the accusing newspaper to retain public esteem and secure reelection presumably at the cost of unfair rulings against an accused. In this case too many fine-drawn assumptions against the independence of judicial action must be made to call such a possibility a clear and present danger to justice. For this to follow, there must be a judge of less than ordinary fortitude without friends or support or a powerful and vindictive newspaper bent upon a rule or ruin policy, and a public unconcerned with or uninterested in the truth or the protection of their judicial institutions. If, as the Florida courts have held and as we have assumed, the petitioners deliberately distorted the facts to abase and destroy the efficiency of the court, those misrepresentations with the indicated motives manifested themselves in the language employed by petitioners in their editorials. The Florida courts see in this objectionable language an open effort to use purposely the power of the press to destroy without reason the reputation of judges and the competence of courts. This is the clear and present danger they fear to justice. Although we realize that we do not have the same close relations with the people of Florida that is enjoyed by the Florida courts, we have no doubt that Floridians in general would react to these editorials in substantially the same way as citizens of other parts of our common country.

As we have pointed out, we must weigh the impact of the words against the protection given by the principles of the First Amendment, as adopted by the Fourteenth, to public comment on pending court cases. We conclude that the danger under this record to fair judicial administration has not the clearness and immediacy necessary to close the door of permissible public comment. When that door is closed, it closes all doors behind it.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice FRANKFURTER concurring. . . .

Without a free press there can be no free society.[1] Freedom of the press, however, is not an end in itself but a means to the end of a free society. The scope and nature of the constitutional protection of freedom of speech must be viewed in that light and in that light applied. The independence of the judiciary is no less a means to the end of a free society, and the proper functioning of an independent judiciary puts the freedom of the press in its proper perspective. For the judiciary cannot function properly if what the press does is reasonably calculated to disturb the judicial judgment in its duty and capacity to act solely on the basis of what is before the court. A judiciary is not independent unless courts of justice are enabled to administer law by absence of pressure from without, whether exerted through the blandishments of reward or the menace of disfavor. In the noble words, penned by John Adams, of the First Constitution of Massachusetts: "It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit." A free press is not to be preferred to an independent judi-

[1] . . . Not unrelated to this whole problem, however, are the technological and economic influences that have vastly transformed the actual operation of the right to a free, in the sense of a governmentally uncensored, press. Bigness and concentration of interest have put their impress also on this industry. "Today ideas are still flowing freely, but the sources from which they rise have shown a tendency to evaporate. . . . The controlling fact in the free flow of thought is not diversity of opinion, it is diversity of the *sources* of opinion—that is, diversity of ownership. . . . There are probably a lot more words written and spoken in America today than ever before, and on more subjects; but if it is true, as this book suggests, that these words and ideas are flowing through fewer channels, then our first freedom has been diminished, not enlarged." E. B. White, in *The New Yorker*, March 16, 1946, p. 97, reviewing Ernst, *The First Freedom* (1946). There are today incomparably more effective and more widespread means for the dissemination of ideas and information than in the past. But a steady shrinkage of a diffused ownership raises far reaching questions regarding the meaning of the "freedom" of a free press.

ciary, nor an independent judiciary to a free press. Neither has primacy over the other; both are indispensable to a free society. The freedom of the press in itself presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. And one of the potent means for assuring judges their independence is a free press. . . .

"Trial by newspaper," like all catch phrases, may be loosely used but it summarizes an evil influence upon the administration of criminal justice in this country. Its absence in England, at least its narrow confinement there, furnishes an illuminating commentary. It will hardly be claimed that the press is less free in England than in the United States. Nor will any informed person deny that the administration of criminal justice is more effective there than here. This is so despite the commonly accepted view that English standards of criminal justice are more civilized, or, at the least, that recognized standards of fair conduct in the prosecution of crime are better observed. Thus, "the third degree" is not unjustly called "the American method." This is not the occasion to enlarge upon the reasons for the greater effectiveness of English criminal justice but it may be confidently asserted that it is more effective partly because its standards are so civilized. There are those who will resent such a statement as praise of another country and dispraise of one's own. What it really means is that one covets for his own country a quality of public conduct not surpassed elsewhere. . . .

The petitioners here could not have disturbed the trial court in its sense of fairness but only in its sense of perspective. The judgment must, I agree, be reversed.

Mr. Justice MURPHY, concurring. . . .

Judges should be foremost in their vigilance to protect the freedom of others to rebuke and castigate the bench and in their refusal to be influenced by unfair or misinformed censure. Otherwise freedom may rest upon the precarious base of judicial sensitiveness and caprice. And a chain reaction may be set up, resulting in countless restrictions and limitations upon liberty.

Mr. Justice RUTLEDGE, concurring.

. . . It is not enough that the judge's sensibilities are affected or that in some way he is brought generally into obloquy. After all, it is to be remembered that it is judges who apply the law of contempt, and the offender is their critic.

The statements in question are clearly fair comment in large part. Portions exceed that boundary. But the record does not disclose that they tended in any way to block or obstruct the functioning of the judicial process. Accordingly I concur in the Court's opinion and judgment.

WEST VIRGINIA STATE BOARD OF EDUCATION *v.* BARNETTE

319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).

On Appeal from the District Court of the United States for the Southern District of West Virginia.

Introduction

That we have any considerable body of decisions in the Supreme Court on the subject of religious liberty is almost wholly the result of litigation carried there by the sect known as Jehovah's Witnesses. They have objected, and generally with success, to a variety of statutes and ordinances whose effect was to interfere with their particular methods of soliciting—by the sale of tracts, by ringing doorbells, by parades, etc. They have also objected, and in the end with success, to the compulsory flag salute in the public schools. We turn first to the problems of religious solicitation.

Jehovah's Witnesses. From the Supreme Court reports, summarizing evidence in trials below, we learn that the Watch Tower Bible & Tract Society is the head of the Jehovah's Witness movement. This organization prints pamphlets and books and distributes them, as well as phonographs and records, to workers in the organization. It "ordains" Witnesses, furnishing each a certificate that he is a minister of the Gospel. Some ministers devote full time, some part time to the work. Witnesses are organized into groups under the direction of "zone servants." The Society sells its publications to the ministers, who offer them to the public for a price and sometimes gratis. The difference between purchase and resale price is retained by the Witness.

Jehovah's Witnesses teach that organized religion is a "racket," the Roman Catholic Church being the greatest racket of all. Both the spirit and method of their work is suggested by the following quotation from *Religion,* a book by their leader, "Judge" Rutherford:

> God's faithful servants go from house to house to bring the message of the kingdom to those who reside there, omitting none, not even the houses of the Roman Catholic Hierarchy, and there they give witness to the kingdom because they are commanded by the Most High to do so. "They shall enter in at the windows like a thief." They do not loot nor break into the houses, but they set up their phonographs before the doors and windows and send the message of the kingdom right into the houses into the ears of those who might wish to hear; and while those desiring to hear are hearing, some of the "sour-pusses" are compelled to hear. Locusts invade the homes of the people and even eat the varnish off the wood and eat the wood to some extent. Likewise God's faithful witnesses, likened unto locusts, get the kingdom message right into the house and they take the veneer off the religious things that are in that house, including candles and "holy water," remove the superstition from the minds of the people, and show them that the doctrines that have been taught to them are wood, hay and stubble, destructible by fire, and they cannot withstand the heat. . . . [At p. 196. Quoted 319 U.S. at 172.]

The "liberty" of the Fourteenth Amendment. The earnest sincerity of the Witnesses is not to be doubted, even if their methods seem far removed from the traditions of religious minorities as represented by Roger Williams, Penn, and Lord Calvert. The Court has recognized that their activities are entitled to the full protection which the Constitution throws about the freedom of worship. And just as freedom of speech and of the press have come to be regarded as a part of the "liberty" guaranteed by the Fourteenth Amendment, so too has the practice of religion. Since the exercise of a fundamental right may not be treated as a concession, legislation requiring a permit to distribute handbills cannot constitutionally be applied to Witnesses offering their tracts. Lovell *v.* Griffin, 303 U.S. 444 (1938); Schneider *v.* New Jersey, 308 U.S. 147 (1939). The fact that the handbills contain an advertisement of books for sale by the Witnesses does not rob the distribution of its constitutional protection. Jamison *v.* Texas, 318 U.S. 413 (1943). The solicitation of money for the Witness movement or of orders for its books may not be subjected to a requirement of prior approval. Cantwell *v.* Connecticut, 310 U.S. 296 (1940); Largent *v.* Texas, 318 U.S. 418 (1943). Many cities lay a license tax on vendors. When a Witness offers tracts and books for sale at a profit to himself, is he to be likened to the seller of pots and brushes, or is the analogy rather to the usher who passes the collection plate at church? The majority of the Court took the latter view and held the tax on canvassers to be constitutionally inapplicable. Murdock *v.* Pennsylvania, 319 U.S. 105 (1943); Jones *v.* Opelika, 319 U.S. 103

(1943), vacating a decision previously rendered in the same case, 316 U.S. 584 (1942); Follett *v.* Town of McCormick, 321 U.S. 573 (1944).

Tracts and child labor. If the selling of tracts is evangelism and not business, what view should be taken when the state endeavors to apply its child labor law to the selling of tracts by a minor? This was the question in Prince *v.* Massachusetts, 321 U.S. 158 (1944), where a Witness had been convicted of permitting a nine-year-old girl to sell *The Watch Tower* in violation of the statute which said that no boy under 12 and no girl under 18 might sell periodicals on the street. A majority of five, per Rutledge, J., gave priority to the statute forbidding child labor. Mr. Justice Murphy thought that religious freedom was too sacred a right to be restricted for anything less than grave danger. Jackson, Roberts, and Frankfurter, JJ. (who had thought that selling by Witnesses was commerce), dissented from the reasoning of the opinion and chided the majority for flinching from the logic of the Murdock Case.

Phonographs and "fighting words." One of the practices of the Witnesses has been to play proselytizing phonographic records on the street. In Cantwell *v.* Connecticut, *supra,* the petitioner had played such a record to two Roman Catholics and in consequence had been convicted of inciting a breach of the peace. A unanimous Court reversed the conviction, though it recognized that the state may punish aggravations which are so gross as to raise a clear and present menace to public peace and order. The Witness who told the town marshal "You are a —— —— racketeer" and "a damned Fascist and the whole government of Rochester are Fascists" was not engaged in a constitutionally protected religious exercise. Chaplinsky *v.* New Hampshire, 315 U.S. 568 (1942).

Parades. While a permit may not be required for the distribution of tracts, it is otherwise as to parades and processions on the streets. "The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties . . .," said Hughes, C.J. Cox *v.* New Hampshire, 312 U.S. 569 (1941).

Doorbells, preaching, and privacy. And now what of an ordinance against ringing doorbells for the purpose of offering advertisements, handbills, and circulars? In Martin *v.* Struthers, 319 U.S. 141 (1943), Justice Black spoke for a majority in holding the ordinance constitutionally inapplicable to the case of a Witness. While any householder was free to post a warning against intruders, the city could not presume to speak for all in an ordinance. Justice Jackson wrote an energetic dissent, urging that the repose of the householders was being lost to view. "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when

one story too many is added." Marsh *v.* Alabama, 326 U.S. 501 (1946), and Tucker *v.* Texas, 326 U.S. 517 (1946), arose respectively in a "company town" and a federal housing project. Were Witnesses legally excluded by "No Vendor" notices posted by the company and the Federal Public Housing Authority as "owners"? The majority held No; a town is still a community even though all its tenements are owned by one entity, and the general principles of religious liberty are not deflected by the particular circumstances of the title to the land.

The compulsory flag salute. The compulsory flag salute in the schools involved considerations of a very different order. When the Witnesses rang doorbells and played offensive records they were the actors, and as we have seen the Court has generally held that religious liberty covered even these intrusions upon the sensibilities of others. But when school boards decreed that children must stand and make a salute and recite a profession of allegiance, without regard for whether the mind and spirit were in accord with the external acts, it was the state which was the actor and the conscientious objectors who stood on the defense. The Witnesses accepted literally the Biblical injunction: "Thou shalt not make unto thee any graven image." To them the flag was an "image." They were prepared to make the following pledge:

> I have pledged my unqualified allegiance and devotion to Jehovah, the Almighty God, and to His Kingdom, for which Jesus commands all Christians to pray.
>
> I respect the flag of the United States and acknowledge it as a symbol of freedom and justice to all.
>
> I pledge allegiance and obedience to all the laws of the United States that are consistent with God's law, as set forth in the Bible.

The Gobitis Case. When in 1937 the constitutionality of the compulsory flag salute was first raised in the Supreme Court, the appeal was dismissed "for want of a substantial federal question." Three more cases were disposed of summarily. Then came Minersville School District *v.* Gobitis, 310 U.S. 586 (1940), and the Court saw that it must really treat the subject in a full opinion. Only Justice Stone dissented from the conclusion that

> It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncrasies among a people so diversified in racial origins and religious allegiances. So to hold would in effect make us the school board for the country.

No one of the Justices, we may be sure, ever thought that the compulsory flag salute was a wise or appropriate means of promoting sound citizenship. There is something revolting to the mind in compelling children to proclaim our national "liberty and justice" when the particular form of expression does violence to their conscience. The only question in the Court has been whether such local requirements were so unreasonable as to warrant the Justices in calling them unconstitutional. On June 8, 1942, when the Opelika Case was first decided by the Court, Justices Black, Douglas, and Murphy announced that they had come to the conclusion that the Gobitis decision was wrong. They thus joined Stone, C.J. 316 U.S. at 623. In February 1943 Justice Rutledge took the place vacated by Justice Byrnes, which proved to be a gain for the view first taken by Justice Stone. When the question was presented again in the Barnette Case, Justice Jackson, who had not been on the Court at the time of the Gobitis decision, also took the view that the compulsory salute could not be sustained. One will note that the decision is placed, not specifically on the freedom of religion, but on an even broader liberty of the mind.

For a lively discussion of these problems, read "The First Commandment and the Fourteenth Amendment," in Mr. Curtis's *Lions Under the Throne, op. cit.*

Opinion

Mr. Justice JACKSON delivered the opinion of the Court.

Following the decision by this Court on June 3, 1940, in Minersville School District *v.* Gobitis, 310 U.S. 586, the West Virginia legislature amended its statutes to require all schools therein to conduct courses of instruction in history, civics, and in the Constitutions of the United States and of the state "for the purpose of teaching, fostering, and perpetuating the ideals, principles, and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government." Appellant Board of Education was directed, with advice of the state superintendent of schools, to "prescribe the courses of study covering these subjects" for public schools. The Act made it the duty of private, parochial, and denominational schools to prescribe courses of study "similar to those required for the public schools."

The Board of Education on January 9, 1942, adopted a resolution containing recitals taken largely from the Court's Gobitis opinion and ordering that the salute to the flag become "a regular part of the program of activities in the public schools," that all teachers and pupils "shall be required to participate in the

salute honoring the nation represented by the flag; provided, however, that refusal to salute the flag be regarded as an act of insubordination, and shall be dealt with accordingly."

The resolution originally required the "commonly accepted salute to the flag" which it defined. Objections to the salute as "being too much like Hitler's" were raised by the Parent and Teachers Association, the Boy and Girl Scouts, the Red Cross, and the Federation of Women's Clubs. Some modification appears to have been made in deference to these objections, but no concession was made to Jehovah's Witnesses. What is now required is the "stiff-arm" salute, the saluter to keep the right hand raised with palm turned up while the following is repeated: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all."

Failure to conform is "insubordination" dealt with by expulsion. Readmission is denied by statute until compliance. Meanwhile the expelled child is "unlawfully absent" and may be proceeded against as a delinquent. His parents or guardians are liable to prosecution, and if convicted are subject to fine not exceeding $50 and jail term not exceeding 30 days.

Appellees, citizens of the United States and of West Virginia, brought suit in the United States District Court for themselves and others similarly situated asking its injunction to restrain enforcement of these laws and regulations against Jehovah's Witnesses. The Witnesses are an unincorporated body teaching that the obligation imposed by law of God is superior to that of laws enacted by temporal government. Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them." They consider that the flag is an "image" within this command. For this reason they refuse to salute it.

Children of this faith have been expelled from school and are threatened with exclusion for no other cause. Officials threaten to send them to reformatories maintained for criminally inclined juveniles. Parents of such children have been prosecuted and are threatened with prosecutions for causing delinquency. . . .

This case calls upon us to reconsider a precedent decision, as

the Court throughout its history often has been required to do. Before turning to the Gobitis Case, however, it is desirable to notice certain characteristics by which this controversy is distinguished.

The freedom asserted by these respondents does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the state to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. The state asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.

As the present Chief Justice said in dissent in the Gobitis Case, the state may "require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty, which tend to inspire patriotism and love of country." 310 U.S. at page 604. Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether this slow and easily neglected route to aroused loyalties constitutionally may be short-cut by substituting a compulsory salute and slogan. . . .

There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The state announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of state often convey political ideas just as religious symbols come to convey theological ones. Associated with many

of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

Over a decade ago Chief Justice Hughes led this Court in holding that the display of a red flag as a symbol of opposition by peaceful and legal means to organized government was protected by the free speech guaranties of the Constitution. Stromberg *v.* California, 283 U.S. 359. Here it is the state that employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights.

It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning. It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the state is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind left it open to public authorities to compel him to utter what is not in his mind.

Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. Any credo of nationalism is likely to include what some disapprove or to omit what others think essential, and to give off different overtones as it takes on different accents or interpretations. If official power exists to

coerce acceptance of any patriotic creed, what it shall contain cannot be decided by courts, but must be largely discretionary with the ordaining authority, whose power to prescribe would no doubt include power to amend. Hence validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.

Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual. It is not necessary to inquire whether nonconformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.

The Gobitis decision, however, *assumed,* as did the argument in that case and in this, that power exists in the state to impose the flag salute discipline upon school children in general. The Court only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule. The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. We examine rather than assume existence of this power and, against this broader definition of issues in this case, reexamine specific grounds assigned for the Gobitis decision.

First. It was said that the flag-salute controversy confronted the Court with "the problem which Lincoln cast in memorable dilemma: 'Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence?' " and that the answer must be in favor of strength. Minersville School District *v.* Gobitis, *supra,* 310 U.S. at page 596.

We think these issues may be examined free of pressure or restraint growing out of such considerations.

It may be doubted whether Mr. Lincoln would have thought that the strength of government to maintain itself would be impressively vindicated by our confirming power of the state to expel a handful of children from school. Such oversimplification, so handy in political debate, often lacks the precision necessary

to postulates of judicial reasoning. If validly applied to this problem, the utterance cited would resolve every issue of power in favor of those in authority and would require us to override every liberty thought to weaken or delay execution of their policies.

Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.

The subject now before us exemplifies this principle. Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction. If it is to impose any ideological discipline, however, each party or denomination must seek to control, or failing that, to weaken the influence of the educational system. Observance of the limitations of the Constitution will not weaken government in the field appropriate for its exercise.

Second. It was also considered in the Gobitis Case that functions of educational officers in states, counties and school districts were such that to interfere with their authority "would in effect make us the school board for the country."

The Fourteenth Amendment, as now applied to the states, protects the citizen against the state itself and all of its creatures—boards of education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

Such Boards are numerous and their territorial jurisdiction often small. But small and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity may be less vigilant in calling it to account. The action of Congress

in making flag observance voluntary [1] and respecting the conscience of the objector in a matter so vital as raising the Army [2] contrasts sharply with these local regulations in matters relatively trivial to the welfare of the nation. There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution.

Third. The Gobitis opinion reasoned that this is a field "where courts possess no marked and certainly no controlling competence," that it is committed to the legislatures as well as the courts to guard cherished liberties and that it is constitutionally appropriate to "fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena," since all the "effective means of inducing political changes are left free."

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a state to regulate, for example, a

[1] Sec. 7 of House Joint Resolution 359, approved December 22, 1942, 56 Stat. 1074, 36 U.S.C. (1942 Supp.) sec. 172, 36 U.S.C.A. Section 172, prescribes no penalties for nonconformity but provides:

"That the pledge of allegiance to the flag, 'I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all,' is rendered by standing with the right hand over the heart. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress. . . ."

[2] Sec. 5(*a*) of the Selective Training and Service Act of 1940, 50 U.S.C. (App.) sec. 305(*g*).

public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the state it is the more specific limiting principles of the First Amendment that finally govern this case.

Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. True, the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs. We must transplant these rights to a soil in which the *laissez-faire* concept or principle of noninterference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls. These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

Fourth. Lastly, and this is the very heart of the Gobitis opinion, it reasons that "National unity is the basis of national security," that the authorities have "the right to select appropriate means for its attainment," and hence reaches the conclusion that such compulsory measures toward "national unity" are constitutional. Upon the verity of this assumption depends our answer in this case.

National unity as an end which officials may foster by persua-

sion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the state or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the

rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the state as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

The decision of this Court in Minersville School District *v.* Gobitis and the holdings of those few *per curiam* decisions which preceded and foreshadowed it are overruled, and the judgment enjoining enforcement of the West Virginia Regulation is affirmed.

Affirmed.

Mr. Justice ROBERTS and Mr. Justice REED adhere to the views expressed by the Court in Minersville School District *v.* Gobitis, 310 U.S. 586, and are of the opinion that the judgment below should be reversed.

Mr. Justice BLACK and Mr. Justice DOUGLAS, concurring. . . .

Mr. Justice FRANKFURTER, dissenting.

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by

our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. The duty of a judge who must decide which of two claims before the court shall prevail, that of a state to enact and enforce laws within its general competence, or that of an individual to refuse obedience because of the demands of his conscience, is not that of the ordinary person. It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law. In the light of all the circumstances, including the history of this question in this Court, it would require more daring than I possess to deny that reasonable legislators could have taken the action which is before us for review. Most unwillingly, therefore, I must differ from my brethren with regard to legislation like this. I cannot bring my mind to believe that the "liberty" secured by the due process clause gives this Court authority to deny to the state of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen. . . .

I am fortified in my view of this case by the history of the flag salute controversy in this Court. Five times has the precise question now before us been adjudicated. Four times the Court unanimously found that the requirement of such a school exercise was not beyond the powers of the states. Indeed in the first three cases to come before the Court the constitutional claim now sustained was deemed so clearly unmeritorious that this Court dismissed the appeals for want of a substantial federal question. Leoles *v.* Landers, 302 U.S. 656; Hering *v.* State Board of Education, 303 U.S. 624; Gabrielli *v.* Knickerbocker, 306 U.S. 621. In the fourth case the judgment of the district court upholding the state law was summarily affirmed on the authority of the earlier cases. Johnson *v.* Deerfield, 306 U.S. 621. The fifth case, Minersville District *v.* Gobitis, 310 U.S. 586, was brought here because the decision of the Circuit Court of Appeals for the Third Circuit ran counter to our rulings. They were reaffirmed after full consideration, with one Justice dissenting.

What may be even more significant than this uniform recognition of state authority is the fact that every Justice—13 in all—who has hitherto participated in judging this matter has at one or more times found no constitutional infirmity in what is now condemned. Only the two Justices sitting for the first time on this matter have not heretofore found this legislation inoffensive to the "liberty" guaranteed by the Constitution. And among the Justices who sustained this measure were outstanding judicial leaders in the zealous enforcement of constitutional safeguards of civil liberties—men like Chief Justice Hughes, Mr. Justice Brandeis, and Mr. Justice Cardozo, to mention only those no longer on the Court. . . .

Comment

Contemporaneously with the Barnette decision the Court reversed convictions of three Witnesses for violation of a Mississippi statute which had made it a felony to disseminate any teaching "which reasonably tends to create an attitude of stubborn refusal to salute, honor, or respect the flag. . . ." Taylor *v.* Mississippi, 319 U.S. 583 (1943). The statute had been enacted a few months after Pearl Harbor. Its careless draftsmanship illustrates what may happen if a legislature creates new crimes without due care. The act made a felon of one "who gives information as to the military operations, or plans of defense or military secrets of the nation or this state, by speech, letter, map or picture which would incite any sort of racial distrust, disorder, prejudices or hatreds . . ."! Before legislators undertake to prescribe patriotic exercises for others they might well repeat to themselves the line from "America the Beautiful,"

Confirm thy soul in self-control.

Public rides to private schools. We turn to more difficult problems relating to the interests discussed above. Cochran *v.* Louisiana State Board, 281 U.S. 370 (1930), found no valid objection under the Fourteenth Amendment to a state law providing free schoolbooks to school children, some of whom attended private and even sectarian schools. Much more troublesome was the question in Everson *v.* Board of Education, 330 U.S. 1 (1947), where public money was expended to repay to parents the cost of transporting their children to and from school, including parochial schools. Was this an "establishment of religion"? The majority, per Black, J., held that it was not; they thought that paying all bus fares was like providing policemen to protect all school children at crossings, or like using the fire department to extinguish a fire in a church. The minority of four Justices pointed out, however, that the local authorities had provided only for children

attending public and Catholic schools: was not this an establishment of religion when no provision was made for those who would attend Protestant, Jewish, or nonsectarian private schools? (In fact the record did not show whether in the district there were any children desiring to attend such schools.) The minority stressed, too, the unity of conception which bound together the secular and the religious in the curriculum of the Catholic school. As they saw it, our principle of the neutrality of the state required not merely that the state keep its hands out of religion, but also that religion's hands be kept off the state, and above all that bitter religious controversy be kept out of public life by denying to every denomination any advantage from getting control of public policy or the public purse. The problem is discussed by Professor T. R. Powell, in "Public Rides to Private Schools," *Harvard Educational Review*, Spring 1947.

Separation of Church from the public schools. People of the State of Illinois *ex rel.* McCollum *v.* Board of Education, 68 S.Ct. 461 (1948), held unconstitutional a "released time" program of religious instruction in the public schools. As authorized by an Illinois statute, the school board had set aside a weekly period when teachers selected by local religious groups were admitted to the schools to give religious instruction to those students whose parents had so elected. Regular classrooms were used. Teachers chosen by the various denominations were subject to the approval and supervision of the superintendent. The superintendent determined whether it was practicable for any particular denomination to be represented in the system. Students who did not attend any of the classes were required to leave their regular classrooms and go to another place in the building to pursue their secular studies. Absences from religious classes were reported, presumably for discipline. The Court (Reed, J., dissenting) held that this use of the public school system to aid any or all religious faiths was inconsistent with the freedom of the Fourteenth Amendment. The state was affording the use not only of its buildings but also of its compulsory school machinery as an aid to sectarian groups. "This is not separation of Church and State," said Black, J., for the Court. Some of the Justices stressed the feeling of separatism which was inculcated in the child who adhered to no faith, or whose faith was not represented among the denominational classes offered.

The ROTC. In 1931 (three years after this country had subscribed to the Kellogg-Briand Pact renouncing war as an instrument of national policy) the Southern California Conference of the Methodist Episcopal Church urged that conscientious objectors be exempted from military service. A year later it declared that it was the duty of the church to give moral support to those who had conscientious scruples against participating in military training. In Hamilton *v.* Regents of the University of California, 293 U.S. 245 (1934), certain Methodist students in the University had refused for reasons of con-

science to take the course in the ROTC, and had been informed by the Regents that they would be excluded from the University so long as they continued in their refusal. The Court held that the Fourteenth Amendment did not confer a right to attend a state university free from the obligation of students to take the course in military training. Cardozo, Brandeis, and Stone, JJ., concurring, said:

> Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsions of the agencies of government.

Men who believe in the Sermon on the Mount. In re Summers, 325 U.S. 561 (1945), disclosed the case of a high-minded applicant for admission to the Illinois bar, who had been excluded for want of a certificate from the committee on character and fitness. The applicant was opposed to the use of force, not only in war but also by police action to enforce the law. This position had been found inconsistent with the obligations of an attorney. The majority of the Court held that the Fourteenth Amendment did not secure the conscientious objector against such state action. A year later, however, the Court, overturning a line of precedents, held that the naturalization act (which requires that the applicant promise to "support and defend the Constitution and the laws of the United States of America against all enemies, foreign and domestic"), does not exclude one who is conscientiously opposed to bearing arms. The Court observed that Congress had exempted conscientious objectors from combat service, and that, while "the effort of war is indivisible," it requires many services other than combat. Girouard *v.* United States, 328 U.S. 61 (1946). The three dissenting Justices thought that the silence of Congress, throughout the years after the Court had held conscientious objectors ineligible under the statute, had established the meaning of the naturalization law. Naturalization is, of course, not a constitutional right but only a privilege granted by legislation.

It would be a great mistake to suppose that there is no need to be more tolerant than the Supreme Court compels us to be by its construction of the Constitution. Was it really wise for the authorities of Illinois to bar Summers from the practice of the law? Men who actually believe in the philosophy of the Sermon on the Mount may be out of accord with the times in which we live, but who can doubt that if we all acted on their view the world would be far better than the one we know?

VII

CITIZENSHIP AND SUFFRAGE

UNITED STATES *v.* CLASSIC

313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941).

Appeal from the District Court of the United States for the Eastern District of Louisiana.

Introduction

Congress has power, of course, to make and enforce laws to protect the enjoyment of the rights, privileges, and immunities secured by the Constitution. In particular, the Classic Case teaches that an election official who alters or makes a false return of the ballots in a primary election for a member of Congress is punishable under the laws of the United States. On the face of it this may seem more obvious than surprising. But there have been certain intricacies to the problem of the federal interest in elections, so we should lay out the essentials.

Citizens of the United States. First, who are citizens of the United States? The Fourteenth Amendment gives the answer. As the Court explained in United States *v.* Wong Kim Ark, 169 U.S. 649 (1898),

> The Fourteenth Amendment of the Constitution, in the declaration that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," contemplates two sources of citizenship, and two only: birth and naturalization. Citizenship by naturalization can only be ac-

> quired by naturalization under the authority and in the forms of law. But citizenship by birth is established by the mere fact of birth under the circumstances defined in the Constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization. A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory, or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts.

In the Wong Kim Ark Case it was held that the native-born child of alien parents was a citizen—which is contrary to the view which Justice Miller had expressed in an *obiter dictum* in the Slaughter-House Cases.

The Constitution on voting. "The Constitution of the United States does not confer the right of suffrage upon anyone." That is what the Supreme Court told Mrs. Minor in 1875, when she contended that as a citizen of the United States and of Missouri she had a constitutional right to vote in that state. Minor *v.* Happersett, 21 Wall. 162. The Court was speaking with strict accuracy. The Constitution declares that whoever is eligible by the laws of his state to vote for "the most numerous Branch of the State Legislature" shall by that fact be entitled to vote for Senators and Representatives in Congress. No one of the states has ever allowed all of its citizens to vote. Property qualifications were once common, and women were generally excluded. Minors, who are none the less citizens, are excluded, and in some states literacy qualifications are imposed. Various other facts are made the basis for disqualification, according to the legislation of the several states. The Constitution steps in, however, to say that neither race nor sex may be made the basis for disqualification: Fifteenth and Nineteenth Amendments.

Federal protection of federal rights. One has a federal right to vote for federal Senators and Representatives in his state if he meets the state's requirements for suffrage, because the Constitution has for this purpose made the state's requirements its own. Congress then may protect that federal right by punishing any interference with its free exercise. That is what Congress did by the Enforcement Act of 1870. Section 6 of that Act became section 19 of the Criminal Code, under which Classic was prosecuted for fraud in the election of a Representative in Congress. By that provision Congress enacted that if two or more persons conspired to injure or intimidate any citizen in the

exercise of any federal right, they should be fined or imprisoned. That section said nothing about race or color: the crime is committed whether the interference is because of the citizen's color or for any other reason. And all federal rights are included within the protection, not merely the right to vote.

This provision was sustained in *Ex parte* Yarbrough *et al.*, "The Ku-Klux Cases," 110 U.S. 651 (1884). Those knights in white had been convicted of maltreating a Negro citizen to intimidate him in the matter of his right to vote for a member of Congress. In sustaining the statute, Justice Miller recognized that it applied to interference in any quarter with the freedom and purity of congressional elections:

> In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptation to control these elections by violence and by corruption is a constant source of danger. . . . If the recurrence of acts such as these prisoners stand convicted of are too common in one quarter of the country, and give omen of danger from lawless violence, the free use of money in elections, arising from the vast growth of recent wealth in other quarters, presents equal cause for anxiety.

In United States *v.* Mosley, 238 U.S. 383 (1915), the Court held this section of the statutes as applicable to fraud as to violence in elections: "We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box," said Justice Holmes.

Federal authority over congressional elections. Look now to Section 4 of Article I of the Constitution. While the times, places, and manner of holding congressional elections shall be prescribed in each state by its legislature, Congress may make or alter such regulations. Congress did very little with this power until, by statutes of 1870, 1871, and 1872, it dealt comprehensively with the conduct of congressional elections. In *Ex parte* Siebold, 100 U.S. 371 (1879), a judge of an election at Baltimore, at which members of Congress were chosen, had been convicted of fraud under the federal statute. His argument was that while Congress could have ordained separate congressional elections and have punished frauds therein, it had no power to make it a federal crime for a state officer to commit a fraud in connection with a state election where Congressmen also were elected. "Why not?" Justice Bradley asked, and continued:

> . . . If Congress, by its power to make or alter the regulations, has a general supervisory power over the whole subject, what is there to preclude it from imposing additional sanctions and penalties to prevent such fraud and delinquency?

> . . . The state laws which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by Congress. It simply demands their fulfillment. Content to leave the laws as they are, it is not content with the means provided for their enforcement. It provides additional means for that purpose; and we think it is entirely within its constitutional power to do so. It is simply the exercise of the power to make additional regulations.

The direct primary. When the direct primary supplanted the convention as the mode for choosing party candidates, the question was presented whether Congress had power to reach back to the primaries. By the Corrupt Practices Act Congress had limited the amount of money which a candidate for the House of Representatives or for the Senate could lawfully use "in procuring his nomination and election." In the election of 1918, Truman H. Newberry was Republican candidate for the Senate from Michigan and Henry Ford was his Democratic opponent. Newberry, it appears, expended $100,000 on the primary and final election—wherefore he and 134 confederates were indicted under the statute. The defendants—represented by Charles E. Hughes—challenged the constitutionality of the statute as applied to a primary election. The Court set aside the convictions. Four Justices, speaking by McReynolds, J., held that primaries were beyond the reach of Congress. Four held to the contrary. McKenna, J., concurred in the result, but for some reason thought that perhaps it would be different if Congress passed a new statute after the adoption of the Seventeenth Amendment (providing for the direct election of Senators). Newberry *v.* United States, 256 U.S. 232 (1921).

On the basis of this equivocal result a general impression lingered that federal legislation did not apply to what went on at a congressional primary. Classic, the corrupt election judge in New Orleans, goes down in history as the man who gave the Court occasion to affirm the power of Congress.

Looking back, does not this answer seem obviously and even easily the right one—either because primary elections are embraced within a fair construction of "elections" as used in Section 4 of Article I, or on the ground that at any rate they are so closely related thereto that federal regulation could be sustained as "necessary and proper" to the effective regulation of elections?

Opinion

Mr. Justice STONE delivered the opinion of the Court.

Two counts of an indictment found in a federal district court charged that appellees, Commissioners of Elections, conducting a primary election under Louisiana law, to nominate a candi-

date of the Democratic Party for representative in Congress, willfully altered and falsely counted and certified the ballots of voters cast in the primary election. The questions for decision are whether the right of qualified voters to vote in the Louisiana primary and to have their ballots counted is a right "secured . . . by the Constitution" within the meaning of sections 19 and 20 of the Criminal Code, and whether the acts of appellees charged in the indictment violate those sections. . . .

Section 19 of the Criminal Code condemns as a criminal offense any conspiracy to injure a citizen in the exercise "of any right or privilege secured to him by the Constitution or laws of the United States." Section 20 makes it a penal offense for anyone who, "acting under color of any law" "willfully subjects, or causes to be subjected, any inhabitant of any state . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States." The Government argues that the right of a qualified voter in a Louisiana congressional primary election to have his vote counted as cast is a right secured by Article I, sections 2 and 4 of the Constitution, and that a conspiracy to deprive the citizen of that right is a violation of section 19, and also that the willful action of appellees as state officials, in falsely counting the ballots at the primary election and in falsely certifying the count, deprived qualified voters of that right and of the equal protection of the laws guaranteed by the Fourteenth Amendment, all in violation of section 20 of the Criminal Code.

Article I, section 2 of the Constitution, commands that "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." By section 4 of the same article "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Such right as is secured by the Constitution to qualified voters to choose members of the House of Representatives is thus to be exercised in conformity to the requirements of state law subject to the restrictions prescribed by section 2 and to the authority conferred on Congress by section 4, to regulate the times, places and manner of holding elections for representatives.

We look then to the statutes of Louisiana here involved to ascertain the nature of the right which under the constitutional mandate they define and confer on the voter, and the effect upon its exercise of the acts with which appellees are charged, all with the view to determining, first, whether the right or privilege is one secured by the Constitution of the United States, second, whether the effect under the state statute of appellees' alleged acts is such that they operate to injure or oppress citizens in the exercise of that right within the meaning of section 19 and to deprive inhabitants of the state of that right within the meaning of section 20, and finally, whether sections 19 and 20 respectively are in other respects applicable to the alleged acts of appellees.

Pursuant to the authority given by section 2 of Article I of the Constitution, and subject to the legislative power of Congress under section 4 of Article I, and other pertinent provisions of the Constitution, the states are given, and in fact exercise, a wide discretion in the formulation of a system for the choice by the people of representatives in Congress. In common with many other states, Louisiana has exercised that discretion by setting up machinery for the effective choice of party candidates for representative in Congress by primary elections, and by its laws it eliminates or seriously restricts the candidacy at the general election of all those who are defeated at the primary. All political parties, which are defined as those that have cast at least 5 percent of the total vote at specified preceding elections, are required to nominate their candidates for representative by direct primary elections. Louisiana Act No. 46, Regular Session, 1940, sections 1 and 3. . . .

The right to vote for a representative in Congress at the general election is, as a matter of law, thus restricted to the successful party candidate at the primary, to those not candidates at the primary who file nomination papers, and those whose names may be lawfully written into the ballot by the electors. Even if, as appellees argue, contrary to the decision in Serpas *v.* Trebucq [Court of Appeal for the Parish of Orleans, 1 So. 2d. 346 (1941)], voters may lawfully write into their ballots, cast at the general election, the name of a candidate rejected at the primary and have their ballots counted, the practical operation of the primary law in otherwise excluding from the ballot on the general election the names of candidates rejected at the primary is such as to impose serious restrictions upon the choice of candi-

dates by the voters save by voting at the primary election. In fact, as alleged in the indictment, the practical operation of the primary in Louisiana is, and has been since the primary election was established in 1900, to secure the election of the Democratic primary nominee for the Second Congressional District of Louisiana.

Interference with the right to vote in the congressional primary in the Second Congressional District for the choice of Democratic candidate for Congress is thus as a matter of law and in fact an interference with the effective choice of the voters at the only stage of the election procedure when their choice is of significance, since it is at the only stage when such interference could have any practical effect on the ultimate result, the choice of the Congressman to represent the district. The primary in Louisiana is an integral part of the procedure for the popular choice of Congressman. The right of qualified voters to vote at the congressional primary in Louisiana and to have their ballots counted is thus the right to participate in that choice.

We come then to the question whether that right is one secured by the Constitution. Section 2 of Article I commands that Congressmen shall be chosen by the people of the several states by electors, the qualifications of which it prescribes. The right of the people to choose, whatever its appropriate constitutional limitations, where in other respects it is defined, and the mode of its exercise is prescribed by state action in conformity to the Constitution, is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right. . . . While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, this statement is true only in the sense that the states are authorized by the Contitution, to legislate on the subject as provided by section 2 of Article I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under section 4 and its more general power under Article I, section 8, clause 18 of the Constitution "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." See *Ex parte* Siebold, 100 U.S. 371.

Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at congressional elections. This Court has consistently held that this is a right secured

by the Constitution. And since the constitutional command is without restriction or limitation, the right, unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of individuals as well as of states.

But we are now concerned with the question whether the right to choose at a primary election, a candidate for election as representative, is embraced in the right to choose representatives secured by Article I, section 2. We may assume that the framers of the Constitution in adopting that section, did not have specifically in mind the selection and elimination of candidates for Congress by the direct primary any more than they contemplated the application of the commerce clause to interstate telephone, telegraph and wireless communication which are concededly within it. But in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government. If we remember that "it is a Constitution we are expounding," we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the constitutional purpose.

That the free choice by the people of representatives in Congress, subject only to the restrictions to be found in sections 2 and 4 of Article I and elsewhere in the Constitution, was one of the great purposes of our constitutional scheme of government cannot be doubted. We cannot regard it as any the less the constitutional purpose or its words as any the less guarantying the integrity of that choice when a state, exercising its privilege in the absence of congressional action, changes the mode of choice from a single step, a general election, to two, of which the first is the choice at a primary of those candidates from whom, as a second step, the representative in Congress is to be chosen at the election.

Nor can we say that that choice which the Constitution protects is restricted to the second step because section 4 of Article

I, as a means of securing a free choice of representatives by the people, has authorized Congress to regulate the manner of elections, without making any mention of primary elections. For we think that the authority of Congress, given by section 4, includes the authority to regulate primary elections when, as in this case, they are a step in the exercise by the people of their choice of representatives in Congress. . . . In Newberry *v.* United States, four Justices of this Court were of opinion that the term "elections" in section 4 of Article I did not embrace a primary election, since that procedure was unknown to the framers. A fifth Justice who with them pronounced the judgment of the Court, was of opinion that a primary, held under a law enacted before the adoption of the Seventeenth Amendment, for the nomination of candidates for Senator, was not an election within the meaning of section 4 of Article I of the Constitution, presumably because the choice of the primary imposed no legal restrictions on the election of Senators by the state legislatures to which their election had been committed by Article I, section 3. The remaining four Justices were of the opinion that a primary election for the choice of candidates for Senator or Representative were elections subject to regulation by Congress within the meaning of section 4 of Article I. The question then has not been prejudged by any decision of this Court.

To decide it we turn to the words of the Constitution read in their historical setting as revealing the purpose of its framers, and in search for admissible meanings of its words which, in the circumstances of their application, will effectuate those purposes. As we have said, a dominant purpose of section 2, so far as the selection of Representatives in Congress is concerned, was to secure to the people the right to choose Representatives by the designated electors, that is to say, by some form of election. Cf. the Seventeenth Amendment as to popular "election" of Senators. From time immemorial an election to public office has been in point of substance no more and no less than the expression by qualified electors of their choice of candidates.

Long before the adoption of the Constitution the form and mode of that expression had changed from time to time. There is no historical warrant for supposing that the framers were under the illusion that the method of effecting the choice of the electors would never change or that if it did, the change was for that reason to be permitted to defeat the right of the people to choose representatives for Congress which the Constitution had

guaranteed. The right to participate in the choice of Representatives for Congress includes, as we have said, the right to cast a ballot and to have it counted at the general election whether for the successful candidate or not. Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, section 2. And this right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the Representative. Here, even apart from the circumstance that the Louisiana primary is made by law an integral part of the procedure of choice, the right to choose a Representative is in fact controlled by the primary because, as is alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected Representative. Moreover, we cannot close our eyes to the fact already mentioned that the practical influence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the general election even though there is no effective legal prohibition upon the rejection at the election of the choice made at the primary and may thus operate to deprive the voter of his constitutional right of choice. This was noted and extensively commented upon by the concurring Justices in Newberry *v.* United States.

Unless the constitutional protection of the integrity of "elections" extends to primary elections, Congress is left powerless to effect the constitutional purpose, and the popular choice of Representatives is stripped of its constitutional protection save only as Congress, by taking over the control of state elections, may exclude from them the influence of the state primaries. Such an expedient would end that state autonomy with respect to elections which the Constitution contemplated that Congress should be free to leave undisturbed, subject only to such minimum regulation as it should find necessary to insure the freedom and integrity of the choice. Words, especially those of a constitution, are not to be read with such stultifying narrowness. The words of sections 2 and 4 of Article I, read in the sense which is plainly permissible and in the light of the constitutional purpose, require us to hold that a primary election which involves a necessary

step in the choice of candidates for election as Representatives in Congress, and which in the circumstances of this case controls that choice, is an election within the meaning of the constitutional provision and is subject to congressional regulation as to the manner of holding it.

Not only does section 4 of Article I authorize Congress to regulate the manner of holding elections, but by Article I, section 8, clause 18, Congress is given authority "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." This provision leaves to the Congress the choice of means by which its constitutional powers are to be carried into execution. "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." McCulloch *v.* Maryland, 4 Wheat. 316, 421. That principle has been consistently adhered to and liberally applied, and extends to the congressional power by appropriate legislation to safeguard the right of choice by the people of Representatives in Congress secured by section 2 of Article I.

There remains the question whether sections 19 and 20 are an exercise of the congressional authority applicable to the acts with which appellees are charged in the indictment. Section 19 makes it a crime to conspire to "injure" or "oppress" any citizen "in the free exercise . . . of any right or privilege secured to him by the Constitution." In *Ex parte* Yarbrough and in United States *v.* Mosley, as we have seen, it was held that the right to vote in a congressional election is a right secured by the Constitution, and that a conspiracy to prevent the citizen from voting or to prevent the official count of his ballot when cast, is a conspiracy to injure and oppress the citizen in the free exercise of a right secured by the Constitution within the meaning of section 19. In reaching this conclusion the Court found no uncertainty or ambiguity in the statutory language, obviously devised to protect the citizen "in the free exercise . . . of any right or privilege secured to him by the Constitution," and concerned itself with the question whether the right to participate in choosing a representative is so secured. Such is our function here. Conspiracy to prevent the official count of a citizen's ballot, held in United States *v.* Mosley to be a violation of section 19 in the case of a congres-

sional election, is equally a conspiracy to injure and oppress the citizen when the ballots are cast in a primary election prerequisite to the choice of party candidates for a congressional election. In both cases the right infringed is one secured by the Constitution. The injury suffered by the citizen in the exercise of the right is an injury which the statute describes and to which it applies in the one case as in the other.

The suggestion that section 19, concededly applicable to conspiracies to deprive electors of their votes at congressional elections, is not sufficiently specific to be deemed applicable to primary elections, will hardly bear examination. Section 19 speaks neither of elections nor of primaries. In unambiguous language it protects "any right or privilege secured . . . by the Constitution," a phrase which as we have seen extends to the right of the voter to have his vote counted in both the general election and in the primary election, where the latter is a part of the election machinery, as well as to numerous other constitutional rights which are wholly unrelated to the choice of a Representative in Congress.

In the face of the broad language of the statute, we are pointed to no principle of statutory construction and to no significant legislative history which could be thought to sanction our saying that the statute applies any the less to primaries than to elections, where in one as in the other it is the same constitutional right which is infringed. . . . Differences of opinion have arisen as to the effect of the primary in particular cases on the choice of Representatives. But we are troubled by no such doubt here. Hence, the right to participate through the primary in the choice of Representatives in Congress—a right clearly secured by the Constitution—is within the words and purpose of section 19 in the same manner and to the same extent as the right to vote at the general election. It is no extension of the criminal statute . . . to find a violation of it in a new method of interference with the right which its words protect. For it is the constitutional right, regardless of the method of interference, which is the subject of the statute and which in precise terms it protects from injury and oppression. . . .

If a right secured by the Constitution may be infringed by the corrupt failure to include the vote at a primary in the official count, it is not significant that the primary, like the voting machine, was unknown when section 19 was adopted. Abuse of either may infringe the right and therefore violate section 19. . . .

The right of the voters at the primary to have their votes counted is, as we have stated, a right or privilege secured by the Constitution, and to this section 20 also gives protection. The alleged acts of appellees were committed in the course of their performance of duties under the Louisiana statute requiring them to count the ballots, to record the result of the count, and to certify the result of the election. Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law. Here the acts of appellees infringed the constitutional right and deprived the voters of the benefit of it within the meaning of section 20. . . .

Reversed.

Mr. Chief Justice HUGHES took no part in the consideration or decision of this case. [Doubtless this was because he had been of counsel in the Newberry Case.]

Mr. Justice DOUGLAS (Mr. Justice BLACK and Mr. Justice MURPHY concurring with him), dissented. [They agreed with the majority on the constitutional question of the power of Congress over primaries, but thought the statute under which Classic had been indicted was not sufficiently specific to reach his acts.]

SMITH *v.* ALLWRIGHT

321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944).

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Introduction

"The grandfather clause." Efforts by *legal* means to exclude the Negro from voting in the Southern states have proved almost a complete failure. The series of cases begins with Guinn *v.* United States, 238 U.S. 347 (1915), where a unanimous Court struck down the "grandfather clause" in the Oklahoma constitution. The scheme was this: "No person shall be registered as an elector of this state or be

allowed to vote in any election held herein, unless he be able to read and write any section of the Constitution of the state . . .", provided, however, that if the person or any of his ancestors had been entitled to vote under any form of government on January 1, 1866, such person could vote without having to pass the literacy test. The Court looked through this transparency and held the provision a violation of the Fifteenth Amendment.

Oklahoma proceeded to frame a new suffrage law. It said that all who were registered in 1914—that is, under the unconstitutional scheme—remained voters, but all others—that is, the Negroes—must register between April 30 and May 11, 1916, or be perpetually disenfranchised. The Fifteenth Amendment, said Frankfurter, J., for the Court, "nullifies sophisticated as well as simple-minded modes of discrimination." Lane *v.* Wilson, 307 U.S. 268 (1939). McReynolds and Butler, JJ., dissented.

A denial of equal protection. Texas enacted, quite simply, that "in no event shall a Negro be eligible to participate in a Democratic Party primary election." "We find it unnecessary to consider the Fifteenth Amendment," wrote Holmes, J., in holding this unconstitutional, "because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth." Nixon *v.* Herndon, 273 U.S. 536 (1927).

The Texas legislature thereupon enacted that "Every political party in this state through its state executive committee shall have the power to prescribe the qualifications of its own members. . . ." The executive committee of the Democratic Party adopted a resolution that only whites were qualified to participate in primary elections. Again it was held that the state had denied the equal protection of the laws. The committee acted pursuant to the statute; its discrimination was state, not private, action—so ran the opinion of Justice Cardozo. Nixon *v.* Condon, 286 U.S. 73 (1932). Justices McReynolds, Van Devanter, Sutherland, and Butler dissented.

The Party as a club. Then the legislature merely kept quiet and let the affairs of the Democratic Party take their course. Three weeks after Nixon *v.* Condon was decided, the state Democratic convention adopted a resolution that all white citizens qualified to vote were eligible to membership in the party. Recall that the Fourteenth and Fifteenth Amendments strike at action by the state, not at the acts of private parties. The Democratic Party was a private club which limited its membership to whites. Without dissent the Court held that no constitutional right had been denied. Grovey *v.* Townsend, 295 U.S. 45 (1935), per Roberts, J.

The Classic Case cast a long shadow on the theory of Grovey *v.* Townsend. If, as Classic held, a primary to choose a Senator or Representative is a part of a congressional election, did it not follow that a "private club" which was employed by the state to perform this

function was actually an agent of the state, so that its exclusion of Negroes resulted in the denial of a federal right? That was the question presented in a fourth Texas case, Smith *v.* Allwright.

Opinion

Mr. Justice REED delivered the opinion of the Court.

This writ of certiorari brings here for review a claim for damages in the sum of $5000 on the part of petitioner, a Negro citizen of the 48th precinct of Harris county, Tex., for the refusal of respondents, election and associate election judges respectively of that precinct, to give petitioner a ballot or to permit him to cast a ballot in the primary election of July 27, 1940, for the nomination of Democratic candidates for the United States Senate and House of Representatives, and governor and other state officers. The refusal is alleged to have been solely because of the race and color of the proposed voter.

The actions of respondents are said to violate sections 31 and 43 of Title 8 of the United States Code, in that petitioner was deprived of rights secured by sections 2 and 4 of Article I and the Fourteenth, Fifteenth, and Seventeenth Amendments to the United States Constitution. . . .

The state of Texas by its constitution and statutes provides that every person, if certain other requirements are met which are not here in issue, qualified by residence in the district or county "shall be deemed a qualified elector." Primary elections for United States Senators, Congressmen, and state officers are provided for by chapters 12 and 13 of the statutes. Under these chapters, the Democratic Party was required to hold the primary which was the occasion of the alleged wrong to petitioner. . . . These nominations are to be made by the qualified voters of the party. . . .

The Democratic Party on May 24, 1932, in a state convention adopted the following resolution, which has not since been "amended, abrogated, annulled or avoided": "Be it resolved that all white citizens of the state of Texas who are qualified to vote under the Constitution and laws of the state shall be eligible to membership in the Democratic Party and, as such, entitled to participate in its deliberations." It was by virtue of this resolution that the respondents refused to permit the petitioner to vote.

Texas is free to conduct her elections and limit her electorate as she may deem wise, save only as her action may be affected

by the prohibitions of the United States Constitution or in conflict with powers delegated to and exercised by the national government. The Fourteenth Amendment forbids a state from making or enforcing any law which abridges the privileges or immunities of citizens of the United States and the Fifteenth Amendment specifically interdicts any denial or abridgement by a state of the right of citizens to vote on account of color. Respondents appeared in the district court and the circuit court of appeals and defended on the ground that the Democratic Party of Texas is a voluntary organization with members banded together for the purpose of selecting individuals of the group representing the common political beliefs as candidates in the general election. As such a voluntary organization, it was claimed, the Democratic Party is free to select its own membership and limit to whites participation in the party primary. Such action, the answer asserted, does not violate the Fourteenth, Fifteenth, or Seventeenth Amendment as officers of government cannot be chosen at primaries and the Amendments are applicable only to general elections where governmental officers are actually elected. Primaries, it is said, are political party affairs, handled by party, not governmental, officers. . . .

The right of a Negro to vote in the Texas primary has been considered heretofore by this Court. [Here follows a review of Nixon *v.* Herndon and Nixon *v.* Condon, mentioned in the Introduction.]

In Grovey *v.* Townsend, this Court had before it another suit for damages for the refusal in a primary of a county clerk, a Texas officer with only public functions to perform, to furnish petitioner, a Negro, an absentee ballot. The refusal was solely on the ground of race. This case differed from Nixon *v.* Condon in that a state convention of the Democratic Party had passed the resolution of May 24, 1932, hereinbefore quoted. It was decided that the determination by the state convention of the membership of the Democratic Party made a significant change from a determination by the executive committee. The former was party action, voluntary in character. The latter, as had been held in the Condon Case, was action by authority of the state. The managers of the primary election were therefore declared not to be state officials in such sense that their action was state action. A state convention of a party was said not to be an organ of the state. This Court went on to announce that to deny a vote in a primary was a mere refusal of party membership with which "the

state need have no concern," while for a state to deny a vote in a general election on the ground of race or color violated the Constitution. Consequently, there was found no ground for holding that the county clerk's refusal of a ballot because of racial ineligibility for party membership denied the petitioner any right under the Fourteenth or Fifteenth Amendments.

Since Grovey *v.* Townsend and prior to the present suit, no case from Texas involving primary elections has been before this Court. We did decide, however, United States *v.* Classic. We there held that section 4 of Article I of the Constitution authorized Congress to regulate primary as well as general elections, "where the primary is by law made an integral part of the election machinery." Consequently, in the Classic Case, we upheld the applicability to frauds in a Louisiana primary of sections 19 and 20 of the Criminal Code. Thereby corrupt acts of election officers were subjected to congressional sanctions because that body had power to protect rights of federal suffrage secured by the Constitution in primary as in general elections. This decision depended, too, on the determination that under the Louisiana statutes the primary was a part of the procedure for choice of federal officials. By this decision the doubt as to whether or not such primaries were a part of "elections" subject to federal control, which had remained unanswered since Newberry *v.* United States, was erased. The Nixon Cases were decided under the equal protection clause of the Fourteenth Amendment without a determination of the status of the primary as a part of the electoral process. The exclusion of Negroes from the primaries by action of the state was held invalid under that Amendment. The fusing by the Classic Case of the primary and general elections into a single instrumentality for choice of officers has a definite bearing on the permissibility under the Constitution of excluding Negroes from primaries. This is not to say that the Classic Case cuts directly into the rationale of Grovey *v.* Townsend. This latter case was not mentioned in the opinion. Classic bears upon Grovey *v.* Townsend not because exclusion of Negroes from primaries is any more or less state action by reason of the unitary character of the electoral process but because the recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the state. When Grovey *v.* Townsend was written, the Court looked upon the denial of a

vote in a primary as a mere refusal by a party of party membership. As the Louisiana statutes for holding primaries are similar to those of Texas, our ruling in Classic as to the unitary character of the electoral process calls for a re-examination as to whether or not the exclusion of Negroes from a Texas party primary was state action. . . .

It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the state, like the right to vote in a general election, is a right secured by the Constitution. By the terms of the Fifteenth Amendment that right may not be abridged by any state on account of race. Under our Constitution the great privilege of the ballot may not be denied a man by the state because of his color.

We are thus brought to an examination of the qualifications for Democratic primary electors in Texas, to determine whether state action or private action has excluded Negroes from participation. . . . [It appears that Texas legislation makes the party primary an integral and vital part of the scheme of elections.]

We think that this statutory system for the selection of party nominees for inclusion on the general election ballot makes the party which is required to follow these legislative directions an agency of the state in so far as it determines the participants in a primary election. The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party. . . . If the state requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, practically speaking, to those whose names appear on such a ballot, it endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. This is state action within the meaning of the Fifteenth Amendment. Guinn *v.* United States, 238 U.S. 347, 362.

The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any state because of race. This grant to the people of the opportunity for choice is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial dis-

crimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied. Lane *v.* Wilson, 307 U.S. 268, 275.

The privilege of membership in a party may be, as this Court said in Grovey *v.* Townsend, no concern of a state. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the state makes the action of the party the action of the state. In reaching this conclusion we are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to re-examine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself. Here we are applying, contrary to the recent decision in Grovey *v.* Townsend, the well-established principle of the Fifteenth Amendment, forbidding the abridgment by a state of a citizen's right to vote. Grovey *v.* Townsend is overruled.

Judgment reversed.

Mr. Justice FRANKFURTER concurs in the result.

Mr. Justice ROBERTS dissented. . . .

Comment

We have observed a connection with Norris *v.* Alabama, 294 U.S. 587 (1935), how the law of the Constitution entitles the Negro to a jury from which members of his race have not been systematically excluded, and the decisions discussed above have elaborated the proposition that the Constitution forbids "sophisticated as well as simple-minded modes of discrimination" in elections. A number of other aspects of racial discrimination have been challenged before the Supreme Court.

Public education. Missouri *ex rel.* Gaines *v.* Canada, 305 U.S. 337 (1938), is the leading case on the equal protection of the laws as applied to public education. Missouri maintains the policy of racial segregation

in its public educational system. It has established Lincoln University for its Negro citizens; the University of Missouri is closed to them. Gaines, a graduate of Lincoln, applied for admission to the University of Missouri law school. Lincoln offered no professional instruction in law. Missouri legislation authorized the payment of tuition fees "for the attendance of Negro residents . . . at the university of any adjacent state. . . ." The Court, speaking through Chief Justice Hughes (McReynolds and Butler, JJ., dissenting), held that this did not satisfy the command of the Constitution:

> Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the state was bound to furnish him within its borders facilities for legal education substantially equal to those which the state there afforded for persons of the white race, whether or not other Negroes sought the same opportunity.

This view has been reaffirmed in Sipuel *v.* Board of Regents of University of Oklahoma, 68 S.Ct. 299 (1948): the state must provide professional education for a Negro no less than for a white resident, and "provide it as soon as it does for applicants of any other group."

Residential segregation. Buchanan *v.* Warley, 245 U.S. 60 (1917), struck down an ordinance of Louisville, Ky., which forbade Negroes to move into any block wherein the greater number of houses were occupied by whites, and vice versa. The ordinance was challenged by a white owner who desired to convey a lot to a Negro, which may explain why the Court held it invalid as a taking of the owner's property without due process of law, rather than as a denial of equal protection to Negroes. New Orleans had a similar enactment which forbade Negroes to reside in a white area without the written consent of a majority of the white residents, and vice versa. This was invalidated in a *per curiam* opinion, "on the authority of Buchanan *v.* Warley." Harmon *v.* Tyler, 273 U.S. 668 (1927). These were cases of discrimination by governmental action. But what if individual owners in a neighborhood agree among themselves to a restrictive covenant whereby each binds himself to all other owners not to alienate his property to a Negro? In Corrigan *v.* Buckley, 271 U.S. 323 (1926), the inferior courts had enforced such a covenant, and the Supreme Court dismissed the appeal because the questions raised lacked "any substantial quality or color of merit." The Court repeated what had been said years before, that "the prohibitions of the Fourteenth Amendment 'have reference to state action exclusively, and not to any action of private individuals.'" On several occasions the Court declined to consider similar cases, though in 1945 two Justices—Murphy and Rutledge—indicated that they were prepared to re-examine the question. May *v.* Burgess, 325 U.S. 868.

Does not government itself participate in racial discrimination when it lends the aid of its courts to enforce restrictive covenants by injunction? Consider, too, what effect should be given to the provision of the Civil Rights Act of 1866, now 8 U.S.C. sec. 42, that

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

These and other legal issues as to the enforceability of restrictive covenants were carried up and argued before the Supreme Court throughout January 15 and 16, 1948. In Kraemer *v.* Shelley, 355 Mo. 814 (1946), the Missouri court had unanimously sustained a restrictive covenant against Negroes. A month later the Michigan court reached the same conclusion. Sipes *v.* McGhee, 316 Mich. 614 (1947). In Hurd *v.* Hodge and Urciolo *v.* Hodge, 162 F.(2d) 233 (1947), the Court of Appeals declared that the validity of restrictive covenants had long been settled law in the District of Columbia—though one of the three judges filed a dissent which was both acute and powerful. These were the cases which were argued together before the Supreme Court. On May 3, 1948, Mr. Chief Justice Vinson delivered the Court's judgment, and from that moment restrictive covenants based on race or color became unenforceable. The states, he concluded, denied the equal protection of the laws when by their courts they enforced such private agreements. And as to the District of Columbia, although the equal protection clause of the Fourteenth Amendment is not there operative, yet the provision of the Civil Rights Act quoted above, and also "the public policy of the United States," which is inspired by the spirit of affording equal protection regardless of race or color, forbade the enforcement of such restrictive covenants in the Nation's capital.

Various recent developments illuminate for public scrutiny the position of minorities within our constitutional system. One major fact is that the United States has embraced the principles expressed in the United Nations Charter, including "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Art. 55 of the Charter. Another is the appearance of the challenging *Report of the President's Committee on Civil Rights*, Government Printing Office, Washington (1947). As we consider anew the quality of the liberty actually made secure throughout the United States, the world looks on and compares our achievements with the pretensions of a competing system. "The United States is not so strong, the final triumph of the democratic ideal is not so inevitable that we can ignore what the world thinks of us or our record." *Report*, p. 148.

CONSTITUTION
OF THE
UNITED STATES OF AMERICA

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

ARTICLE I.

SECTION. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION. 2. [1.] The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

[2.] No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[3.] Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. [See Amendment XIV.] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number

of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

[4.] When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

[5.] The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION. 3. [1.] The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote. [See Amendment XVII.]

[2.] Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

[3.] No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

[4.] The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

[5.] The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

[6.] The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

[7.] Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION. 4. [1.] The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

[2.] The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day. [See Amendment XX.]

SECTION. 5. [1.] Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

[2.] Each House may determine the Rules of its Proceedings, punish its Members for Disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

[3.] Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

[4.] Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION. 6. [1.] The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

[2.] No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a member of either House during his Continuance in Office.

SECTION. 7. [1.] All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

[2.] Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it,

but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

[3.] Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION. 8. The Congress shall have Power [1.] To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

[2.] To borrow Money on the credit of the United States;

[3.] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

[4.] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

[5.] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

[6.] To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

[7.] To establish Post Offices and post Roads;

[8.] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

[9.] To constitute Tribunals inferior to the supreme Court;

[10.] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

[11.] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

[12.] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

[13.] To provide and maintain a Navy;

[14.] To make Rules for the Government and Regulation of the land and naval Forces;

[15.] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

[16.] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

[17.] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; —And

[18.] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION. 9. [1.] The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

[2.] The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

[3.] No Bill of Attainder or ex post facto Law shall be passed.

[4.] No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken. [See Amendment XVI.]

[5.] No Tax or Duty shall be laid on Articles exported from any State.

[6.] No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

[7.] No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

[8.] No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION. 10. [1.] No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

[2.] No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

[3.] No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE II.

SECTION. 1. [1.] The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

[2.] Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[3.] The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and

if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President. [See Amendments XII and XX.]

[4.] The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

[5.] No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

[6.] In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected. [See Amendment XX.]

[7.] The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

[8.] Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION. 2. [1.] The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject re-

lating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

[2.] He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

[3.] The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III.

SECTION. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION. 2. [1.] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State; [See Amendment XI.]—between Citi-

zens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[2.] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

[3.] The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION. 3. [1.] Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

[2.] The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE IV.

SECTION. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION. 2. [1.] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

[2.] A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

[3.] No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

SECTION. 3. [1.] New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the

Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

[2.] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION. 4. 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 Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI.

[1.] All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

[2.] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[3.] The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same. [Entered into operation in 1789.]

AMENDMENTS

[ARTICLE I.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[ARTICLE II.]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

[ARTICLE III.]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

[ARTICLE IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[ARTICLE V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[ARTICLE VI.]

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

[ARTICLE VII.]

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

[ARTICLE VIII.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

[ARTICLE IX.]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

[ARTICLE X.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

[The first ten Amendments were adopted in 1791.]

[ARTICLE XI.]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State. [In 1798 Amendment XI was declared to have been adopted.]

[ARTICLE XII.]

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name

in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; —The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States. [Adopted in 1804.]

[ARTICLE XIII.]

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation. [Adopted in 1865.]

[ARTICLE XIV.]

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article. [Adopted in 1868.]

[ARTICLE XV.]

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation. [Adopted in 1870.]

[ARTICLE XVI.]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration. [Adopted in 1913.]

[ARTICLE XVII.]

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided,* That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution. [Adopted in 1913.]

[ARTICLE XVIII.]

SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress. [Adopted in 1919.]

[ARTICLE XIX.]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation. [Adopted in 1920.]

[ARTICLE XX.]

SECTION 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

SECTION 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

SECTION 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

SECTION 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

SECTION 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

SECTION 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission. [Adopted in 1933.]

[ARTICLE XXI.]

SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

SECTION 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress. [Adopted in 1933.]

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