Title: The Constitution of the United States of America: Analysis and Interpretation

Editor: Edward Samuel Corwin

Release date: June 20, 2006 [EBook #18637]

Language: English

E-text prepared by Kevin Handy, Lisa Reigel, John Hagerson,
and the Project Gutenberg Online Distributed Proofreading Team
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82D CONGRESS } { DOCUMENT
2d Session } **SENATE** { NO. 170

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THE CONSTITUTION OF THE UNITED STATES OF AMERICA

ANALYSIS AND INTERPRETATION

ANNOTATIONS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JUNE 30, 1952

Prepared by the Legislative Reference Service, Library of Congress

Edward S. Corwin, Editor

UNITED STATES GOVERNMENT PRINTING OFFICE WASHINGTON: 1953

For sale by the Superintendent of Documents, U.S. Government Printing Office

Washington 25 D.C.—Price $6.25

SENATE JOINT RESOLUTION 69

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JOINT RESOLUTION To prepare a revised edition of the Annotated Constitution of the United States of America as published in 1938 as Senate Document 232 of the Seventy-fourth Congress.

Whereas the Annotated Constitution of the United States of America published in 1938 as Senate Document 232, Seventy-fourth Congress, has served a very useful purpose by supplying essential information in one volume and at a very reasonable price; and

Whereas Senate Document 232 is no longer available at the Government Printing Office; and

Whereas the reprinting of this document without annotations for the last ten years is now considered appropriate: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Librarian of Congress is hereby authorized and directed to have the Annotated Constitution of the United States of America, published in 1938, revised and extended to include annotations of decisions of the Supreme Court prior to January 1, 1948, construing the several provisions of the Constitution correlated under each separate provision, and to have the said revised document printed at the Government Printing Office. Three thousand copies shall be printed, of which two thousand two hundred copies shall be for the use of the House of Representatives and eight hundred copies for the use of the Senate.

Sec. 2. There is hereby authorized to be appropriated for carrying out the provisions of this Act, with respect to the preparation but not including printing, the sum of $35,000 to remain available until expended.

Approved June 17, 1947.

PREFACE

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By Honorable Alexander Wiley

Chairman, Senate Foreign Relations Committee

To the Members and Committees of the Congress, the Constitution is more than a revered abstraction; it is an everyday companion and counsellor. Into it, the Founding Fathers breathed the spirit of life; through every subsequent generation, that spirit has remained vital.

In more than a century and a half of cataclysmic events, the Constitution has successfully withstood test after test. No crisis—foreign or domestic—has impaired its vitality. The system of checks and balances which it sets up has enabled the growing nation to adapt itself to every need and at the same time to checkrein every bid for arbitrary power.

And meantime America itself has evolved dynamically and dramatically. The humble 13 colonies, carved out of the wilderness in the 18th Century, emerged in the 20th Century as leader of earth —industrial—military—political—economic—psychological. Yet the broad outline of the Supreme Law remains today fundamentally intact.

It is small wonder that W.E. Gladstone described the Constitution as "the most wonderful work ever struck off at a given time by the brain and purpose of man." He knew, as should we, that the Constitution's words, its phrases, clauses, sentences, paragraphs, and sections still possess a

miraculous quality—a mingled flexibility and strength which permits its adaptation to the needs of the hour without sacrifice of its essential character as the basic framework of freedom.

Congress has long recognized how necessary it is to have a handy working guide to this superb charter. It has sought a map, so to speak, of the great historical landmarks of Constitutional jurisprudence—landmarks which mark the oft-times epic battles of clashing legal interpretations. A first step was taken toward meeting this need by publication of Senate Document 12, 63d Congress in 1913. Ten years later, in 1923 another volume was issued, Senate Document 96, 67th Congress, and it was followed in turn by Senate Document 154 of the 68th Congress.

In 1936, Congress authorized a further revision, this time by the Legislative Reference Service. Mr. Wilfred C. Gilbert, now the Assistant Director of the Service, was the editor of this volume which became Senate Document 232, 74th Congress, and he has given counsel throughout the development of the present edition of this volume.

After another decade of significant and far-reaching judicial interpretation, the Senate Judiciary Committee reported out Senate Joint Resolution 69 of the 80th Congress calling upon the Librarian of Congress for the preparation of the new work. However, because of the increase in responsibilities of the Legislative Reference Service, it was no longer feasible for it to undertake this additional burden with its regular staff. The Director of the Service, Dr. Ernest S. Griffith, suggested therefore that Dr. Edward S. Corwin be engaged to head the project with a collaborating staff to be furnished by the Legislative Reference Service. [Pg iv]

In my capacity at the time, as Chairman of the Senate Judiciary Committee, I was delighted to give my approval to this arrangement, for I recognized our particular good fortune in obtaining the services of an acknowledged authority for this highly significant and delicate enterprise.

I should like now to express our thanks and appreciation to Dr. Corwin and to his collaborators from the Service, Dr. Norman J. Small, Assistant Editor, Miss Mary Louise Ramsey, and Dr. Robert J. Harris, for all their prodigious and skilled labors.

Moreover, for their considerable efforts in connection with the detailed legislative and printing arrangements for the publication of this volume, I should like to express appreciation to Mr. Darrell St. Claire, Staff Member for the Senate Rules Committee, as well as Chief Clerk for the Joint Committee on the Library of Congress; and Mr. Julius N. Cahn, previously Executive Assistant to me when I was Chairman of the Judiciary Committee and now Counsel to the Senate Foreign Relations Committee.

Initiated in the Republican 80th Congress, the project was undertaken With funds supplied by the succeeding Democratic 81st Congress, while the Democratic 82d Congress extended its coverage to include Supreme Court decisions through June 30, 1952. The document thus represents Congressional nonpartisan activity at its best, as should ever be the case in our fidelity to this great charter.

In the present volume, in addition to the annotations indicating the current state of interpretation, Dr. Corwin has undertaken to supply an historical background to the several lines of reasoning. It is our hope and expectation that this introduction will prove of immense benefit to users in understanding the trends of judicial constitutional interpretation.

It is our further hope that this edition as a whole may serve a still larger purpose—strengthening our understanding of and loyalty to the principles of this republic.

In that way, the Constitution will remain the blueprint for freedom. It will continue as an inspiration for us of this blessed land, and for men and women everywhere; for they look to these shores as the lighthouse of freedom, in a world where the darkness of despotism hangs so heavily.

May 30, 1953.

PREFACE [Pg v]

For many years the Congress has felt the need for a handy, concise guide to the interpretation of the Constitution. An edition of the Constitution issued in 1913 as Senate Document 12, 63d Congress, took a step in this direction by supplying under each clause, a citation of Supreme Court decisions thereunder. This was obviously of limited usefulness, leaving the reader, as it did, to an examination of cases for any specific information. In 1921 the matter received further consideration. Senate Resolution 151 authorized preparation of a volume to contain the Constitution and its amendments, to January 1, 1923 "with citations to the cases of the Supreme Court of the United States construing its several provisions." This was issued as Senate Document 96 of the 67th Congress, and was followed the next year by a similar volume

annotating the cases through the October 1923 Term of the Supreme Court. (Senate Document 154, 68th Congress.) Both of these volumes went somewhat beyond the mere enumeration of cases, carrying under the particular provisions of the Constitution a brief statement of the point involved in the principal cases cited.

Thirteen years of Constitutional developments led Congress in 1936 to authorize a revision of the 1924 volume, and under authority of Senate Concurrent Resolution 35 introduced by Senator Ashurst, Chairman of the Judiciary Committee, such a revision was prepared in the Legislative Reference Service and issued as Senate Document 232, 74th Congress.

This volume was, like its predecessors, dedicated to the need felt by Members for a convenient ready-reference manual. However, so extensive and important had been the judicial interpretation of the Constitution in the interim that a very much larger volume was the result.

After another decade, in the course of which many of the earlier interpretations were reviewed and modified, the Senate again moved for a revision of the Annotations. Senate Joint Resolution 69 introduced by the then Chairman of the Judiciary Committee, Senator Alexander Wiley, again called upon the Library of Congress to undertake the work. The confidence thus implied was most thoroughly appreciated. To meet his responsibilities, the Librarian called upon Dr. Edward S. Corwin to head the project. The collaborating staff, supplied by the Legislative Reference Service, included Dr. Norman J. Small as assistant editor, Miss Mary Louise Ramsey, and Robert J. Harris.

This time, more than ever, the compilers faced a difficult task in balancing the prime requirement of a thorough and adequate annotation against the very practical desire to keep the results within convenient compass.

Work on the project was delayed until funds were made available. In consequence the annotations have been extended to a somewhat later date, covering decisions of the Supreme Court through June 30, 1952.

ERNEST S. GRIFFITH,
Director, Legislative Reference Service.

EDITOR'S FOREWORD

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The purpose of this volume is twofold; first, to set forth so far as feasible the currently operative meaning of all provisions of the Constitution of the United States; second, to trace in the case of the most important provisions the course of decision and practice whereby their meaning was arrived at by the Constitution's official interpreters. Naturally, the most important source of material relied upon comprises relevant decisions of the Supreme Court; but acts of Congress and Executive orders and regulations have also been frequently put under requisition. Likewise, proceedings of the Convention which framed the Constitution have been drawn upon at times, as have the views of dissenting Justices and occasionally of writers, when it was thought that they would aid understanding.

That the Constitution has possessed capacity for growth in notable measure is evidenced by the simple fact of its survival and daily functioning in an environment so vastly different from that in which it was ordained and established by the American people. Nor has this capacity resided to any great extent in the provision which the Constitution makes for its own amendment. Far more has it resided in the power of judicial review exercised by the Supreme Court, the product of which, and hence the record of the Court's achievement in adapting the Constitution to changing conditions, is our national Constitutional Law.

Thus is explained the attention that has been given in some of these pages to the development of certain of the broader doctrines which have influenced the Court in its determination of constitutional issues, especially its conception of the nature of the Federal System and of the proper role of governmental power in relation to private rights. On both these great subjects the Court's thinking has altered at times—on a few occasions to such an extent as to transcend Tennyson's idea of the law "broadening from precedent to precedent" and to amount to something strongly resembling a juridical revolution, bloodless but not wordless.

The first volume of Reports which issued from the Court following Marshall's death—11 Peters (1837)—signalizes such a revolution, that is to say, a recasting of fundamental concepts; so does 100 years later, Volume 301 of the United States Reports, in which the National Labor Relations Act [The "Wagner Act"] and the Social Security Act of 1935 were sustained. Another considerable revolution was marked by the Court's acceptance in 1925 of the theory that the word "liberty" in the Fourteenth Amendment rendered the restrictions of the First Amendment upon Congress available also against the States.

In the preparation of this volume constant use has been made of "The Constitution of the United States of America Annotated," which was brought out under the editorship of Mr. W.C. Gilbert in 1938. Its copious listing of cases has been especially valuable. Its admirable Tables of Contents and Index have furnished a model for those of the present volume. If this model has been approximated the contents of this volume ought to be readily accessible despite its size. The

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coverage of the volume ends with the cases decided June, 1952.

A personal word or two must be added. The Editor was invited to undertake this project by Dr. Ernest S. Griffith, Director of the Legislative Reference Service of the Library of Congress, and his constant interest in the progress of our labors has been a tremendous source of encouragement. To his able collaborators the Editor will not attempt to express his appreciation —they share with him the credit for such merits as the work possesses and responsibility for its short comings. And I am sure that they join me in thanking Miss Evelyn K. Mayhugh for her skill and devotion in aiding us at every step in our common task.

EDWARD S. CORWIN.

INTRODUCTION

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It is my purpose in this Introduction to the *Constitution of the United States, Annotated* to sketch rapidly certain outstanding phases of the Supreme Court's interpretation of the Constitution for the illustration they may afford of the interests, ideas, and contingencies which have from time to time influenced the Court in this still supremely important area of its powers and of the comparable factors which give direction to its work in the same field at the present time.

As employed in this country, Constitutional Law signifies a body of rules resulting from the interpretation by a high court of a written constitutional instrument in the course of disposing of cases in which the validity, in relation to the constitutional instrument, of some act of governmental power, State or national, has been challenged. This function, conveniently labelled "Judicial Review," involves the power and duty on the part of the Court of pronouncing void any such act which does not square with its own reading of the constitutional instrument. Theoretically, therefore, it is a purely juristic product, and as such does not alter the meaning. To those who hold this theory, the Court does not elaborate the instrument, as legislative power might; it elucidates it, bringing forth into the light of day, as it were, what was in the instrument from the first.

In the case of judicial review as exercised by the Supreme Court of the United States in relation to the national Constitution, its preservative character has been at times a theme of enthusiastic encomium, as in the following passage from a speech by the late Chief Justice White, made shortly before he ascended the Bench:

> ... The glory and ornament of our system which distinguishes it from every other government on the face of the earth is that there is a great and mighty power hovering over the Constitution of the land to which has been delegated the awful responsibility of restraining all the coordinate departments of government within the walls of the governmental fabric which our fathers built for our protection and immunity.[1]

At other times the subject has been dealt with less enthusiastically, even skeptically.

One obstacle that the theory encountered very early was the refusal of certain Presidents to regard the Constitution as primarily a source of rules for judicial decision. It was rather, they urged, a broadly discretionary mandate to themselves and to Congress. And pursuing the logic of this position, they contended that while the Court was undoubtedly entitled to read the Constitution independently for the purpose of deciding cases, this very purpose automatically limited the authoritativeness of its readings; and that within their respective jurisdictions President and Congress enjoyed the same correlative independence as the Court did within its jurisdiction. This was, in effect, the position earlier of Jefferson and Jackson, later of Lincoln, and in recent times that of the two Roosevelts.

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Another obstacle has been of the Court's own making. Whether because of the difficulty of amending the Constitution or for cautionary reasons, the Court took the position, as early as 1851, that it would reverse previous decisions on constitutional issues when convinced they were erroneous.[2] An outstanding instance of this nature was the decision in the Legal Tender cases, in 1871, reversing the decision which had been rendered in Hepburn *v.* Griswold fifteen months earlier;[3] and no less shattering to the prestige of *stare decisis* in the constitutional field was the Income Tax decision of 1895,[4] in which the Court accepted Mr. Joseph Choate's invitation to "correct a century of error". The "constitutional revolution" of 1937 produced numerous reversals of earlier precedents on the ground of "error", some of them, the late Mr. James M. Beck complained, without "the obsequious respect of a funeral oration".[5] In 1944 Justice Reed cited fourteen cases decided between March 27, 1937 and June 14, 1943 in which one or more prior constitutional decisions were overturned.[6] On the same occasion Justice Roberts expressed the opinion that adjudications of the Court were rapidly gravitating "into the same class as a restricted railroad ticket, good for this day and train only".[7]

Years ago the eminent historian of the Supreme Court, Mr. Charles Warren, had written:

> However the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court.[8]

In short, it is "not necessarily so" that the Constitution is preserved in the Court's reading of it.

A third difficulty in the way of the theory that Judicial Review is preservative of the Constitution is confronted when we turn to consider the statistical aspects of the matter. The suggestion that the Constitution of the United States contained in embryo from the beginning the entirety of our national Constitutional Law confronts the will to believe with an altogether impossible test. Compared with the Constitutional Document, with its 7,000 words more or less, the bulk of material requiring to be noticed in the preparation of an annotation of this kind is simply immense. First and last, the Court has probably decided well over 4,000 cases involving questions of constitutional interpretation. In many instances, to be sure, the constitutional issue was disposed of quite briefly. In some instances, on the other hand, the published report of the case runs to more than 200 pages.[9] In the total, it is probable that at least 50,000 pages of the United States Supreme Court Reports are devoted to Constitutional Law topics.

Nor is this the whole story, or indeed the most important part of it. Even more striking is the fact that the vast proportion of cases forming the corpus of national Constitutional Law has stemmed, or has purported to stem, from four or five brief phrases of the Constitutional Document, the power "to regulate ... commerce among the States," impairment of "the obligation of contracts" (now practically dried up as a formal source of constitutional law), deprivation of "liberty or property without due process of law" (which phrase occurs both as a limitation on the National Government and, since 1868, on the States), and out of four or five doctrines which the Constitution is assumed to embody. The latter are, in truth, the essence of the matter, for it is [Pg xi] through these doctrines, and under the cover which they afford, that outside interests, ideas, preconceptions, have found their way into Constitutional Law, have indeed become for better, for worse, its leavening element.

That is to say, the effectiveness of Constitutional Law as a system of restraints on governmental action in the United States, which is its primary *raison d'etre*, depends for the most part on the effectiveness of these doctrines as they are applied by the Court to that purpose. The doctrines to which I refer are (1) the doctrine or concept of Federalism; (2) the doctrine of the Separation of Powers; (3) the concept of a Government of Laws and not of Men, as opposed especially to indefinite conceptions of presidential power; (4) and the substantive doctrine of Due Process of Law and attendant conceptions of Liberty. What I proposed to do is to take up each of these doctrines or concepts in turn, tell something of their earlier history, and then project against this background a summary account of what has happened to them in recent years in consequence of the impact of war, of economic crisis, and of the political and ideological reaction to the latter during the Administrations of Franklin D. Roosevelt.

I

Federalism

Federalism in the United States embraces the following elements: (1) as in all federations, the union of several autonomous political entities, or "States," for common purposes; (2) the division of legislative powers between a "National Government," on the one hand, and constituent "States," on the other, which division is governed by the rule that the former is "a government of enumerated powers" while the latter are governments of "residual powers"; (3) the direct operation, for the most part, of each of these centers of government, within its assigned sphere, upon all persons and property within its territorial limits; (4) the provision of each center with the complete apparatus of law enforcement, both executive and judicial; (5) the supremacy of the "National Government" within its assigned sphere over any conflicting assertion of "state" power; (6) dual citizenship.

The third and fourth of the above-listed salient features of the American Federal System are the ones which at the outset marked it off most sharply from all preceding systems, in which the member states generally agreed to obey the mandates of a common government for certain stipulated purposes, but retained to themselves the right of ordaining and enforcing the laws of the union. This, indeed, was the system provided in the Articles of Confederation. The Convention of 1787 was well aware, of course, that if the inanities and futilities of the Confederation were to be avoided in the new system, the latter must incorporate "a coercive principle"; and as Ellsworth of Connecticut expressed it, the only question was whether it should be "a coercion of law, or a coercion of arms," that "coercion which acts only upon delinquent individuals" or that which is applicable to "sovereign bodies, states, in their political capacity."[10] In Judicial Review the former principle was established, albeit without entirely discarding the latter, as the War [Pg xii] between the States was to demonstrate.

The sheer fact of Federalism enters the purview of Constitutional Law, that is, becomes a judicial concept, in consequence of the conflicts which have at times arisen between the idea of State Autonomy ("State Sovereignty") and the principle of National Supremacy. Exaltation of the latter principle, as it is recognized in the Supremacy Clause (Article VI, paragraph 2) of the Constitution, was the very keystone of Chief Justice Marshall's constitutional jurisprudence. It was Marshall's position that the supremacy clause was intended to be applied literally, so that if an unforced reading of the terms in which legislative power was granted to Congress confirmed its right to enact a particular statute, the circumstance that the statute projected national power into a hitherto accustomed field of state power with unavoidable curtailment of the latter was a matter of indifference. State power, as Madison in his early nationalistic days phrased it, was "no

criterion of national power," and hence no independent limitation thereof.

Quite different was the outlook of the Court over which Marshall's successor, Taney, presided. That Court took as its point of departure the Tenth Amendment, which reads, "The powers not delegated to the United States by this Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In construing this provision the Court under Taney sometimes talked as if it regarded all the reserved powers of the States as limiting national power; at other times it talked as if it regarded certain subjects as reserved exclusively to the States, slavery being, of course, the outstanding instance.[11]

But whether following the one line of reasoning or the other, the Taney Court subtly transformed its function, and so that of Judicial Review, in relation to the Federal System. Marshall viewed the Court as primarily an organ of the National Government and of its supremacy. The Court under Taney regarded itself as standing outside of and above both the National Government and the States, and as vested with a quasi-arbitral function between two centers of diverse, but essentially equal, because "sovereign", powers. Thus in Ableman *v.* Booth, which was decided on the eve of the War between the States, we find Taney himself using this arresting language:

> This judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the States from any encroachment upon their reserved rights by the general government.... So long ... as this Constitution shall endure, this tribunal must exist with it, deciding in the peaceful forms of judicial proceeding, the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force.[12]

It is, therefore, the Taney Court, rather than the Marshall Court, which elaborated the concept of Dual Federalism. Marshall's federalism is more aptly termed national federalism; and turning to modern issues, we may say without exaggeration that the broad general constitutional issue between the Court and the Franklin D. Roosevelt program in such cases as Schechter Corp. *v.* United States and Carter *v.* Carter Coal Co.[13] was, whether Marshall's or Taney's brand of federalism should prevail. More precisely, the issue in these cases was whether Congress' power to regulate commerce must stop short of regulating the employer-employee relationship in industrial production, that having been hitherto regulated by the States. In Justice Sutherland's words in the Carter case:

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> Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices; and it is insisted that interstate commerce is greatly affected thereby.... The conclusive answer is that the evils are all local evils over which the Federal Government has no legislative control. The relation of employer and employee is a local relation. At common law, it is one of the domestic relations. The wages are paid for the doing of local work. Working conditions are obviously local conditions. The employees are not engaged in or about commerce, but exclusively in producing a commodity. And the controversies and evils, which it is the object of the act to regulate and minimize, are local controversies and evils affecting local work undertaken to accomplish that local result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character.[14]

We all know how this issue was finally resolved. In the Fair Labor Standards Act of 1938 Congress not only prohibits interstate commerce in goods produced by substandard labor, but it directly forbids, with penalties, the employment of labor in industrial production for interstate commerce on other than certain prescribed terms. And in United States *v.* Darby[15] this Act was sustained by the Court, in all its sweeping provisions, on the basis of an opinion by Chief Justice Stone which in turn is based on Chief Justice Marshall's famous opinions in McCulloch *v.* Maryland and Gibbons *v.* Ogden rendered more than a century and a quarter ago. In short, as a principle capable of delimiting the national legislative power, the concept of Dual Federalism as regards the present Court seems today to be at an end, with consequent aggrandizement of national power.

There is, however, another side to the story. For in one respect even the great Marshall has been in effect overruled in support of enlarged views of national authority. Without essaying a vain task of "tithing mint, anise and cummin," it is fairly accurate to say that throughout the 100 years which lie between Marshall's death and the cases of the 1930's, the conception of the federal relationship which on the whole prevailed with the Court was a competitive conception, one which envisaged the National Government and the States as jealous rivals. To be sure, we occasionally get some striking statements of contrary tendency, as in Justice Bradley's opinion in 1880 for a divided Court in the Siebold Case,[16] where is reflected recognition of certain results of the War between the States; or later in a frequently quoted dictum by Justice McKenna, in Hoke *v.* United States, in which the Mann White Slave Act was sustained in 1913:

> Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction ... but it must be kept in mind that we are one

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> people; and the powers reserved to the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral.[17]

The competitive concept is, nevertheless, the one much more generally evident in the outstanding results for American Constitutional Law throughout three-quarters of its history. Of direct pertinence in this connection is the doctrine of tax exemption which converted federalism into a principle of private immunity from taxation, so that, for example, neither government could tax as income the official salaries paid by the other government.[18] This doctrine traces immediately to Marshall's famous judgment in McCulloch *v.* Maryland,[19] and bespeaks a conception of the federal relationship which regards the National Government and the States as bent on mutual frustration. Today the principle of tax exemption, except so far as Congress may choose to apply it to federal instrumentalities by virtue of its protective powers under the necessary and proper clause, is at an end.

By the cooperative conception of the federal relationship the States and the National Government are regarded as mutually complementary parts of a single governmental mechanism all of whose powers are intended to realize the current purposes of government according to their applicability to the problem in hand. This is the conception on which the recent social and economic legislation professes to rest. It is the conception which the Court invokes throughout its decisions in sustaining the Social Security Act of 1935 and supplementary state legislation. It is the conception which underlies congressional legislation of recent years making certain crimes against the States, like theft, racketeering, kidnapping, crimes also against the National Government whenever the offender extends his activities beyond state boundary lines. The usually cited constitutional justification for such legislation is that which was advanced forty years ago in the above quoted Hoke Case.[20]

It has been argued that the cooperative conception of the federal relationship, especially as it is realized in the policy of federal subventions to the States, tends to break down state initiative and to devitalize state policies. Actually, its effect has often been just the contrary, and for the reason pointed out by Justice Cardozo in Helvering *v.* Davis,[21] decided in 1937, namely, that the States, competing as they do with one another to attract investors, have not been able to embark separately upon expensive programs of relief and social insurance. Another great objection to Cooperative Federalism is more difficult to meet. This is, that Cooperative Federalism invites further aggrandizement of national power. Unquestionably it does, for when two cooperate, it is the stronger member of the combination who usually calls the tunes. Resting as it does primarily on the superior fiscal resources of the National Government, Cooperative Federalism has been, at least to date, a short expression for a constantly increasing concentration of power at Washington in the stimulation and supervision of local policies.[22]

The last element of the concept of Federalism to demand attention is the doctrine that the National Government is a government of enumerated powers only, and consequently under the necessity at all times of justifying its measures juridically by pointing to some particular clause or clauses of the Constitution which, when read separately or in combination, may be thought to grant power adequate to such measures. In spite of such recent decisions as that in United States *v.* Darby, this time-honored doctrine still guides the authoritative interpreters of the Constitution in determining the validity of acts which are passed by Congress in presumed exercise of its powers of domestic legislation—the course of reasoning pursued by the Chief Justice in the Darby Case itself is proof that such is the fact. In the field of foreign relations, on the contrary, the doctrine of enumerated powers has always had a difficult row to hoe, and today may be unqualifiedly asserted to be defunct.

As early as the old case of Penhallow *v.* Doane, which was decided by the Supreme Court in 1795, certain counsel thought it pertinent to urge the following conception of the War Power:

> A formal compact is not essential to the institution of a government. Every nation that governs itself, under what form soever, without any dependence on a foreign power, is a sovereign state. In every society there must be a sovereignty. 1 Dall. Rep. 46, 57. Vatt. B. 1. ch. 1. sec. 4. The powers of war form an inherent characteristic of national sovereignty; and, it is not denied, that Congress possessed those powers....[23]

To be sure, only two of the Justices felt it necessary to comment on this argument, which one of them endorsed, while the other rejected it.

Yet seventy-five years later Justice Bradley incorporated closely kindred doctrine into his concurring opinion in the Legal Tender Cases;[24] and in the years following the Court itself frequently brought the same general outlook to questions affecting the National Government's powers in the field of foreign relations. Thus in the Chinese Exclusion Case, decided in 1889, Justice Field, in asserting the unlimited power of the National Government, and hence of Congress, to exclude aliens from American shores, remarked:

> While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with the powers which belong to independent nations, the exercise of which can be invoked

> for the maintenance of its absolute independence and security throughout its entire territory.[25]

And four years later the power of the National Government to deport alien residents at the option of Congress was based by Justice Gray on the same general reasoning.[26]

Finally, in 1936, Justice Sutherland, speaking for the Court in United States *v.* Curtiss-Wright Corporation, with World War I a still recent memory, took over bodily counsel's argument of 140 years earlier, and elevated it to the head of the column of authoritative constitutional doctrine. He said:

> A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union.... It results that the investment of the Federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the Federal government as a necessary concomitant of nationality.[27]

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In short, the power of the National Government in the field of international relationship is not simply a complexus of particular enumerated powers; it is an inherent power, one which is attributable to the National Government on the ground solely of its belonging to the American People as a sovereign political entity at International Law. In that field the principle of Federalism no longer holds, if it ever did.[28]

II

The Separation of Powers

The second great structural principle of American Constitutional Law is supplied by the doctrine of the Separation of Powers. The notion of three distinct functions of government approximating what we today term the legislative, the executive, and the judicial, is set forth in Aristotle's Politics,[29] but it was the celebrated Montesquieu who, by joining the idea to the notion of a "mixed constitution" of "checks and balances", in Book XI of his Spirit of the Laws, brought Aristotle's discovery to the service of the rising libertarianism of the eighteenth century. It was Montesquieu's fundamental contention that "men entrusted with power tend to abuse it". Hence it was desirable to divide the powers of government, first, in order to keep to a minimum the powers lodged in any single organ of government; secondly, in order to be able to oppose organ to organ.

In the United States libertarian application of the principle was originally not too much embarrassed by inherited institutions. In its most dogmatic form the American conception of the Separation of Powers may be summed up in the following propositions: (1) There are three intrinsically distinct functions of government, the legislative, the executive, and the judicial; (2) these distinct functions ought to be exercised respectively by three separately manned departments of government; which, (3) should be constitutionally equal and mutually independent; and finally, (4) a corollary doctrine stated by Locke—the legislature may not delegate its powers.[30]

Prior even to Franklin D. Roosevelt this entire colligation of ideas had been impaired by three developments in national governmental practice: first, the growth of Presidential initiative in legislation; secondly, the delegation by Congress of legislative powers to the President; thirdly, the delegation in many instances of like powers to so-called independent agencies or commissions, in which are merged in greater or less measure the three powers of government of Montesquieu's postulate. Under Roosevelt the first two of these developments were brought to a pitch not formerly approximated, except temporarily during World War I.

The truth is that the practice of delegated legislation is inevitably and inextricably involved with the whole idea of governmental intervention in the economic field, where the conditions to be regulated are of infinite complexity and are constantly undergoing change. Granted such intervention, it is simply out of the question to demand that Congress should attempt to impose upon the shifting and complex scene the relatively permanent molds of statutory provision, unqualified by a large degree of administrative discretion. One of the major reasons urged for governmental intervention is furnished by the need for gearing the different parts of the industrial process with one another for a planned result. In wartime this need is freely conceded by all; but its need in economic crisis is conceivably even greater, the results sought being more complex. So in the interest both of unity of design and of flexibility of detail, presidential power today takes increasing toll from both ends of the legislative process—both from the formulation of legislation and from its administration. In other words, as a barrier capable of preventing such fusion of presidential and congressional power, the principle of the Separation of Powers does not appear to have retained much of its original effectiveness; for on only one occasion[31] prior to the disallowance, in Youngstown *v.* Sawyer,[32] President Truman's seizure in April 1952 of the steel industry has the Court been constrained to condemn, as in conflict with that principle, a

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congressional delegation of legislative power. Indeed, its application in the field of foreign relations has been virtually terminated by Justice Sutherland's opinion in the Curtiss-Wright Case.[33]

The Youngstown Opinion appears to rest on the proposition that since Congress could have ordered the seizure, e.g., under the necessary and proper clause, the President, in making it on his own, usurped "legislative power" and thereby violated the principle of the Separation of Powers. In referring to this proposition, the Chief Justice (in his dissenting opinion, for himself and Justices Reed and Minton) quoted as follows from a 1915 brief of the then Solicitor General of the United States on this same question:

> The function of making laws is peculiar to Congress, and the Executive can not exercise that function to any degree. But this is not to say that all of the *subjects* concerning which laws might be made are perforce removed from the possibility of Executive influence. The Executive may act upon things and upon men in many relations which have not, though they might have, been actually regulated by Congress.
>
> In other words, just as there are fields which are peculiar to Congress and fields which are peculiar to the Executive, so there are fields which are common to both, in the sense that the Executive may move within them until they shall have been occupied by legislative action. These are not the fields of legislative prerogative, but fields within which the lawmaking power may enter and dominate whenever it chooses. This situation results from the fact that the President is the active agent, not of Congress, but of the Nation.[34]

Or, in more general terms, the fact that one of the three departments may apply its distinctive techniques to a certain subject matter sheds little or no light on the question whether one of the other departments may deal with the same subject matter according to its distinctive techniques. Indeed, were it otherwise, the action of the Court in disallowing President Truman's seizure order would have been of very questionable validity, inasmuch as the President himself conceded that Congress could do so.

The conception of the Separation of Powers doctrine advanced in Youngstown appears to have been an ad hoc discovery for the purpose of disposing of that particular case. [Pg xviii]

To sum up the argument to this point: War, the Roosevelt-Truman programs, and the doctrines of Constitutional Law on which they rest, and the conception of governmental function which they incorporate, have all tremendously strengthened forces which even earlier were making, slowly, to be sure, but with "the inevitability of gradualness," for the concentration of governmental power in the United States, first in the hands of the National Government; and, secondly, in the hands of the national Executive. In the Constitutional Law which the validation of the Roosevelt program has brought into full being, the two main structural elements of government in the United States in the past, the principle of Dual Federalism and the doctrine of the Separation of Powers, have undergone a radical and enfeebling transformation which war has, naturally, carried still further.

III

A Government of Laws and Not of Men

The earliest repositories of executive power in this country were the provincial governors. Being the point of tangency and hence of irritation between imperial policy and colonial particularism, these officers incurred a widespread unpopularity that was easily generalized into distrust of their office. So when Jefferson asserted in his *Summary View*, in 1774, that the King "is no more than the chief officer of the people, appointed by the laws and circumscribed with definite powers, to assist in working the great machine of government,"[35] he voiced a theory of executive power which, impudently as it flouted historical fact, had the support of the draftsmen of the first American constitutions. In most of these instruments the governors were elected annually by the legislative assemblies, were stripped of every prerogative of their predecessors in relation to legislation, and were forced to exercise the powers left them subject to the advice of a council chosen also by the assembly, and from its own members if it so desired. Finally, out of abundant caution the constitution of Virginia decreed that executive powers were to be exercised "according to the laws of" the Commonwealth, and that no power or prerogative was ever to be claimed "by virtue of any law, statute or custom of England." "Executive power", in short, was left entirely to legislative definition and was cut off from all resources of the common law and the precedents of English monarchy.

Fortunately or unfortunately, the earlier tradition of executive power was not to be exorcised so readily. Historically, this tradition traces to the fact that the royal prerogative was residual power, that the monarch was first on the ground, that the other powers of government were off-shoots from monarchical power. Moreover, when our forefathers turned to Roman history, as they intermittently did, it was borne in upon them that dictatorship had at one time been a normal feature of republican institutions.

And what history consecrated, doctrine illumined. In Chapter XI of John Locke's Second Treatise [Pg xix]

on Civil Government, from the pages of which much of the opening paragraphs of the Declaration of Independence comes, we read: "Absolute arbitrary power, or governing without settled standing laws, can neither of them consist with the ends of society and government".[36] In Chapter XIV of the same work we are told, nevertheless, that "prerogative" is the power "to act according to discretion without the prescription of the law and sometimes against it"; and that this power belongs to the executive, it being "impossible to foresee and so by laws to provide for all accidents and necessities that may concern the public, or make such laws as will do no harm if they are executed with inflexible rigor." Nor, continues Locke, is this "undoubted prerogative" ever questioned, "for the people are very seldom or never scrupulous or nice in the point" whilst the prerogative "is in any tolerable degree employed for the use it was meant, that is, for the good of the people."[37] A parallel ambivalence pervades both practice and adjudication under the Constitution from the beginning.

The opening clause of Article II of the Constitution reads: "The executive power shall be vested in a President of the United States of America". The primary purpose of this clause, which made its appearance late in the Convention and was never separately passed upon by it, was to settle the question whether the executive branch should be plural or single; a secondary purpose was to give the President a title. There is no hint in the published records that the clause was supposed to add cubits to the succeeding clauses which recite the President's powers and duties in detail.

For all that, the "executive power" clause was invoked as a grant of power in the first Congress to assemble under the Constitution, and outside Congress in 1793. On the former occasion Madison and others advanced the contention that the clause empowered the President to remove without the Senate's consent all executive officers, even those appointed with that consent, and in effect this view prevailed, to be ratified by the Supreme Court 137 years later in the famous Oregon Postmaster Case.[38]

In 1793 the protagonist of "executive power" was Alexander Hamilton, who appealed to the clause in defense of Washington's proclamation of neutrality, issued on the outbreak of war between France and Great Britain. Prompted by Jefferson to take up his pen and "cut him to pieces in face of public," Madison shifted position, and charged Hamilton with endeavoring to smuggle the prerogative of the King of Great Britain into the Constitution via the "executive power" clause.[39] Three years earlier Jefferson had himself written in an official opinion as Secretary of State: [The Executive branch of the government], "possessing the rights of self-government from nature, cannot be controlled in the exercise of them but by a law, passed in the forms of the Constitution".[40]

This time judicial endorsement of the broad conception of the executive power came early. In laying the foundation in Marbury *v.* Madison for the Court's claim of power to pass on the constitutionality of acts of Congress, Marshall said: "The government of the United States has been emphatically termed a government of laws and not of men".[41] Two pages along he added these words: [Pg xx]

> By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.
>
> In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.[42]

From these words arises the doctrine of Political Questions, an escape clause from the trammels of judicial review for high executive officers in the performance of their discretionary duties. The doctrine was continued, even expanded, by Marshall's successor. In Luther *v.* Borden,[43] decided in 1849, the Court was invited to review the determination by the President that the existing government of Rhode Island was "republican" in form. It declined the invitation, holding that the decision of Congress and of the President as Congress's delegate was final in the matter, and bound the courts. Otherwise said Chief Justice Taney, the guarantee clause of the Constitution (Article IV, section 4) "is a guarantee of anarchy and not of order". But a year later the same Chief Justice, speaking again for the unanimous Court, did not hesitate to rule that the President's powers as commander-in-chief were purely military in character, those of any top general or top admiral.[44] Hamilton had said the same thing in Federalist No. 69.

Alongside the opinions of the Court of this period, however, stand certain opinions of Attorneys General that yield a less balanced bill of fare. For it is the case that, from the first down to the present year of grace, these family lawyers of the Administration in power have tended to favor expansive conceptions of presidential prerogative. As early as 1831 we find an Attorney-General arguing before the Supreme Court that, in performance of the trust enjoined upon him by the "faithful execution" clause, the President "not only may, but ... is bound to avail himself of every appropriate means not forbidden by law."[45] Especially noteworthy is a series of opinions handed down by Attorney-General Cushing in the course of the years 1853 to 1855. In one of these the

Attorney-General laid down the doctrine that a marshal of the United States, when opposed in the execution of his duty by unlawful combinations too powerful to be dealt with by the ordinary processes of a federal court, had authority to summon the entire able-bodied force of his precinct as a *posse comitatus*, comprising not only bystanders and citizens generally but any and all armed forces,[46] which is precisely the theory upon which Lincoln based his call for volunteers in April, 1861.

Also manifest is the debt of Lincoln's message of July 4, 1861, to these opinions. Here in so many words the President lays claim to "the war power", partly on the ground of his duty to "take care that the laws be faithfully executed", partly in reliance on his powers as Commander-in-Chief, incidentally furnishing thereby a formula which has frequently reappeared in opinions of [Pg xxi] Attorneys-General in recent years. Nor did Lincoln ever relinquish the belief that on the one ground or the other he possessed extraordinary resources of power which Congress lacked and the exercise of which it could not control—an idea in the conscientious pursuit of which his successor came to the verge of utter disaster.

When first confronted with Lincoln's theory in the Prize Cases,[47] in the midst of war, a closely divided Court treated it with abundant indulgence; but in *Ex parte* Milligan[48] another closely divided Court swung violently to the other direction, adopting the comfortable position that the normal powers of the government were perfectly adequate to any emergency that could possibly arise, and citing the war just "happily terminated" in proof. But once again the principle of equilibrium asserted itself. Five months after Milligan, the same Bench held unanimously in Mississippi *v.* Johnson[49] that the President is not accountable to any court save that of impeachment either for the nonperformance of his constitutional duties or for the exceeding of his constitutional powers.

This was in the 1866-1867 term of Court. Sixteen years later, in 1882, Justice Samuel Miller gave classic expression to the principle of "a government of laws and not of men" in these words: "No man is so high that he is above the law.... All officers are creatures of the law and are bound to obey it."[50] Eight years later this same great Judge queried whether the President's duty to take care that the laws be faithfully executed is "limited to the enforcement of acts of Congress or of treaties according to their express terms," whether it did not also embrace "the rights, duties, and obligations growing out of the Constitution itself ... and all the protection implied by the nature of the government under the Constitution."[51] Then in 1895, in the Debs Case,[52] the Court sustained unanimously the right of the National Executive to go into the federal courts and secure an injunction against striking railway employees who were interfering with interstate commerce, although it was conceded that there was no statutory basis for such action. The opinion of the Court extends the logic of the holding to any widespread public interest.

The great accession to presidential power in recent decades has been accompanied by the breakdown dealt with earlier of the two great structural principles of the American Constitutional System, the doctrine of Dual Federalism and the doctrine of the Separation of Powers. The first exponent of "the New Presidency", as some termed it, was Theodore Roosevelt, who tells us in his *Autobiography* that the principle which governed him in his exercise of the presidential office was that he had not only a right but a duty "to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws."[53] In his book, *Our Chief Magistrate and his Powers*, Ex-President Taft warmly protested against the notion that the President has any constitutional warrant to attempt the role of a "Universal Providence."[54] A decade earlier his destined successor, Woodrow Wilson, had avowed the opinion that "the President is at liberty, both in law and conscience, to be as big a man as he can".[55]

But it is the second Roosevelt who beyond all twentieth-century Presidents succeeded in affixing [Pg xxii] the stamp both of personality and of crisis upon the Presidency as it exists at this moment. In the solution of the problems of an economic crisis, "a crisis greater than war", he claimed for the National Government in general, and for the President in particular, powers which they had hitherto exercised only on the justification of war. Then when the greatest crisis in the history of our international relations arose, he imparted to the President's diplomatic powers new extension, now without consulting Congress, now with Congress's approval; and when at last we entered World War II, he endowed the precedents of both the War between the States and of World War I with unprecedented scope.[56]

It is timely therefore to inquire whether American Constitutional Law today affords the Court a dependable weapon with which to combat effectively contemporary enlarged conceptions of presidential power. Pertinent in this connection is the aforementioned recent action of the Court in Youngstown *v.* Sawyer disallowing presidential seizure of the steel industry. The net result of that Case is distinctly favorable to presidential pretensions, in two respects: First, because of the failure of the Court to traverse the President's finding of facts allegedly justifying his action, an omission in accord with the doctrine of Political Questions; secondly, the evident endorsement by a majority of the Court of the doctrine that, as stated in Justice Clark's opinion: "The Constitution does grant to the President extensive authority in times of grave and imperative national emergency".[57] That the Court would have sustained, as against the President's action, a clear-cut manifestation of congressional action to the contrary is, on the other hand, unquestionable. In short, if we are today looking for a check upon the development of executive emergency government, our best reliance is upon the powers of Congress, which can always supply needed

gaps in its legislation. The Court can only say "no", and there is no guarantee that in the public interest it would wish to assume this responsibility.

IV

The Concept of Substantive Due Process of Law

A cursory examination of the pages of this volume reveals that fully a quarter of them deal with cases in which the Court has been asked to protect private interests of one kind or another against legislation, most generally state legislation, which is alleged to invade "liberty" or "property" contrary to "due process of law". How is this vast proliferation of cases, and attendant expansion of the Court's constitutional jurisdiction, to be explained? The explanation, in brief, is to be found in the replacement of the original meaning of the due process clause with a meaning of vastly greater scope. Judicial review is always a function, so to speak, of the viable Constitutional Law of a particular period.

From what has been previously said in this Introduction, it clearly appears that the Court's interpretation of the Constitution has involved throughout considerable lawmaking, but in no other instance has its lawmaking been more evident than in its interpretation of the due process clauses, and in no other instance have the state judiciaries contributed so much to the final result. The modern concept of substantive due process is not the achievement of any one American high court; it is the joint achievement of several—in the end, of all.[58]

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The thing which renders the due process clause an important datum of American Constitutional Law is the role it has played first and last in articulating certain theories of private immunity with the Constitutional Document. The first such theory was Locke's conception of the property right as anterior to government and hence as setting a moral limit to its powers.[59] But while Locke's influence is seen to pervade the Declarations and Bills of Rights which often accompanied the revolutionary State Constitutions, yet their promise was early defeated by the overwhelming power of the first state legislatures, especially *vis-a-vis* the property right. One highly impressive exhibit of early state legislative power is afforded by the ferocious catalogue of legislation directed against the Tories, embracing acts of confiscation, bills of pains and penalties, even acts of attainder. A second exhibit of the same kind is furnished by the flood of paper money laws and other measures of like intent which the widespread debtor class forced through the great majority of the state assemblies in the years following the general collapse of values in 1780.

The most important reaction of the creditor interest to this course of legislation was its energetic part in bringing about the Philadelphia Convention. Closer, however, to our purpose is the leadership taken by the new federal judiciary in asserting the availability against predatory state legislation of extra-constitutional principles sounding in Natural Law. In 1795 Justice Paterson of the new Supreme Court admonished a Pennsylvania jury that to construe a certain state statute in a way to bring it into conflict with plaintiff's property rights would render it void. "Men," said he, "have a sense of property.... The preservation of property ... is a primary object of the social compact".[60] Three years later, Justice Chase proclaimed from the Supreme Bench itself, with characteristic emphasis, his rejection of the idea that state legislative power was absolute unless its authority was "expressly restrained" by the constitution of the State.[61] He too was thinking primarily of the rights of property.

To dicta such as these constantly accrued others of like tenor from various high state courts, the total of which had come to comprise prior to the War between the States an impressive body of coherent doctrine protective of vested rights but claiming little direct support from written constitutional texts. This indeed was its weakness. For the question early obtruded itself, whether judicial review could pretend to operate on a merely moral basis. Both the notion that the Constitution was an emanation from the sovereignty of the people, and the idea that judicial review was but a special aspect of normal judicial function, forbade the suggestion. It necessarily followed that unless judicial protection of the property right against legislative power was to be waived, it must be rested on some clause of the constitutional document; and, inasmuch as the due process clause and the equivalent law of the land clause of certain of the early state constitutions were the only constitutional provisions which specifically mentioned property, they were the ones selected for the purpose.

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The absorptive powers of the law of the land clause, the precursor in the original state constitutions of the historically synonymous due process clause, was foreshadowed as early as 1819 in a dictum by Justice William Johnson of the United States Supreme Court:

> As to the words from Magna Charta ... after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.[62]

Thirty-eight years later, in 1857, the prophecy of these words was realized in the famous Dred Scott Case,[63] in which Section 8 of the Missouri Compromise, whereby slavery was excluded from the territories, was held void under the Fifth Amendment, not on the ground that the procedure for enforcing it was not due process of law, but because the Court regarded it as

unjust to forbid people to take their slaves, or other property, into the territories, the common property of all the States.

Meanwhile, in the previous year (1856) the recently established Court of Appeals of New York had, in the landmark case of Wynehamer *v.* People,[64] set aside a state-wide prohibition law as comprising, with regard to liquors in existence at the time of its going into effect, an act of destruction of property not within the power of government to perform "even by the forms of due process of law". The term due process of law, in short, simply drops out of the clause, which comes to read "no person shall be deprived of property", period. At the same time Judge Comstock's opinion in the case sharply repudiates all arguments against the statute sounding in Natural Law concepts, fundamental principles of liberty, common reason and natural rights, and so forth. Such theories were subversive of the necessary powers of government. Furthermore, there was "no process of reasoning by which it can be demonstrated that the 'Act for the Prevention of Intemperance, Pauperism and Crime' is void, upon principles and theories outside of the constitution, which will not also, and by an easier induction, bring it in direct conflict with the constitution itself."[65] Thus it was foreshadowed that the law of the land and the due process of law clauses, which were originally inserted in our constitutions to consecrate a specific mode of trial in criminal cases, to wit, the grand jury, petit jury process of the common law, would be transformed into a general restraint upon substantive legislation capable of affecting property rights detrimentally.

It is against this background that the adoption of the Fourteenth Amendment in 1868 must be projected. Applied, as in the Dred Scott and Wynehamer cases, the clause which forbids any State "to deprive any person of life, liberty or property without due process of law" proffered the Court, in implication, a vast new jurisdiction, but this the Court at first manifested the greatest reluctance to enter upon. It did not wish, it protested, to become "a perpetual censor upon all State legislation"; nor did it wish, by enlarged conceptions of the rights protected by the Amendment, to encourage Congress to take over, under the fifth section of the Amendment, the regulation of all civil rights. "The federal equilibrium" had already been sufficiently disturbed by the results of the War between the States and Reconstruction.[66]

But this self-denying ordinance, which never had the support of more than a very narrow majority of the Court, soon began to crumble at the edges. It was a period of immense industrial expansion, and the men who directed this wanted a free hand. In 1878 the American Bar Association was formed from the elite of the American Bar. Organized as it was in the wake of the "barbarous" decision—as one member termed it—in Munn *v.* Illinois,[67] in which the Supreme Court had held that states were entitled by virtue of their police power to prescribe the charges of "businesses affected with a public interest," the Association, through its more eminent members, became the mouthpiece of a new constitutional philosophy which was compounded in about equal parts from the teachings of the British Manchester School of Political Economy and Herbert Spencer's highly sentimentalized version of the doctrine of evolution, just then becoming the intellectual vogue; plus a "booster"—in the chemical sense—from Sir Henry Maine's *Ancient Law*, first published in 1861. I refer to Maine's famous dictum that "the movement of the progressive societies has hitherto been a movement from *Status to Contract*". If hitherto, why not henceforth?[68] [Pg xxv]

In short, the American people were presented, overnight as it were, with a new doctrine of Natural Law. Encouraged by certain dicta of dissenting Justices of the Supreme Court, a growing procession of high State courts—those of New York, Pennsylvania, Illinois, and Massachusetts, leading the way—now began infiltrating the due process clauses and especially the word "liberty" thereof, of their several State constitutions with the new revelation. The product of these activities was the doctrine of freedom of contract, the substantial purport of which was that any legislation which restricted the liberty of male persons twenty-one years of age, whether they were employers or employees, in the making of business contracts, far from being presumptively constitutional, must be justified by well known facts of which the court was entitled to take judicial notice; otherwise it fell under the ban of the due process clause.[69]

At last, in 1898, the Supreme Court at Washington, following some tentative gestures in that direction, accepted the new dispensation outright. In Smyth *v.* Ames decided that year, partially overturning Munn *v.* Illinois, it gave notice of its intention to review in detail the "reasonableness" of railway rates set by State authority and in Holden *v.* Hardy it ratified, at the same term, the doctrine of freedom of contract.[70] The result of the two holdings for the Court's constitutional jurisdiction is roughly indicated by the fact that whereas it had decided 134 cases under the Amendment during the thirty preceding years, in the ensuing thirteen years it decided 430 such cases.[71]

For more than a generation now the Court became the ultimate guardian, in the name of the Constitutional Document, of the *laissez-faire* conception of the proper relation of Government to Private Enterprise, a rather inconstant guardian, however, for its fluctuating membership tipped the scales now in favor of Business, now in favor of Government. And today the latter tendency appears to have prevailed. In its decisions early in 1937 sustaining outstanding Roosevelt Administration measures, the Court not only subordinated the freedom of employers to contract to the freedom of employees to organize, but intimated broadly that liberty in some of its phases is much more dependent upon legislative implementation that upon judicial protection.[72]

In contrast to this withdrawal, however, has been the Court's projection of another segment of "liberty" into new territory. In Gitlow *v.* New York,[73] decided in 1925, even in sustaining an antisyndicalist statute, the Court adopted *arguendo* the proposition which it had previously rejected, that "liberty" in Amendment XIV renders available against the States the restraints which Amendment I imposes on Congress. For fifteen years little happened. Then in 1940, the Court supplemented its ruling in the Gitlow Case with the so-called "Clear and Present Danger" rule, an expedient which was designed to divest state enactments restrictive of freedom of speech, of press, of religion, and so forth, of their presumed validity, just as, earlier, statutes restrictive of freedom of contract had been similarly disabled. By certain of the Justices, this result was held to be required by "the preferred position" of some of these freedoms in the hierarchy of constitutional values; an idea to which certain other Justices demurred. The result to date has been a series of holdings the net product of which for our Constitutional Law is at this juncture difficult to estimate; and the recent decision in Dennis *v.* United States under Amendment I augments the difficulty.[74] [Pg xxvi]

A passing glance will suffice for the operation of the due process clause of Amendment V in the domain of foreign relations and the War Power. The reader has only to consult in these pages such holdings as those in Belmont *v.* United States, Yakus *v.* United States, Korematsu *v.* United States, to be persuaded that even the Constitution is no exception to the maxim, *inter arma silent leges*.[75]

In short, the substantive doctrine of due process of law does not today support judicial intervention in the field of social and economic legislation in anything like the same measure that it did, first in the States, then through the Supreme Court on the basis of Amendment XIV, in the half century between 1885 and 1935. But this fact does not signify that the clause is not, in both its procedural sense and its broader sense, especially when supplemented by the equal protection clause of Amendment XIV, a still valuable and viable source of judicial protection against parochial despotisms and petty tyrannies. Yet even in this respect, as certain recent decisions have shown, the Court can often act more effectively on the basis of congressional legislation implementing the Amendment than when operating directly on the basis of the Amendment itself.[76]

Résumé

Considered for the two fundamental subjects of the powers of government and the liberties of individuals, interpretation of the Constitution by the Supreme Court falls into four tolerably distinguishable periods. The first, which reaches to the death of Marshall, is the period of the dominance of the Constitutional Document. The tradition concerning the original establishment of the Constitution was still fresh, and in the person and office of the great Chief Justice the intentions of the framers enjoyed a renewed vitality. This is not to say that Marshall did not have views of his own to advance; nor is it to say that the historicity of a particular theory concerning the Constitution is necessarily a matter of critical concern save to students of history. It is only to say that the theories which Marshall urged in support of his preferences were, in fact, frequently verifiable as theories of the framers of the Constitution. [Pg xxvii]

The second period is a lengthy one, stretching from the accession of Chief Justice Taney in 1835 to, say, 1895. It is the period *par excellence* of Constitutional Theory. More and more the constitutional text fades into the background, and the testimony of the *Federalist*, Marshall's sole book of precedents, ceases to be cited. Among the theories which in one way or other received the Court's approval during this period were the notion of Dual Federalism, the doctrine of the Police Power, the taboo on delegation of legislative power, the derived doctrine of Due Process of Law, the conception of liberty as Freedom of Contract, and still others. The sources of some of these doctrines and the nature of the interests benefited by them have been indicated earlier in these pages. Their net result was to put the national law-making power into a strait-jacket so far as the regulation of business was concerned.

The third period was that of Judicial Review pure and simple. The Court, as heir to the accumulated doctrines of its predecessors, found itself for the time being in possession of such a variety of instruments of constitutional exegesis that it was often able to achieve almost any result in the field of constitutional interpretation which it considered desirable, and that without flagrant departure from judicial good form. Indeed, it is altogether apparent that the Court was in actual possession and in active exercise of what Justice Holmes once termed "the sovereign prerogative of choice." It was early in this period that Governor Hughes, soon to ascend the Bench, said, without perhaps intending all that his words literally conveyed, "We are under a Constitution, but the Constitution is what the judges say it is." A decade later it was suggested by an eminent law teacher that attorneys arguing "due process cases" before the Court ought to address the Justices not as "Your Honors" but as "Your Lordships"; and Senator Borah, in the Senate debate on Mr. Hughes' nomination for Chief Justice, in 1930, declared that the Supreme Court had become "economic dictator in the United States". Some of the Justices concurred in these observations, especially Justices Holmes and Brandeis. Asserted the latter, the Court has made itself "a super-legislature" and Justice Holmes could discover "hardly any limit but the sky" to the power claimed by the Court to disallow State acts "which may happen to strike a majority [of its members] as for any reason undesirable".[77]

The fourth period is still with us. It was ushered in by World War I, but its results were

consolidated and extended during the 1930's, and have been subsequently still further enlarged and confirmed by World War II and the "cold war". Many of these results have been treated above. Others can be searched out in the pages of this volume. What they sum up to is this: that what was once vaunted as a Constitution of Rights, both State rights and private rights, has been replaced to a great extent by a Constitution of Powers. The Federal System has shifted base in the direction of a consolidated national power; within the National Government itself there has been an increased flow of power in the direction of the President; even judicial enforcement of the Bill of Rights has faltered at times, in the presence of national emergency.

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In this situation judicial review as exercised by the Supreme Court does not cease being an important technique of government under the Constitution, but its field of operation has contracted. The purpose which it serves more and more exclusively is the purpose for which it was originally created to serve, the maintenance of the principle of National Supremacy. But in fact, this is the purpose which it has always served predominantly, even in the era when it was cutting its widest swathe in the field of national legislative policy, the period from 1895 to 1935. Even then there was a multiplicity of state legislatures and only one Congress, so that the legislative grist that found its way to the Court's mill was overwhelmingly of local provenience. And since then several things have happened to confirm this predominance: first, the annexation to Amendment XIV of much of the content of the Federal Bill of Rights; secondly, the extension of national legislative power, especially along the route of the commerce clause, into the field of industrial regulation, with the result of touching state legislative power on many more fronts than ever before; thirdly, the integration of the Nation's industrial life, which has brought to the National Government a major responsibility for the maintenance of a functioning social order.

Forty years ago the late Justice Holmes said:

> "I do not think the United States would come to an end if we [the Court] lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States".[78]

By and large, this still sizes up the situation.

EDWARD S. CORWIN.

January, 1953.

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Notes

[1] *Cong. Record*, vol. 23, p. 6516.

[2] *The Genessee Chief*, 12 How. 443 (1851), overturning *The Thomas Jefferson*, 10 Wheat. 428 (1825).

[3] Knox *v.* Lee, 12 Wall. 457 (1871); Hepburn *v.* Griswold, 8 Wall. 603 (1870).

[4] Pollock *v.* Farmers' Loan & Trust Co., 157 U.S. 429; Same, 158 U.S. 601.

[5] *Cong. Record*, vol. 78, p. 5358.

[6] Smith *v.* Allwright, 321 U.S. 649, 665.

[7] Ibid. 669.

[8] *The Supreme Court in United States History*, III, 470-471 (1922).

[9] The Dartmouth College Case (1819) occupies 197 pages of 4 Wheaton; Gibbons *v.* Ogden (1824), 240 pages of 9 Wheaton; The Charles River Bridge case (1837), 230 pages of 11 Peters; the Passenger Cases (1849), 290 pages of 7 Howard; the Dred Scott Case (1857), 240 pages of 19 Howard; *Ex parte* Milligan (1866), 140 pages of 4 Wallace; the first Pollock Case (1895), 325 pages of 157 U.S.; Myers *v.* United States (1926), 243 pages of 272 U.S.

[10] Max Farrand, *The Records of the Federal Convention of 1787*, III, 240-241 (1911).

[11] See Taney's words in 5 How. 504, 573-574 (1847), and 7 How. 283, 465-70 (1849).

[12] 21 How. 506, 520-521 (1859).

[13] 295 U.S. 495 (1935); 298 U.S. 238 (1936).

[14] 298 U.S. 238, 308-309.

[15] 312 U.S. 100 (1941).

[16] 100 U.S. 371.

[17] 227 U.S. 308, 322.

[18] Dobbins *v.* Commsrs., 16 Pet. 435 (1842); Collector *v.* Day, 11 Wall. 113. (1870).

[19] 4 Wheat. 316, 431 (1819).

[20] For references and further details, see E.S. Corwin, *Court over Constitution*, 129-176 (1938).

[21] [Transcriber's Note: Footnote 21 is missing from original text.]

[22] In this connection, *see* Oklahoma *v.* Civil Service Comm'n., 330 U.S. 127, 142-145 (1947).

[23] 3 Dall. 54, 74.

[24] 12 Wall. 457, 555 (1871).

[25] 130 U.S. 581, 604.

[26] Fong Yue Ting, 149 U.S. 698 (1893).

[27] 299 U.S. 304, 316-318.

[28] *See also* University of Illinois *v.* United States, 289 U.S. 48, 59 (1933). In Lichter *v.* United States, 334 U.S. 742, 782 (1948), Justice Burton, speaking for the Court, says: "The war powers of Congress and the President are only those which are derived from the Constitution", but he adds: "the primary implication of a war power is that it shall be an effective power to wage war successfully", which looks very like an attempt to duck the doctrine of an inherent war power while appropriating its results.

[29] Welldon (tr.), Book VI, chap. XIV (1888). Jowett and some others propose a different arrangement.

[30] John Locke. The Second Treatise on Civil Government, § 141. For the historical background of this principle, see P.W. Duff and H.E. Whiteside, "*Delegata Potestas Non P[=o]test Delegari*", *Selected Essays on Constitutional Law*, IV, 291-316 (1938).

[31] Panama Refining Co. *v.* Ryan, 293 U.S. 388 (1935); Schechter Corp. *v.* United States, 295 U.S. 495 (1935). [Pg xxx]

[32] 343 U.S. 579 (1952).

[33] 299 U.S. 304, 327-329.

[34] 343 U.S. 579, 690.

[35] Andrew C. McLaughlin, *A Constitutional History of the United States*, 81 (1935).

[36] Locke, op. cit., § 137.

[37] Ibid., § 159-161.

[38] Meyers *v.* United States, 272 U.S. 52 (1926).

[39] For the famous debate between "Pacificus" (Hamilton) and "Helvidius" (Madison), see E.S. Corwin, *The President's Control of Foreign Relations*, chap. I (1917).

[40] Writings of Thomas Jefferson, V, 209 (P.L. Ford, ed.; 1895).

[41] 1 Cr. 137, 163 (1803).

[42] Ibid., 165-166.

[43] 7 How. 1.

[44] Fleming *v.* Page, 9 How. 602 (1850).

[45] United States *v.* Tingy, 5 Pet. 115, 122.

[46] 6 *Op. Atty. Gen.* 466 (1854).

[47] 2 Black 635 (1863).

[48] 4 Wall. 2 (1866).

[49] 4 Wall. 475 (1866).

[50] United States *v.* Lee, 106 U.S. 196, 220.

[51] In Re Neagle, 135 U.S. 1, 64.

[52] 158 U.S. 564.

[53] *Autobiography*, 388-389 (1913).

[54] *Op. cit.*, 144 (1916).

[55] *Constitutional Government in the United States*, 70 (1908).

[56] *See* E.S. Corwin. *Total War and the Constitution*, 35-77 (1947).

[57] 343 U.S. 579, 662.

[58] *See* E.S. Corwin. *Liberty Against Government*, Chaps. III, IV (1948).

[59] "... the supreme power cannot take from any man any part of his property without his consent". *Second Treatise*, § 138.

[60] Van Home's Lessee *v.* Dorrance, 2 Dall. 304, 310 (1795).

[61] Calder *v.* Bull, 3 Dall. 386, 388-389 (1798). *See also* Loan Association *v.* Topeka, 20 Wall. 655 (1875).

[62] Bank of Columbia *v.* Okely, 4 Wheat. 235, 244.

[63] Scott *v.* Sandford, 19 How. 393, 450 (1857).

[64] 13 N.Y. 378 (1856).

[65] Ibid. 390-392. The absolute veto of the Court of Appeals in the Wynehamer case was replaced by the Supreme Court, under the due process clause of the Fourteenth Amendment, by a more flexible doctrine, which left it open to the State to show reasonable justification for that type of legislation in terms of acknowledged ends of the Police Power, namely, the promotion of the public health, safety and morals. *See* Mugler *v.* Kansas, 123 U.S. 623 (1887); and for a transitional case, Bartemeyer *v.* Iowa, 18 Wall. 129 (1874).

[66] The Slaughter House Cases, 16 Wall. 36, 78-82 (1873). The opinion of the Court was focused principally on the privileges and immunities clause, and the narrow construction given it at this time is still the law of the Court. But Justices Bradley and Swayne pointed out the potentialities of the due process of law clause, and the former's interpretation of it may be fairly regarded as the first step toward the translation by the Court of "liberty" as Freedom on Contract.

[67] 94 U.S. 113 (1876).

[68] Benjamin R. Twiss, *Lawyers and the Constitution, How Laissez Faire Came to the Supreme Court*, 141-173 (1942).

[69] *See* especially Lochner *v.* New York, 198 U.S. 45 (1905); and Adkins *v.* Children's Hospital, 261 U.S. 525 (1923).

[70] 169 U.S. 466; ibid. 366.

[71] *See* Charles W. Collins, *The Fourteenth Amendment and the States*, 188-206 (1912). [Pg xxxi]

[72] Labor Board *v.* Jones & Laughlin, 301 U.S. 1, 33-34; West Coast Hotel Co. *v.* Parrish, 300 U.S. 379, 391-392.

[73] 268 U.S. 652, 666; *cf.* Prudential Ins. Co. *v.* Cheek, 259 U.S. 530, 543 (1922).

[74] The subject can be pursued in detail in connection with Amendment I, pp. 769-810.

[75] These cases are treated in the text, *see* Table of Cases.

[76] *See* Williams *v.* United States, 341 U.S. 97 (1951).

[77] *See:* Oliver Wendell Holmes, *Collected Legal Papers*, 239, 295-296 (1920); Merlo J. Pusey, *Charles Evans Hughes*, I, 203-206 (1951). Burns Baking Co. *v.* Bryan, 204 U.S. 504, 534 (1924); Baldwin *v.* Missouri, 281 U.S. 586, 595 (1930); *American Political Science Review*, xii, 241 (1918); *New York Times*, February 12, 1930. It was also during the same period that Judge Andrew A. Bruce of North Dakota wrote: "We are governed by our judges and not by our legislatures.... It is our judges who formulate our public policies and our basic law". *The American Judge*, 6, 8 (1924). Substantially contemporaneously a well read French critic described our system as *Le Gouvernment des Juges* (1921); while toward the end of the period Louis B. Boudin published his well known *Government by Judiciary* (2 vols., 1932).

[78] *Collected Legal Papers*, 295-296.

CONTENTS [Pg xxxiii]

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THE CONSTITUTION OF THE UNITED STATES OF AMERICA

[Pg 9]

HISTORICAL NOTE ON FORMATION OF THE CONSTITUTION

In June 1774, the Virginia and Massachusetts assemblies independently proposed an intercolonial meeting of delegates from the several colonies to restore union and harmony between Great Britain and her American Colonies. Pursuant to these calls there met in Philadelphia in September of that year the first Continental Congress, composed of delegates from 12 colonies. On October 14, 1774, the assembly adopted what has come to be known as the Declaration and Resolves of the First Continental Congress. In that instrument, addressed to His Majesty and to the people of Great Britain, there was embodied a statement of rights and principles, many of which were later to be incorporated in the Declaration of Independence and the Federal Constitution.[a]

This Congress adjourned in October with a recommendation that another Congress be held in Philadelphia the following May. Before its successor met, the battle of Lexington had been fought. In Massachusetts the colonists had organized their own government in defiance of the royal governor and the Crown. Hence, by general necessity and by common consent, the second Continental Congress assumed control of the "Twelve United Colonies", soon to become the "Thirteen United Colonies" by the cooperation of Georgia. It became a *de facto* government: it called upon the other colonies to assist in the defense of Massachusetts; it issued bills of credit; it took steps to organize a military force, and appointed George Washington commander in chief of the Army.

While the declaration of the causes and necessities of taking up arms of July 6, 1775,[b] expressed a "wish" to see the union between Great Britain and the colonies "restored", sentiment for independence was growing. Finally, on May 15, 1776, Virginia instructed her delegates to the Continental Congress to have that body "declare the united colonies free and independent States."[c] Accordingly on June 7 a resolution was introduced in Congress declaring the union [Pg 10] with Great Britain dissolved, proposing the formation of foreign alliances, and suggesting the drafting of a plan of confederation to be submitted to the respective colonies.[d] Some delegates argued for confederation first and declaration afterwards. This counsel did not prevail. Independence was declared on July 4, 1776; the preparation of a plan of confederation was postponed. It was not until November 17, 1777, that the Congress was able to agree on a form of government which stood some chance of being approved by the separate States. The Articles of Confederation were then submitted to the several States, and on July 9, 1778, were finally approved by a sufficient number to become operative.

Weaknesses inherent in the Articles of Confederation became apparent before the Revolution out of which that instrument was born had been concluded. Even before the thirteenth State (Maryland) conditionally joined the "firm league of friendship" on March 1, 1781, the need for a revenue amendment was widely conceded. Congress under the Articles lacked authority to levy taxes. She could only request the States to contribute their fair share to the common treasury, but the requested amounts were not forthcoming. To remedy this defect, Congress applied to the

States for power to lay duties and secure the public debts. Twelve States agreed to such an amendment, but Rhode Island refused her consent, thereby defeating the proposal.

Thus was emphasized a second weakness in the Articles of Confederation, namely, the *liberum veto* which each State possessed whenever amendments to that instrument were proposed. Not only did all amendments have to be ratified by each of the 13 States, but all important legislation needed the approval of 9 States. With several delegations often absent, one or two States were able to defeat legislative proposals of major importance.

Other imperfections in the Articles of Confederation also proved embarrassing. Congress could, for example, negotiate treaties with foreign powers, but all treaties had to be ratified by the several States. Even when a treaty was approved, Congress lacked authority to secure obedience to its stipulations. Congress could not act directly upon the States or upon individuals. Under such circumstances foreign nations doubted the value of a treaty with the new republic.

Furthermore, Congress had no authority to regulate foreign or interstate commerce. Legislation in this field, subject to unimportant exceptions, was left to the individual States. Disputes between States with common interests in the navigation of certain rivers and bays were inevitable. Discriminatory regulations were followed by reprisals.

Virginia, recognizing the need for an agreement with Maryland respecting the navigation and jurisdiction of the Potomac River, appointed in June 1784, four commissioners to "frame such liberal and equitable regulations concerning the said river as may be mutually advantageous to the two States." Maryland in January 1785 responded to the Virginia resolution by appointing a like number of commissioners[e] "for the purpose of settling the navigation and jurisdiction over [Pg 11] that part of the bay of Chesapeake which lies within the limits of Virginia, and over the rivers Potomac and Pocomoke" with full power on behalf of Maryland "to adjudge and settle the jurisdiction to be exercised by the said States, respectively, over the waters and navigations of the same."[f]

At the invitation of Washington the commissioners met at Mount Vernon, in March 1785, and drafted a compact which, in many of its details relative to the navigation and jurisdiction of the Potomac, is still in force.[g] What is more important, the commissioners submitted to their respective States a report in favor of a convention of all the States "to take into consideration the trade and commerce" of the Confederation. Virginia, in January 1786, advocated such a convention, authorizing its commissioners to meet with those of other States, at a time and place to be agreed on, "to take into consideration the trade of the United States; to examine the relative situations and trade of the said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several States, such an act relative to this great object, as when unanimously ratified by them, will enable the United States in Congress, effectually to provide for the same."[h]

This proposal for a general trade convention seemingly met with general approval; nine States appointed commissioners. Under the leadership of the Virginia delegation, which included Randolph and Madison, Annapolis was accepted as the place and the first Monday in September 1786 as the time for the convention. The attendance at Annapolis proved disappointing. Only five States—Virginia, Pennsylvania, Delaware, New Jersey, and New York—were represented; delegates from Massachusetts, New Hampshire, North Carolina, and Rhode Island failed to attend. Because of the small representation, the Annapolis convention did not deem "it advisable to proceed on the business of their mission." After an exchange of views, the Annapolis delegates unanimously submitted to their respective States a report in which they suggested that a convention of representatives from all the States meet at Philadelphia on the second Monday in May 1787 to examine the defects in the existing system of government and formulate "a plan for supplying such defects as may be discovered."[i]

The Virginia legislature acted promptly upon this recommendation and appointed a delegation to go to Philadelphia. Within a few weeks New Jersey, Pennsylvania, North Carolina, Delaware, and Georgia also made appointments. New York and several other States hesitated on the ground that, without the consent of the Continental Congress, the work of the convention would be extra-legal; that Congress alone could propose amendments to the Articles of Confederation. Washington was quite unwilling to attend an irregular convention. Congressional approval of the [Pg 12] proposed convention became, therefore, highly important. After some hesitancy Congress approved the suggestion for a convention at Philadelphia "for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the States render the Federal Constitution adequate to the exigencies of Government and the preservation of the Union."

Thereupon, the remaining States, Rhode Island alone excepted, appointed in due course delegates to the Convention, and Washington accepted membership on the Virginia delegation.

Although scheduled to convene on May 14, 1787, it was not until May 25 that enough delegates were present to proceed with the organization of the Convention. Washington was elected as presiding officer. It was agreed that the sessions were to be strictly secret.

On May 29 Randolph, on behalf of the Virginia delegation, submitted to the convention 15

propositions as a plan of government. Despite the fact that the delegates were limited by their instructions to a revision of the Articles, Virginia had really recommended a new instrument of government. For example, provision was made in the Virginia plan for the separation of the three branches of government; under the Articles executive, legislative, and judicial powers were vested in the Congress. Furthermore the legislature was to consist of two houses rather than one.

On May 30 the Convention went into a committee of the whole to consider the 15 propositions of the Virginia plan *seriatim*. These discussions continued until June 13, when the Virginia resolutions in amended form were reported out of committee. They provided for proportional representation in both houses. The small States were dissatisfied. Therefore, on June 14 when the Convention was ready to consider the report on the Virginia plan, Paterson of New Jersey requested an adjournment to allow certain delegations more time to prepare a substitute plan. The request was granted, and on the next day Paterson submitted nine resolutions embodying important changes in the Articles of Confederation, but strictly amendatory in nature. Vigorous debate followed. On June 19 the States rejected the New Jersey plan and voted to proceed with a discussion of the Virginia plan. The small States became more and more discontented; there were threats of withdrawal. On July 2 the convention was deadlocked over giving each State an equal vote in the upper house—five States in the affirmative, five in the negative, one divided.[j]

The problem was referred to a committee of 11, there being 1 delegate from each State, to effect a compromise. On July 5 the committee submitted its report, which became the basis for the "great compromise" of the convention. It was recommended that in the upper house each State should have an equal vote, that in the lower branch each State should have one representative for every 40,000 inhabitants, counting three-fifths of the slaves, that money bills should originate in the lower house (not subject to amendment by the upper chamber). When on July 12 the motion of Gouverneur Morris of Pennsylvania that direct taxation should also be in proportion to representation, was adopted, a crisis had been successfully surmounted. A compromise spirit began to prevail. The small States were now willing to support a strong national government. [Pg 13]

Debates on the Virginia resolutions continued. The 15 original resolutions had been expanded into 23. Since these resolutions were largely declarations of principles, on July 24 a committee of five[k] was selected to draft a detailed constitution embodying the fundamental principles which had thus far been approved. The Convention adjourned from July 26 to August 6 to await the report of its committee of detail. This committee, in preparing its draft of a Constitution, turned for assistance to the State constitutions, to the Articles of Confederation, to the various plans which had been submitted to the Convention and other available material. On the whole the report of the committee conformed to the resolutions adopted by the Convention, though on many clauses the members of the committee left the imprint of their individual and collective judgments. In a few instances the committee avowedly exercised considerable discretion.

From August 6 to September 10 the report of the committee of detail was discussed, section by section, clause by clause. Details were attended to, further compromises were effected. Toward the close of these discussions, on September 8, another committee of five[l] was appointed "to revise the style of and arrange the articles which had been agreed to by the house."

On Wednesday, September 12 the report of the committee of style was ordered printed for the convenience of the delegates. The Convention for 3 days compared this report with the proceedings of the Convention. The Constitution was ordered engrossed on Saturday, September 15.

The Convention met on Monday, September 17, for its final session. Several of the delegates were disappointed in the result. A few deemed the new Constitution a mere makeshift, a series of unfortunate compromises. The advocates of the Constitution, realizing the impending difficulty of obtaining the consent of the States to the new instrument of Government, were anxious to obtain the unanimous support of the delegations from each State. It was feared that many of the delegates would refuse to give their individual assent to the Constitution. Therefore, in order that the action of the convention would appear to be unanimous, Gouverneur Morris devised the formula "Done in Convention, by the unanimous consent of the States present the 17th of September * * * In witness whereof we have hereunto subscribed our names." Thirty-nine of the forty-two delegates present thereupon "subscribed" to the document.[m]

The Convention had been called to revise the Articles of Confederation. Instead, it reported to the Continental Congress a new Constitution. Furthermore, while the Articles specified that no amendments should be effective until approved by the legislatures of all the States, the Philadelphia Convention suggested that the new Constitution should supplant the Articles of Confederation when ratified by conventions in nine States. For these reasons, it was feared that the new Constitution might arouse opposition in Congress. [Pg 14]

Three members of the Convention—Madison, Gorham, and King—were also Members of Congress. They proceeded at once to New York, where Congress was in session, to placate the expected opposition. Aware of their vanishing authority, Congress on September 28, after some debate, decided to submit the Constitution to the States for action. It made no recommendation for or against adoption.

Two parties soon developed, one in opposition and one in support of the Constitution, and the Constitution was debated, criticized, and expounded clause by clause. Hamilton, Madison, and Jay wrote a series of commentaries, now known as the Federalist Papers, in support of the new

instrument of government.[n] The closeness and bitterness of the struggle over ratification and the conferring of additional powers on the central government can scarcely be exaggerated. In some States ratification was effected only after a bitter struggle in the State convention itself.

Delaware, on December 7, 1787, became the first State to ratify the new Constitution, the vote being unanimous. Pennsylvania ratified on December 12, 1787, by a vote of 46 to 23, a vote scarcely indicative of the struggle which had taken place in that State. New Jersey ratified on December 19, 1787, and Georgia on January 2, 1788, the vote in both States being unanimous. Connecticut ratified on January 9, 1788; yeas 128, nays 40. On February 6, 1788, Massachusetts, by a narrow margin of 19 votes in a convention with a membership of 355, endorsed the new Constitution, but recommended that a bill of rights be added to protect the States from Federal encroachment on individual liberties. Maryland ratified on April 28, 1788; yeas 63, nays 11. South Carolina ratified on May 23, 1788; yeas 149, nays 73. On June 21, 1788, by a vote of 57 to 46, New Hampshire became the ninth State to ratify, but like Massachusetts she suggested a bill of rights.

By the terms of the Constitution nine States were sufficient for its establishment among the States so ratifying. The advocates of the new Constitution realized, however, that the new government could not succeed without the addition of New York and Virginia, neither of which had ratified. Madison, Marshall, and Randolph led the struggle for ratification in Virginia. On June 25, 1788, by a narrow margin of 10 votes in a convention of 168 members, that State ratified over the objection of such delegates as George Mason and Patrick Henry. In New York an attempt to attach conditions to ratification almost succeeded. But on July 26, 1788, New York ratified, with a recommendation that a bill of rights be appended. The vote was close—yeas 30, nays 27.

Eleven States having thus ratified the Constitution,[o] the Continental Congress—which still functioned at irregular intervals—passed a resolution on September 13, 1788, to put the new Constitution into operation. The first Wednesday of January 1789 was fixed as the day for choosing presidential electors, the first Wednesday of February for the meeting of electors, and the first Wednesday of March (i.e. March 4, 1789) for the opening session of the new Congress. Owing to various delays, Congress was late in assembling, and it was not until April 30, 1789, that George Washington was inaugurated as the first President of the United States. [Pg 15]

Notes

[a] The colonists, for example, claimed the right "to life, liberty, and property", "the rights, liberties, and immunities of free and natural-born subjects within the realm of England"; the right to participate in legislative councils; "the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of [the common law of England]"; "the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws"; "a right peaceably to assemble, consider of their grievances, and petition the king." They further declared that the keeping of a standing army in the colonies in time of peace without the consent of the colony in which the army was kept was "against law"; that it was "indispensably necessary to good government, and rendered essential by the English constitution, that the constituent branches of the legislature be independent of each other"; that certain acts of Parliament in contravention of the foregoing principles were "infringements and violations of the rights of the colonists." (Text in Documents Illustrative of the Formation of the Union, pp. 1-5.)

[b] Text in Documents Illustrative of the Formation of the Union, pp. 10-17.

[c] Ibid., pp. 19-20.

[d] Ibid., p. 21.

[e] George Mason, Edmund Randolph, James Madison, and Alexander Henderson were appointed commissioners for Virginia; Thomas Johnson, Thomas Stone, Samuel Chase, and Daniel of St. Thomas Jenifer for Maryland.

[f] The text of the resolutions is to be found in 153 U.S. 162-163.

[g] See Wharton *v.* Wise, 153 U.S. 155 [1894].

[h] Text in Documents Illustrative of the Formation of the Union, p. 38.

[i] Ibid., pp. 39-43.

[j] The New Hampshire delegation did not arrive until July 23, 1787.

[k] Rutledge of South Carolina, Randolph of Virginia, Gorham of Massachusetts, Ellsworth of Connecticut, and Wilson of Pennsylvania.

[l] William Samuel Johnson of Connecticut, Alexander Hamilton of New York, Gouverneur Morris of Pennsylvania, James Madison of Virginia, and Rufus King, of Massachusetts.

[m] At least 65 persons had received appointments as delegates to the Convention; 55 actually attended at different times during the course of the proceedings; 39 signed the document. It has been estimated that generally fewer than 30 delegates attended the daily sessions. For further details respecting the Convention of 1787 *see*: Elliott, Debates; Farrand, Records of the Constitutional Conventions; Farrand, The Framing of the Constitution; Meigs, Growth of the Constitution.

[n] These commentaries on the Constitution, written during the struggle for ratification, have been frequently cited by the Supreme Court as an authoritative contemporary interpretation of the meaning of its provisions.

[o] North Carolina added her ratification on November 21, 1789; yeas 184, nays 77. Rhode Island did not ratify until May 29, 1790; yeas 34, nays 32.

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

[Pg 17]

LITERAL PRINT

CONSTITUTION OF THE UNITED STATES

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. [Pg 19]

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. 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.

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.

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. The actual Enumeration shall be made within three Years after the first Meeting of [Pg 20] 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.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section. 3. 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.

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.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and [Pg 21] 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.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

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.

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.

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. 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.

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.

Section. 5. 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 [Pg 22] Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

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.

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.

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. 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.

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. 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.

Every Bill which shall have passed the House of Representatives and the Senate, shall, [Pg 23] 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.

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 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;

To borrow Money on the credit of the United States; [Pg 24]

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

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;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

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;

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 [Pg 25]

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. 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.

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.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

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.

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. [Pg 26]

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. 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.

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 it's 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 $^{\text{the}}$ Congress.

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. 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

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. [Pg 27]

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.

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. [Pg 28]

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.

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.

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.

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. 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 [Pg 29] executive Departments, upon any Subject relating 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.

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.

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.

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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. 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;—between Citizens 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.

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.

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.

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Section. 3. 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.

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. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

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.

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. 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.

[Pg 32]

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 it's equal Suffrage in the Senate.

Article. VI.

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.

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. [Pg 33]

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.

done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth In witness whereof We have hereunto subscribed our Names,

Gᴼ Washington—Presidᵗ
and deputy from Virginia

New Hampshire	John Langdon Nicholas Gilman
Massachusetts	Nathaniel Gorham Rufus King
Connecticut	Wᴹ: Samᴸ· Johnson Roger Sherman
New York : : :	Alexander Hamilton
New Jersey	Wil: Livingston David Brearley. Wᴹ·· Paterson. Jona: Dayton
Pennsylvania	B Franklin Thomas Mifflin Robᵀ Morris Geo. Clymer Thoˢ· FitzSimons Jared Ingersoll James Wilson Gouv Morris
Delaware	Geo: Read Gunning Bedford jun John Dickinson Richard Bassett Jaco: Broom
Maryland	James Mᶜ Henry Dan of Sᵀ Thoˢ· Jenifer Danᴸ Carroll
Virginia	John Blair— James Madison Jr.

The Word, "the," being interlined between the seventh and eighth Lines of the first Page, The Word "Thirty" being partly written on an Erazure in the fifteenth Line of the first Page, The Words "is tried" being interlined between the thirty second and thirty third Lines of the first Page and the Word "the" being interlined between the forty third and forty fourth Lines of the second Page.

Attest William Jackson
Secretary

[Pg 34]

North Carolina	{ Wm.. Blount { Richd. Dobbs Spaight. { Hu Williamson
South Carolina	{ J. Rutledge { Charles Cotesworth Pinckney { Charles Pinckney { Pierce Butler
Georgia	{ William Few { Abr Baldwin

[Pg 35]

In Convention Monday, September 17th 1787.
Present
The States of

New Hampshire, Massachusetts, Connecticut, MR. Hamilton from New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.

Resolved,

That the preceeding Constitution be laid before the United States in Congress assembled, and that it is the Opinion of this Convention, that it should afterwards 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; and that each Convention assenting to, and ratifying the Same, should give Notice thereof to the United States in Congress assembled. Resolved, That it is the Opinion of this Convention, that as soon as the Conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a Day on which Electors should be appointed by the States which shall have ratified the same, and a Day on which the Electors should assemble to vote for the President, and the Time and Place for commencing Proceedings under this Constitution. That after such Publication the Electors should be appointed, and the Senators and Representatives elected: That the Electors should meet on the Day fixed for the Election of the President, and should transmit their Votes certified, signed, sealed and directed, as the Constitution requires, to the Secretary of the United States in Congress assembled, that the Senators and Representatives should convene at the Time and Place assigned; that the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President; and, that after he shall be chosen, the Congress, together with the President, should, without Delay, proceed to execute this Constitution.

[Pg 36]

By the Unanimous Order of the Convention

Go. Washington Presidt

W. Jackson Secretary.

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA

[Pg 37]

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.[a]

[Pg 39]

Amendment [I.][b]

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.

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Amendment [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.

Amendment [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.

Amendment [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.

Amendment [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.

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Amendment [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.

Amendment [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.

Amendment [VIII.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment [IX.]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment [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.

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Amendment [XI.][c]

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.

Amendment [XII.][d]

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 [Pg 43] 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.

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Amendment XIII.[e]

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.

[Pg 45]

Amendment XIV.[f]

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.

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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.

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Amendment XV.[g]

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.

AMENDMENT XVI.[h]

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.

[Pg 48]

AMENDMENT [XVII.][i]

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 [Pg 49] chosen before it becomes valid as part of the Constitution.

AMENDMENT [XVIII.][j]

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.

SEC. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

[Pg 50]

SEC. 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.

AMENDMENT [XIX.][k]

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.

AMENDMENT [XX.][l]

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, [Pg 51] 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.

SEC. 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.

SEC. 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 [Pg 52] 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.

SEC. 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.

SEC. 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

SEC. 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.

[Pg 53]

AMENDMENT [XXI.][m]

SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

SEC. 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.

SEC. 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.

[Pg 54]

AMENDMENT [XXII.][n]

SECTION 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

SECTION 2. 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 to the States by the Congress.

Notes

[a] In Dillon *v.* Gloss, 256 U.S. 368 [1921], the Supreme Court stated that it would take Judicial notice of the date on which a State ratified a proposed constitutional amendment. Accordingly the Court consulted the State Journals to determine the dates on which each house of the legislature of certain States ratified the 18th Amendment. It, therefore, follows that the date on which the governor approved the ratification, or the date on which the secretary of state of a given State certified the ratification, or the date on which the Secretary of State of the United States received a copy of said certificate, or the date on which he proclaimed that the amendment had been ratified are not controlling. Hence, the ratification date given in the following notes is the date on which the legislature of a given State approved the particular amendment (signature by the speaker or presiding officers of both houses being considered a part of the ratification of the "legislature"). When that date is not available, the date given is that on which it was approved by the governor or certified by the secretary of state of the particular State. In each case such fact has been noted. Except as otherwise indicated information as to ratification is based on data supplied by the Department of State.

[b] Brackets enclosing an amendment number indicate that the number was not specifically assigned in the resolution proposing the amendment. It will be seen, accordingly, that only amendments XIII, XIV, XV and XVI were thus technically ratified by number. The first 10 amendments along with 2 others which failed of ratification were proposed by Congress on September 25, 1789, when they passed the Senate [1 Ann. Cong. (1st Cong., 1st sess.) 90], having previously passed the House on September 24 [*Id.*, 948]. They appear officially in 1 Stat. 97. Ratification was completed on December 15, 1791, when the eleventh State (Virginia) approved these amendments, there being then 14 States in the Union.

The several State legislatures ratified the first 10 amendments to the Constitution (i.e. nos. 3 to 12 of those proposed) on the following dates: New Jersey, November 20, 1789; Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1790; New Hampshire, January 25, 1790; Delaware, January 28, 1790; New York, February 27, 1790; Pennsylvania, March 10, 1790; Rhode Island, June 7, 1790; Vermont, November 3, 1791; Virginia, December 15, 1791. The two amendments which failed of ratification (i.e. nos. 1 and 2 of those proposed) prescribed the ratio of representation to population in the House, and specified that no law varying the compensation of members of Congress should be effective until after an intervening election of Representatives. The first was ratified by 10 States (1 short of the requisite number) and the second by 6 States [2 Doc. Hist. Const., 325-390].

[c] The 11th Amendment was proposed by Congress on March 4, 1794, when it passed the House [4 Ann. Cong. (3d Cong., 1st sess.) 477, 478], having previously passed the Senate on January 14 [*Id.*, 30, 31]. It appears officially in 1 Stat. 402. Ratification was completed on February 7, 1795, when the twelfth State (North Carolina) approved the amendment, there being then 15 States in the Union. Official announcement of ratification was not made until January 8, 1798, when President John Adams in a message to Congress stated that the 11th Amendment had been adopted by three-fourths of the States and that it "may now be deemed to be a part of the Constitution" [1 Mess. and Papers of Pres. 250]. In the interim South Carolina had ratified, and Tennessee had been admitted into the Union as the Sixteenth State.

The several State legislatures ratified the 11th Amendment on the following dates: New York, March 27, 1794; Rhode Island, March 31, 1794; Connecticut, May 8, 1794; New Hampshire, June 16, 1794; Massachusetts, June 26, 1794; Vermont, between October 9 and November 9, 1794; Virginia, November 18, 1794; Georgia, November 29, 1794; Kentucky, December 7, 1794; Maryland, December 26, 1794; Delaware, January 23, 1795; North Carolina, February 7, 1795; South Carolina, December 4, 1797 [State Department, Press Releases, vol. XII, p. 247 (1935)].

[d] The 12th Amendment was proposed by Congress on December 9, 1803, when it passed the House [13 Ann. Cong. (8th Cong., 1st sess.) 775, 776], having previously passed the Senate on December 2 [*Id.*, 209]. It was not signed by the presiding officers of the House and Senate until December 12. It appears officially in 2 Stat. 306. Ratification was probably completed on June 15, 1804, when the legislature of the thirteenth State (New Hampshire) approved the amendment, there being then 17 States in the Union. The Governor of New Hampshire, however, vetoed this act of the legislature on June 20, and the act failed to pass again by two-thirds vote then required by the State constitution. Inasmuch as art. V of the Federal Constitution specifies that amendments shall become effective "when ratified by the legislatures of three-fourths of the several States or by conventions in three-fourths thereof," it has been generally believed that an approval or veto by a governor is without significance. If the ratification by New Hampshire be deemed ineffective, then the amendment became operative by Tennessee's ratification on July 27, 1804. On September 25, 1804, in a circular letter to the Governors of the several States, Secretary of State Madison declared the amendment ratified by three-fourths of the States.

The several State legislatures ratified the 12th Amendment on the following dates: North Carolina, December 22, 1803; Maryland, December 24, 1803; Kentucky, December 27, 1803; Ohio, between December 5 and December 30, 1803; Virginia, between December 20, 1803 and February 3, 1804; Pennsylvania, January 5, 1804; Vermont, January 30, 1804; New York, February 10, 1804; New Jersey, February 22, 1804; Rhode Island, between February 27 and March 12, 1804; South Carolina, May 15, 1804; Georgia, May 19, 1804; New Hampshire, June 15, 1804; and Tennessee, July 27, 1804. The amendment was rejected by Delaware on January 18, 1804, and by Connecticut at its session begun May 10, 1804.

[e] The 13th Amendment was proposed by Congress on January 31, 1865, when it passed the House [Cong. Globe (38th Cong., 2d sess.) 531], having previously passed the Senate on April 8, 1864 [*Id.* (38th Cong., 1st sess.) 1490]. It appears officially in 13 Stat. 567 under the date of February 1, 1865. Ratification was completed on December 6, 1865, when the legislature of the twenty-seventh State (Georgia) approved the amendment, there being then 36 States in the Union. On December 18, 1865, Secretary of State Seward certified that the 13th Amendment had become a part of the Constitution [13 Stat. 774].

The several State legislatures ratified the 13th Amendment on the following dates: Illinois, February 1, 1865; Rhode Island, February, 2, 1865; Michigan,

February 2, 1865; Maryland, February 3, 1865; New York, February 3, 1865; West Virginia, February 3, 1865; Missouri, February 6, 1865; Maine, February 7, 1865; Kansas, February 7, 1865; Massachusetts, February 7, 1865; Pennsylvania, February 8, 1865; Virginia, February 9, 1865; Ohio, February 10, 1865; Louisiana, February 15 or 16, 1865; Indiana, February 16, 1865; Nevada, February 16, 1865; Minnesota, February 23, 1865; Wisconsin, February 24, 1865; Vermont, March 9, 1865 (date on which it was "approved" by Governor); Tennessee, April 7, 1865; Arkansas, April 14, 1865; Connecticut, May 4, 1865; New Hampshire, June 30, 1865; South Carolina, November 13, 1865; Alabama, December 2, 1865 (date on which it was "approved" by Provisional Governor); North Carolina, December 4, 1865; Georgia, December 6, 1865; Oregon, December 11, 1865; California, December 15, 1865; Florida, December 28, 1865 (Florida again ratified this amendment on June 9, 1868, upon its adoption of a new constitution); Iowa, January 17, 1866; New Jersey, January 23, 1866 (after having rejected the amendment on March 16, 1865); Texas, February 18, 1870; Delaware, February 12, 1901 (after having rejected the amendment on February 8, 1865). The amendment was rejected by Kentucky on February 24, 1865, and by Mississippi on December 2, 1865.

"A thirteenth amendment depriving of United States citizenship any citizen who should accept any title, office, or emolument from a foreign power, was proposed by Congress on May 1, 1810, when it passed the House [21 Ann. Cong. (11th Cong., 2d sess.) 2050], having previously passed the Senate on April 27 [20 Ann. Cong. (11th Cong., 2d sess.) 672]. It appears officially in 2 Stat. 613. It failed of adoption, being ratified by but 12 States up to December 10, 1812 [2 Miscell. Amer. State Papers, 477-479; 2 Doc. Hist. Const. 454-499], there then being 18 in all.

"Another thirteenth amendment, forbidding any future amendment that should empower Congress to interfere with the domestic institutions of any State, was proposed by Congress on March 2, 1861, when it passed the Senate [Cong. Globe (36th Cong., 2d sess.) 1403], having previously passed the House on February 28 [*Id.*, 1285]. It appears officially in 12 Stat. 251. It failed of adoption, being ratified by but three States: Ohio, May 13, 1861 [58 Laws Ohio, 190]; Maryland, January 10, 1862 [Laws Maryland (1861-62) 21]; Illinois, February 14, 1862 [2 Doc. Hist. Const., 518] irregular, because by convention instead of by legislation as authorized by Congress." [Burdick, The Law of the American Constitution, 637.]

[f] The 14th Amendment was proposed by Congress on June 13, 1866, when it passed the House [Cong. Globe (39th Cong., 1st sess.) 3148, 3149], having previously passed the Senate on June 8 [*Id.*, 3042]. It appears officially in 14 Stat. 358 under date of June 16, 1866. Ratification was probably completed on July 9, 1868, when the legislature of the twenty-eighth State (South Carolina or Louisiana) approved the amendment, there being then 37 States in the Union. However, Ohio and New Jersey had prior to that date "withdrawn" their earlier assent to this amendment. Accordingly, Secretary of State Seward on July 20, 1868, certified that the amendment had become a part of the Constitution if the said withdrawals were ineffective [15 Stat. 706-707]. Congress at once (July 21, 1868) passed a joint resolution declaring the amendment a part of the Constitution and directing the Secretary to promulgate it as such. On July 28, 1868, Secretary Seward certified without reservation that the amendment was a part of the Constitution. In the interim, two other States, Alabama on July 13 and Georgia on July 21, 1868, had added their ratifications.

The several State legislatures ratified the 14th Amendment on the following dates: Connecticut, June 30, 1866; New Hampshire, July 7, 1866; Tennessee, July 19, 1866; New Jersey, September 11, 1866 (the New Jersey Legislature on February 20, 1868 "withdrew" its consent to the ratification; the Governor vetoed that bill on March 5, 1868; and it was repassed over his veto on March 24, 1868); Oregon, September 19, 1866 (Oregon "withdrew" its consent on October 15, 1868); Vermont, October 30, 1866; New York, January 10, 1867; Ohio, January 11, 1867 (Ohio "withdrew" its consent on January 15, 1868); Illinois, January 15, 1867; West Virginia, January 16, 1867; Michigan, January 16, 1867; Kansas, January 17, 1867; Minnesota, January 17, 1867; Maine, January 19, 1867; Nevada, January 22, 1867; Indiana, January 23, 1867; Missouri, January 26, 1867 (date on which it was certified by the Missouri secretary of state); Rhode Island, February 7, 1867; Pennsylvania, February 12, 1867; Wisconsin, February 13, 1867 (actually passed February 7, but not signed by legislative officers until February 13); Massachusetts, March 20, 1867; Nebraska, June 15, 1867; Iowa, March 9, 1868; Arkansas, April 6, 1868; Florida, June 9, 1868; North Carolina, July 2, 1868 (after having rejected the amendment on December 13, 1866); Louisiana, July 9, 1868 (after having rejected the amendment on February 6, 1867); South Carolina, July 8, 1868;

(after having rejected the amendment on December 20, 1866); Alabama, July 13, 1868 (date on which it was "approved" by the Governor); Georgia, July 21, 1868 (after having rejected the amendment on November 9, 1866—Georgia ratified again on February 2, 1870); Virginia, October 8, 1869 (after having rejected the amendment on January 9, 1867); Mississippi, January 17, 1870; Texas, February 18, 1870 (after having rejected the amendment on October 27, 1866); Delaware, February 12, 1901 (after having rejected the amendment on February 7, 1867). The amendment was rejected (and not subsequently ratified) by Kentucky on January 8, 1807, and by Maryland on March 23, 1867.

[g] The 15th Amendment was proposed by Congress on February 26, 1869, when it passed the Senate [Cong. Globe (40th Cong., 3rd sess.) 1641], having previously passed the House on February 25 [*Id.* 1563, 1564]. It appears officially in 15 Stat. 346 under date of February 27, 1869. Ratification was probably completed on February 3, 1870, when the legislature of the twenty-eighth State (Iowa) approved the amendment, there being then 37 States in the Union. However, New York had prior to that date "withdrawn" its earlier assent to this amendment. Even if this withdrawal were effective, Nebraska's ratification on February 17, 1870, authorized Secretary of State Fish's certification of March 30, 1870, that the 15th Amendment had become a part of the Constitution [16 Stat 1131].

The several State legislatures ratified the 15th Amendment on the following dates: Nevada, March 1, 1869; West Virginia, March 3, 1869; North Carolina, March 5, 1869; Louisiana, March 5, 1869 (date on which it was "approved" by the Governor); Illinois March 5, 1869; Michigan, March 5, 1869; Wisconsin, March 5, 1869; Maine, March 11, 1869; Massachusetts, March 12, 1869; South Carolina, March 15, 1869; Arkansas, March 15, 1869; Pennsylvania, March 25, 1869; New York, April 14, 1869 (New York "withdrew" its consent to the ratification on January 5, 1870); Indiana, May 14, 1869; Connecticut, May 19, 1869; Florida, June 14, 1869; New Hampshire, July 1, 1869; Virginia, October 8, 1869; Vermont, October 20, 1869; Alabama, November 16, 1869; Missouri, January 7, 1870 (Missouri had ratified the first section of the 15th Amendment on March 1, 1869; it failed to include in its ratification the second section of the amendment); Minnesota, January 13, 1870; Mississippi, January 17, 1870; Rhode Island, January 18, 1870; Kansas, January 19, 1870 (Kansas had by a defectively worded resolution previously ratified this amendment on February 27, 1869); Ohio, January 27, 1870 (after having rejected the amendment on May 4, 1869); Georgia, February 2, 1870; Iowa, February 3, 1870; Nebraska, February 17, 1870; Texas, February 18, 1870; New Jersey, February 15, 1871 (after having rejected the amendment on February 7, 1870); Delaware, February 12, 1901 (date on which approved by Governor; Delaware had previously rejected the amendment on March 18, 1869). The amendment was rejected (and not subsequently ratified) by California, Kentucky, Maryland, Oregon, and Tennessee.

[h] The 16th Amendment was proposed by Congress on July 12, 1909, when it passed the House [44 Cong. Rec. (61st Cong., 1st sess.) 4390, 4440, 4441], having previously passed the Senate on July 5 [*Id.*, 4121]. It appears officially in 36 Stat 184. Ratification was completed on February 3, 1913, when the legislature of the thirty-sixth State (Delaware, Wyoming, or New Mexico) approved the amendment, there being then 48 States in the Union. On February 25, 1913, Secretary of State Knox certified that this amendment had become a part of the Constitution [37 Stat. 1785].

The several State legislatures ratified the 16th Amendment on the following dates: Alabama, August 10, 1909; Kentucky, February 8, 1910; South Carolina, February 19, 1910; Illinois, March 1, 1910; Mississippi, March 7, 1910; Oklahoma, March 10, 1910; Maryland, April 8, 1910; Georgia, August 3, 1910; Texas, August 16, 1910; Ohio, January 19, 1911; Idaho, January 20, 1911; Oregon, January 23, 1911; Washington, January 26, 1911; Montana, January 27, 1911; Indiana, January 30, 1911; California, January 31, 1911; Nevada, January 31, 1911; South Dakota, February 1, 1911; Nebraska, February 9, 1911; North Carolina, February 11, 1911; Colorado, February 15, 1911; North Dakota, February 17, 1911; Michigan, February 23, 1911; Iowa, February 24, 1911; Kansas, March 2, 1911; Missouri, March 16, 1911; Maine, March 31, 1911; Tennessee, April 7, 1911; Arkansas, April 22, 1911 (after having rejected the amendment at the session begun January 9, 1911); Wisconsin, May 16, 1911; New York, July 12, 1911; Arizona, April 3, 1912; Minnesota, June 11, 1912; Louisiana, June 28, 1912; West Virginia, January 31, 1913; Delaware, February 3, 1913; Wyoming, February 3, 1913; New Mexico, February 3, 1913; New Jersey, February 4, 1913; Vermont, February 19, 1913; Massachusetts, March 4, 1913; New Hampshire, March 7, 1913 (after having rejected the amendment on March 2, 1911). The amendment was rejected (and not subsequently ratified) by Connecticut, Rhode Island,

and Utah.

[i] The 17th Amendment was proposed by Congress on May 13, 1912, when it passed the House [48 Cong. Rec. (62d Cong., 2d sess.) 6367], having previously passed the Senate on June 12, 1911 [47 Cong. Rec. (62d Cong. 1st sess.) 1925]. It appears officially in 37 Stat. 646. Ratification was completed on April 8, 1913, when the thirty-sixth State (Connecticut) approved the amendment, there being then 48 States in the Union. On May 31, 1913, Secretary of State Bryan certified that it had become a part of the Constitution [38 Stat. 2049].

The several State legislatures ratified the 17th Amendment on the following dates: Massachusetts, May 22, 1912; Arizona, June 3, 1912; Minnesota, June 10, 1912; New York, January 15, 1913; Kansas, January 17, 1913; Oregon, January 23, 1913; North Carolina, January 25, 1913; California, January 28, 1913; Michigan, January 28, 1913; Iowa, January 30, 1913; Montana, January 30, 1913; Idaho, January 31, 1913; West Virginia, February 4, 1913; Colorado, February 5, 1913; Nevada, February 6, 1913; Texas, February 7, 1913; Washington, February 7, 1913; Wyoming, February 8, 1913; Arkansas, February 11, 1913; Illinois, February 13, 1913; North Dakota, February 14, 1913; Wisconsin, February 18, 1913; Indiana, February 19, 1913; New Hampshire, February 19, 1913; Vermont, February 19, 1913; South Dakota, February 19, 1913; Maine, February 20, 1913; Oklahoma, February 24, 1913; Ohio, February 25, 1913; Missouri, March 7, 1913; New Mexico, March 13, 1913; Nebraska, March 14, 1913; New Jersey, March 17, 1913; Tennessee, April 1, 1913; Pennsylvania, April 2, 1913; Connecticut, April 8, 1913; Louisiana, June 5, 1914. The amendment was rejected by Utah on February 26, 1913.

[j] The 18th Amendment was proposed by Congress on December 18, 1917, when it passed the Senate [Cong. Rec. (65th Cong., 2d sess.) 478], having previously passed the House on December 17 [*Id.*, 470]. It appears officially in 40 Stat 1050. Ratification was completed on January 16, 1919, when the thirty-sixth State approved the amendment, there being then 48 States in the Union. On January 29, 1919, Acting Secretary of State Polk certified that this amendment had been adopted by the requisite number of States [40 Stat. 1941]. By its terms this amendment did not became effective until 1 year after ratification.

The several State legislatures ratified the 18th Amendment on the following dates: Mississippi, January 8, 1918; Virginia, January 11, 1918; Kentucky, January 14, 1918; North Dakota, January 28, 1918 (date on which approved by Governor); South Carolina, January 29, 1918; Maryland, February 13, 1918; Montana, February 19, 1918; Texas, March 4, 1918; Delaware, March 18, 1918; South Dakota, March 20, 1918; Massachusetts, April 2, 1918; Arizona, May 24, 1918; Georgia, June 26, 1918; Louisiana, August 9, 1918 (date on which approved by Governor); Florida, November 27, 1918; Michigan, January 2, 1919; Ohio, January 7, 1919; Oklahoma, January 7, 1919; Idaho, January 8, 1919; Maine, January 8, 1919; West Virginia, January 13, 1919; California, January 13, 1919; Tennessee, January 13, 1919; Washington, January 13, 1919; Arkansas, January 14, 1919; Kansas, January 14, 1919; Illinois, January 14, 1919; Indiana, January 14, 1919; Alabama, January 15, 1919; Colorado, January 15, 1919; Iowa, January 15, 1919; New Hampshire, January 15, 1919; Oregon, January 15, 1919; Nebraska, January 16, 1919; North Carolina, January 16, 1919; Utah, January 16, 1919; Missouri, January 16, 1919; Wyoming, January 16, 1919; Minnesota, January 17, 1919; Wisconsin, January 17, 1919; New Mexico, January 20, 1919; Nevada, January 21, 1919; Pennsylvania, February 25, 1919; Connecticut, May 6, 1919; New Jersey, March 9, 1922; New York, January 29, 1919; Vermont, January 29, 1919.

[k] The 19th Amendment was proposed by Congress on June 4, 1919, when it passed the Senate [Cong. Rec. (66th Cong., 1st sess.) 635], having previously passed the House on May 21, [*Id.*, 94]. It appears officially in 41 Stat. 362. Ratification was completed on August 18, 1920, when the thirty-sixth State (Tennessee) approved the amendment, there being then 48 States in the Union. On August 26, 1920, Secretary of State Colby certified that it had become a part of the Constitution [41 Stat. 1823].

The several State legislatures ratified the 19th Amendment on the following dates: Illinois, June 10, 1919 (readopted June 17, 1919); Michigan, June 10, 1919; Wisconsin, June 10, 1919; Kansas, June 16, 1919; New York, June 16, 1919; Ohio, June 16, 1919; Pennsylvania, June 24, 1919; Massachusetts, June 25, 1919; Texas, June 28, 1919; Iowa, July 2, 1919 (date on which approved by Governor); Missouri, July 3, 1919; Arkansas, July 28, 1919; Montana, August 2, 1919 (date on which approved by Governor); Nebraska, August 2, 1919; Minnesota, September 8, 1919; New Hampshire, September 10, 1919

(date on which approved by Governor); Utah, October 2, 1919; California, November 1, 1919; Maine, November 5, 1919; North Dakota, December 1, 1919; South Dakota, December 4, 1919 (date on which certified); Colorado, December 15, 1919 (date on which approved by Governor); Kentucky, January 6, 1920; Rhode Island, January 6, 1920; Oregon, January 13, 1920; Indiana, January 16, 1920; Wyoming, January 27, 1920; Nevada, February 7, 1920; New Jersey, February 9, 1920; Idaho, February 11, 1920; Arizona, February 12, 1920; New Mexico, February 21, 1920 (date on which approved by Governor); Oklahoma, February 28, 1920; West Virginia, March 10, 1920; Washington, March 22, 1920; Tennessee, August 18, 1920; Connecticut, September 14, 1920 (confirmed September 21, 1920); Vermont, February 8, 1921. The amendment was rejected by Georgia on July 24, 1919; by Alabama on September 22, 1919; by South Carolina on January 29, 1920; by Virginia on February 12, 1920; by Maryland on February 24, 1920; by Mississippi on March 29, 1920; by Louisiana on July 1, 1920.

[l] The 20th Amendment was proposed by Congress on March 2, 1932, when it passed the Senate [Cong. Rec. (72d Cong., 1st sess.) 5086], having previously passed the House on March 1 [*Id.*, 5027]. It appears officially in 47 Stat. 745. Ratification was completed on January 23, 1933, when the thirty-sixth State approved the amendment, there being then 48 States in the Union. On February 6, 1933, Secretary of State Stimson certified that it had become a part of the Constitution [47 Stat. 2569].

The several State legislatures ratified the 20th Amendment on the following dates: Virginia, March 4, 1932; New York, March 11, 1932; Mississippi, March 16, 1932; Arkansas, March 17, 1932; Kentucky, March 17, 1932; New Jersey, March 21, 1932; South Carolina, March 25, 1932; Michigan, March 31, 1932; Maine, April 1, 1932; Rhode Island, April 14, 1932; Illinois, April 21, 1932; Louisiana, June 22, 1932; West Virginia, July 30, 1932; Pennsylvania, August 11, 1932; Indiana, August 15, 1932; Texas, September 7, 1932; Alabama, September 13, 1932; California, January 4, 1933; North Carolina, January 5, 1933; North Dakota, January 9, 1933; Minnesota, January 12, 1933; Arizona, January 13, 1933; Montana, January 13, 1933; Nebraska, January 13, 1933; Oklahoma, January 13, 1933; Kansas, January 16, 1933; Oregon, January 16, 1933; Delaware, January 19, 1933; Washington, January 19, 1933; Wyoming, January 19, 1933; Iowa, January 20, 1933; South Dakota, January 20, 1933; Tennessee, January 20, 1933; Idaho, January 21, 1933; New Mexico, January 21, 1933; Georgia, January 23, 1933; Missouri, January 23, 1933; Ohio, January 23, 1933; Utah, January 23, 1933; Colorado, January 24, 1933; Massachusetts, January 24, 1933; Wisconsin, January 24, 1933; Nevada, January 26, 1933; Connecticut, January 27, 1933; New Hampshire, January 31, 1933; Vermont, February 2, 1933; Maryland, March 24, 1933; Florida, April 26, 1933.

A proposed amendment which would authorize Congress to limit, regulate, and prohibit the labor of persons under 18 years of age was passed by Congress on June 2, 1924. This proposal at the time it was submitted to the States was referred to as "the proposed 20th Amendment." It appears officially in 43 Stat. 670.

The status of this proposed amendment is a matter of conflicting opinion. The Kentucky Court of Appeals in Wise *v.* Chandler (270 Ky. 1 [1937]) has held that it is no longer open to ratification because: (1) Rejected by more than one-fourth of the States; (2) a State may not reject and then subsequently ratify, at least when more than one-fourth of the States are on record as rejecting; and (3) more than a reasonable time has elapsed since it was submitted to the States in 1924. The Kansas Supreme Court in Coleman *v.* Miller (146 Kan. 390 [1937]) came to the opposite conclusion.

On October 1, 1937, 27 States had ratified the proposed amendment. Of these States 10 had previously rejected the amendment on one or more occasions. At least 26 different States have at one time rejected the amendment.

[m] The 21st Amendment was proposed by Congress on February 20, 1933, when it passed the House [Cong. Rec. (72d Cong., 2d sess.) 4516], having previously passed the Senate on February 16 [*Id.*, 4231]. It appears officially in 47 Stat. 1625. Ratification was completed on December 5, 1933, when the thirty-sixth State (Utah) approved the amendment, there being then 48 States in the Union. On December 5, 1933, Acting Secretary of State Phillips certified that it had been adopted by the requisite number of States [48 Stat. 1749].

The several State conventions ratified the 21st Amendment on the following dates: Michigan, April 10, 1933; Wisconsin, April 25, 1933; Rhode Island, May 8, 1933; Wyoming, May 25, 1933; New Jersey, June 1, 1933; Delaware, June 24, 1933; Indiana, June 26, 1933; Massachusetts, June 26, 1933; New York,

June 27, 1933; Illinois, July 10, 1933; Iowa, July 10, 1933; Connecticut, July 11, 1933; New Hampshire, July 11, 1933; California, July 24, 1933; West Virginia, July 25, 1933; Arkansas, August 1, 1933; Oregon, August 7, 1933; Alabama, August 8, 1933; Tennessee, August 11, 1933; Missouri, August 29, 1933; Arizona, September 5, 1933; Nevada, September 5, 1933; Vermont, September 23, 1933; Colorado, September 26, 1933; Washington, October 3, 1933; Minnesota, October 10, 1933; Idaho, October 17, 1933; Maryland, October 18, 1933; Virginia, October 25, 1933; New Mexico, November 2, 1933; Florida, November 14, 1933; Texas, November 24, 1933; Kentucky, November 27, 1933; Ohio, December 5, 1933; Pennsylvania, December 5, 1933; Utah, December 5, 1933; Maine, December 6, 1933; Montana, August 6, 1934. The amendment was rejected by a convention in the State of South Carolina, on December 4, 1933. The electorate of the State of North Carolina voted against holding a convention at a general election held on November 7, 1933.

[n] The twenty-second Amendment was proposed by Congress on March 24, 1947, having passed the House on March 21, 1947 [Cong. Rec. (80th Cong., 1st sess.) 2392] and having previously passed the Senate on March 12, 1947 [Id. 1978]. It appears officially in 61 Stat. 959. Ratification was completed on February 27, 1951, when the thirty-sixth State (Minnesota) approved the amendment; there being then 48 States in the Union. On March 1, 1951, Jess Larson, Administrator of General Services, certified that it had been adopted by the requisite number of States [16 F.R. 2019].

A total of 41 State legislatures ratified the Twenty-second Amendment on the following dates: Maine, March 31, 1947; Michigan, March 31, 1947; Iowa, April 1, 1947; Kansas, April 1, 1947; New Hampshire, April 1, 1947; Delaware, April 2, 1947; Illinois, April 3, 1947; Oregon, April 3, 1947; Colorado, April 12, 1947; California, April 15, 1947; New Jersey, April 15, 1947; Vermont, April 15, 1947; Ohio, April 16, 1947; Wisconsin; April 16, 1947; Pennsylvania, April 29, 1947; Connecticut, May 21, 1947; Missouri, May 22, 1947; Nebraska, May 23, 1947; Virginia, January 28, 1948; Mississippi, February 12, 1948; New York, March 9, 1948; South Dakota, January 21, 1949; North Dakota, February 25, 1949; Louisiana, May 17, 1950; Montana, January 25, 1951; Indiana, January 29, 1951; Idaho, January 30, 1951; New Mexico, February 12, 1951; Wyoming, February 12, 1951; Arkansas, February 15, 1951; Georgia, February 17, 1951; Tennessee, February 20, 1951; Texas, February 22, 1951; Utah, February 26, 1951; Nevada, February 26, 1951; Minnesota, February 27, 1951; North Carolina, February 28, 1951; South Carolina, March 13, 1951; Maryland, March 14, 1951; Florida, April 16, 1951; and Alabama, May 4, 1951.

THE CONSTITUTION OF THE UNITED STATES OF AMERICA WITH ANNOTATIONS

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PREAMBLE

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THE CONSTITUTION OF THE UNITED STATES OF AMERICA WITH ANNOTATIONS

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THE PREAMBLE

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.

Purpose and Effect of the Preamble

Although the preamble is not a source of power for any department of the Federal Government,[1] the Supreme Court has often referred to it as evidence of the origin, scope, and purpose of the Constitution. "Its true office" wrote Joseph Story in his Commentaries, "is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them. For example, the preamble declares one object to be, 'to provide for the common defense.' No one can doubt that this does not enlarge the powers of Congress to

pass any measures which they deem useful for the common defence. But suppose the terms of a given power admit of two constructions, the one more restrictive, the other more liberal, and each of them is consistent with the words, but is, and ought to be, governed by the intent of the power; if one could promote and the other defeat the common defence, ought not the former, upon the soundest principles of interpretation, to be adopted?"[2] Moreover, the preamble bears witness to the fact that the Constitution emanated from the people, and was not the act of sovereign and independent States,[3] and that it was made for, and is binding only in, the United States of America.[4] In the Dred Scott case,[5] Chief Justice Taney declared that: "The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. [Pg 60] They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty."[6]

Notes

[1] Jacobson *v.* Massachusetts, 197 U.S. 11, 22 (1905).

[2] 1 Story, Commentaries on the Constitution, § 462.

[3] McCulloch *v.* Maryland, 4 Wheat. 316, 403 (1819); Chisholm *v.* Georgia, 2 Dall. 419, 470 (1793); Martin *v.* Hunter, Wheat. 304, 324 (1816).

[4] Downes *v.* Bidwell, 182 U.S. 244, 251 (1901); In re Ross, 140 U.S. 453, 464 (1891).

[5] 19 How. 393 (1857).

[6] Ibid. 404.

ARTICLE I [Pg 61]

LEGISLATIVE DEPARTMENT

[Pg 63]

LEGISLATIVE DEPARTMENT

[Pg 71]

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.

Doctrine of Enumerated Powers

Two important doctrines of Constitutional Law—that the Federal Government is one of enumerated powers and that legislative power may not be delegated—are derived in part from this section. The classical statement of the former is that by Chief Justice Marshall in McCulloch *v.* Maryland: "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."[1] That, however, "the executive power" is not confined to the items of it which are enumerated in article II was asserted early in the history of the Constitution by Madison and Hamilton alike and is today the doctrine of the Court;[2] and a similar latitudinarian conception of "the judicial power of the United States" was voiced in Justice Brewer's opinion for the Court in Kansas *v.* Colorado.[3] But even when confined to "the legislative powers herein granted," the doctrine is severely strained by Marshall's conception of some of these as set forth in his McCulloch *v.* Maryland opinion: This asserts that "the sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government";[4] he characterizes "the power of making war," of "levying taxes," and of "regulating commerce" as "great, substantive and independent powers";[5] and the power conferred by the "necessary and proper" clause embraces, he declares, "all [legislative] means which are appropriate" to carry out "the legitimate ends" of the Constitution, unless forbidden by "the letter and spirit of the Constitution."[6] Nine years later, Marshall introduced what Story in his Commentaries labels the concept of "resulting powers," those which "rather be a result from the whole mass of the powers of the National Government, and from the nature of political society, than a consequence or incident of the powers specially enumerated."[7] Story's reference is to Marshall's opinion in American Insurance Company *v.* Canter,[8] where the latter says, that "the Constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty."[9] And from the power to acquire territory, he continues, arises as "the inevitable consequence" the right to govern it.[10] Subsequently, powers have been repeatedly ascribed to the National Government by the Court on grounds which ill accord with the doctrine of enumerated powers: the power to legislate in effectuation of the "rights expressly given, and duties expressly enjoined" by the Constitution;[11] the power to impart to the paper currency of the Government the quality of legal tender in the payment of debts;[12] the power to acquire territory by discovery;[13] the power to legislate for the Indian tribes wherever situated in the United States;[14] the power to exclude and deport aliens;[15] and to require that those who are admitted be registered and fingerprinted;[16] and finally the complete powers of sovereignty, both those of war and peace, in the conduct of foreign relations. In the words of Justice Sutherland in United States *v.* Curtiss-Wright Export Corporation,[17] decided in 1936: "The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was

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thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states.... That this doctrine applies only to powers which the states had, is self evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source.... A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union.... It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality."[18] Yet for the most part, these holdings do not, as Justice Sutherland suggests, directly affect "the internal affairs" of the nation; they touch principally its peripheral relations, as it were. The most serious inroads on the doctrine of [Pg 73] enumerated powers are, in fact, those which have taken place under cover of the doctrine—the vast expansion in recent years of national legislative power in the regulation of commerce among the States and in the expenditure of the national revenues; and verbally at least Marshall laid the ground for these developments in some of the phraseology above quoted from his opinion in McCulloch *v.* Maryland.

Nondelegability of Legislative Power

ORIGIN OF DOCTRINE

At least three distinct ideas have contributed to the development of the principle that legislative power cannot be delegated. One is the doctrine of separation of powers: Why go to the trouble of separating the three powers of government if they can straightway remerge on their own motion? The second is the concept of due process of law, which precludes the transfer of regulatory functions to private persons. Lastly, there is the maxim of agency "*Delegata potestas non potest delegari*," which John Locke borrowed and formulated as a dogma of political science.[19] In Hampton Jr. & Co. *v.* United States,[20] Chief Justice Taft offered the following explanation of the origin and limitations of this idea as a postulate of constitutional law: "The well-known maxim '*Delegata potestas non potest delegari*,' applicable to the law of agency in the general and common law, is well understood and has had wider application in the construction of our Federal [Pg 74] and State Constitutions than it has in private law. The Federal Constitution and State Constitutions of this country divide the governmental power into three branches. * * * in carrying out that constitutional division * * * it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from 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."[21]

FUNCTIONS WHICH MAY BE DELEGATED

Yielding to "common sense and the inherent necessities of governmental co-ordination" the Court has sustained numerous statutes granting in the total vast powers to administrative or executive agencies. Two different theories, both enunciated during the Chief Justiceship of John Marshall, have been utilized to justify these results. First in importance is the theory that another department may be empowered to "fill up the details" of a statute.[22] The second is that Congress may legislate contingently, leaving to others the task of ascertaining the facts which bring its declared policy into operation.[23]

POWER TO SUPPLEMENT STATUTORY PROVISIONS

The pioneer case which recognized the right of Congress to lodge in another department the power to "fill up the details" of a statute arose out of the authority given to federal courts to establish rules of practice, provided such rules were not repugnant to the laws of the United States. Chief Justice Marshall overruled the objection that this constituted an invalid delegation of legislative power, saying: "It will not be contended, that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may 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, [Pg 75] to fill up the details."[24]

STANDARDS FOR ADMINISTRATIVE ACTION

Before another agency can "fill up the details," Congress must enact something to be thus

supplemented. In the current idiom, the lawmakers must first adopt a policy or set up an "intelligible standard" to which administrative action must conform.[25] But the Court has taken a generous view of what constitutes a policy or standard. Although it has said that "procedural safeguards cannot validate an unconstitutional delegation,"[26] the nature of the proceedings appears to be one of the elements weighed in determining whether a specific delegation is constitutional.[27] In cases where the delegated power is exercised by orders directed to particular persons after notice and hearing, with findings of fact and of law based upon the record made in the hearing, the Court has ruled that such general terms as "public interest,"[28] "public convenience, interest, or necessity,"[29] or "excessive profits,"[30] were sufficient to satisfy constitutional requirements. But in two cases arising under the National Industrial Recovery Act, a policy declaration of comparable generality was held insufficient for the promulgation of rules applicable to all persons engaged in a designated activity, without the procedural safeguards which surround the issuance of individual orders.[31] By subsequent decisions, somewhat more elaborate, but still very broad, standards have been deemed adequate for various price fixing measures.[32] In a recent case,[33] the Court sustained a statute which, without any explicit standards whatever, authorized the Federal Home Loan Bank Board to make rules and regulations for the supervision of Federal Savings and Loan Associations. That decision was influenced by the fact that the corporation was chartered by federal law as well as by the peculiar problems involved in the supervision of financial institutions. The Court was at pains to make clear that this decision would not necessarily govern the disposition of dissimilar cases.[34]

RULE-MAKING POWER [Pg 76]

After Wayman *v.* Southard, nearly three quarters of a century elapsed before the Court had occasion to approve the delegation to an executive officer of power to issue regulations for the administration of a statute. In 1897 it sustained the authority granted to the Commissioner of Internal Revenue to designate the "marks, brands and stamps" to be affixed to packages of oleomargarine.[35] Soon thereafter it upheld an act which directed the Secretary of the Treasury to promulgate minimum standards of quality and purity for tea imported into the United States.[36] It has approved the delegation to executive or administrative officials of authority to make rules governing the use of forest reservations;[37] permitting reasonable variations and tolerances in the marking of food packages to disclose their contents;[38] designating tobacco markets at which grading of tobacco would be compulsory;[39] establishing priorities for the transportation of freight during a period of emergency;[40] prescribing price schedules for the distribution of milk;[41] or for all commodities[42] and for rental housing[43] in time of war; regulating wages and prices in the production and distribution of coal;[44] imposing a curfew to protect military resources in designated areas from espionage and sabotage;[45] providing for the appointment of receivers or conservators for Federal Savings and Loan Associations;[46] allotting marketing quotas for tobacco;[47] and prescribing methods of accounting for carriers in interstate commerce.[48]

ORDERS DIRECTED TO PARTICULAR PERSONS [Pg 77]

The now familiar pattern of regulation of important segments of the economy by boards or commissions which combine in varying proportions the functions of all three departments of government was first established by the States in the field of railroad rate regulation. Discovering that direct action was impracticable, the State legislatures created commissions to deal with the problem. One of the pioneers in this development was Minnesota, whose Supreme Court justified the practice in an opinion which, with the implied[49] and later the explicit,[50] endorsement of the Supreme Court, practically settled the law on this point: "If such a power is to be exercised at all, it can only be satisfactorily done by a board or commission, constantly in session, whose time is exclusively given to the subject, and who, after investigation of the facts, can fix rates with reference to the peculiar circumstances of each road, and each particular kind of business, and who can change or modify these rates to suit the ever-varying conditions of traffic."[51] Contemporaneously Congress created the Interstate Commerce Commission to regulate the rates and practices of railroads with respect to interstate commerce. Although the Supreme Court has never had occasion to render a direct decision on the delegation of rate-making power to the Commission, it has repeatedly affirmed rate orders issued by that agency.[52] Likewise it has sustained the power of the Secretary of War to order the removal or alteration of bridges which unreasonably obstructed navigation over navigable waters;[53] the power of the Federal Reserve Board to authorize national banks to act as fiduciaries;[54] the authority of the Secretary of Labor to deport aliens of certain enumerated classes, if after hearing he found such aliens to be "undesirable residents";[55] the responsibility of the Interstate Commerce Commission to approve railroad consolidations found to be in the "public interest";[56] and the powers of the Federal Radio Commission[57] and the Federal Communications Commission[58] to license broadcasting stations as "public convenience, interest and necessity" may require. The terms, however, in which a statute delegates authority to an administrative agent are subject to judicial review; and in a recent case the Court disallowed an order of the Secretary of Agriculture proporting resting on § 8 of the Agricultural Marketing Agreement Act of 1937[59] as *ultra vires*.

[60]

DELEGATION TO PRIVATE PERSONS [Pg 78]

Although in a few early cases the Supreme Court enforced statutes which gave legal effect to local customs of miners with respect to mining claims on public lands,[61] and to standards adopted by railroads for equipment on railroad cars,[62] it held, in Schechter Poultry Corp. *v.* United States,[63] and Carter *v.* Carter Coal Company[64] that private trade groups could not be empowered to issue binding rules concerning methods of competition or wages and hours of labor. On the other hand, statutes providing that restrictions upon the production or marketing of agricultural commodities shall become operative only upon a favorable vote by a prescribed majority of the persons affected have been upheld.[65] The position of the Court is that such a requirement does not involve any delegation of legislative authority, since Congress has merely placed a restriction upon its own regulation by withholding its operation in a given case unless it is approved upon a referendum.[66]

POWER TO GIVE EFFECT TO CONTINGENT LEGISLATION [Pg 79]

An entirely different problem arises when, instead of directing another department of government to apply a general statute to individual cases, or to supplement it by detailed regulation, Congress commands that a previously enacted statute be revived, suspended or modified, or that a new rule be put into operation, upon the finding of certain facts by an executive or administrative officer. Since the delegated function in such cases is not that of "filling up the details" of a statute, authority for it must be sought elsewhere than in Wayman *v.* Southard and its progeny. It is to be found in an even earlier case—The Brig Aurora[67]—where the revival of a law upon the issuance of a Presidential proclamation was upheld in 1813. After previous restraints on British shipping had lapsed, Congress passed a new law stating that those restrictions should be renewed in the event the President found and proclaimed that France had abandoned certain practices which violated the neutral commerce of the United States. To the objection that this was an invalid delegation of legislative power, the Court answered briefly that "we can see no sufficient reason, why the legislature should not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct."[68]

MODIFICATION OF TARIFF LAWS

This point was raised again in Field *v.* Clark,[69] where the Tariff Act of 1890 was assailed as unconstitutional because it directed the President to suspend the free importation of enumerated commodities "for such time as he shall deem just" if he found that other countries imposed upon agricultural or other products of the United States duties or other exactions which "he may deem to be reciprocally unequal and unjust." In sustaining this statute the Court relied heavily upon two factors: (1) legislative precedents which demonstrated that "in the judgment of the legislative branch of the government, it is often desirable, if not essential, * * *, to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations";[70] (2) that the act "did not, in any real sense, invest the President with the power of legislation. * * * Congress itself prescribed, in advance, the duties to be levied, * * *, while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. * * * He had no discretion in the premises except in respect to the duration of the suspension so ordered."[71] By similar reasoning, the Court sustained the flexible provisions of the Tariff Act of 1922 whereby duties were increased or decreased to reflect differences in cost of production at home and abroad, as [Pg 80] such differences were ascertained and proclaimed by the President.[72]

ARMS EMBARGO

That the delegation of discretion in dealing with foreign relations stands upon a different footing than the transfer of authority to regulate domestic concerns was clearly indicated in United States *v.* Curtiss-Wright Export Corp.[73] There the Court upheld the Joint Resolution of Congress which made it unlawful to sell arms to certain warring countries "if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace * * *, and if * * *, he makes proclamation to that effect, * * *" Said Justice Sutherland for the Court: "It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the Federal Government in the field of international relations—* * *, Congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."[74]

INTERNAL AFFAIRS

Panama Refining Co. *v.* Ryan[75] was the first case in which the President had been authorized to

put into effect by proclamation, a new and independent rule pertaining to internal affairs. One section of the National Industrial Recovery Act authorized the President to forbid the shipment in interstate commerce of oil produced or withdrawn from storage in violation of State law. Apart from the purposes broadly stated in the first section—economic recovery and conservation of [Pg 81] natural resources—the measure contained no standard or statement of policy by which the President should be guided in determining whether or when to issue the order. Nor did it require him to make any findings of fact to disclose the basis of his action. By a vote of eight-to-one the Court held the delegation invalid. The only case in which the power of an administrative official to modify a rule enacted by Congress relating to domestic affairs has been sustained is Opp Cotton Mills *v.* Administrator.[76] That case involved the provisions of the Fair Labor Standards Act which authorized the appointment of Industry Advisory Committees to investigate conditions in particular industries, with notice and opportunity to be heard afforded to interested parties. Upon consideration of factors enumerated in the law and upon finding that the conditions specified in the law were fulfilled, such Committees were empowered to recommend and the Administrator to adopt, higher minimum wage rates for particular industries. Emphasizing the procedure which the agency was directed to follow and the fact that it would be impossible for Congress to prescribe specific minimum wages for particular industries,[77] a unanimous court sustained the law on the ground that the sole function of the Administrator was to put into effect the definite policy adopted by the legislators.

EMERGENCY STATUTES

Occupying a midway station between legislation which deals with foreign affairs and purely domestic legislation is what may be termed "emergency statutes." These are largely the outgrowth of the two World Wars. Thus on December 16, 1950, President Truman issued a proclamation declaring "the existence of a national emergency," and by so doing "activated" more than sixty statutes or parts thereof which by their terms apply to or during "a condition of emergency" or "in time of war or national emergency," etc. Most of these specifically leave it to the President to determine the question of emergency, and the White House assumption seems to be that they all do so. Many of the provisions thus activated delegate powers of greater or less importance to the President himself or remove statutory restrictions thereon.[78]

PUNISHMENT OF VIOLATIONS [Pg 82]

If Congress so provides, violations of valid administrative regulations may be punished as crimes.[79] But the penalties must be provided in the statute itself; additional punishment cannot be imposed by administrative action.[80] In an early case, the Court held that a section prescribing penalties for any violation of a statute did not warrant a prosecution for wilful disobedience of regulations authorized by, and lawfully issued pursuant to, the act.[81] Without disavowing this general proposition, the Court, in 1944, upheld a suspension order issued by the OPA whereby a dealer in fuel oil who had violated rationing regulations was forbidden to receive or deal on that commodity.[82] Although such an order was not explicitly authorized by statute, it was sustained as being a reasonable measure for effecting a fair allocation of fuel oil, rather than as a means of punishment for an offender. In another OPA case, the Court ruled that in a criminal prosecution, a price regulation was subject to the same rule of strict construction as a statute, and that omissions from, or indefiniteness in, such a regulation, could not be cured by the Administrator's interpretation thereof.[83]

Congressional Investigations

INVESTIGATIONS IN AID OF LEGISLATION

No provision of the Constitution expressly authorized either house of Congress to make investigations and exact testimony to the end that it may exercise its legislative function effectively and advisedly. But such a power had been frequently exercised by the British Parliament and by the Assemblies of the American Colonies prior to the adoption of the Constitution.[84] It was asserted by the House of Representatives as early as 1792 when it appointed a committee to investigate the disaster to General St. Clair and his army in the Northwest and empowered it to "call for such persons, papers, and records, as may be necessary to assist their inquiries."[85]

CONDUCT OF EXECUTIVE DEPARTMENT

For many years the investigating function of Congress was limited to inquiries into the administration of the Executive Department or of instrumentalities of the Government. Until the administration of Andrew Jackson this power was not seriously challenged.[86] During the controversy over renewal of the charter of the Bank of the United States, John Quincy Adams [Pg 83] contended that an unlimited inquiry into the operations of the bank would be beyond the power of the House.[87] Four years later the legislative power of investigation was challenged by the President. A committee appointed by the House of Representatives "with power to send for persons and papers, and with instructions to inquire into the condition of the various executive departments, the ability and integrity with which they have been conducted, * * *"[88] called upon

the President and the heads of departments for lists of persons appointed without the consent of the Senate and the amounts paid to them. Resentful of this attempt "to invade the just rights of the Executive Departments" the President refused to comply and the majority of the committee acquiesced.[89] Nevertheless Congressional investigations of Executive Departments have continued to the present day. Shortly before the Civil War, contempt proceedings against a witness who refused to testify in an investigation of John Brown's raid upon the arsenal at Harper's Ferry occasioned a thorough consideration by the Senate of the basis of this power. After a protracted debate, which cut sharply across sectional and party lines, the Senate voted overwhelmingly to imprison the contumacious witness.[90] Notwithstanding this firmly established legislative practice the Supreme Court took a narrow view of the power in the case of Kilbourn *v.* Thompson.[91] It held that the House of Representatives had overstepped its jurisdiction when it instituted an investigation of losses suffered by the United States as a creditor of Jay Cooke and Company, whose estate was being administered in bankruptcy by a federal court. But nearly half a century later, in McGrain *v.* Daugherty,[92] it ratified in sweeping terms, the power of Congress to inquire into the administration of an executive department and to sift charges of malfeasance in such administration.

PRIVATE AFFAIRS

Beginning with the resolution adopted by the House of Representatives in 1827 which vested its Committee on Manufactures "with the power to send for persons and papers with a view to ascertain and report to this House such facts as may be useful to guide the judgment of this House in relation to a revision of the tariff duties on imported goods,"[93] the two Houses have asserted the right to inquire into private affairs when necessary to enlighten their judgment on [Pg 84] proposed legislation. In Kilbourn *v.* Thompson,[94] the Court denied the right of Congress to pry into private affairs. Again, in Interstate Commerce Commission *v.* Brimson,[95] in sustaining a statute authorizing the Courts to use their process to compel witnesses to give testimony sought by the Commission for the enforcement of the act, the Court warned that, "neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen."[96] Finally, however, in McGrain *v.* Daugherty,[97] the power of either House "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, * * *"[98] was judicially recognized and approved.

PURPOSE OF INQUIRY

In the absence of any showing that legislation was contemplated as a result of the inquiry undertaken in Kilbourn *v.* Thompson, the Supreme Court concluded that the purpose was an improper one—to pry into matters with which the judiciary alone was empowered to deal.[99] Subsequent cases have given the legislature the benefit of a presumption that its object is legitimate. In re Chapman[100] established the proposition that to make an investigation lawful "it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded."[101] Similarly, in McGrain *v.* Daugherty, the investigation was presumed to have been undertaken in good faith to aid the Senate in legislating.[102] Going one step further in Sinclair *v.* United States,[103] which on its facts presented a close parallel to the Kilbourn Case, the Court affirmed the right of the Senate to carry on its investigation of fraudulent leases of government property after suit for the recovery thereof had been instituted. The president of the lessee corporation had refused to testify on the ground that the questions related to his private affairs and to matters cognizable only in the courts wherein they were pending and that the committee avowedly had departed from any inquiry in aid of legislation. The Senate prudently had directed the investigating committee to ascertain what, if any, other or additional legislation may be advisable. Conceding "that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending [Pg 85] suits," the Court declared that the authority "to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits."[104]

JUDICIAL FUNCTIONS

When either House exercises a judicial function, as in judging of elections or determining whether a member should be expelled, it is clearly entitled to compel the attendance of witnesses to disclose the facts upon which its action must be based. Thus the Court held that since a House had a right to expel a member for any offense which it deemed incompatible with his trust and duty as a member, it was entitled to investigate such conduct and to summon private individuals to give testimony concerning it.[105] The decision in Barry *v.* United States ex rel. Cunningham[106] sanctioned the exercise of a similar power in investigating a Senatorial election.

SANCTIONS OF THE INVESTIGATORY POWER

Contempt

Explicit judicial recognition of the right of either House of Congress to commit for contempt a witness who ignores its summons or refuses to answer its inquiries dates from McGrain *v.* Daugherty. But the principle there applied had its roots in an early case, Anderson *v.* Dunn,[107] which affirmed in broad terms the right of either branch of the legislature to attach and punish a person other than a member for contempt of its authority—in that case an attempt to bribe one of its members. The right to punish a contumacious witness was conceded in Marshall *v.* Gordon,[108] although the Court there held that the implied power to deal with contempt did not extend to the arrest of a person who published matter defamatory of the House. Both Anderson *v.* Dunn and Marshall *v.* Gordon emphasized that the power to punish for contempt rests upon the right of self-preservation; that is, in the words of Chief Justice White, "the right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is inherent legislative power to compel in order that legislative functions may be performed."[109] Whence it was argued, in Jurney *v.* MacCracken[110] that the Senate had no power to punish a witness who, having been commanded to produce papers, destroyed them after service of the subpoena, because the "power to punish for contempt may never be exerted, in the case of a private citizen, solely *qua* punishment. * * * the power to punish ceases as soon as the obstruction has been removed, or its removal has become impossible; * * *" The Court confirmed the power to punish for a past contempt as an appropriate means for vindicating "the established and essential privilege of requiring the production of evidence."[111]

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Criminal Prosecutions

Under the rule laid down by Anderson *v.* Dunn, imprisonment for contempt of one of the Houses of Congress could not extend beyond the adjournment of the body which ordered it.[112] This limitation seriously impaired the efficacy of such sanction. Accordingly, in 1857 Congress found it necessary to provide criminal penalties for recalcitrant witnesses, in order to make its power to compel testimony more effective. The Supreme Court held that the purpose of this statute was merely to supplement the power of contempt by providing additional punishment, and overruled all constitutional objections to it saying: "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; * * *."[113] In a prosecution for wilful failure of a person to produce records within her custody and control pursuant to a lawful subpoena issued by a committee of the House of Representatives, the Supreme Court ruled that the presence of a quorum of the committee at the time of the return of the subpoena was not an essential element of the offense.[114] Previously the Court had held that a prosecution could not be maintained under a general perjury statute for false testimony given before a Congressional committee unless a quorum of the committee was present when the evidence was given.[115]

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> Section 2. Clause 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.
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> Clause 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 the State in which he shall be chosen.

Qualifications of Members of Congress

CONGRESSIONAL PROTECTION OF RIGHT TO VOTE FOR REPRESENTATIVES

Although the qualifications of electors of Members of Congress are defined by State law,[116] the right to vote for such Representatives is derived from the Federal Constitution.[117] Unlike the rights guaranteed by the Fourteenth and Fifteenth Amendments, this privilege is secured against the actions of individuals as well as of the States.[118] It embraces the right to cast a ballot and to have it counted honestly.[119] Where a primary election is made by law an integral part of the procedure of choice or where the choice of a representative is in fact controlled by the primary, the Constitution safeguards the rights of qualified electors to participate therein.[120] Congress may protect this right by appropriate legislation.[121] In prosecutions instituted under section 19 of the Criminal Code,[122] the Court had held that failure to count ballots lawfully cast,[123] or dilution of their value by stuffing the ballot box with fraudulent ballots[124] constitutes a denial of the constitutional right to elect Representatives in Congress. But the bribery of voters, although within reach of Congressional power under other clauses of the Constitution, is not deemed to be an interference with the rights guaranteed by this section to other qualified voters.[125]

WHEN THE ABOVE QUALIFICATIONS MUST BE POSSESSED

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The principal disputes which have arisen under these sections have related to the time as of which members-elect must fulfill the conditions of eligibility, and whether additional requirements may be imposed by federal or State law. Although on two occasions when it refused to seat persons who were ineligible when they sought to take the oath of office, the Senate indicated that eligibility must exist at the time of election, it is now established in both Houses that it is sufficient if the requirements are met when the oath is administered. Thus persons elected to either House before attaining the required age or term of citizenship have been admitted as soon as they became qualified.[126]

ENLARGEMENT OF QUALIFICATIONS

Writing in The Federalist[127] with reference to the election of Members of Congress, Hamilton expressed the opinion that "the qualifications of persons who may * * * be chosen * * * are defined and fixed in the Constitution and are unalterable by the legislature." The question remained academic until the Civil War, when Congress passed a law requiring its members to take an oath that they had never been disloyal to the Federal Government. In subsequent contests over the seating of men charged with disloyalty, the right of Congress to establish by law other qualifications for its members than those contained in the Constitution was sharply challenged. Nevertheless, both the House and Senate, relying on this act, did refuse to seat several persons.[128] At this time the principal argument against the statute was that all persons were eligible for the office of Representative unless the Constitution made them ineligible. In Burton *v.* United States,[129] the argument was given a new twist. A law providing that a Senator or Representative convicted of unlawfully receiving money for services rendered before a government department should be "rendered forever thereafter incapable of holding any office of honor, trust or profit under the Government of the United States," was assailed as an unconstitutional interference with the authority of each House to judge the qualifications of, or to expel, one of its own members. The Court construed the statute not to affect the offender's tenure as a Senator, and left undecided the power of Congress to impose additional qualifications (or disqualifications).[130] In exercising the power granted by section 5 to judge the qualifications of its own members, each House has asserted the power to inquire into the conduct of a member-elect prior to his election. In 1900 the House of Representatives refused to seat a person who practiced polygamy,[131] and in 1928 the Senate voted to exclude a Senator-elect on the ground that his acceptance of large campaign contributions from persons who were subject to regulation by a State Administrative Commission of which he had been Chairman were "contrary to sound public policy" and tainted his credentials with fraud and corruption.[132]

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INABILITY OF THE STATES TO ENLARGE

A State may not add to the qualifications prescribed by the Constitution for members of the Senate and House of Representatives. Asserting this principle, the House in 1807 seated a member whose election was contested on the ground that he had not been twelve months a resident of the district from which elected as required by State law. No attempt was made to ascertain whether these requirements were met because the State law was deemed to be unconstitutional.[133] Both the House and Senate have seated members elected during their term of office as State judges, despite the provision of State constitutions purporting to bar the election of judges to any other office under the State or the United States during such term.[134]

> Clause 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].[135] 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.

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THE CENSUS REQUIREMENT

While section 2 expressly provides for an enumeration of persons, Congress has repeatedly directed an enumeration not only of the free persons in the States, but also of those in the territories, and has required all persons over eighteen years of age to answer an ever-lengthening list of inquiries concerning their personal and economic affairs. This extended scope of the census has received the implied approval of the Supreme Court;[136] it is one of the methods whereby the national legislature exercises its inherent power to obtain the information

necessary for intelligent legislative action. Although taking an enlarged view of its power in making the enumeration of persons called for by this section, Congress has not always complied with its positive mandate to reapportion representatives among the States after the census is taken. It failed to make such a reapportionment after the census of 1920, being unable to reach agreement for allotting representation without further increasing the size of the House. Ultimately, by the act of June 18, 1929,[137] it provided that the membership of the House of Representatives should henceforth be restricted to 435 members, to be distributed among the States by the so-called "method of major fractions" which had been earlier employed in the apportionment of 1911.

Clause 4. When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

Clause 5. The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

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SECTION 3. Clause 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].

Clause 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].[138]

Clause 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.

Clause 4. The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

Clause 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.

Clause 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.

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Clause 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. Clause 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.

Federal Legislation Under This Clause

Not until 1842 did Congress undertake to exercise the power to regulate the "times, places and manner of holding elections for Senators and Representatives." In that year it passed a law requiring the election of Representatives by districts.[139] Prior to that time some of the States had sought to increase their influence by electing all of their Representatives on a general ticket. The frequent deadlocks between the two Houses of State legislatures with respect to the election of Senators prompted Congress to pass a further act in 1866, which compelled the two bodies to meet in joint session on a specified day, and to meet everyday thereafter and vote for a Senator until one was elected.[140] The first comprehensive federal statute dealing with elections was adopted in 1870. Under the Enforcement Act of 1870 and kindred measures,[141] false registration, bribery, voting without legal right, making false returns of votes cast, interference in any manner with officers of election, and the neglect by any such officer of any duty required

of him by State of federal law, were made federal offenses. Provision was made for the appointment by federal judges of persons to attend at places of registration and at elections with authority to challenge any person proposing to register or vote unlawfully, to witness the counting of votes, and to identify by their signatures the registration of voters and election tally sheets. After twenty-four years experience Congress repealed those portions of the Reconstruction legislation which dealt specifically with elections, but left in effect those dealing generally with Civil Rights.[142] As seen earlier, those sections have been invoked for the prosecution of election offenses which interfere with the rights of voters guaranteed by the second section of this article. The election laws, of the Reconstruction period were held invalid in part as applied to municipal elections,[143] but were found to be a constitutional exercise of the [Pg 93] authority conferred by this section with respect to the election of members of Congress.[144]

LEGISLATURE DEFINED

While requiring the election of Representatives by districts, Congress has left it to the States to define the areas from which members should be chosen. This has occasioned a number of disputes concerning the validity of action taken by the States. In Ohio ex rel. Davis *v.* Hildebrant, [145] a requirement that a redistricting law be submitted to a popular referendum was challenged and sustained. After the reapportionment made pursuant to the 1930 census, deadlocks between the Governor and legislature in several States, produced a series of cases in which the right of the Governor to veto a reapportionment bill was questioned. Contrasting this function with other duties committed to State legislatures by the Constitution, the Court decided that it was legislative in character and hence subject to gubernatorial veto to the same extent as ordinary legislation under the terms of the State constitution.[146]

PRESENT INEQUALITY OF ELECTION DISTRICTS

The Reapportionment Act of 1929[147] omitted a requirement contained in the 1911 law[148] that Congressional districts be "composed of a contiguous and compact territory, * * * containing as nearly as practicable an equal number of inhabitants." Since the earlier act was not repealed it was argued that the mandate concerning compactness, contiguity and equality of population of districts was still controlling. The Supreme Court rejected this view.[149] In Colegrove *v.* Green, [150] the Illinois Apportionment law, which created districts now having glaringly unequal populations, was attacked as unconstitutional on the ground that it denied to voters in the more populous districts the full right to vote and to the equal protection of the laws. The Court dismissed the complaint, three Justices asserting that the issue was not justiciable, and a fourth that the case was one in which the Court should decline to exercise jurisdiction.[151] Justice [Pg 94] Black, dissenting in an opinion in which Justices Douglas and Murphy joined, argued: "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 of each vote case. * * * legislation which must inevitably bring about glaringly unequal representation in the Congress in favor of special classes and groups should be invalidated, 'whether accomplished ingeniously or ingenuously'."[152]

CONGRESSIONAL PROTECTION OF THE ELECTORAL PROCESS

Congress can by law protect the voter from personal violence or intimidation and the election itself from corruption and fraud.[153] To accomplish these ends it may adopt the statutes of the States and enforce them by its own sanctions.[154] It may punish a State election officer for violating his duty under a State law governing Congressional elections.[155] It may also punish federal officers and employees who solicit or receive contributions to procure the nomination of a particular candidate in a State primary election.[156] At one time the Court held that Congress had no power, at least prior to the adoption of the Seventeenth Amendment, to limit the expenditures made to procure a primary nomination to the United States Senate,[157] but this decision has been greatly weakened, and the right of the National Government to regulate primary elections conducted under State law for the nomination of Members of Congress has been squarely recognized where such primary is made by State law "an integral part of the procedure of choice, or where in fact the primary effectively controls the choice,..."[158]

> Clause 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]. [Pg 95]
>
> SECTION 5. Clause 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.

Clause 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.

Clause 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.

Clause 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.

Powers and Duties of the Houses

POWER TO JUDGE ELECTIONS

Each House, in judging of elections under this clause acts as a judicial tribunal, with like power to compel attendance of witnesses. In the exercise of its discretion, it may issue a warrant for the arrest of a witness to procure his testimony, without previous subpoena, if there is good reason to believe that otherwise such witness would not be forthcoming.[159] It may punish perjury committed in testifying before a notary public upon a contested election.[160] The power to judge elections extends to an investigation of expenditures made to influence nominations at a primary election.[161] Refusal to permit a person presenting credentials in due form to take the oath of office does not oust the jurisdiction of the Senate to inquire into the legality of the election.[162] Nor does such refusal unlawfully deprive the State which elected such person of its equal [Pg 96] suffrage in the Senate.[163]

"A QUORUM TO DO BUSINESS"

For many years the view prevailed in the House of Representatives that it was necessary for a majority of the members to vote on any proposition submitted to the House in order to satisfy the constitutional requirement for a quorum. It was a common practice for the opposition to break a quorum by refusing to vote. This was changed in 1890, by a ruling made by Speaker Reed, and later embodied in Rule XV of the House, that members present in the chamber but not voting would be counted in determining the presence of a quorum.[164] The Supreme Court upheld this rule in United States *v.* Ballin,[165] saying that the capacity of the House to transact business is "created by the mere presence of a majority," and that since the Constitution does not prescribe any method for determining the presence of such majority "it is therefore within the competency of the House to prescribe any method which shall be reasonably certain to ascertain the fact."[166] The rules of the Senate provide for the ascertainment of a quorum only by a roll call,[167] but in a few cases it has held that if a quorum is present, a proposition can be determined by the vote of a lesser number of members.[168]

RULES OF PROCEDURE

In the exercise of their constitutional power to determine their rules of proceedings the Houses of Congress may not "ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the House, * * * The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the House, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal."[169] Where a rule affects private rights, the construction thereof becomes a [Pg 97] judicial question. In United States *v.* Smith,[170] the Court held that the Senate's attempt to reconsider its confirmation of a person nominated by the President as Chairman of the Federal Power Commission was not warranted by its rules, and did not deprive the appointee of his title to the office. In Christoffel *v.* United States[171] a sharply divided Court upset a conviction for perjury in the district courts of one who had denied under oath before a House Committee any affiliation with Communism. The reversal was based on the ground that inasmuch as a quorum of the Committee, while present at the outset, was not present at the time of the alleged perjury, testimony before it was not before a "competent tribunal" within the sense of the District of Columbia Code.[172] Four Justices, speaking by Justice Jackson dissented, arguing that under the rules and practices of the House, "a quorum once established is presumed to continue unless and until a point of no quorum is raised" and that the Court was, in effect, invalidating this rule, thereby invalidating at the same time the rule of self-limitation observed by courts "where such an issue is tendered."[173]

POWERS OF THE HOUSES OVER MEMBERS

Congress has authority to make it an offense against the United States for a Member, during his continuance in office, to receive compensation for services before a government department in relation to proceedings in which the United States is interested. Such a statute does not interfere with the legitimate authority of the Senate or House over its own Members.[174] In upholding the power of the Senate to investigate charges that some Senators had been speculating in sugar stocks during the consideration of a tariff bill, the Supreme Court asserted that "the right to expel extends to all cases where the offence is such as in the judgment of the Senate is inconsistent with the trust and duty of a Member."[175] It cited with apparent approval the action of the Senate in expelling William Blount in 1797 for attempting to seduce an American agent among the Indians from his duty and for negotiating for services in behalf of the British Government among the Indians—conduct which was not a "statutable offense" and which was not committed in his official character, nor during the session of Congress nor at the seat of government. [Pg 98]

THE DUTY TO KEEP A JOURNAL

The object of the clause requiring the keeping of a Journal is "to insure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents."[176] When the Journal of either House is put in evidence for the purpose of determining whether the yeas and nays, were ordered, and what the vote was on any particular question, the Journal must be presumed to show the truth, and a statement therein that a quorum was present, though not disclosed by the yeas and nays, is final.[177] But when an enrolled bill, which has been signed by the Speaker of the House and by the President of the Senate, in open session, receives the approval of the President and is deposited in the Department of State, its authentication as a bill that has passed Congress is complete and unimpeachable, and it is not competent to show from the Journals of either House that an act so authenticated, approved, and deposited, in fact omitted one section actually passed by both Houses of Congress.[178]

> SECTION 6. Clause 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. [Pg 99]

Compensation, Immunities and Disabilities of Members

WHEN THE PAY STARTS

A Member of Congress who receives his certificate of admission, and is seated, allowed to vote, and serve on committees, is *prima facie* entitled to the seat and salary, even though the House subsequently declares his seat vacant. The one who contested the election and was subsequently chosen to fill the vacancy is entitled to salary only from the time the compensation of such "predecessor" has ceased.[179]

PRIVILEGE FROM ARREST

This clause is practically obsolete. It applies only to arrests in civil suits, which were still common in this country at the time the Constitution was adopted.[180] It does not apply to service of process in either civil[181] or criminal cases.[182] Nor does it apply to arrest in any criminal case. The phrase "treason, felony or breach of the peace" is interpreted to withdraw all criminal offenses from the operation of the privilege.[183]

THE PRIVILEGE OF SPEECH OR DEBATE

The protection of this clause is not limited to words spoken in debate, but is applicable to written reports, to resolutions offered, to the act of voting and to all things generally done in a session of the House by one of its members in relation to the business before it.[184] In Kilbourn *v.* Thompson[185] the Supreme Court quoted with approval the following excerpt from the opinion of Chief Justice Parsons in the early Massachusetts of Coffin *v.* Coffin,[186] giving a broad scope to the immunity of legislators: "'These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I, therefore, think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and in the execution of the office. And I would define the article as securing to every member exemption from prosecution for everything said or done by him as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular, according to the [Pg 100]

rules of the House, or irregular and against their rules. I do not confine the member to his place in the House; and I am satisfied that there are cases in which he is entitled to this privilege when not within the walls of the representatives' chamber.'"[187] Accordingly the Court ruled that Members of the House of Representatives were not liable to a suit for false imprisonment by reason of their initiation and prosecution of the legislative proceedings under which plaintiff was arrested.[188] Nor does the claim of an unworthy purpose destroy the privilege. "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators".[189]

> Clause 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.

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INCOMPATIBLE OFFICES

According to legislative precedents, visitors to academies, regents, directors and trustees of public institutions, and members of temporary commissions who receive no compensation as such, are not officers within the constitutional inhibition of section 6.[190] Government contractors and federal officers who resign before presenting their credentials may be seated as Members of Congress.[191] In 1909, after having increased the salary of the Secretary of State, [192] Congress reduced it to the former figure so that a Member of the Senate at the time the increase was voted would be eligible for that office.[193] The first clause again became a subject of discussion in 1937, when Justice Black was appointed to the Supreme Court in face of the fact that Congress had recently improved the financial position of Justices retiring at seventy and the term for which Mr. Black had been elected to the Senate from Alabama in 1932 had still some time to run. The appointment was defended by the argument that inasmuch as Mr. Black was only fifty-one years old at the time and so would be ineligible for the "increased emolument" for nineteen years, it was not *as to him* an increased emolument.[194]

> Section 7. Clause 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.
>
> Clause 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.

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THE LEGISLATIVE PROCESS

REVENUE BILLS

Only bills to levy taxes in the strict sense of the word are comprehended by the phrase "all bills for raising revenue"; bills for other purposes, which incidentally create revenue, are not included. [195] An act providing a national currency secured by a pledge of bonds of the United States, which, "in the furtherance of that object, and also to meet the expenses attending the execution of the act," imposed a tax on the circulating notes of national banks was held not to be a revenue measure which must originate in the House of Representatives.[196] Neither was a bill which provided that the District of Columbia should raise by taxation and pay to designated railroad companies a specified sum for the elimination of grade crossings and the construction of a union railway station.[197] The substitution of a corporation tax for an inheritance tax,[198] and the addition of a section imposing an excise tax upon the use of foreign built pleasure yachts,[199] have been held to be within the Senate's constitutional power to propose amendments.

APPROVAL BY THE PRESIDENT

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The President is not restricted to signing a bill on a day when Congress is in session.[200] He may sign within ten days (Sundays excepted) after the bill is presented to him, even if that period extends beyond the date of the final adjournment of Congress.[201] His duty in case of approval of a measure is merely to sign it. He need not write on the bill the word "approved" nor the date. If no date appears on the face of the roll, the Court may ascertain the fact by resort to any source of information capable of furnishing a satisfactory answer.[202] A bill becomes law on the date of its approval by the President.[203] When no time is fixed by the act it is effective from the date of its approval,[204] which usually is taken to be the first moment of the day, fractions of a day being disregarded.[205]

THE VETO POWER

If Congress adjourns within ten days (Sundays excepted) of the presentation of a bill to the President, the return of the bill is prevented within the meaning of this clause. Consequently it does not become law if the President does not sign it, but succumbs to what in Congressional parlance is called a "pocket veto."[206] But a brief recess by the House in which a bill originated, while the Congress is still in session, does not prevent the return of a bill by delivery to one of the officers of the House who has implied authority to receive it.[207] The two-thirds vote of each House required to pass a bill over a veto means two-thirds of a quorum.[208] After a bill becomes law the President has no authority to repeal it. Asserting this truism, the Supreme Court held in The Confiscation Cases,[209] that the immunity proclamation issued by the President in 1868 did not require reversal of a decree condemning property which had been seized under the Confiscation Act of 1862.[210]

> Clause 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.

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PRESENTATION OF RESOLUTIONS

The sweeping nature of this obviously ill-considered provision is emphasized by the single exception specified to its operation. Actually, it was impossible from the first to give it any such scope. Otherwise the intermediate stages of the legislative process would have been bogged down hopelessly, not to mention other highly undesirable results. In a report rendered by the Senate Judiciary Committee in 1897 it was shown that the word "necessary" in the clause had come in practice to refer "to the necessity occasioned by the requirement of other provisions of the Constitution, whereby every exercise of 'legislative powers' involves the concurrence of the two Houses"; or more briefly, "necessary" here means necessary if an "order, resolution, or vote" is to have the force of law. Such resolutions have come to be termed "joint resolutions" and stand on a level with "bills," which if "enacted" become Statutes. But "votes" taken in either House preliminary to the final passage of legislation need not be submitted to the President, nor resolutions passed by the Houses concurrently with a view to expressing an opinion or to devising a common program of action (e.g., the concurrent resolutions by which during the fight over Reconstruction the Southern States were excluded from representation in the House and Senate, the Joint Committee on Reconstruction containing members from both Houses was created, etc.), or to directing the expenditure of money appropriated to the use of the two Houses.[211] Within recent years the concurrent resolution has been put to a new use—the termination of powers delegated to the Chief Executive, or the disapproval of particular exercises of power by him. Most of the important legislation enacted for the prosecution of World War II provided that the powers granted to the President should come to an end upon adoption of concurrent resolutions to that effect.[212] Similarly, measures authorizing the President to reorganize executive agencies have provided that a Reorganization Plan promulgated by him should be reported by Congress and should not become effective if one[213] or both[214] Houses adopted a resolution disapproving it. Also, it was settled as early as 1789 that resolutions of Congress proposing amendments to the Constitution need not be submitted to the President, the Bill of Rights having been referred to the States without being laid before President Washington for his approval—a procedure which the Court ratified in due course.[215]

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> Section 8. The Congress shall have Power 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.

The Taxing-Spending Power

KINDS OF TAXES PERMITTED

By the terms of the Constitution, the power of Congress to levy taxes is subject to but one exception and two qualifications. Articles exported from any State may not be taxed at all. Direct taxes must be levied by the rule of apportionment and indirect taxes by the rule of uniformity. The Court has emphasized the sweeping character of this power by saying from time to time that it "reaches every subject,"[216] that it is "exhaustive"[217] or that it "embraces every conceivable power of taxation."[218] Despite these generalizations, the power has been at times substantially curtailed by judicial decision with respect to the subject matter of taxation, the manner in which taxes are imposed, and the objects for which they may be levied.

DECLINE OF THE FORBIDDEN SUBJECT MATTER TEST

In recent years the Supreme Court has restored to Congress the power to tax most of the subject matter which had previously been withdrawn from its reach by judicial decision. The holding of Evans *v.* Gore[219] and Miles *v.* Graham[220] that the inclusion of the salaries received by federal judges in measuring the liability for a nondiscriminatory income tax violated the constitutional mandate that the compensation of such judges should not be diminished during their continuance [Pg 106] in office was repudiated in O'Malley *v.* Woodrough.[221] The specific ruling of Collector *v.* Day[222] that the salary of a State officer is immune to federal income taxation also has been overruled.[223] But the principle underlying that decision—that Congress may not lay a tax which would impair the sovereignty of the States—is still recognized as retaining some vitality.

THE RISE AND FALL OF COLLECTOR *v.* DAY

Collector *v.* Day was decided in 1871 while the country was still in the throes of reconstruction. As noted by Chief Justice Stone in a footnote to his opinion in Helvering *v.* Gerhardt,[224] the Court had not then determined how far the Civil War amendments had broadened the federal power at the expense of the States; the fact that the taxing power had recently been used with destructive effect upon notes issued by State banks[225] suggested the possibility of similar attacks upon the existence of the States themselves. Two years later the Court took the logical further step of holding that the federal income tax could not be imposed on income received by a municipal corporation from its investments.[226] A far-reaching extension of private immunity was granted in Pollock *v.* Farmers Loan and Trust Co.,[227] where interest received by a private investor on State or municipal bonds was held to be exempt from federal taxation. As the apprehensions of this era subsided, the doctrine of these cases was pushed into the background. It never received the same wide application as did McCulloch *v.* Maryland[228] in curbing the power of the States to tax operations or instrumentalities of the Federal Government. Only once since the turn of the century has the national taxing power been further narrowed in the name of Dual Federalism. In 1931 the Court held that a federal excise tax was inapplicable to the manufacture and sale to a municipal corporation of equipment for its police force.[229] Justices Stone and Brandeis dissented from this decision and it is doubtful whether it would be followed today.

FEDERAL TAXATION OF STATE INTERESTS

Within a decade after the Pollock decision the retreat from Collector *v.* Day began. In 1903, a succession tax upon a bequest to a municipality for public purposes was upheld on the ground that the tax was payable out of the estate before distribution to the legatee. Looking to form and [Pg 107] not to substance, in disregard of the mandate of Brown *v.* Maryland,[230] a closely divided Court declined to "regard it as a tax upon the municipality, though it might operate incidentally to reduce the bequest by the amount of the tax."[231] When South Carolina embarked upon the business of dispensing alcoholic beverages, its agents were held to be subject to the national internal revenue tax, the ground of the holding being that in 1787 such a business was not regarded as one of the ordinary functions of government.[232] Another decision marking a clear departure from the logic of Collector *v.* Day was Flint *v.* Stone Tracy Company,[233] where the Court sustained an act of Congress taxing the privilege of doing business as a corporation, the tax being measured by the income. The argument that the tax imposed an unconstitutional burden on the exercise by a State of its reserved power to create corporate franchises was rejected, partly in consideration of the principle of national supremacy, and partly on the ground that the corporate franchises were private property. This case also qualified Pollock *v.* Farmers Loan and Trust Company to the extent of allowing interest on State bonds to be included in measuring the tax on the corporation. Subsequent cases have sustained an estate tax on the net estate of a decedent, including State bonds;[234] excise taxes on the transportation of merchandise in performance of a contract to sell and deliver it to a county;[235] on the importation of scientific apparatus by a State university;[236] on admissions to athletic contests sponsored by a State institution, the net proceeds of which were used to further its educational program;[237] and on admissions to recreational facilities operated on a nonprofit basis by a municipal corporation.[238] Income derived by independent engineering contractors from the performance of State functions;[239] the compensation of trustees appointed to manage a street railway taken over and operated by a State;[240] profits derived from the sale of State bonds;[241] or from oil produced by lessees of State lands;[242] have all been held to be subject to federal

taxation despite a possible economic burden on the State.

IS ANY IMMUNITY LEFT THE STATES?

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Although there have been sharp differences of opinion among members of the Supreme Court in recent cases dealing with the tax immunity of State functions and instrumentalities, it has been stated that "all agree that not all of the former immunity is gone."[243] Twice the Court has made an effort to express its new point of view in a statement of general principles by which the right to such immunity shall be determined. However, the failure to muster a majority in concurrence with any single opinion in the more recent of these cases leaves the question very much in doubt. In Helvering *v.* Gerhardt,[244] where, without overruling Collector *v.* Day, it narrowed the immunity of salaries of State officers and federal income taxation, the Court announced "* * *, two guiding principles of limitation for holding the tax immunity of State instrumentalities to its proper function. The one, dependent upon the nature of the function being performed by the State or in its behalf, excludes from the immunity activities thought not to be essential to the preservation of State governments even though the tax be collected from the State treasury. * * * The other principle, exemplified by those cases where the tax laid upon individuals affects the State only as the burden is passed on to it by the taxpayer, forbids 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."[245]

CONFLICTING VIEWS ON THE COURT

The second attempt to formulate a general doctrine was made in New York *v.* United States,[246] where, on review of a judgment affirming the right of the United States to tax the sale of mineral waters taken from property owned and operated by the State of New York, the Court was asked to and did reconsider the right of Congress to tax business enterprises carried on by the States. Justice Frankfurter, speaking for himself and Justice Rutledge, made the question of discrimination *vel non* against State activities the test of the validity of such a tax. They found "no restriction upon Congress to include the States in levying a tax exacted equally from private [Pg 109] persons upon the same subject matter."[247] In a concurring opinion in which Justices Reed, Murphy, and Burton joined, Chief Justice Stone rejected the criterion of discrimination. He repeated what he had said in an earlier case to the effect that "'* * * the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax * * * or the appropriate exercise of the functions of the government affected by it.'"[248] Justices Douglas and Black dissented in an opinion written by the former on the ground that the decision disregarded the Tenth Amendment, placed "the sovereign States on the same plane as private citizens," and made them "pay the Federal Government for the privilege of exercising powers of sovereignty guaranteed them by the Constitution."[249] In the most recent case dealing with State immunity the Court sustained the tax on the second ground mentioned in Helvering *v.* Gerhardt—that the burden of the tax was borne by private persons—and did not consider whether the function was one which the Federal Government might have taxed if the municipality had borne the burden of the exaction.[250]

THE RULE OF UNIFORMITY

Whether a tax is to be apportioned among the States according to the census taken pursuant to article I, section 2, or imposed uniformly throughout the United States depends upon its classification as direct or indirect.[251] The rule of uniformity for indirect taxes is easy to obey. It exacts only that the subject matter of a levy be taxed at the same rate wherever found in the United States; or, as it is sometimes phrased, the uniformity required is "geographical," not "intrinsic."[252] The clause accordingly places no obstacle in the way of legislative classification for the purpose of taxation, nor in the way of what is called progressive taxation.[253] A taxing statute does not fail of the prescribed uniformity because its operation and incidence may be affected by differences in State laws.[254] A federal estate tax law which permitted a deduction for a like tax paid to a State was not rendered invalid by the fact that one State levied no such tax.[255] The term "United States" in this clause refers only to the States of the Union, the District of Columbia, and incorporated territories. Congress is not bound by the rule of uniformity in framing tax measures for unincorporated territories.[256] Indeed, in Binns *v.* United States,[257] the Court sustained license taxes imposed by Congress but applicable only in Alaska, where the [Pg 110] proceeds, although paid into the general fund of the Treasury, did not in fact equal the total cost of maintaining the territorial government.

PURPOSES OF TAXATION

Regulation by Taxation

The discretion of Congress in selecting the objectives of taxation has also been held at times to be subject to limitations implied from the nature of the Federal System. Apart from matters which Congress is authorized to regulate, the national taxing power, it has been said, "reaches only existing subjects."[258] Congress may tax any activity actually carried on, regardless of whether it is permitted or prohibited by the laws of the United States[259] or by those of a State.[260] But so-called federal "licenses," so far as they relate to trade within State limits, merely express "the purpose of the government not to interfere * * * with the trade nominally licensed, if the required taxes are paid." Whether the "licensed" trade shall be permitted at all is a question for decision by the State.[261] This, nevertheless, does not signify that Congress may not often regulate to some extent a business within a State in order the more effectively to tax it. Under the necessary and proper clause, Congress may do this very thing. Not only has the Court sustained regulations concerning the packaging of taxed articles such as tobacco[262] and oleomargarine,[263] ostensibly designed to prevent fraud in the collection of the tax; it has also upheld measures taxing drugs[264] and firearms[265] which prescribed rigorous restrictions under which such articles could be sold or transferred, and imposed heavy penalties upon persons dealing with them in any other way. These regulations were sustained as conducive to the efficient collection of the tax though they clearly transcended in some respects this ground of justification.

Extermination by Taxation [Pg 111]

A problem of a different order is presented where the tax itself has the effect of suppressing an activity or where it is coupled with regulations which clearly have no possible relation to the collection of the tax. Where a tax is imposed unconditionally, so that no other purpose appears on the face of the statute, the Court has refused to inquire into the motives of the lawmakers and has sustained the tax despite its prohibitive proportions.[266] In the language of a recent opinion: "It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. * * * The principle applies even though the revenue obtained is obviously negligible, * * *, or the revenue purpose of the tax may be secondary, * * * Nor does a tax statute necessarily fall because it touches on activities which Congress might not otherwise regulate. As was pointed out in Magnano Co. *v.* Hamilton, 292 U.S. 40, 47 (1934): 'From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment.'"[267] But where the tax is conditional, and may be avoided by compliance with regulations set out in the statute, the validity of the measure is determined by the power of Congress to regulate the subject matter. If the regulations are within the competence of Congress, apart from its power to tax, the exaction is sustained as an appropriate sanction for making them effective;[268] otherwise it is invalid.[269] During the Prohibition Era, Congress levied a heavy tax upon liquor dealers who operated in violation of State law. In United States *v.* Constantine[270] the Court held that this tax was unenforceable after the repeal of the Eighteenth Amendment, since the National Government had no power to impose an additional penalty for infractions of State law.

The Protective Tariff [Pg 112]

The earliest examples of taxes levied with a view to promoting desired economic objectives in addition to raising revenue were, of course, import duties. The second statute adopted by the first Congress was a tariff act which recited 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 merchandise imported."[271] After being debated for nearly a century and a half, the constitutionality of protective tariffs was finally settled by the unanimous decision of the Supreme Court in Hampton and Company *v.* United States,[272] where Chief Justice Taft wrote: "The second objection to § 315 is that the declared plan of Congress, either expressly or by clear implication, formulates its rule to guide the President and his advisory Tariff Commission as one directed to a tariff system of protection that will avoid damaging competition to the country's industries by the importation of goods from other countries at too low a rate to equalize foreign and domestic competition in the markets of the United States. It is contended that the only power of Congress in the levying of customs duties is to create revenue, and that it is unconstitutional to frame the customs duties with any other view than that of revenue raising. * * * In this first Congress sat many members of the Constitutional Convention of 1787. This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, long acquiesced in, fixes the construction to be given its provisions. * * * The enactment and enforcement of a number of customs revenue laws drawn with a motive of maintaining a system of protection, since the revenue law of 1789, are matters of history. * * * Whatever we may think of the wisdom of a protection policy, we can not hold it unconstitutional. So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subject of taxes cannot invalidate Congressional action."[273]

SPENDING FOR THE GENERAL WELFARE

The grant of power to "provide * * * for the general welfare" raises a two-fold question: How may Congress provide for "the general welfare" and what is "the general welfare" which it is authorized to promote? The first half of this question was answered by Thomas Jefferson in his Opinion on the Bank as follows: "* * * the laying of taxes is the *power*, and the general welfare the *purpose* for which the power is to be exercised. They [Congress] are not to lay taxes *ad libitum for any purpose they please*; but only *to pay the debts or provide for the welfare of the Union*. In like manner, they are not *to do anything they please* to provide for the general welfare, but only to *lay taxes* for that purpose."[274] The clause, in short, is not an independent grant of power, but a qualification of the taxing power. Although a broader view has been occasionally asserted,[275] Congress has not acted upon it and the Courts have had no occasion to adjudicate the point.

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Hamilton *v.* Madison

With respect to the meaning of "the general welfare" the pages of The Federalist itself disclose a sharp divergence of views between its two principal authors. Hamilton adopted the literal, broad meaning of the clause;[276] Madison contended that the powers of taxation and appropriation of the proposed government should be regarded as merely instrumental to its remaining powers, in other words, as little more than a power of self-support.[277] From an early date Congress has acted upon the interpretation espoused by Hamilton. Appropriations for subsidies[278] and for an ever increasing variety of "internal improvements"[279] constructed by the Federal Government, had their beginnings in the administrations of Washington and Jefferson.[280] Since 1914, federal grants-in-aid,—sums of money apportioned among the States for particular uses, often conditioned upon the duplication of the sums by the recipient State, and upon observance of stipulated restrictions as to its use—have become commonplace.[281]

Triumph of the Hamiltonian Theory

The scope of the national spending power was brought before the Supreme Court at least five times prior to 1936, but the Court disposed of four of them without construing the "general welfare" clause. In the Pacific Railway Cases[282] and Smith *v.* Kansas City Title and Trust Company,[283] it affirmed the power of Congress to construct internal improvements, and to charter and purchase the capital stock of federal land banks, by reference to the powers of the National Government over commerce, the post roads and fiscal operations, and to its war powers. Decisions on the merits were withheld in two other cases—Massachusetts *v.* Mellon and Frothingham *v.* Mellon[284]—on the ground that neither a State nor an individual citizen is entitled to a remedy in the courts against an unconstitutional appropriation of national funds. In United States *v.* Gettysburg Electric Railway Co.,[285] however, the Court had invoked "the great power of taxation to be exercised for the common defence and the general welfare,"[286] to sustain the right of the Federal Government to acquire land within a State for use as a national park. Finally, in United States *v.* Butler,[287] the Court gave its unqualified endorsement to Hamilton's views on the taxing power. Wrote Justice Roberts for the Court: "Since the foundation of the Nation sharp differences of opinion have persisted as to the true interpretation of the phrase. Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section; that, as the United States is a government of limited and enumerated powers, the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress. In this view the phrase is mere tautology, for taxation and appropriation are or may be necessary incidents of the exercise of any of the enumerated legislative powers. Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. Each contention has had the support of those whose views are entitled to weight. This court had noticed the question, but has never found it necessary to decide which is the true construction. Justice Story, in his Commentaries, espouses the Hamiltonian position. We shall not review the writings of public men and commentators or discuss the legislative practice. Study of all these leads us to conclude that the reading advocated by Justice Story is the correct one. While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of § 8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."[288]

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The Security Act Cases

Although holding that the spending power is not limited by the specific grants of power contained in article I, section 8, the Court found, nevertheless, that it was qualified by the Tenth Amendment, and on this ground ruled in the Butler case that Congress could not use moneys raised by taxation to "purchase compliance" with regulations "of matters of State concern with respect to which Congress has no authority to interfere."[289] Within little more than a year this

decision was reduced to narrow proportions by Steward Machine Co. *v.* Davis,[290] which sustained the tax imposed on employers to provide unemployment benefits, and the credit allowed for similar taxes paid to a State. To the argument that the tax and credit in combination were "weapons of coercion, destroying or impairing the autonomy of the States," the Court replied that relief of unemployment was a legitimate object of federal expenditure under the "general welfare" clause; that the Social Security Act represented a legitimate attempt to solve the problem by the cooperation of State and Federal Governments; that the credit allowed for State taxes bore a reasonable relation "to the fiscal need subserved by the tax in its normal operation,"[291] since State unemployment compensation payments would relieve the burden for direct relief borne by the national treasury. The Court reserved judgment as to the validity of a tax "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."[292]

Earmarked Funds [Pg 116]

The appropriation of the proceeds of a tax to a specific use does not affect the validity of the exaction, if the general welfare is advanced and no other constitutional provision is violated. Thus a processing tax on coconut oil was sustained despite the fact that the tax collected upon oil of Philippine production was segregated and paid into the Philippine Treasury.[293] In Helvering *v.* Davis,[294] the excise tax on employers, the proceeds of which were not earmarked in any way, although intended to provide funds for payments to retired workers, was upheld under the "general welfare" clause, the Tenth Amendment being found to be inapplicable.

Conditional Grants-in-Aid

In the Steward Machine Company case, it was a taxpayer who complained of the invasion of the State sovereignty and the Court put great emphasis on the fact that the State was a willing partner in the plan of cooperation embodied in the Social Security Act.[295] A decade later the right of Congress to impose conditions upon grants-in-aid over the objection of a State was squarely presented in Oklahoma *v.* United States Civil Service Commission.[296] The State objected to the enforcement of a provision of the Hatch Act,[297] whereby its right to receive federal highway funds would be diminished in consequence of its failure to remove from office a member of the State Highway Commission found to have taken an active part in party politics while in office. Although it found that the State had created a legal right which entitled it to an adjudication of its objection, the Court denied the relief sought on the ground that, "While the United States is not concerned with, and has no power to regulate local political activities as such of State officials, it does have power to fix the terms upon which its money allotments to State shall be disbursed. * * * The end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship. So even though the action taken by Congress does have effect upon certain activities within the State, it has never been thought that such effect made the federal act invalid."[298]

"Debts of the United States"

The power to pay the debts of the United States is broad enough to include claims of citizens arising on obligations of right and justice.[299] The Court sustained an act of Congress which set apart for the use of the Philippine Islands, the revenue from a processing tax on coconut oil of [Pg 117] Philippine production, as being in pursuance of a moral obligation to protect and promote the welfare of the people of the Islands.[300] Curiously enough, this power was first invoked to assist the United States to collect a debt due to it. In United States *v.* Fisher[301] the Supreme Court sustained a statute which gave the Federal Government priority in the distribution of the estates of its insolvent debtors. The debtor in that case was the endorser of a foreign bill of exchange which apparently had been purchased by the United States. Invoking the "necessary and proper" clause, Chief Justice Marshall deduced the power to collect a debt from the power to pay its obligations by the following reasoning: "The government is to pay the debt of the Union, and must be authorized to use the means which appear to itself most eligible to effect that object. It has, consequently, a right to make remittances by bills or otherwise, and to take those precautions which will render the transaction safe."[302]

> Clause 2. *The Congress shall have Power* * * * To borrow Money on the credit of the United States.

The Borrowing Power

The original draft of the Constitution reported to the convention by its Committee of Detail empowered Congress "To borrow money and emit bills on the credit of the United States."[303] When this section was reached in the debates, Gouverneur Morris moved to strike out the clause "and emit bills on the credit of the United States." Madison suggested that it might be sufficient "to prohibit the making them a tender." After a spirited exchange of views on the subject of paper money the convention voted, nine States to two, to delete the words "and emit bills."[304]

Nevertheless, in 1870, the Court relied in part upon this clause in holding that Congress had authority to issue treasury notes and to make them legal tender in satisfaction of antecedent debts.[305] When it borrows money "on the credit of the United States" Congress creates a binding obligation to pay the debt as stipulated and cannot thereafter vary the terms of its agreement. A law purporting to abrogate a clause in government bonds calling for payment in gold coin was held to contravene this clause, although the creditor was denied a remedy in the absence of a showing of actual damage.[306]

Clause 3. *The Congress shall have power* * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. [Pg 118]

Purpose of the Clause

This clause serves a two-fold purpose: it is the direct source of the most important powers which the National Government exercises in time of peace: and, except for the due process of law clause of Amendment XIV, it is the most important limitation imposed by the Constitution on the exercise of State power. The latter, or restrictive, operation of the clause was long the more important one from the point of view of Constitutional Law. Of the approximately 1400 cases which reached the Supreme Court under the clause prior to 1900, the overwhelming proportion stemmed from State legislation.[307] It resulted that, with an important exception to be noted in a moment, the guiding lines in construction of the clause were initially laid down from the point of view of its operation as a curb on State power, rather than of its operation as a source of national power; and the consequence of this was that the word "commerce," as designating the thing to be protected against State interference, came to dominate the clause, while the word "regulate" remained in the background.

Definition of Terms: Gibbons *v.* Ogden

"COMMERCE"

The etymology of the word, "cum merce (with merchandise)" carries the primary meaning of traffic—i.e., "to buy and sell goods; to trade" (Webster's International). This narrow conception was replaced in the great leading case of Gibbons *v.* Ogden, 9 Wheat. 1 (1824), by a much broader one, on which interpretation of the clause has been patterned ever since. The case arose out of a series of acts of the legislature of New York, passed between the years 1798 and 1811, which conferred upon Livingston and Fulton the exclusive right to navigate the waters of that State with steam-propelled vessels. Gibbons challenged the monopoly by sending from Elizabethtown, New Jersey, into the Hudson in the State of New York two steam vessels which had been licensed and enrolled to engage in the coasting trade under an act passed by Congress in 1793. Counsel for Ogden (an assignee of Livingston and Fulton) argued that since Gibbons' vessels carried only passengers between New Jersey and New York, they were not engaged in [Pg 119] traffic and hence not in "commerce" in the sense of the Constitution. This argument Chief Justice Marshall answered as follows: "The subject to be regulated is commerce; * * * 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."[308] The term, therefore, included navigation—a conclusion which Marshall supported by appeal to general understanding, to the prohibition in article I, § 9, against any preference being given "'* * * by any regulation of commerce or revenue, to the ports of one State over those of another,'" and to the admitted and demonstrated power of Congress to impose embargoes.[309]

"COMMERCE" TODAY

Later in his opinion Marshall qualified the word "intercourse" with the word "commercial."[310] Today "commerce" in the sense of the Constitution, and hence "interstate commerce" when it is carried on across State lines, covers every species of movement of persons and things, whether for profit or not;[311] every species of communication, every species of transmission of [Pg 120] intelligence, whether for commercial purposes or otherwise;[312] every species of commercial negotiation which, as shown "by the established course of the business," will involve sooner or later an act of transportation of persons or things, or the flow of services or power across State lines.[313]

From time to time the Court has said that certain things were not interstate commerce, such as mining or manufacturing undertaken "with the intent" that the product shall be transported to other States;[314] insurance transactions when carried on across State lines;[315] exhibitions of baseball between professional teams which travel from State to State;[316] the making of contracts for the insertion of advertisements in periodicals in another State;[317] contracts for personal services to be rendered in another State.[318] Recent decisions either overturn or cast doubt on most if not all of these holdings. By one of these the gathering of news by a press association and its transmission to client newspapers is termed interstate commerce.[319] By another the activities of a Group Health Association which serves only its own members are held

to be "trade" within the protection of the Sherman Act and hence capable, if extended, of becoming interstate commerce.[320] By a third the business of insurance when transacted between an insurer and an insured in different States is interstate commerce.[321]

THE "NECESSARY AND PROPER" CLAUSE

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In the majority of the above cases the commerce clause was involved solely as a limitation on the powers of the States. But when the clause is treated as a source of national power it is, of course, read in association with the power of Congress "* * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, * * *,"[322] with the result that, as is pointed out later, "interstate commerce" has come in recent years practically to connote both those operations which precede as well as those which follow commercial intercourse itself, provided such operations are deemed by the Court to be capable of "affecting" such intercourse.[323]

"AMONG THE SEVERAL STATES"

In Cohens *v.* Virginia, decided in 1821, Marshall had asserted, "for all commercial purposes we are one nation."[324] In Gibbons *v.* Ogden, however, he conceded that the phrase commerce "among the several States" was "not one which would probably have been selected to indicate the completely interior traffic of a State"; and added: "The genius and character of the whole government seem to be, that its action is to be applied to all external concerns of the nation, and to those internal concerns which affect the States generally; but not those which are completely within a particular State, which do not affect other States, and with which it is not necessary to [Pg 122] interfere, for the purpose of executing some of the general powers of the government."[325]

This recognition of an "exclusively internal" commerce of a State ("intrastate commerce" today) appears at times to have been regarded as implying the existence of an area of State power which Congress was not entitled constitutionally to enter.[326] This inference overlooked the fact that, in consequence of its powers under the necessary and proper clause, Congress can, as Marshall indicates in the words above quoted, interfere with the completely internal concerns of a State "for the purpose of executing its general powers," one of which is its power over foreign and interstate commerce. It is today established doctrine that "no form of State activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress."[327]

And while the word "among" serves to demark "the completely internal" commerce of a State from that which "extends to or affects" other States, it also serves, as Marshall further pointed out, to emphasize the fact that "the power of Congress does not stop at the jurisdictional lines of the several States," but "must be exercised whenever [wherever?] the subject exists. * * * Commerce among the States must, of necessity, be commerce [within?] the States. * * * The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several States."[328]

"REGULATE"

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Elucidating this word in his opinion for the Court in Gibbons *v.* Ogden, Chief Justice Marshall said: "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 wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."[329]

INTERSTATE VERSUS FOREIGN COMMERCE

There are certain later judicial dicta which urge or suggest that Congress's power to regulate interstate commerce restrictively is less than its analogous power over foreign commerce, the argument being that whereas the latter is a branch of the nation's unlimited power over foreign relations, the former was conferred upon the National Government primarily in order to protect freedom of commerce from State interference. The four dissenting Justices in the Lottery Case (decided in 1903) endorsed this view in the following words: "It is argued that the power to regulate commerce among the several States is the same as the power to regulate commerce with foreign nations, and among the Indian tribes. But is its scope the same? * * *, the power to regulate commerce with foreign nations and the power to regulate interstate commerce, are to be taken *diverso intuitu*, for the latter was intended to secure equality and freedom in

commercial intercourse as between the States, not to permit the creation of impediments to such intercourse; while the former clothes Congress with that power over international commerce, pertaining to a sovereign nation in its intercourse with foreign nations, and subject, generally speaking, to no implied or reserved power in the States. The laws which would be necessary and proper in the one case, would not be necessary or proper in the other. * * * But that does not [Pg 124] challenge the legislative power of a sovereign nation to exclude foreign persons or commodities, or place an embargo, perhaps not permanent, upon foreign ships or manufactures. * * * The same view must be taken as to commerce with Indian tribes. There is no reservation of police powers or any other to a foreign nation or to an Indian tribe, and the scope of the power is not the same as that over interstate commerce."[330]

And twelve years later Chief Justice White, speaking for the Court, expressed the same view, as follows: "In the argument reference is made to decisions of this court dealing with the subject of the power of Congress to regulate interstate commerce, but the very postulate upon which the authority of Congress to absolutely prohibit foreign importations as expounded by the decisions of this court rests is the broad distinction which exists between the two powers and therefore the cases cited and many more which might be cited announcing the principles which they uphold have obviously no relation to the question in hand."[331]

But dicta to the contrary are much more numerous and span a far longer period of time. Thus Chief Justice Taney wrote in 1847: "The power to regulate commerce among the several States is granted to Congress in the same clause, and by the same words, as the power to regulate commerce with foreign nations, and is coextensive with it."[332] And nearly fifty years later Justice Field, speaking for the Court, said: "The power to regulate commerce among the several States was granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations."[333] Today it is firmly established doctrine that the power to regulate commerce, whether with foreign nations or among the several States comprises the power to restrain or prohibit it at all times for the welfare of the public, provided only the specific limitations imposed upon Congress's powers, as by the due process clause of the Fifth Amendment, are not transgressed.[334]

Nor does the power to regulate commerce stop with, nor in fact is it most commonly exercised in, measures designed to outlaw some branch of commerce. In the words of the Court: It is the power to provide by appropriate legislation for its "protection and advancement";[335] to adopt measures "to promote its growth and insure its safety";[336] "to foster, protect, control and restrain, [commerce]."[337] This protective power has, moreover, two dimensions. In the first [Pg 125] place, it includes the power to reach and remove every conceivable obstacle to or restriction upon interstate and foreign commerce from whatever source arising, whether it results from unfavorable conditions within the States or from State legislative policy, like the monopoly involved in Gibbons *v.* Ogden; or from both combined. In the second place, it extends—as does also the power to restrain commerce—to the instruments and agents by which commerce is carried on; nor are such instruments and agents confined to those which were known or in use when the Constitution was adopted.[338]

INSTRUMENTS OF COMMERCE

The applicability of Congress's power to the agents and instruments of commerce is implied in Marshall's opinion in Gibbons *v.* Ogden,[339] where the waters of the State of New York in their quality as highways of interstate and foreign transportation are held to be governed by the overruling power of Congress. Likewise, the same opinion recognizes that in "the progress of things," new and other instruments of commerce will make their appearance. When the Licensing Act of 1793 was passed, the only craft to which it could apply were sailing vessels, but it and the power by which it was enacted were, Marshall asserted, indifferent to the "principle" by which vessels were moved. Its provisions therefore reached steam vessels as well. A little over half a century later the principle embodied in this holding was given its classic expression in the opinion of Chief Justice Waite in the case of the Pensacola Telegraph Co. *v.* Western Union Co., [340] a case closely paralleling Gibbons *v.* Ogden in other respects also. The passage alluded to reads as follows: "The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of times and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation."[341] The Radio Act of 1927 whereby "all forms of interstate and foreign radio transmissions within the United States, its Territories and possessions" were brought under national control, affords another illustration. [Pg 126] Thanks to the foregoing doctrine the measure met no serious constitutional challenge either on the floors of Congress or in the Courts.[342]

NAVIGATION

In the case of Pennsylvania *v.* Wheeling & Belmont Bridge Co.,[343] decided in 1852, the Court, on the application of the complaining State, acting as representative of the interests of its citizens, granted an injunction requiring that a bridge, erected over the Ohio under a charter from the State of Virginia, either be altered so as to admit of free navigation of the river, or else be entirely abated. The decision was justified by the Court on the basis both of the commerce clause and of a compact between Virginia and Kentucky, whereby both these States had agreed to keep the Ohio River "free and common to the citizens of the United States." The injunction was promptly rendered inoperative by an act of Congress declaring the bridge to be "a lawful structure" and requiring all vessels navigating the Ohio to be so regulated as not to interfere with it.[344] This act the Court sustained as within Congress's power under the commerce clause, saying: "So far, * * *, as this bridge created an obstruction to the free navigation of the river, in [Pg 127] view of the previous acts of Congress, they [the said acts] are to be regarded as modified by this subsequent legislation; and, although it still may be an obstruction in fact, [it] is not so in the contemplation of law. * * * That body [Congress] having in the exercise of this power, regulated the navigation consistent with its preservation and continuation, the authority to maintain it would seem to be complete. That authority combines the concurrent powers of both governments, State and federal, which, if not sufficient, certainly none can be found in our system of government."[345] In short, it is Congress and not the Court which is authorized by the Constitution to regulate commerce.

The law and doctrine of the earlier cases with respect to the fostering and protection of navigation are well summed up in the following frequently cited passage from the Court's opinion in Gilman *v.* Philadelphia,[346] decided in 1866. "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England."[347]

Thus Congress was within its powers in vesting the Secretary of War with power to determine whether a structure of any nature in or over a navigable stream is an obstruction to navigation and to order its abatement if he so finds.[348] Nor is the United States required to compensate the owners of such structures for their loss, since they were always subject to the servitude represented by Congress's powers over commerce; and the same is true of the property of riparian owners which is damaged.[349] And while it was formerly held that lands adjoining [Pg 128] nonnavigable streams were not subject to the above mentioned servitude,[350] this rule has been impaired by recent decisions;[351] and at any rate it would not apply as to a stream which had been rendered navigable by improvements.[352]

In exercising its power to foster and protect navigation Congress legislates primarily on things external to the act of navigation. But that act itself and the instruments by which it is accomplished are also subject to Congress's power if and when they enter into or form a part of "commerce among the several States." When does this happen? Words quoted above from the Court's opinion in the Gilman case answered this question to some extent; but the decisive answer to it was returned five years later in the case of The "Daniel Ball."[353] Here the question at issue was whether an act of Congress, passed in 1838 and amended in 1852, which required that steam vessels engaged in transporting passengers or merchandise upon the "bays, lakes, rivers, or other navigable waters of the United States," applied to the case of a vessel which navigated only the waters of the Grand River, a stream which lies entirely in the State of Michigan. Argued counsel for the vessel: "The navigable rivers of the United States pass through States, they form their boundary lines, they are not in any one State, nor the exclusive property of any one, but are common to all. To make waters navigable waters of the United States, some other incident must attach to them besides the territorial and the capability for public use. This term contrasts with *domestic* waters of the United States, and implies, not simply that the waters are public and within the Union, but that they have attached to them some circumstance that brings them within the scope of the sovereignty of the United States as defined by the [Pg 129] Constitution." Then as a sort of *reductio ad absurdum* counsel added: "* * * if merely because a stream is a highway it becomes a navigable water of the United States, in a sense that attaches to it and to the vessels trading upon it the regulating control of Congress, then every highway must be regarded as a highway of the United States, and the vehicles upon *it* must be subject to the same control. But this will not be asserted on the part of the Government."[354] The Court answered: "In this case it is admitted that the steamer was engaged in shipping and transporting down Grand River, goods destined and marked for other States than Michigan, and in receiving and transporting up the river goods brought within the State from without its limits; * * * So far as she was employed in transporting goods destined for other States, or goods brought from

without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced."[355] Turning then to counsel's *reductio ad absurdum*, the Court added: "We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation. And we answer further, that we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the States, when the agency extends through two or more States, and when it is confined in its action entirely within the limits of a single State. If its authority does not extend to an agency in such commerce, when that agency is confined within the limits of a State, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a State, and leaving it at the boundary line at the other end, the Federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter."[356] In short, it was admitted inferentially, that the principle of the decision would apply to land transportation; but the actual demonstration of the fact still awaited some years.[357] See *infra*.

HYDROELECTRIC POWER

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As a consequence, in part, of its power to forbid or remove obstructions to navigation in the navigable waters of the United States, Congress has acquired the right to develop hydroelectric power, and the ancillary right to sell it to all takers. By a long-standing doctrine of Constitutional Law the States possess dominion over the beds of all navigable streams within their borders,[358] but on account of the servitude which Congress's power to regulate commerce imposes upon such streams, they are practically unable, without the assent of Congress, to utilize their prerogative for power development purposes. Sensing, no doubt, that controlling power to this end must be attributed to some government in the United States and that "in such matters there can be no divided empire,"[359] the Court held, in 1913, in United States *v.* Chandler-Dunbar Co.,[360] that in constructing works for the improvement of the navigability of a stream, Congress was entitled, as a part of a general plan, to authorize the lease or sale of such excess water power as might result from the conservation of the flow of the stream. "If the primary purpose is legitimate," it said, "we can see no sound objection to leasing any excess of power over the needs of the government. The practice is not unusual in respect to similar public works constructed by State governments."[361]

Congress's Jurisdiction Over Navigable Streams Today

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Since the Chandler-Dunbar case the Court has come, in effect, to hold that it will sustain any act of Congress which purports to be for the improvement of navigation whatever other purposes it may also embody; nor does the stream involved have to be one which is "navigable in its natural state." Such, at least, seems to be the algebraic sum of its holdings in Arizona *v.* California,[362] decided in 1931, and in the United States *v.* Appalachian Electric Power Co.,[363] decided in 1940. In the former the Court, speaking through Justice Brandeis, said that it was not free to inquire into the motives "which induced members of Congress to enact the Boulder Canyon Project Act," adding: "As the river is navigable and the means which the Act provides are not unrelated to the control of navigation, * * *, the erection and maintenance of such dam and reservoir are clearly within the powers conferred upon Congress. Whether the particular structures proposed are reasonably necessary, is not for this Court to determine. * * * And the fact that purposes other than navigation will also be served could not invalidate the exercise of the authority conferred, even if those other purposes would not alone have justified an exercise of congressional power."[364] And in the Appalachian Electric Power case, the Court, abandoning previous holdings which had laid down the doctrine that to be subject to Congress's power to regulate commerce a stream must be "navigable in fact," said: "A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken," provided there must be a "balance between cost and need at a time when the improvement would be useful. * * * Nor is it necessary that the improvements should be actually completed or even authorized. The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic. * * * Nor is it necessary for navigability that the use should be continuous. * * * Even absence of use over long periods of years, because of changed conditions, * * * does not affect the navigability of rivers in the constitutional sense."[365]

Purposes for Which Power May be Exercised

Furthermore, the Court defined the purposes for which Congress may regulate navigation in the broadest terms, as follows: "It cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. * * * That authority is as broad as the needs of commerce. * * * Flood protection, watershed development, recovery of the cost of

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improvements through utilization of power are likewise parts of commerce control."[366] These views the Court has since reiterated.[367] Nor is it by virtue of Congress's power over navigation alone that the National Government may develop super-power. Its war powers and power of expenditure in furtherance of the common defense and the general welfare supplement its powers over commerce in this respect.[368]

Congressional Regulation of Land Transportation

EARLY ACTS; FEDERAL PROVISION FOR HIGHWAYS

The acquisition and settlement of California stimulated Congress some years before the Civil War to authorize surveys of possible routes for railway lines to the Pacific; but it was not until 1862, in the midst of war, with its menace of a general dissolution of the Union, that more decisive action was taken. That year Congress voted aid in the construction of a line from Missouri River to the Pacific; and four years later it chartered the Union Pacific Company.[369] First and last, litigation growing out of this type of legislation has resulted in the establishment in judicial decision of the following propositions: *First*, that Congress may provide highways for interstate transportation (earlier, as well as today, this result might have followed from Congress's power of spending, independently of the commerce clause, as well as from its war and postal powers, which were also invoked by the Court in this connection); *second*, that it may charter private corporations for the purpose of doing the same thing; *third*, that it may vest such corporations with the power of eminent domain in the States; and *fourth*, that it may exempt their franchises from State taxation.[370]

BEGINNINGS OF FEDERAL RAILWAY REGULATION

Congress began regulating the railroads of the country in a more positive sense in 1866. By the so-called Garfield Act of that year "every railroad company in the United States, whose road is operated by steam," was authorized by Congress "* * * to connect with roads of other States so as [Pg 133] to form continuous lines for the transportation of passengers, freight, troops, governmental supplies, and mails, to their destination";[371] while by an act passed on July 24 of the same year it was ordered, "in the interest of commerce and the convenient transmission of intelligence * * * by the government of the United States and its citizens, that the erection of telegraph lines shall, so far as State interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one State for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the National Government for this national privilege."[372]

Another act of the same period provided that "no railroad company within the United States whose road forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one State to another, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State to another, shall confine the same in cars, boats, or vessels of any description, for a longer period than twenty-eight consecutive hours, without unloading the same for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes."[373]

REGULATION OF RAILROAD RATES: THE INTERSTATE COMMERCE COMMISSION

On account of the large element of "fixed charges" which enters into the setting of rates by railway companies, competition between lines for new business was from the first very sharp, and resulted in many evils which, in the early 70's, led in the Middle West to the enactment by the State legislatures of the so-called "Granger Laws"; and in the famous "Granger Cases," headed by Munn *v.* Illinois,[374] the Court at first sustained this legislation, in relation to both the commerce clause and the due process of law clause of Amendment XIV. The principal circumstance, however, which shaped the Court's attitude toward the "Granger Laws" had, by a decade later, disappeared, the fact, namely, that originally the railroad business was largely in local hands. In consequence, first, of the panic of 1873, and then of the panic of 1885, hundreds of these small lines went into bankruptcy, from which they emerged consolidated into great [Pg 134] interstate systems. The result for the Court's interpretation of the commerce clause was determinative. In the case of Wabash, St. Louis and Pacific R. Co. *v.* Illinois,[375] decided in 1886, it was ruled that a State may not regulate charges for the carriage even within its own boundaries of goods brought from without the State or destined to points outside it; that in this respect Congress's power over interstate commerce was exclusive. The following year, Congress, responding to a widespread public demand, passed the original Interstate Commerce Act.[376]

By this measure a commission of five was created with authority to pass upon the "reasonableness" of all charges by railroads for the transportation of goods or persons in interstate commerce and to order the discontinuance of all such charges as it found to be "unreasonable," or otherwise violative of the provisions of the act. In Interstate Commerce Commission *v.* Brimson,[377] decided in 1894, the validity of the Commission as a means "necessary and proper" for the enforcement of Congress's power to regulate commerce among

the States was sustained, as well as its right to enter the courts of the United States in order to secure process for the execution of its orders. Later decisions of the Court, however, including one in which the act was construed not to give the Commission power to set reasonable maximum rates in substitution for those found by it to be unreasonable, disappointed earlier expectations.[378]

The history of the Commission as an effective instrument of government dates from the Hepburn Act of 1906[379] which was followed four years later by the Mann-Elkins Act.[380] By the former the Commission was explicitly endowed with the power, after a full hearing on a complaint made to it, "to determine and prescribe just and reasonable" maximum rates. By the latter it was further authorized to set such rates on its own initiative, and without waiting for a complaint; while any increase of rates by a carrier was made subject to suspension by the Commission until its approval could be obtained. At the same time, the Commission's jurisdiction was extended to telegraphs, telephones and cables.[381]

THE INTERSTATE COMMERCE COMMISSION TODAY

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The powers of the Commission, which has been gradually increased to a body of eleven, are today largely defined in the Transportation Act of February 28, 1920. By that act they were extended not only to all "railroads," comprehensively defined, but also to the following additional categories of "'common carriers' * * * all pipeline companies; telegraph, telephone, and cable companies operating by wire or wireless [*See* note 3 above]; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire." The jurisdiction of the Commission covers not only the characteristic activities of such carriers in commerce among the States, but also the issuance of securities by them, and all consolidations of existing companies, or lines. Furthermore, for the first time, the Commission was put under the injunction, in exercising its control over rates and charges, to "give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation."[382] Railway rate control itself, which was originally entered upon by the National Government exclusively from the point of view of restraint, has thus been assimilated to the idea of "fostering and promoting" transportation.

Two types of constitutional questions have presented themselves under the legislation just passed in review: 1. Those arising out of the safeguards which the Bill of Rights throws about property rights; 2. Those arising out of the intermingling of the interstate and intrastate operations of the same carriers, and the resulting tangency of State with national power. Only the latter are considered at this point.

THE SHREVEPORT CASE

Section 1 of the act of 1887 contains the proviso "that the provisions of this act shall not apply to 'transportation' wholly within the State." Section 3 of the act prohibits "any common carrier subject to the provisions" of the act from giving "any unreasonable preference or advantage" to any person, firm, or locality. In the Shreveport Case,[383] decided in 1914, the Commission, reading § 3 independently of § 1, had ordered several Texas lines to increase certain of their rates between points in Texas till they should approximate rates already approved by the Commission [Pg 136] to adjoining points in Louisiana. The latter rates, being interstate, were admittedly subject to the Commission. The local rates were as clearly within the normal jurisdiction of the State, and had in fact been set by the Texas Railway Commission. The Court found that the Interstate Commerce Commission had not exceeded its statutory powers. The constitutional objection to the Commission's action was stated thus: "That Congress is impotent to control the intrastate charges of an interstate carrier even to the extent necessary to prevent injurious discrimination against interstate traffic." This objection the Court met, as follows: "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 in the national field."[384] This, the Court continued, "is not to say that Congress possesses the authority to regulate the internal commerce of a State as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled."[385]

THE ACT OF 1920 AND STATE RAILWAY RATE REGULATION

The power of the Commission under § 3 of the act of 1887, as interpreted in the Shreveport Case, was greatly enlarged by § 416 of the act of 1920, which authorizes the Commission to remove "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce." Thus, commerce as a whole, instead of specific firms or localities, is made the beneficiary of the restriction. In the Wisconsin R.R. Comm. *v.* Chicago, B. & Q.R.R. Co.,[386] the Court held that this section sustained the Interstate Commerce Commission in annulling intrastate passenger rates which it found to be unduly low, in comparison with rates which the Commission had established for interstate travel, and so tending to thwart, in deference to a merely local interest, the general [Pg 137]

purpose of the act to maintain an efficient transport service for the benefit of the country at large.[387]

REGULATION OF OTHER AGENTS OF CARRIAGE AND COMMUNICATION

In the Pipe Line Cases, decided in 1914,[388] the Court affirmed the power of Congress to regulate the transportation of oil and gas in pipe lines from one State to another and held that this power applies to such transportation even though the oil (or gas) in question was the property of the owner of the lines.[389] Thirteen years later, in 1927, the Court ruled that an order by a State commission fixing rates on electric current generated within the State and sold to a distributor in another State was invalid as imposing a burden on interstate commerce, thus holding impliedly that Congress' power to regulate the transmission of electric current from one State to another carried with it the power to regulate the price of such electricity.[390] Proceeding on this implication Congress, in the Federal Power Act of 1935,[391] conferred upon the Federal Power Commission the power to govern the wholesale distribution of electricity in interstate commerce; and three years later vested in the same body like power over natural gas moving in interstate commerce.[392] In Federal Power Commission *v.* Natural Gas Pipeline Company,[393] the power of the Commission to set the prices at which gas, originating in one [Pg 138] State and transported into another, should be sold to distributors wholesale in the latter State, was sustained by the Court in the following terms: "The argument that the provisions of the statute applied in this case are unconstitutional on their face is without merit. The sale of natural gas originating in the State and its transportation and delivery to distributors in any other State constitutes interstate commerce, which is subject to regulation by Congress. * * * It is no objection to the exercise of the power of Congress that it is attended by the same incidents which attend the exercise of the police power of a State. The authority of Congress to regulate the prices of commodities in interstate commerce is at least as great under the Fifth Amendment as is that of the States under the Fourteenth to regulate the prices of commodities in intrastate commerce."[394]

Other acts regulative of interstate commerce and communication which belong to this period are the Federal Communications Act of 1934, which regulates, through the Federal Communications Commission,[395] "interstate and foreign communication by wire and radio"; the Federal Motor Carrier Act of 1935, which, through the Interstate Commerce Commission, governs the transportation of persons and property by motor vehicle common carriers;[396] the Civil Aeronautics Act of 1938, enacted for the purpose of bringing under the control of a central agency, called "the Civil Aeronautics Authority" (functioning through the Civil Aeronautics Administrator and the Civil Aeronautics Board) all phases of airborne commerce, foreign and interstate.[397] None of these measures have provoked challenge to the power of Congress to [Pg 139] enact them.

ACTS OF CONGRESS PROTECTIVE OF LABOR ENGAGED IN INTERSTATE TRANSPORTATION

In the course of the years 1903 to 1908 Congress enacted a series of such measures which were notable both on account of their immediate purpose and as marking the entry of the National Government into the field of labor legislation. The Safety Appliance Act of 1893,[398] which applied only to cars and locomotives engaged in moving interstate traffic, was amended in 1903 to embrace "all trains, locomotives, tenders, cars," etc., "used on any railway engaged in interstate commerce * * * and to all other locomotives * * * cars," etc., "used in connection therewith."[399] In Southern Railway Company *v.* United States,[400] the validity of this extension of the act was challenged. The Court sustained the measure as being within Congress's power, saying: "* * * this is so, not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce."[401]

Four years later the Hours of Service Act of 1907[402] was passed, requiring, as a safety measure, that carriers engaged in the transportation of passengers or property by railroad in interstate or foreign commerce should not work their employees for longer periods than those prescribed by the Act. In sustaining this legislation the Court, speaking through Justice Hughes, said: "The fundamental question here is whether a restriction upon the hours of labor of employés who are connected with the movement of trains in interstate transportation is comprehended within this [Pg 140] sphere of authorized legislation. This question admits of but one answer. The length of hours of service has direct relation to the efficiency of the human agencies upon which protection of life and property necessarily depends. * * * In its power suitably to provide for the safety of the employés and travelers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train dispatchers, telegraphers, and other persons embraced within the class defined by the act."

[403]

But by far the most notable of these safety measures were the Federal Employers Liability Acts of 1906 and 1908,[404] the second of which merely reenacted the first with certain "unconstitutional" features eliminated. What the amended act does, in short, is to modify, in the case of injuries incurred by the employees of interstate carriers while engaged in interstate commerce, the defenses that had hitherto been available to the carriers at common law. The principal argument against the acts was that the commerce clause afforded no basis for an attempt to regulate the relation of master and servant, which had heretofore in all cases fallen to the reserved powers of the States; that indeed the rules of common law modified or abrogated by the act existed solely under State authority, and had always been enforced, in the main, in the courts of the States.[405] Countering this argument, the Court, speaking by Justice Van Devanter, quoted the following passage from the brief of the Solicitor-General: "Interstate commerce—if not always, at any rate when the commerce is transportation—is an act. Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly or unsafe or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical and less secure. Therefore, Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and [Pg 141] instruments perform the work of interstate commerce, whenever such legislation bears, or in the exercise of a fair legislative discretion can be deemed to bear, upon the reliability or promptness or economy or security or utility of the interstate commerce act."[406]

The Adair Case

But while the idea expressed here that the human agents of commerce, in the sense of transportation, are instrumentalities of it, and so, in that capacity, within the protective power of Congress, signalized the entrance of Congress into the field of labor legislation, the Court was not at the time prepared to give the idea any considerable scope. Pertinent in this connection is the case of Adair *v.* United States,[407] which was decided between the two Employers' Liability Cases. Here was involved the validity of § 10 of the "Erdman Act" of 1898,[408] by which it was made a misdemeanor for a carrier or agent thereof to require of an employee, as a condition of employment, that he should not become or remain a member of a trade union, or to threaten him with loss of employment if he should become or remain a member. This proviso the Court held not to be a regulation of commerce, there being no connection between an employee's membership in a labor organization and the carrying on of interstate commerce. Twenty-two years later, however, in 1930, the Court conceded that the connection between interstate commerce and union membership was a real and substantial one, and on that ground sustained the power of Congress in the Railway Labor Act of 1926[409] to prevent employers from interfering with the right of employees to select freely their own collective bargaining representatives.[410]

The Railroad Retirement Act [Pg 142]

Still pursuing the idea of protecting commerce and the labor engaged in it concurrently, Congress, by the Railroad Retirement Act of June 27, 1934,[411] ordered the compulsory retirement of superannuated employees of interstate carriers, and provided that they be paid pensions out of a fund comprising compulsory contributions from the carriers and their present and future employees. In Railroad Retirement Board *v.* Alton R.R. Company,[412] however, a closely divided Court held this legislation to be in excess of Congress's power to regulate commerce and contrary to the due process clause of Amendment V. Said Justice Roberts for the majority: "We feel bound to hold that a pension plan thus imposed is in no proper sense a regulation of the activity of interstate transportation. It is an attempt for social ends to impose by sheer fiat noncontractual incidents upon the relation of employer and employee, not as a rule or regulation of commerce and transportation between the States, but as a means of assuring a particular class of employees against old age dependency. This is neither a necessary nor an appropriate rule or regulation affecting the due fulfillment of the railroads' duty to serve the [Pg 143] public in interstate transportation."[413] Chief Justice Hughes, speaking for the dissenters, contended, on the contrary, that "the morale of the employees [had] an important bearing upon the efficiency of the transportation service." He added: "The fundamental consideration which supports this type of legislation is that industry should take care of its human wastage, whether that is due to accident or age. That view cannot be dismissed as arbitrary or capricious. It is a reasoned conviction based upon abundant experience. The expression of that conviction in law is regulation. When expressed in the government of interstate carriers, with respect to their employees likewise engaged in interstate commerce, it is a regulation of that commerce. As such, so far as the subject matter is concerned, the commerce clause should be held applicable."[414]

Under subsequent legislation, an excise is levied on interstate carriers and their employees, while by separate but parallel legislation a fund is created in the Treasury out of which pensions are paid along the lines of the original plan. The constitutionality of this scheme appears to be taken for granted in Railroad Retirement Board *v.* Duquesne Warehouse Company.[415]

BILLS OF LADING; THE FERGER CASE

Some years earlier the Court had had occasion in United States *v.* Ferger,[416] decided in 1919, to reiterate the rule laid down in the Southern Railway Case, that Congress's protective power over interstate commerce reaches all kinds of obstructions whatever the source of their origin. Ferger and associates had been indicted under a federal statute for issuing a false bill of lading, to cover a fictitious shipment in interstate commerce. Their defense was that, since there could be no commerce in a fraudulent bill of lading, therefore Congress's power could not reach their alleged offense, a contention which Chief Justice White, speaking for the Court, answered thus: "But this mistakenly assumes that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by the relation of that subject to commerce and its effect upon it. We say mistakenly assumes, because we think it clear that if the proposition were sustained it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to [Pg 144] interstate commerce (*In re Debs*, 158 U.S. 564) and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves. * * * That as instrumentalities of interstate commerce, bills of lading are the efficient means of credit resorted to for the purpose of securing and fructifying the flow of a vast volume of interstate commerce upon which the commercial intercourse of the country, both domestic and foreign, largely depends, is a matter of common knowledge as to the course of business of which we may take judicial notice. Indeed, that such bills of lading and the faith and credit given to their genuineness and the value they represent are the producing and sustaining causes of the enormous number of transactions in domestic and foreign exchange, is also so certain and well known that we may notice it without proof."[417]

Congressional Regulation of Commerce as Traffic

THE SHERMAN ACT; THE "SUGAR TRUST CASE"

Congress's chief effort to regulate commerce in the primary sense of "traffic" is embodied in the Sherman Antitrust Act of 1890, the opening section of which declares "every contract, combination in the form of trust or otherwise," or "conspiracy in restraint of trade and commerce among the several States, or with foreign nations" to be "illegal," while the second section makes it a misdemeanor for anybody to "monopolize or attempt to monopolize any part of such commerce."[418] The act was passed to curb the growing tendency to form industrial combinations and the first case to reach the Court under it was the famous "Sugar Trust Case," United States *v.* E.C. Knight Co.[419] Here the Government asked for the cancellation of certain agreements, whereby, through purchases of stock in other companies, the American Sugar Refining Company, had "acquired," it was conceded, "nearly complete control of the manufacture of refined sugars in the United States." The question of the validity of the act was not expressly discussed by the Court, but was subordinated to that of its proper construction. So proceeding, the Court, in pursuance of doctrines of Constitutional Law which were then dominant with it, turned the act from its intended purpose and destroyed its effectiveness for several years, as that of the Interstate Commerce Act was being contemporaneously impaired. The following passage early in Chief Justice Fuller's opinion for the Court, sets forth the conception of the Federal System that controlled the decision: "It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of [Pg 145] union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."[420]

In short, what was needed, the Court felt, was a hard and fast line between the two spheres of power, and in the following series of propositions it endeavored to lay down such a line: (1) production is always local, and under the exclusive domain of the States; (2) commerce among the States does not commence until goods "commence their final movement from their State of origin to that of their destination"; (3) the sale of a product is merely an incident of its production and while capable of "bringing the operation of commerce into play," affects it only incidentally; (4) such restraint as would reach commerce, as above defined, in consequence of combinations to control production "in all its forms," would be "indirect, however inevitable and whatever its extent," and as such beyond the purview of the act.[421] Applying then the above reasoning to the case before it, the Court proceeded: "The object [of the combination] was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. It is true that the bill alleged that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations; but this was no more than to say that

trade and commerce served manufacture to fulfil its function. Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and other States, and refined sugar was also forwarded by the companies to other States for sale. Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree." [422]

THE SHERMAN ACT REVISED

[Pg 146]

Four years later occurred the case of Addyston Pipe and Steel Co. *v.* United States,[423] in which the Antitrust Act was successfully applied as against an industrial combination for the first time. The agreements in the case, the parties to which were manufacturing concerns, effected a [Pg 147] division of territory among them, and so involved, it was held, a "direct" restraint on the distribution and hence of the transportation of the products of the contracting firms. The holding, however, did not question the doctrine of the earlier case, which in fact continued substantially undisturbed until 1905, when Swift and Co. *v.* United States,[424] was decided.

THE "CURRENT OF COMMERCE" CONCEPT: THE SWIFT CASE

Defendants in the Swift case were some thirty firms engaged in Chicago and other cities in the business of buying livestock in their stockyards, in converting it at their packing houses into fresh meat, and in the sale and shipment of such fresh meat to purchasers in other States. The charge against them was that they had entered into a combination to refrain from bidding against each other in the local markets, to fix the prices at which they would sell, to restrict shipments of meat, and to do other forbidden acts. The case was appealed to the Supreme Court on defendants' contention that certain of the acts complained of were not acts of interstate [Pg 148] commerce and so did not fall within a valid reading of the Sherman Act. The Court, however, sustained the Government on the ground that the "scheme as a whole" came within the act, and that the local activities alleged were simply part and parcel of this general scheme.[425]

Referring to the purchases of livestock at the stockyards, the Court, speaking by Justice Holmes, said: "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce."[426] Likewise the sales alleged of fresh meat at the slaughtering places fell within the general design. Even if they imported a technical passing of title at the slaughtering places, they also imported that the sales were to persons in other States, and that shipments to such States were part of the transaction.[427] Thus, sales of the type which in the Sugar Trust Case were thrust to one side as immaterial from the point of view of the law, because they enabled manufacture "to fulfill its function," were here treated as merged in an interstate commerce stream. Thus, the concept of commerce as *trade*, that is, as *traffic*, again entered the Constitutional Law picture, with the result that conditions which directly affected interstate trade could not be dismissed on the ground that they affected interstate commerce, in the sense of interstate *transportation*, only "indirectly." Lastly, the Court added these significant words: "But we do not mean to imply that the rule which marks the point at which State taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the States."[428] That is to say, the line that confines State power from one side does not always confine national power from the other. For even though the line accurately divides the subject matter of the complementary spheres, still national power is always entitled to take on such additional extension as is requisite to guarantee its effective exercise, and is furthermore supreme.

THE DANBURY HATTERS CASE

[Pg 149]

In this respect, the Swift Case only states what the Shreveport Case was later to declare more explicitly; and the same may be said of an ensuing series of cases in which combinations of employees engaged in such intrastate activities as manufacturing, mining, building construction, and the distribution of poultry were subjected to the penalties of the Sherman Act because of the effect or intended effect of their activities on interstate commerce.[429]

STOCKYARDS AND GRAIN FUTURES ACTS

In 1921 Congress passed the Packers and Stockyards Act[430] whereby the business of commission men and livestock dealers in the chief stockyards of the country was brought under national supervision; and the year following it passed the Grain Futures Act[431] whereby exchanges dealing in grain futures were subjected to control. The decisions of the Court

sustaining these measures both built directly upon the Swift Case.

In Stafford *v.* Wallace,[432] which involved the former act, Chief Justice Taft, speaking for the Court, said: "The object to be secured by the act is the free and unburdened flow of livestock from the ranges and farms of the West and Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products to the consuming cities of the country in the Middle West and East, or, still as livestock, to the feeding places and fattening farms in the Middle West or East for further preparation for the market."[433] The stockyards, therefore, were "not a place of rest or final destination." They were "but a throat through which the current flows," and the sales there were not merely local transactions. "They do not stop the flow;—but, on the contrary" are "indispensable to its continuity."[434]

In Chicago Board of Trade *v.* Olsen,[435] involving the Grain Futures Act, the same course of reasoning was repeated. Speaking of the Swift Case, Chief Justice Taft remarked: "That case was a milestone in the interpretation of the commerce clause of the Constitution. It recognized the [Pg 150] great changes and development in the business of this vast country and drew again the dividing line between interstate and intrastate commerce where the Constitution intended it to be. It refused to permit local incidents of a great interstate movement, which taken alone were intrastate, to characterize the movement as such."[436] Of special significance, however, is the part of the opinion which was devoted to showing the relation between future sales and cash sales, and hence the effect of the former upon the interstate grain trade. The test, said the Chief Justice, was furnished by the question of price. "The question of price dominates trade between the States. Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it."[437] Thus a practice which demonstrably affects prices would also affect interstate trade "directly," and so, even though local in itself, would fall within the regulatory power of Congress. In the following passage, indeed, Chief Justice Taft whittles down, in both cases, the "direct-indirect" formula to the vanishing point: "Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent."[438] And it was in reliance on the doctrine of these cases that Congress first set to work to combat the Depression in 1933 and the years immediately following. But in fact, much of its legislation at this time marked a wide advance upon the measures just passed in review. They did not stop with regulating traffic among the States and the instrumentalities thereof; they also essayed to govern production and industrial relations in the field of production. Confronted with this revolutionary claim to power on Congress' part, the Court again deemed itself called upon to define a limit to the commerce power that would save to the States their historical sphere, and especially their customary monopoly of legislative power in relation to industry and labor management.

THE SECURITIES AND EXCHANGE COMMISSION

Not all antidepression legislation, however, was of this revolutionary type. The Securities Exchange Act of 1934[439] and the Public Utility Company Act ("Wheeler-Rayburn Act") of 1935[440] were not. The former creates the Securities and Exchange Commission, and authorizes it to lay down regulations designed to keep dealing in securities honest and above-board and [Pg 151] closes the channels of interstate commerce and the mails to dealers refusing to register under the act. The latter requires, by sections 4 (a) and 5, the companies which are governed by it to register with the Securities and Exchange Commission and to inform it concerning their business, organization and financial structure, all on pain of being prohibited use of the facilities of interstate commerce and the mails; while by section 11, the so-called "death sentence" clause, the same act closes after a certain date the channels of interstate communication to certain types of public utility companies whose operations, Congress found, were calculated chiefly to exploit the investing and consuming public. All these provisions have been sustained,[441] Gibbons *v.* Ogden, furnishing the Court its principal reliance.[442]

Congressional Regulation of Production and Industrial Relations [Pg 152]

ANTIDEPRESSION LEGISLATION

In the following words of Chief Justice Hughes, spoken in a case which was decided a few days after President Franklin D. Roosevelt's first inauguration, the problem which confronted the new Administration was clearly set forth: "When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry."[443]

THE NATIONAL INDUSTRIAL RECOVERY ACT

The initial effort of Congress to deal with this situation was embodied in the National Industrial Recovery Act of June 16, 1933.[444] The opening section of the act asserted the existence of "a

national emergency productive of widespread unemployment and disorganization of industry which" burdened "interstate and foreign commerce," affected "the public welfare," and undermined "the standards of living of the American people." To effect the removal of these conditions the President was authorized, upon the application of industrial or trade groups, to approve "codes of fair competition," or to prescribe the same in cases where such applications were not duly forthcoming. Among other things such codes, of which eventually more than 700 were promulgated, were required to lay down rules of fair dealing with customers and to furnish labor certain guarantees respecting hours, wages and collective bargaining. For the time being business and industry were to be cartelized on a national scale.

THE SCHECHTER CASE

In the case of Schechter Corp. *v.* United States,[445] one of these codes, the Live Poultry Code, was pronounced unconstitutional. Although it was conceded that practically all poultry handled by the Schechters came from outside the State, and hence via interstate commerce, the Court held, nevertheless, that once the chickens came to rest in the Schechters' wholesale market interstate commerce in them ceased. The act, however, also purported to govern business activities which "affected" interstate commerce. This, Chief Justice Hughes held, must be taken to mean "directly" affect such commerce: "the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, * * *, there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government."[446] In short, the case was governed by the ideology of the Sugar Trust [Pg 153] Case, which was not mentioned in the Court's opinion.[447]

THE AGRICULTURAL ADJUSTMENT ACT

Congress' second attempt to combat the Depression comprised the Agricultural Adjustment Act of 1933.[448] As is pointed out elsewhere the measure was set aside as an attempt to regulate production, a subject which was held to be "prohibited" to the United States by Amendment X.[449] *See* pp. 917-918.

THE BITUMINOUS COAL CONSERVATION ACT

The third measure to be disallowed was the Guffey-Snyder Bituminous Coal Conservation Act of 1935.[450] The statute created machinery for the regulation of the price of soft coal, both that sold in interstate commerce and that sold "locally," and other machinery for the regulation of hours of labor and wages in the mines. The clauses of the act dealing with these two different matters were declared by the act itself to be separable so that the invalidity of the one set would not affect the validity of the other; but this strategy was ineffectual. A majority of the Court, speaking by Justice Sutherland held that the act constituted one connected scheme of regulation which, inasmuch as it invaded the reserved powers of the States over conditions of employment in productive industry, was violative of the Constitution and void.[451] Justice Sutherland's opinion set out from Chief Justice Hughes's assertion in the Schechter Case of the "fundamental" [Pg 154] character of the distinction between "direct" and "indirect" effects; that is to say, from the doctrine of the Sugar Trust Case. It then proceeded: "Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices; and it is insisted that interstate commerce is greatly affected thereby. But, ..., the conclusive answer is that the evils are all local evils over which the Federal Government has no legislative control. The relation of employer and employee is a local relation. At common law, it is one of the domestic relations. The wages are paid for the doing of local work. Working conditions are obviously local conditions. The employees are not engaged in or about commerce, but exclusively in producing a commodity. And the controversies and evils, which it is the object of the act to regulate and minimize, are local controversies and evils affecting local work undertaken to accomplish that local result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character."[452] We again see the influence of the ideology of the Sugar Trust Case.[453]

THE NATIONAL LABOR RELATIONS ACT

The case in which the Court reduced the distinction between "direct" and "indirect" effects to the vanishing point, and thereby put Congress in the way of governing productive industry and labor relations in such industry was National Labor Relations Board *v.* Jones and Laughlin Steel Corp.,[454] decided April 12, 1937. Here the statute involved was the National Labor Relations Act of July 5, 1935,[455] which forbids "any unfair labor practice affecting interstate commerce" and lists among these "the denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining." Ignoring recent holdings, government counsel appealed to the "current of commerce" concept of the Swift Case. The scope of respondent's activities, they pointed out, was immense. Besides its great steel-producing plants, it owned and operated mines, steamships, and terminal railways scattered through

several States, and altogether it gave employment to many thousands of workers. A vast industrial commonwealth such as this, whose operations constantly traversed State lines, comprised, they contended, a species of territorial enclave which was subject in all its parts to the only governmental power capable of dealing with it as an entity, that is, the National Government. Yet even if this were not so, still the protective power of Congress over interstate commerce must be deemed to extend to disruptive strikes by employees of such an immense concern, and hence to include power to remove the causes of such strikes. The Court, speaking through Chief Justice Hughes, held the corporation to be subject to the act on the latter ground. "The close and intimate effect," said he, "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." Nor will it do to say that such effect is "indirect." Considering defendant's "far-flung activities," the effect of strife between it and its employees "* * * would be immediate and [it] 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. * * * 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."[456] [Pg 155]

While the act was thus held to be within the constitutional powers of Congress in relation to a productive concern, the interruption of whose business by strike "might be catastrophic," the decision was forthwith held to apply also to two minor concerns;[457] and in a later case the Court stated specifically that "the smallness of the volume of commerce affected in any particular case" is not a material consideration.[458] Moreover, the doctrine of the Jones-Laughlin Case applies equally to "natural" products, to coal mined, to stone quarried, to fruit and vegetables grown.[459]

THE FAIR LABOR STANDARDS ACT; THE DARBY CASE

In 1938 Congress enacted the Fair Labor Standards Act.[460] The measure prohibits not only the shipment in interstate commerce of goods manufactured by employees whose wages are less than the prescribed minimum or whose weekly hours of labor are greater than the prescribed maximum, but also the employment of workmen in the production of goods for such commerce at other than the prescribed wages and hours. Interstate commerce is defined by the act to mean "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." It was further provided that "for the purposes of this act an employee shall be deemed to have been engaged in the production of goods [that is, for interstate commerce] if such employee was employed * * *, or in any process or occupation necessary to the production thereof, in any State." Sustaining an indictment under the act, a unanimous Court, speaking by Chief Justice Stone, said: "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 commerce flows."[461] In support of the decision the Court invokes Chief Justice Marshall's reading of the necessary and proper clause in McCulloch *v.* Maryland and his reading of the commerce clause in Gibbons *v.* Ogden.[462] Objections purporting to be based on the Tenth Amendment are met from the same point of view: "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. *See* e.g., II Elliot's Debates, 123, 131; III id. 450, 464, 600; IV id. 140, 149; I Annals of Congress, 432, 761, 767-768; Story, Commentaries on the Constitution, §§ 1907-1908."[463] Commenting recently on this decision, former Justice Roberts said: "Of course, the effect of sustaining the Fair Labor Standards Act was to place the whole matter of wages and hours of persons employed throughout the United States, with slight exceptions, under a single federal regulatory scheme and in this way completely to supersede state exercise of the police power in this field."[464] In a series of later cases construing terms of the act, it had been given wide application.[465] [Pg 156]

THE AGRICULTURAL MARKETING AGREEMENT ACT [Pg 159]

Meantime Congress had returned to the task of bolstering agriculture by passing the Agricultural Marketing Agreement Act of June 3, 1937,[466] authorizing the Secretary of Agriculture to fix the minimum prices of certain agricultural products, when the handling of such products occurs "in the current of interstate or foreign commerce or * * * directly burdens, obstructs or affects interstate or foreign commerce in such commodity or product thereof." In United States *v.* Wrightwood Dairy Company[467] the Court sustained an order of the Secretary of Agriculture

fixing the minimum prices to be paid to producers of milk in the Chicago "marketing area." The dairy company demurred to the regulation on the ground of its applying to milk produced and sold intrastate. Sustaining the order the Court said: "Congress plainly has power to regulate the price of milk distributed through the medium of interstate commerce, * * *, and it possesses every power needed to make that regulation effective. 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. *See* McCulloch *v.* Maryland, 4 Wheat. 316, 421; * * * 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. Gibbons *v.* Ogden, 9 Wheat. 1, 196. 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."[468]

In Wickard *v.* Filburn[469] a still deeper penetration by Congress into the field of production was sustained. As amended by the act of 1941, the Agricultural Adjustment Act of 1938,[470] regulates production even when not intended for commerce but wholly for consumption on the producer's farm. Sustaining this extension of the act, the Court pointed out that the effect of the statute was to support the market. It said: "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 [Pg 160] 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."[471] And it elsewhere stated: "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. * * * The Court's recognition of the relevance of the economic effects in the application of the Commerce Clause, * * *, has made the mechanical application of legal formulas no longer feasible."[472]

Acts of Congress Prohibiting Commerce

FOREIGN COMMERCE; JEFFERSON'S EMBARGO

"Jefferson's Embargo" of 1807-1808, which cut all trade with Europe, was attacked on the ground that the power to regulate commerce was the power to preserve it, not the power to destroy it. This argument was rejected by Judge Davis of the United States District Court for Massachusetts [Pg 161] in the following words: "A national sovereignty is created [by the Constitution]. Not an unlimited sovereignty, but a sovereignty, as to the objects surrendered and specified, limited only by the qualifications and restrictions, expressed in the Constitution. Commerce is one of those objects. The care, protection, management and control, of this great national concern, is, in my opinion, vested by the Constitution, in the Congress of the United States; and their power is sovereign, relative to commercial intercourse, qualified by the limitations and restrictions, expressed in that instrument, and by the treaty making power of the President and Senate. * * * Power to regulate, it is said, cannot be understood to give a power to annihilate. To this it may be replied, that the acts under consideration, though of very ample extent, do not operate as a prohibition of all foreign commerce. It will be admitted that partial prohibitions are authorized by the expression; and how shall the degree, or extent, of the prohibition be adjusted, but by the discretion of the National Government, to whom the subject appears to be committed? * * * The term does not necessarily include shipping or navigation; much less does it include the fisheries. Yet it never has been contended, that they are not the proper objects of national regulation; and several acts of Congress have been made respecting them. * * * [Furthermore] if it be admitted that national regulations relative to commerce, may apply it as an instrument, and are not necessarily confined to its direct aid and advancement, the sphere of legislative discretion is, of course, more widely extended; and, in time of war, or of great impending peril, it must take a still more expanded range. Congress has power to declare war. It, of course, has power to prepare for war; and the time, the manner, and the measure, in the application of constitutional means, seem to be left to its wisdom and discretion. * * * Under the Confederation, * * * we find an express reservation to the State legislatures of the power to pass prohibitory commercial laws, and, as respects exportations, without any limitations. Some of them exercised this power. * * * Unless Congress, by the Constitution, possess the power in question, it still exists in the State legislatures—but this has never been claimed or pretended, since the adoption of the federal Constitution; and the exercise of such a power by the States, would be manifestly inconsistent with the power, vested by the people in Congress, 'to regulate commerce.' Hence I infer, that the power, reserved to the States by the articles of Confederation, is surrendered to Congress, by the Constitution; unless we suppose, that, by some strange process, it has been merged or extinguished, and now exists

no where."[473]

FOREIGN COMMERCE; PROTECTIVE TARIFFS [Pg 162]

Tariff laws have customarily contained prohibitory provisions, and such provisions have been sustained by the Court under Congress's revenue powers (*see above*) and under its power to regulate foreign commerce. Speaking for the Court in University of Illinois *v.* United States,[474] in 1933, Chief Justice Hughes said: "The Congress may determine what articles may be imported into this country and the terms upon which importation is permitted. No one can be said to have a vested right to carry on foreign commerce with the United States. * * * It is true that the taxing power is a distinct power; that it is distinct from the power to regulate commerce. * * * It is also true that the taxing power embraces the power to lay duties. Art. I, § 8, cl. 1. But because the taxing power is a distinct power and embraces the power to lay duties, it does not follow that duties may not be imposed in the exercise of the power to regulate commerce. The contrary is well established. Gibbons *v.* Ogden, 9 Wheat. 1, 202. 'Under the power to regulate foreign commerce Congress impose duties on importations, give drawbacks, pass embargo and nonintercourse laws, and make all other regulations necessary to navigation, to the safety of passengers, and the protection of property.' Groves *v.* Slaughter, 15 Pet. 449, 505. The laying of duties is 'a common means of executing the power.' 2 Story on the Constitution, § 1088."[475]

FOREIGN COMMERCE; BANNED ARTICLES

The forerunners of more recent acts excluding objectionable commodities from interstate commerce are the laws forbidding the importation of like commodities from abroad. This power Congress has exercised since 1842. In that year it forbade the importation of obscene literature or pictures from abroad.[476] Six years later it passed an act "to prevent the importation of spurious and adulterated drugs" and to provide a system of inspection to make the prohibition effective.[477] Such legislation guarding against the importation of noxiously adulterated foods, drugs, or liquor has been on the statute books ever since. In 1887 the importation by Chinese nationals of smoking opium was prohibited,[478] and subsequent statutes passed in 1909 and 1914 made it unlawful for anyone to import it.[479] In 1897 Congress forbade the importation of any tea "inferior in purity, quality, and fitness for consumption" as compared with a legal standard.[480] The act was sustained in 1904, in the leading case of Buttfield *v.* Stranahan.[481] In "The Abby Dodge" case an act excluding sponges taken by means of diving or diving apparatus from the waters of the Gulf of Mexico or Straits of Florida was sustained, but construed as not applying to sponges taken from the territorial waters of a State.[482] In Weber *v.* Freed[483] an act prohibiting the importation and interstate transportation of prize-fight films or of pictorial [Pg 163] representation of prize fights was upheld. Speaking for the unanimous Court, Chief Justice White said: "In view of the complete power of Congress over foreign commerce and its authority to prohibit the introduction of foreign articles recognized and enforced by many previous decisions of this court, the contentions are so devoid of merit as to cause them to be frivolous."[484] In Brolan *v.* United States[485] the Court again stressed the absolute nature of Congress's power over foreign commerce, saying: "In the argument reference is made to decisions of this court dealing with the subject of the power of Congress to regulate interstate commerce, but the very postulate upon which the authority of Congress to absolutely prohibit foreign importations as expounded by the decisions of this court rests is the broad distinction which exists between the two powers and therefore the cases cited and many more which might be cited announcing the principles which they uphold have obviously no relation to the question in hand."[486]

INTERSTATE COMMERCE; CONFLICT OF DOCTRINE AND OPINION

The question whether Congress's power to regulate commerce "among the several States" embraced the power to prohibit it furnished the topic of one of the most protracted debates in the entire history of the Constitution's interpretation, a debate the final resolution of which in favor of Congressional power is an event of first importance for the future of American Federalism. The issue was as early as 1841 brought forward by Henry Clay, in an argument before the Court in which he raised the specter of an act of Congress forbidding the interstate slave trade.[487] The debate was concluded ninety-nine years later by the decision in United States *v.* Darby, in which the Fair Labor Standards Act was sustained. The résumé of it which is given below is based on judicial opinions, arguments of counsel, and the writings of jurists and political scientists. Much of this material was evoked by efforts of Congress, from about 1905 onward, to stop the shipment interstate of the products of child labor.

ACTS OF CONGRESS PROHIBITIVE OF INTERSTATE COMMERCE [Pg 168]

The earliest such acts were in the nature of quarantine regulations and usually dealt solely with interstate transportation. In 1884 the exportation or shipment in interstate commerce of livestock having any infectious disease was forbidden.[488] In 1903 power was conferred upon the Secretary of Agriculture to establish regulations to prevent the spread of such diseases through foreign or interstate commerce.[489] In 1905 the same official was authorized to lay an absolute embargo or quarantine upon all shipments of cattle from one State to another when the public

necessity might demand it.[490] A statute passed in 1905 forbade the transportation in foreign and interstate commerce and the mails of certain varieties of moths, plant lice, and other insect pests injurious to plant crops, trees, and other vegetation.[491] In 1912 a similar exclusion of diseased nursery stock was decreed,[492] while by the same act, and again by an act of 1917,[493] the Secretary of Agriculture was invested with powers of quarantine on interstate commerce for the protection of plant life from disease similar to those above described for the prevention of the spread of animal disease. While the Supreme Court originally held federal quarantine regulations of this sort to be constitutionally inapplicable to intrastate shipments of livestock, on the ground that federal authority extends only to foreign and interstate commerce,[494] this view has today been abandoned. *See* pp. 248-249.

THE LOTTERY CASE

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The first case to come before the Court in which the issues discussed above were canvassed at all thoroughly was Champion *v.* Ames,[495] involving the act of 1895 "for the suppression of lotteries."[496] An earlier act excluding lottery tickets from the mails had been upheld in the earlier case of In re Rapier,[497] on the proposition that Congress clearly had the power to see that the very facilities furnished by it were not put to bad uses. But in the case of commerce the facilities are not ordinarily furnished by the National Government, and the right to engage in foreign and interstate commerce comes from the Constitution itself, or is anterior to it.

How difficult the Court found the question produced by the act of 1895, forbidding any person to bring within the United States or to cause to be "carried from one State to another" any lottery ticket, or an equivalent thereof, "for the purpose of disposing of the same," is shown by the fact that the case was thrice argued before the Court, and the fact that the Court's decision finally sustaining the act was a five-to-four decision. The opinion of the Court, on the other hand, prepared by Justice Harlan, marked an almost unqualified triumph at the time for the view that Congress's power to regulate commerce among the States includes the power to prohibit it, especially to supplement and support State legislation enacted under the police power.[498] Early in the opinion extensive quotation is made from Chief Justice Marshall's opinion in Gibbons *v.* Ogden,[499] with special stress upon the definition there given of the phrase "to regulate." Justice Johnson's assertion on the same occasion is also given: "The power of a sovereign State over commerce, * * *, amounts to nothing more than, a power to limit and restrain it at pleasure." Further along is quoted with evident approval Justice Bradley's statement in Brown *v.* Houston, [500] that "the power to regulate commerce among the several States is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations."

NATIONAL PROHIBITIONS AND STATE POLICE POWER

Following in the wake of Champion *v.* Ames, Congress has repeatedly brought its prohibitory powers over interstate commerce and communications to the support of certain local policies of the States in the exercise of their reserved powers, thereby aiding them in the repression of the liquor traffic,[501] of traffic in game taken in violation of State laws,[502] of commerce in convict-made goods,[503] of the white slave traffic,[504] of traffic in stolen motor vehicles,[505] of kidnapping,[506] of traffic in stolen property,[507] of racketeering,[508] of prize-fight films or other pictorial representation of encounters of pugilists.[509] The conception of the Federal System on which the Court based its validation of this legislation was stated by it in 1913 in sustaining the Mann "White Slave" Act in the following words: "Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction, * * *, but it must be kept in mind that we are one people; and the powers reserved to the States and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material, and moral."[510] At the same time, the Court made it plain that in prohibiting commerce among the States, Congress was equally free to support State legislative policy or to devise a policy of its own. "Congress," it said, "may exercise this authority in aid of the policy of the State, if it sees fit to do so. It is equally clear that the policy of Congress acting independently of the States may induce legislation without reference to the particular policy or law of any given State. Acting within the authority conferred by the Constitution it is for Congress to determine what legislation will attain its purposes. The control of Congress over interstate commerce is not to be limited by State laws."[511]

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HAMMER *v.* DAGENHART

However, it is to be noted that none of this legislation operated in the field of industrial relations. So when the Court was confronted in 1918, in the case of Hammer *v.* Dagenhart,[512] with an act which forbade manufacturers and others to offer child-made goods for transportation in interstate commerce,[513] it held the act, by the narrow vote of five Justices to four, to be not an act regulative of commerce among the States, but one which invaded the reserved powers of the States. "The maintenance of the authority of the States over matters purely local," said Justice Day for the Court, "is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution."[514] As to earlier decisions sustaining Congress's prohibitory powers, Justice Day

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said: "In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. * * * This element is wanting in the present case. * * * The goods shipped are in themselves harmless. * * * When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to federal control under the commerce power. * * * 'When commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another State for sale, * * *, but by its actual delivery to a common carrier for transportation, * * *' (Mr. Justice Jackson in *In re Greene*, 52 Fed. Rep. 113). This principle has been recognized often in this court. Coe *v.* Errol, 116 U.S. 517 * * *."[515]

The decision in Hammer *v.* Dagenhart was, in short, governed by the same general conception of the interstate commerce process as that which governed the decision in the Sugar Trust Case. Commerce was envisaged as beginning only with an act of transportation from one State to another. And from this it was deduced that the only commerce which Congress may prohibit is an act of transportation from one State to the other which is followed in the latter by an act within the normal powers of government to prohibit. Commerce, however, is primarily *traffic*; and the theory of the Child Labor Act was that it was designed to discourage a widespread and pernicious interstate traffic in the products of child labor—pernicious because it bore "a real and substantial relation" to the existence of child labor employment in some States and constituted a direct inducement to its spread to other States. Deprived of the interstate market which this decision secured to it, child labor could not exist.

INTERSTATE COMMERCE IN STOLEN GOODS BANNED

In Brooks *v.* United States,[516] decided in 1925, the Court, in sustaining the National Motor Vehicle Theft Act of 1919,[517] materially impaired the *ratio decidendi* of Hammer *v.* Dagenhart. At the outset of his opinion for the Court, Chief Justice Taft stated the general proposition that "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other States from the State of origin." This statement was [Pg 172] buttressed by a review of previous cases, including the explanation that the goods involved in Hammer *v.* Dagenhart were "harmless" and did not spread harm to persons in other States. Passing then to the measure before the Court, the Chief Justice noted "the radical change in transportation" brought about by the automobile, and the rise of "elaborately organized conspiracies for the theft of automobiles * * *, and their sale or other disposition" in another police jurisdiction from the owner's. This, the opinion declared, "is a gross misuse of interstate commerce. Congress may properly punish such interstate transportation by anyone with knowledge of the theft, because of its harmful result and its defeat of the property rights of those whose machines against their will are taken into other jurisdictions."[518]

The Motor Vehicle Act was sustained, therefore, mainly as protective of owners of automobiles, that is to say, of interests in "the State of origin." It was designed to repress automobile thefts, and that notwithstanding the obvious fact that such thefts must necessarily occur before transportation of the thing stolen can take place, that is, under the formula followed in Hammer *v.* Dagenhart, before Congress's power over interstate commerce becomes operative. Also, the Court took cognizance of "elaborately organized conspiracies" for the theft and disposal of automobiles across State lines—that, to say, of a widespread traffic in such property.

THE DARBY CASE

The formal overruling of Hammer *v.* Dagenhart, however, did not occur until 1941 when, in sustaining the Fair Labor Standards Act, a unanimous Court, speaking by Justice Stone, said: "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. * * * 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 [Pg 173] 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."[519] And commenting in a recent case on the Fair Labor Standards Act, Justice Burton, speaking for the Court said: "The primary purpose of the act is not so much to regulate interstate commerce as such, as it is, through the exercise of legislative power, to prohibit the shipment of goods in interstate commerce if they are produced under substandard labor conditions."[520]

CONGRESS AND THE FEDERAL SYSTEM

In view of these developments the following dictum by Justice Frankfurter, was no doubt, intended to be reassuring as to the future of the Federal System: "The interpenetrations of modern society have not wiped out State lines. It is not for us [the Court] to make inroads upon our federal system either by indifference to its maintenance or excessive regard for the unifying forces of modern technology. Scholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity."[521] While this may be conceded, the unmistakable lesson of recent cases is that the preservation of our Federal System depends today mainly upon Congress.

The Commerce Clause as a Restraint on State Powers

DOCTRINAL BACKGROUND

The grant of power to Congress over commerce, unlike that of power to levy customs duties, the power to raise armies, and some others, is unaccompanied by correlative restrictions on State power. This circumstance does not, however, of itself signify that the States were expected still to participate in the power thus granted Congress, subject only to the operation of the supremacy clause. As Hamilton points out in The Federalist, while some of the powers which are vested in the National Government admit of their "concurrent" exercise by the States, others are of their very nature "exclusive," and hence render the notion of a like power in the States "contradictory and repugnant."[522] As an example of the latter kind of power Hamilton mentioned the power of Congress to pass a uniform naturalization law. Was the same principle expected to apply to the power over foreign and interstate commerce?

Unquestionably one of the great advantages anticipated from the grant to Congress of power [Pg 174] over commerce was that State interferences with trade, which had become a source of sharp discontent under the Articles of Confederation, would be thereby brought to an end. As Webster stated in his argument for appellant in Gibbons *v.* Ogden: "The prevailing motive was to regulate commerce; to rescue it from the embarrassing and destructive consequences, resulting from the legislation of so many different States, and to place it under the protection of a uniform law." In other words, the constitutional grant was itself a regulation of commerce in the interest of uniformity. Justice Johnson's testimony in his concurring opinion in the same case is to like effect: "There was not a State in the Union, in which there did not, at that time, exist a variety of commercial regulations; * * * By common consent, those laws dropped lifeless from their statute books, for want of sustaining power that had been relinquished to Congress";[523] and Madison's assertion, late in life, that power had been granted Congress over interstate commerce mainly as "a negative and preventive provision against injustice among the States,"[524] carries a like implication.

That, however, the commerce clause, unimplemented by Congressional legislation, took from the States any and all power over foreign and interstate commerce was by no means universally conceded; and Ogden's attorneys directly challenged the idea. Moreover, as was pointed out on both sides in Gibbons *v.* Ogden, legislation by Congress regulative of any particular phase of commerce would still leave many other phases unregulated and consequently raise the question whether the States were entitled to fill the remaining gaps, if not by virtue of a "concurrent" power over interstate and foreign commerce, then by virtue of "that immense mass of legislation," as Marshall termed it, "which embraces everything within the territory of a State, not surrendered to the general government,"[525]—in a word, the "police power."

The commerce clause does not, therefore, without more ado, settle the question of what power is left to the States to adopt legislation regulating foreign or interstate commerce in greater or less measure. To be sure, in cases of flat conflict between an act or acts of Congress regulative of such commerce and a State legislative act or acts, from whatever State power ensuing, the act of Congress is today recognized, and was recognized by Marshall, as enjoying an unquestionable supremacy.[526] But suppose, *first*, that Congress has passed no act; or *secondly*, that its legislation does not clearly cover the ground which certain State legislation before the Court attempts to cover—what rules then apply? Since Gibbons *v.* Ogden both of these situations have [Pg 175] confronted the Court, especially as regards interstate commerce, hundreds of times, and in meeting them the Court has, first and last, coined or given currency to numerous formulas, some of which still guide, even when they do not govern, its judgment.

DOCTRINAL BACKGROUND; WEBSTER'S CONTRIBUTION

The earliest, and the most successful, attempt to set forth a principle capable of guiding the Court in adjusting the powers of the States to unexercised power of Congress under the commerce clause was that which was made by Daniel Webster in his argument in Gibbons *v.* Ogden, in the following words: "He contended, * * *, that the people intended, in establishing the Constitution, to transfer from the several States to a general government, those high and important powers over commerce, which, in their exercise, were to maintain a uniform and general system. From the very nature of the case, these powers must be exclusive; that is, the higher branches of commercial regulation must be exclusively committed to a single hand. What is it that is to be regulated? Not the commerce of the several States, respectively, but the commerce of the United States. Henceforth, the commerce of the States was to be a unit; and the system by which it was to exist and be governed, must necessarily be complete, entire and

uniform." At the same time Webster conceded "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."[527]

Webster also dealt with the problem which arises when Congress has exercised its power. The results of its act, he contended, must be treated as a unit, so that when Congress had left subject matter within its jurisdiction unregulated, it must be deemed to have done so of design, and its omissions, or silences, accordingly be left undisturbed by State action. Although Marshall, because he thought the New York act creating the Livingston-Fulton monopoly to be in direct conflict with the Enrolling and Licensing Act of 1793, was not compelled to pass on either of Webster's theories, he indicated his sympathy with them.[528]

COOLEY *v.* BOARD OF PORT WARDENS

Aside from Marshall's opinion in 1827 in Brown *v.* Maryland,[529] in which the famous "original package" formula made its debut, the most important utterance of the Court touching [Pg 176] interpretation of the commerce clause as a restriction on State legislative power is that for which Cooley *v.* Board of Wardens of Port of Philadelphia,[530] decided in 1851, is usually cited. The question at issue was the validity of a Pennsylvania pilotage act so far as it applied to vessels engaged in foreign commerce and the coastwise trade. The Court, speaking through Justice Curtis, sustained the act on the basis of a distinction between those subjects of commerce which "imperatively demand a single uniform rule" operating throughout the country and those which "as imperatively" demand "that diversity which alone can meet the local necessities of navigation," that is to say, of commerce. As to the former the Court held Congress's power to be "exclusive"—as to the latter it held that the States enjoyed a power of "concurrent legislation."

While this formula obviously stems directly from Webster's argument in Gibbons *v.* Ogden, it covers considerably less ground. Citation, nevertheless, of the Cooley case throughout the next half century eliminated the difference and brought the Curtis dictum abreast of Webster's earlier argument. The doctrine consequently came to be established, *first*, that Congress's power over interstate commerce is "exclusive" as to those phases of it which require "uniform regulation"; *second*, that outside this field, as plotted by the Court, the States enjoyed a "concurrent" power of regulation, subject to Congress's overriding power.[531]

JUDICIAL FORMULAS

But meantime other formulas had emerged from the judicial smithy, several of which are brought together into something like a doctrinal system, in Justice Hughes' comprehensive opinion for the Court in the Minnesota Rate Cases,[532] decided in 1913. "Direct" regulation of foreign or interstate commerce by a State is here held to be out of the question. At the same time, the States have their police and taxing powers, and may use them as their own views of sound public policy may dictate even though interstate commerce may be "incidentally" or "indirectly" regulated, it being understood that such "incidental" or "indirect" effects are always subject to Congressional disallowance. "Our system of government," Justice Hughes reflects, "is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its [Pg 177] full scope without unnecessary loss of local efficiency."[533]

In more concrete terms, the varied formulas which characterize this branch of our Constitutional Law have been devised by the Court from time to time in an endeavor to effect "a practical adjustment" between two great interests, the maintenance of freedom of commerce except so far as Congress may choose to restrain it, and the maintenance in the States of efficient local governments. Thus, while formulas may serve to steady and guide its judgment, the Court's real function in this area of judicial review is essentially that of an arbitral or quasi-legislative body. So much so is this the case that in 1940 three Justices joined in an opinion in which they urged that the business of drawing the line between the immunity of interstate commerce and the taxing power of the States "should be left to the legislatures of the States and the Congress," with the final remedy in the hands of the latter.[534]

State Taxing Power and Foreign Commerce

BROWN *v.* MARYLAND; THE ORIGINAL PACKAGE DOCTRINE

The leading case under this heading is Brown *v.* Maryland,[535] decided in 1827, the issue in which was the validity of a Maryland statute requiring "all importers of foreign articles or commodities," preparatory to selling the same, to take out a license. Holding this act to be void under both article I, sec. 10, and the commerce clause, the Court, speaking through Chief Justice Marshall, advanced the following propositions: (1) that "commerce is intercourse; one of its most ordinary ingredients is traffic"; (2) that the right to import includes the right to sell; (3) that a tax on the sale of an article is a tax on the article itself—a conception of the incidence of taxation which has at times had important repercussions in other fields of Constitutional Law; (4) that the taxing power of the State does not extend in any form to imports from abroad so long as they remain "the property of the importer, in his warehouse, in the original form or package" in which [Pg 178]

they were imported—the famous "original package doctrine"; (5) that once, however, the importer parts with his importations "or otherwise mixes them with the general property of the State by breaking up his packages," the law may treat them as part and parcel of such property; (6) that even while in the original package imports are subject to the incidental operation of police measures adopted by the State in good faith for the protection of the public against apparent dangers. Lastly, in determining whether a State law amounts to a regulation of commerce the Court would, Marshall announced, be guided by "substance" and not by "form"—a proposition which has many times opened the way to extensive inquiries by the Court into the actualities both of commercial practice and of State administration.

The decision in Brown *v.* Maryland, but more especially the "original package doctrine" there laid down, has been sometimes criticised as going too far. It would have been sufficient, the critics contend, for the Court to have held the Maryland act void on account of its obviously discriminatory character; and they urge that original packages receiving the protection of the State ought to be subject to nondiscriminatory taxation by it. The criticism was partially anticipated by Marshall himself in the apprehensions which he voiced that any concession to "the great importing States" might be turned by them against the rest of the country. Indeed, he is uncertain whether the original package doctrine will prove sufficient for its purposes and accordingly offers it not as a rule "universal in its application," but rather as a stop-gap principle. History has proved, however, that in this he builded better than he knew. For in the field of foreign commerce the original package doctrine has never been disturbed, and it has scarcely been added to; and so confined, it has never been surpassed by any later piece of judicial legislation, whether in point of durability or in that of definiteness and easy comprehensibility. [536]

State Taxation of the Subject Matter of Interstate Commerce

GENERAL CONSIDERATIONS

The task of drawing the line between State power and the commercial interest has proved a comparatively simple one in the field of foreign commerce, the two things being in great part territorially distinct. With "commerce among the States" it is very different. This is conducted in the interior of the country, by persons and corporations that are ordinarily engaged also in local [Pg 179] business; its usual incidents are acts which, if unconnected with commerce among the States, would fall within the State's powers of police and taxation; while the things it deals in and the instruments by which it is carried on comprise the most ordinary subject matter of State power. In this field the Court has, consequently, been unable to rely upon sweeping solutions. To the contrary, its judgments have often been fluctuating and tentative, even contradictory; and this is particularly the case as respects the infringement of the State taxing power on interstate commerce. In the words of Justice Frankfurter: "The power of the States to tax and the limitations upon that power imposed by the Commerce Clause have necessitated a long, continuous process of judicial adjustment. The need for such adjustment is inherent in a Federal Government like ours, where the same transaction has aspects that may concern the interests and involve the authority of both the central government and the constituent States. The history of this problem is spread over hundreds of volumes of our Reports. To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts."[537]

THE STATE FREIGHT TAX CASE

The great leading case dealing with the relation of the State's taxing power to interstate commerce is that of the State Freight Tax,[538] decided in 1873. The question before the Court was the validity of a Pennsylvania statute, passed eight years earlier, which required every company transporting freight within the State, with certain exceptions, to pay a tax at specified rates on each ton of freight carried by it. Overturning the act, the Court held: "(1) The transportation of freight, or of the subjects of commerce, is a constituent part of commerce itself; (2) a tax upon freight, transported from State to State, is a regulation of commerce among the States; (3) whenever the subjects in regard to which a power to regulate commerce is asserted are in their nature National, or admit of one uniform system or plan of regulation, they are exclusively within the regulating control of Congress; (4) transportation of passengers or merchandise through a State, or from one State to another, is of this nature; (5) hence a statute of a State imposing a tax upon freight, taken up within the State and carried out of it, or taken up without the State and brought within it, is repugnant to that provision of the Constitution of the United States, which ordains that 'Congress shall have power to regulate commerce with foreign [Pg 180] nations and among the several States, and with the Indian tribes.'"[539]

GOODS IN TRANSIT

States, therefore, may not tax property in transit in interstate commerce. A nondiscriminatory tax, however, is permitted if the goods have not yet started in interstate commerce, or have completed the interstate transit even though still in the original package, unless they are foreign imports in the original package; and States may also impose a nondiscriminatory tax when there is a break in an interstate transit, and the goods have not been restored to the current of

interstate commerce. Such is the law in brief. Two questions arise, first, when do goods originating in a State pass from under its power to tax; and, second, when do goods arriving from another State lose their immunity?

The leading case dealing with the first of these questions is Coe *v.* Errol,[540] in which the matter at issue was the right of the town of Errol, New Hampshire, to tax certain logs on their way to points in Maine, while they lay in the river before the town or along its shore awaiting the spring freshets and consequent rise of the river. As to the logs in the river, which had come from Maine on their way to Lewiston in the same State, but had been detained at Errol by low water, the Supreme Court of New Hampshire itself ruled that the local tax did not apply, the logs being still in transit. As to the logs which had been cut in New Hampshire and lay on the shore or in tributaries of the river, both courts were again in agreement that they were still subject to local taxation, notwithstanding the intention of their owners to send them out of the State. Said Justice Bradley: "* * * goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey."[541] [Pg 181]

STATE TAXATION OF MANUFACTURING AND MINING

Under the above rule, obviously, production is not interstate commerce even though the thing produced is intended for the interstate market. Thus a Pennsylvania *ad valorem* tax on anthracite coal when prepared and ready for shipment was held not to be an interference with interstate commerce although applied to coal destined for a market in other States;[542] and in Oliver Iron Company *v.* Lord[543] an occupation tax on the mining of iron ore was upheld, although substantially all of the ore was immediately and continuously loaded on cars and shipped into other States. Said the Court: "Mining is not interstate commerce, but, * * * subject to local regulation and taxation. Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce."[544] Likewise an annual privilege tax on the business of producing natural gas in the State, computed on the value of the gas produced "as shown by the gross proceeds derived from the sale thereof by the producer," was held constitutional even though most of the gas passed into interstate commerce in continuous movement from the wells.[545] And in Utah Power and Light Co. *v.* Pfost[546] the generation of electricity in a State was held to be distinguishable from its transmission over wires to consumers in another State, and hence taxable by the former State. Likewise, a State statute imposing a privilege tax on the production of mechanical power for sale or use did not contravene the interstate commerce clause although applied to an engine operating a compressor to increase the pressure of natural gas and thereby permit it to be transported to purchasers in other States.[547] Similarly, a tax so much per pound on shrimp taken within the three-mile belt of the coast of the taxing State was valid, since the taxable event, the taking of the shrimp, occurred before they could be said to have entered the interstate commerce stream.[548]

PRODUCTION FOR AN ESTABLISHED MARKET [Pg 182]

But while the production of goods intended for the interstate market is taxable by the State where it takes place, their purchase for an established market in another State is interstate commerce and as such is neither regulatable nor taxable by the State of origin, provided at any rate their trans-shipment is not unduly delayed.[549] Thus, oil gathered into the pipe lines of a distributing company and intended for the most part for customers outside the State, is in interstate commerce from the moment it leaves the wells;[550] and a like result has been reached as to natural gas.[551] "The typical and actual course of events," says the Court, "marks the carriage of the greater part as commerce among the States and theoretical possibilities may be left out of account."[552]

REJECTION OF THE ORIGINAL PACKAGE CONCEPT IN INTERSTATE COMMERCE

But the question also arises as to when goods entering a State from another State become part of the mass of property of the former and hence taxable by it? In Brown *v.* Maryland,[553] Chief Justice Marshall, had remarked at the close of his opinion, "We suppose the principles laid down in this case, apply equally to importations from a sister State."[554] Forty-two years later, in Woodruff *v.* Parham,[555] an effort was made to induce the Court, in reliance on this dictum, to apply the original package doctrine against a Mobile, Alabama tax on sales at auction, so far as it reached "imports" from sister States. The Court refused the invitation; first on the ground that Marshall's statement was *obiter*, the point not having been involved in Brown *v.* Maryland; second, because usage contemporary with the Constitution and of the Constitution itself confined the term "imports" as employed in article I, section 10 to imports from abroad; third, because the tax in question was nondiscriminatory. At the same time, nevertheless, reference was made to the power of Congress to interpose at any time in exercise of its power over commerce, "in such a manner as to prevent the States from any oppressive interference with the free interchange of commodities by the citizens of one State with those of another."[556] The same result was reached [Pg 183]

a few years later in Brown *v.* Houston,[557] where it was held that coal transported down the Mississippi from Pennsylvania had been validly subjected by Louisiana to a general *ad valorem* property tax, having "come to its place of rest, for final disposal or use," and hence become "a part of the general mass of property in the State."[558] Again, however, a caveat was entered in behalf of the power of Congress to impose a different rule affording "a temporary exemption" of property transported from one State to another from taxation by the latter.[559]

INSPECTION CHARGES

Woodruff *v.* Parham and Brown *v.* Houston are still good law for the most part.[560] Nevertheless, there is one respect in which imports from sister States are treated as "imports" in the sense of the Constitution, and that is in being exempt from "unreasonable" inspection charges.[561] It is true, also, that in a series of cases involving sales of oil about 1920 the Court appeared to be contemplating reviving the original package doctrine,[562] but these holdings were presently "qualified" in a sweeping opinion by Chief Justice Taft, reviewing the cases.[563] But taxation is one thing, prohibition another. In the field of the police power, where its applicability was not so much as suggested in Brown *v.* Maryland, the original package doctrine has been frequently invoked by the Court against State legislation, and even today, perhaps retains a spark of life.[564]

LOCAL SALES: PEDDLERS [Pg 184]

By the same token, local sales of goods brought into a State from another State are subject to a nondiscriminatory exercise of its taxing power. Such a tax, the Court has said, "has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected"; and this is true, even of goods immediately to be used in interstate commerce.[565] The commerce clause, therefore, does not prohibit a State from imposing special license taxes on merchants using profit sharing coupons and trading stamps although the coupons may have been inserted in retail packages by the manufacturer or shipper outside the State and are redeemable outside the State, either by such manufacturer or shipper, or by some other agency outside the State;[566] nor yet a nondiscriminatory tax upon local peddling of goods and sales thereof by peddlers even though the goods are foreign or interstate imports, since the sale occurs after foreign or interstate commerce thereof has ended.[567] And in Kehrer *v.* Stewart[568] it was held that a State tax upon resident managing agents of nonresident meatpacking houses did not conflict with the commerce clause, regardless of the fact that the greater portion of the business was interstate in character, the tax having been construed by the highest court of the State as applying only to the business of selling to local customers from the stock of "original packages" shipped into the State without a previous sale or contract to sell, and kept and held for sale in the ordinary course of trade. Contrariwise, a tax on sales discriminatory in its incidence against merchandise because of its origin in another State is *ipso facto* unconstitutional. The leading case is Welton *v.* Missouri,[569] decided in 1876, in which a peddler's license tax confined to the sale of goods manufactured outside the State was set aside. The doctrine of Welton *v.* Missouri has been reiterated many times.[570]

STOPPAGE IN TRANSIT [Pg 185]

It also follows logically from Coe *v.* Errol,[571] and the cases deriving from it, that a State may impose a nondiscriminatory tax when there is a break in interstate transit, and the goods have not been restored to the current of interstate commerce. The effect of an interruption upon the continuity of an interstate movement depends upon its causes and purposes. If the delay is due to the necessities of the journey, as in the Coe case, where the logs were detained for a time within the State by low water, they are deemed "in the course of commercial transportation, and * * * clearly under the protection of the Constitution."[572] Intention thus often enters into the determination of the question whether goods from another State have come to rest sufficiently to subject them to the local taxing power. In a typical case the Court held that oil shipped from Pennsylvania and held in tanks in Memphis, Tennessee for separation, distribution and reshipment, was subject to the taxing power of the latter State.[573] The delay in transportation resulting from these proceedings on the part of the owners, the Court pointed out, was clearly designed for their own profit and convenience and was not a necessary incident to the method of transportation adopted, as had been the delay of the logs coming from Maine in Coe *v.* Errol. The distinction is fundamental.[574]

Applying this rule in more recent cases, the Court has upheld State taxation: on the use and storage of gasoline brought into the State by a railroad company and unloaded and stored there, to be used for its interstate trains;[575] on gasoline imported and stored by an airplane company and withdrawn to fill airplanes that use it in their interstate travel;[576] on supplies brought into the State by an interstate railroad company to be used in replacements, repairs and extensions, and installed immediately upon arrival in the taxing State;[577] on equipment brought into the [Pg 186] State by a telephone and telegraph company for operation, maintenance, and repair of its

interstate system.[578] In all these cases the Court applied the principle that "use and storage" are subject to local taxation when "there is an interval after the articles have reached the end of their interstate movement and before their consumption in interstate operation has begun."[579] On the other hand, in the absence of such an "interval," the Court declared invalid State gasoline taxes imposed per gallon of gasoline imported by interstate carriers as fuel for use in such vehicles, and used within the State as well as in their interstate travel.[580]

THE DRUMMER CASES; ROBBINS *v.* SHELBY COUNTY TAXING DISTRICT

But there is one situation in which goods introduced into one State from another have until recent years enjoyed a special immunity from taxation by the former, and that is when they were introduced in consequence of a contract of sale. The leading case is Robbins *v.* Shelby County Taxing District,[581] in which the Court, after a penetrating survey of commercial practices, ruled that "the negotiation of sales of goods"—in this instance by sample—"which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce." In short, whereas in foreign commerce, importation is succeeded by the right to sell in the original package, in interstate commerce sale was succeeded by the right of importation, which continued until the goods reached the hands of the purchaser. The benefits of this holding were extended in a series of rulings in which it was held to apply whether solicitation of orders was or was not made with sample,[582] and to sales which were not, accurately speaking, consummated until the actual delivery of the goods, which was attended by local incidents. So, [Pg 187] where a North Carolina agent of a Chicago firm took orders for framed pictures, which were then sent to him packed separately from the frames and then framed by him before delivery, the rule laid down in the Robbins case was held to apply throughout, with the result that North Carolina could tax or license no part of the transaction described;[583] so also as to a sewing machine ordered by a customer in North Carolina and sent to her C.O.D.;[584] so also as to brooms sent in quantity for the fulfillment of a number of orders, and subject to rejection by the purchaser if deemed by him not up to sample.[585] Said Justice Holmes in the case last referred to: "'Commerce among the States' is a practical conception not drawn from the 'witty diversities' * * * of the law of sales. * * * The brooms were specifically appropriated to specific contracts, in a practical, if not in a technical, sense. Under such circumstances it is plain that, wherever might have been the title, the transport of the brooms for the purpose of fulfilling the contracts was protected commerce."[586] Nor did it make any difference that the solicitor received his compensation in form of down payment by the purchaser.[587] Moreover, sales under a mail order business, with delivery taking place within the State to a carrier for through shipment to another State to fill orders, was held to be beyond the taxing power of the first State.[588] The fact that a concern doing a strictly interstate business had goods on hand within the State which were capable of being used in intrastate commerce, did not, the Court declared, take the business out of the protection of the commerce clause and allow the State to impose a privilege tax on such concern.

LIMITATION OF THE ROBBINS CASE

On the other hand, it was early held that the rule laid down in the Robbins case did not prevent a State from taxing a resident citizen who engaged in a general commission business, on the [Pg 188] profits thereof, although the business consisted "for the time being, wholly or partially in negotiating sales between resident and nonresident merchants, of goods situated in another State."[589] Also, it has been held that a stamp tax on transfers of corporate stock, as applied to a sale between two nonresidents, of the stock of foreign railway corporations, was not an interference with interstate commerce.[590] Likewise, the business of taking orders on commission for the purchase and sale of grain and cotton for future delivery not necessitating interstate shipment was ruled not to be interstate commerce, and as such exempt from taxation, although deliveries were sometimes made by interstate shipment.[591] And in Banker Bros. Co. *v.* Pennsylvania[592] it was held that a tax upon a domestic corporation selling automobiles built by a foreign corporation under an arrangement by which the latter agreed to build for and sell to the former, for cash, at a specified price less than list price, was not a tax on interstate transactions, there being nothing which connected the ultimate buyer with the manufacturer but a warranty and the buyer's agreement to pay the list price f.o.b. factory. Similarly, in Browning *v.* Waycross[593] it was held that the business of erecting lightning rods within the limits of a town by the agent of a nonresident manufacturer on whose behalf such agent had solicited orders for the sale of the rods, and from whom he had received them when shipped into the State, was validly subjected to a municipal license tax. "It was not," said the Court, "within the power of the parties by the form of their contract to convert what was exclusively a local business, * * *, into an interstate commerce business * * *"[594] Also, a municipal license tax upon persons engaged in the business of buying or selling cotton for themselves was found not to impose a forbidden burden upon interstate commerce even though the cotton was purchased with a view to ultimate shipment in some other State or country.[595] Nor was a gallonage tax imposed by a State upon a distributor of liquid fuel rendered repugnant to the commerce clause by the fact that the distributor caused fuel sold to customers in the State to be shipped from another State for delivery in tank cars—"deemed original packages"—on purchaser's siding, as agreed. Said the Court: "The contracts were executory and related to unascertained goods. * * * It does not appear

that when they were made appellant had any fuels of the kinds covered, or that those to be delivered were then in existence. There was no selection of goods by purchasers. Appellant was not required by the contracts to obtain the fuels at Wilmington but was free to effect performance by shipping from, any place within or without Pennsylvania."[596]

THE ROBBINS CASE TODAY

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In the cases reviewed in the preceding paragraph protestants against local taxation appealed, but unavailingly, to the Robbins case. So it would seem that the generative powers of that prolific precedent had begun to wane somewhat even before the Depression, an event which rendered judicial reaction against it still more pronounced. Indeed, by the Court's decision in McGoldrick *v.* Berwind-White Co.,[597] in 1940, the authority of the entire line of cases descending from Robbins *v.* Shelby County Taxing District was seriously impaired, for the time being, while a second holding the same year seemed to reduce the significance of the Robbins case itself to that of a reassertion of the elementary rule against discrimination. "The commerce clause," Justice Reed remarked sententiously, "forbids discrimination, whether forthright or ingenious."[598]

DEPRESSION CASES: USE TAXES

With a majority of the States on the verge of bankruptcy, extensive recourse was had to sales taxes and, as an offset to these in favor of the local economy, "use" taxes on competing products coming from sister States. The basic decision sustaining the use tax, in this novel employment of it, was Henneford *v.* Silas Mason Co.,[599] in which was involved a State of Washington two per cent tax on the privilege of using products coming from sister States. Excepted from the tax, on the other hand, was any property the sole use of which had already been subjected to an equal or greater tax, whether under the laws of Washington or any other State. Stressing this provision in its opinion, the Court said: "Equality is the theme that runs through all the sections of the statute. * * * When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates."[600] There being no actual discrimination in favor of Washington products, the tax was valid.

DEPRESSION CASES: SALES TAXES

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A companion piece of the Henneford case in motivation, although it occurred three years later, was McGoldrick *v.* Berwind-White Coal Mining Company,[601] in which it was held that in the absence of Congressional action, a New York City general sales tax was applicable to sales of coal under contracts entered into within the municipality and calling for delivery therein. Speaking for the majority, Justice Stone declared any "distinction * * * between a tax laid on sales made, without previous contract, after the merchandise had crossed the State boundary, and sales, the contracts for which when made contemplate or require the transportation of merchandise interstate to the taxing State," to be "without the support of reason or authority";[602] and the Robbins case was held to be "narrowly limited to fixed-sum license taxes imposed on the business of soliciting order for the purchase of goods to be shipped interstate, * * *"[603] Three Justices, speaking by Chief Justice Hughes, dissented. Three companion cases decided the same day were found to follow the Berwind-White pattern,[604] while a fourth was held not to, on the ground that foreign commerce was involved.[605] For the time being Robbins and family looked to be on the way out.

END OF THE DEPRESSION CASES

[Pg 191]

Two cases, decided respectively in 1944 and 1946, signalized the end of the Depression. In McLeod *v.* Dilworth Co.,[606] a divided Court ruled that a sales tax could not be validly imposed by a State on sales to its residents which were consummated by acceptance of orders in, and shipment of goods from another State, in which title passed upon delivery to the carrier. Said Justice Frankfurter for the majority: "A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, * * * A sales tax is a tax on the freedom of purchase * * * A use tax is a tax on the enjoyment of that which was purchased. In view of the differences in the basis of these two taxes and the differences in the relation of the taxing State to them, a tax on an interstate sale like the one before us and unlike the tax on the enjoyment of the goods sold, involves an assumption of power by a State which the Commerce Clause was meant to end."[607] He also "distinguished" the Berwind-White case—just as it had "distinguished" the Robbins case—but not to the satisfaction of three of his brethren, who found the decision to mark a retreat from the Berwind-White case.[608]

The second case, Nippert *v.* Richmond,[609] involved a municipal ordinance imposing upon solicitors of orders for goods a license tax of fifty dollars and one-half of one per cent of the gross earnings, commissions, etc., for the preceding year in excess of $1,000. Speaking for the same majority that had decided McLeod *v.* Dilworth Co., Justice Rutledge found that "as the case has been made, the issue is substantially whether the long line of so-called 'drummer cases' beginning with Robbins *v.* Shelby County Taxing District, 120 U.S. 489, shall be adhered to in result or shall now be overruled in the light of what attorneys for the city say are recent trends

requiring that outcome."[610] The tax was held void, Berwind-White being not only "distinguished" this time, but also "explained." "The drummer," said Justice Rutledge, "is a figure representative of a by-gone day," citing Wright, Hawkers and Walkers in Early America (1927). "But his modern prototype persists under more euphonious appellations. So endure the basic reasons which brought about his protection from the kind of local favoritism the facts of this case typify."[611] [Pg 192]

A year later a Mississippi "privilege tax" laid upon each person soliciting business for a laundry not licensed in the State, was set aside directly on the authority of the Robbins case.[612] It would appear that Robbins and his numerous progeny can once more claim full constitutional status.[613]

TAXATION OF CARRIAGE OF PERSONS

Whether the carriage of persons from one State to another was a branch of interstate commerce was a question which the Court was able to side-step in Gibbons *v.* Ogden.[614] A quarter of a century later, however, an affirmative answer was suggested in the Passenger Cases,[615] in which a State tax on each passenger arriving on a vessel from a foreign country was set aside, though chiefly in reliance on existing treaties and acts of Congress. But similar cases arising after the Civil War were disposed of by direct recourse to the commerce clause.[616] Meantime, in 1865, the newly admitted State of Nevada, in an endeavor to prevent a threatened dissipation of its population, levied a special tax on railroad and stage companies for every passenger they carried out of the State, and in Crandall *v.* Nevada[617] this act was held void on the general ground that the National Government had at all times the right to require the services of its citizens at the seat of government and they the correlative right to visit the seat of government, rights which, if the Nevada tax was valid, were at the mercy of any State, the power to tax being without limit. Reference was also made to the right of the government to transport troops at all times by the most expeditious method. Two of the Justices, however, rejected this line of reasoning and held the act to be void under the commerce clause.[618] But it was not until 1885 that the Court, in deciding Gloucester Ferry Company *v.* Pennsylvania,[619] stated flatly that "Commerce among the States * * * includes the transportation of persons,"[620] and hence was not taxable by the States, a proposition which is still good law.[621] Four years earlier it had been held that the transmission of telegraph messages from one State to another, being interstate commerce, was something that the State of origin could not tax.[622]

State Taxation of the Interstate Commerce Privilege: Foreign Corporations [Pg 193]

DOCTRINAL HISTORY

In the famous case of Paul *v.* Virginia,[623] decided in 1869, it was held that a corporation chartered by one State could enter other States only with their assent, which might "be granted upon such terms and conditions as those States may think proper to impose";[624] but along with this holding went the statement that "the power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals."[625] And in the State Freight Tax Case it is implied that no State can regulate or restrict the right of a "foreign" corporation—one chartered by another State—to carry on interstate commerce within its borders,[626] an implication which soon became explicit. In Leloup *v.* Port of Mobile,[627] decided in 1888, the Court had before it a license tax on a telegraph company which was engaged in both domestic and interstate business. The general nature of the exaction did not suffice to save it. Said the Court: "The question is squarely presented to us, * * *, whether a State, as a condition of doing business within its jurisdiction, may exact a license tax from a telegraph company, a large part of whose business is the transmission of messages from one State to another and between the United States and foreign countries, and which is invested with the powers and privileges conferred by the act of Congress passed July 24, 1866, and other acts incorporated in Title LXV of the Revised Statutes? Can a State prohibit such a company from doing such a business within its jurisdiction, unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies, and prohibit the transaction of such business altogether. We are not prepared to say that this can be done."[628]

In Crutcher *v.* Kentucky[629] a like result was reached, without assistance from an act of Congress, with respect to a Kentucky statute which provided that the agent of an express company not incorporated by the laws of that State should not carry on business there without first obtaining a license from the State, and that, preliminary thereto, he must satisfy the auditor of the State that the company he represented was possessed of an actual capital of at least $150,000. The act was held to be a regulation of interstate commerce so far as applied to a corporation of another State in that business. "To carry on interstate commerce," said the Court, "is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject."[630] [Pg 194]

LICENSE TAXES

The demand for what in effect is a license is, of course, capable of assuming various guises. In Ozark Pipe Line *v.* Monier[631] an annual franchise tax on foreign corporations equal to one-tenth of one per cent of the par value of their capital stock and surplus employed in business in the State was found to be a privilege tax, and hence one which could not be exacted of a foreign corporation whose business in the taxing State consisted exclusively of the operation of a pipe line for transporting petroleum through the State in interstate commerce, and of activities the sole purpose of which was the furtherance of its interstate business. Likewise a Massachusetts tax based on "the corporate surplus" of a foreign corporation having only an office in the State for the transaction of interstate business was held in Alpha Portland Cement Co. *v.* Massachusetts to be virtually an attempt to license interstate commerce.[632] In the same category of unconstitutional taxation of the interstate commerce privilege, the Court has also included the following: a State "franchise" tax on a foreign corporation, whose sole business in the State consisted in landing, storing and selling in the original package goods imported by it from abroad, the tax being imposed annually on the doing of such business and measured by the value of the goods on hand;[633] a State privilege or occupation tax on every corporation engaged in the business of operating and maintaining telephone lines and furnishing telephone service in the State, of so much for each telephonic instrument controlled and operated by it, as applied to [Pg 195] a company furnishing both interstate and intrastate service, and employing the same telephones, wires, etc., in both as integrated parts of its system;[634] a State occupation tax measured by the entire gross receipts of the business of a radio broadcasting station, licensed by the Federal Communications Commission, and engaged in broadcasting advertising "programs" for customers for hire to listeners within and beyond the State, since it did not "appear that any of the taxed income ... [was] allocable to interstate commerce";[635] a State occupation tax on the business of loading and unloading vessels engaged in interstate and foreign commerce;[636] an Indiana income tax imposed on the gross receipts from commerce inasmuch as the tax reached indiscriminately and without apportionment the gross income from both interstate commerce and intrastate activities;[637] an Arkansas statute making entry into the State of motor vehicles carrying more than twenty gallons of gasoline conditional on the payment of an excise on the excess.[638]

DOCTRINE OF WESTERN UNION TELEGRAPH *v.* KANSAS EX REL. COLEMAN [Pg 196]

One of the most striking concessions ever made by the Court to the interstate commercial interest at the expense of the State's taxing power was that which appeared originally in 1910, in Western Union Telegraph. Co. *v.* Kansas ex rel. Coleman,[639] which involved a percentage tax upon the total capitalization of all foreign corporations doing or seeking to do a local business in the State. The Court pronounced the tax, as to the Western Union, a burden upon the company's interstate business and upon its property located and used outside the State, and hence void under both the commerce clause and the due process of law clause of the Fourteenth Amendment. The decision was substantially aided by the fact that the company had been doing a general telegraphic business within the State for more than fifty years without having been subjected to such an exaction.[640]

SPREAD OF THE DOCTRINE

The doctrine of the case, however, soon cast off these initial limitations. In Looney *v.* Crane Company[641] a similar tax by the State of Texas was disallowed as to an Illinois corporation, engaged in its home State in the manufacture of hardware, but maintaining in Texas depots and warehouses from which orders were filled and sales made, likewise, in International Paper Company *v.* Massachusetts,[642] it was clearly stated that "the immunity of interstate commerce from State taxation" is not confined to what is done by carriers in such commerce, but "is universal and covers every class of ... [interstate] commerce, including that conducted by merchants and trading companies." On the same occasion the general proposition was laid down that "the power of a State to regulate the transaction of a local business within its borders by a [Pg 197] foreign corporation, ... is not unrestricted or absolute, but must be exerted in subordination to the limitations which the Constitution places on State action."[643]

STATUS OF THE DOCTRINE TODAY

The precise standing of this doctrine is, nevertheless, seriously clouded by certain more recent holdings. In Sprout *v.* South Bend,[644] decided in 1928, the doctrine was still applied, to disallow a license tax on concerns operating a bus interstate. Pointing to the fact that the ordinance made no distinction between busses engaged exclusively interstate and those engaged intrastate or both interstate and intrastate, the Court said: "In order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business."[645] Likewise, in Cooney *v.* Mountain States Telephone and Telegraph Co., the Court asserted that to sustain a State occupation tax on one whose business is both interstate and intrastate, "it must appear

* * *, and that the one [who is] taxed could discontinue the intrastate business without [also] withdrawing from the interstate business."[646] A year later, nevertheless, Justice Brandeis, speaking for the Court in Pacific Telephone and Telegraph Co. *v.* Tax Commission,[647] asserted flatly: "No decision of this Court lends support to the proposition that an occupation tax upon local business, otherwise valid, must be held void merely because the local and interstate branches are for some reason inseparable."[648] An occupation tax, like other taxes and expenses, lessens the benefit derived by interstate commerce from the joint operation with it of the [Pg 198] intrastate business of the carrier; but it is not an undue burden on interstate commerce where, as in this case, the advantage to the carrier, and to the interstate commerce, of continuing the intrastate business is greatly in excess of the tax. And subsequent holdings in cases involving foreign corporations doing a mixed business, comprising both interstate and intrastate elements, have tended on the whole to restore the rule stated in Paul *v.* Virginia[649] shortly after the Civil War, that the Constitution does not confer upon a foreign corporation the right to engage in local business in a State without its assent, which it may give on such terms as it chooses.[650]

State Taxation of Property Engaged in, and of the Proceeds From, Interstate Commerce

GENERAL ISSUE

In this area of Constitutional Law the principle asserted in the State Freight Tax Case,[651] that a State may not tax interstate commerce, is confronted with the principle that a State may tax all purely domestic business within its borders and all property "within its jurisdiction." Inasmuch as most large concerns prosecute both an interstate and a domestic business, while the instrumentalities of interstate commerce and the pecuniary returns from such commerce are ordinarily property within the jurisdiction of some State or other, the task before the Court in drawing the line between the immunity claimed by interstate business on the one hand and the prerogatives claimed by local power on the other has at times involved it in self-contradiction, as successive developments have brought into prominence novel aspects of its complex problem or have altered the perspective in which the interests competing for its protection have appeared. In this field words of the late Justice Rutledge, spoken in 1946, are especially applicable: "For cleanly as the commerce clause has worked affirmatively on the whole, its implied negative operation on State power has been uneven, at times highly variable. * * * Into what is thus left [Pg 199] open for inference to fill, divergent ideas of meaning may be read much more readily than into what has been made explicit by affirmation. That possibility is broadened immeasurably when not logic alone, but large choices of policy, affected in this instance by evolving experience of federalism, control in giving content to the implied negation."[652]

DEVELOPMENT OF THE APPORTIONMENT RULE

At the outset the Court appears to have thought that it could solve all difficulties by the simple device of falling back on Marshall's opinion in Brown *v.* Maryland;[653] and on the same day that it set aside Pennsylvania's freight tax by appeal to that transcendent precedent, it sustained, by reference to the same authority, a Pennsylvania tax on the gross receipts of all railroads chartered by it, the theory being that such receipts had, by tax time, become "part of the mass of property of the State."[654] This precedent stood fourteen years, being at last superseded by a ruling in which substantially the same tax was held void as to a Pennsylvania chartered steamship company.[655] A year later the Court sustained Massachusetts in levying a tax on Western Union, a New York corporation, on account of property owned and used by it in the State, taking as the basis of the assessment such proportion of the value of its capital stock as the length of its lines within the State bore to their entire length throughout the country.[656] The tax was characterized by the Court as an attempt by Massachusetts "to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the amount and value of the capital so employed by it therein."[657] And drawing on certain decisions in which it had sought to limit the principle of tax exemption as applied in the case of railroads chartered by the United States, it expressed concern that "the necessary powers of the States" should not be destroyed or "their efficient exercise" be prevented.[658] Three years later Pennsylvania, still in quest of revenue, was sustained in applying the Massachusetts idea to Pullman's Palace Car Company, a "foreign" corporation.[659] Pointing to the fact that the company had at all times substantially the same number of cars within the State and continuously and constantly used there a portion of its property, the Court commended the State for taking "as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States, * * *" This, said the Court, was "a just and equitable method of assessment;" one which, "if it were adopted by all the States [Pg 200] through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more."[660]

THE UNIT RULE

And pursuing the same course of thought, the Court, in Adams Express Company *v.* Ohio,[661] decided in 1897, sustained that State in taxing property worth less than $70,000.00 at a

valuation of more than half a million, on the ground that the latter figure did not exceed, in relation to the total capital value of the company, the proportion borne by the railway mileage which the company covered in Ohio to the total mileage which it covered in all States. To the objection that "the intangible values" reached by the tax were derived from interstate commerce, the Court replied with the "cardinal rule * * * that whatever property is worth for purposes of income and sale it is also worth for purposes of taxation,"[662] which obviously does not meet the issue. What the case indubitably establishes is that a State may tax property within its limits "as part of a going concern" and hence "at its value as it is in its organic relations," although those relations constitute interstate commerce.[663] In short, values created by interstate commerce *are* taxed.

Thus emerged the concept of an "apportioned" tax, or as it is called when applied to the problem of property valuation, the "unit rule," which till 1938 afforded the Court its chief reliance in the field of Constitutional Law now under review. The theory underlying the concept appears to be that it is always possible for a State to devise a formula whereby it may assign to the property employed in interstate commerce within its limits, or to the proceeds from such commerce, a value which it may tax or by which it may "measure" a tax, without unconstitutionally burdening or interfering with interstate commerce, while at the same time exacting from it a fair return for the protection which the State gives it. The question in each case is, of course, whether the State has guessed right.

APPORTIONED PROPERTY TAXES [Pg 201]

In reliance on the apportionment concept the Court has at various times sustained, in the case of a sleeping car company, as we have seen, a valuation based on the ratio of the miles of track over which the company runs within the State to the whole track mileage over which it runs;[664] in the case of a railroad company, a valuation based on the ratio of its mileage within the State to its total mileage;[665] in the case of a telegraph company, a valuation based upon the ratio of its length of line within the State to its total length;[666] in the case of an express company, as we have just seen, a valuation based upon the ratio of miles covered by it in the State to the mileage covered by it in all States.[667] Also, a tax has been upheld as to a railroad line whose principal business was hauling ore from mines in the taxing State to terminal docks outside the State, where the line and the docks were treated by the railway as a unit, the charge for the dock service being absorbed in the charge per ton transported; and where the evidence did not show that the mileage value of the part of the line outside of the taxing State, with the docks included, was greater than the mileage value of part within it.[668] Nor does the commerce clause preclude the assessment of an interstate railway within a State by taking such part of the value of the railroad's entire system, less the value of its localized property, such as terminal buildings, shops and nonoperating real estate, as is represented by the ratio which the railroad's mileage within the State bears to its total mileage.[669] To the objection that the mileage formula was inapplicable in this instance because of the disparity of the revenue-producing capacity between the lines in and out of the State, the Court answered that mathematical exactitude in making an apportionment had never been a constitutional requirement. "Wherever," it explained, "the State's taxing authorities have been held to have intruded upon the protected domain of interstate commerce in their use of a mileage formula, the special circumstances of the particular situation, in the view which this Court took of them, precluded a defensible utilization of the mileage basis."[670] The principle of apportionment is, moreover, applicable to the intangible property of a company engaged in both interstate and local commerce, as well as to its tangible property.[671]

APPORTIONED GROSS RECEIPTS TAXES [Pg 202]

The first State to attempt to employ the apportionment device in order to tax the gross receipts of companies engaged in interstate commerce was Maine, in connection with a so-called "franchise tax," which was levied on such proportion of the revenues of railroads operating in the State as their mileage there bore to their total mileage. In Maine *v.* Grand Trunk Railway Company,[672] a sharply divided Court upheld the tax on the basis of its designation, giving scant attention to its apportionment feature. Said Justice Field for the majority: "The privilege of exercising the franchises of a corporation within a State is generally one of value, and often of great value, and the subject of earnest contention. It is natural, therefore, that the corporation should be made to bear some proportion of the burdens of government. As the granting of the privilege rests entirely in the discretion of the State, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the State in its judgment may deem most conducive to its interests or policy."[673] Four Justices, speaking by Justice Bradley, protested forcefully that the decision directly contradicted a whole series of decisions holding that the States are without power to tax interstate commerce;[674] and seventeen years later another sharply divided Court endorsed this contention when it overturned a Texas gross receipts tax drawn on the lines of the earlier Maine statute.[675] The Maine tax, however, the later Court suggested, had been in the nature of a commutation tax in lieu of all taxes, which the Texas tax was not.[676]

FRANCHISE TAXES

Today the term, franchise tax, possesses no specific saving quality of its own. If the tax is merely a "just equivalent" of other taxes it is valid however calculated.[677] Conversely, when such taxes are in addition to other taxes then their fate will be determined by the same rules as would apply had the label been omitted.[678] More precisely, the rule governing this species of tax is ordinarily the apportionment concept, and if the basis of apportionment adopted by the taxing [Pg 203] State is deemed by the Court to be a fair and reasonable one, the tax will be sustained; otherwise, not.

Thus a franchise tax may be measured by such proportion of the company's net income as its capital invested in the taxing State and its business carried on there bear to its total capital and business;[679] also by the net income justly attributable to business done within the State although a part of this was derived from foreign or interstate commerce;[680] also by such proportion of the company's outstanding capital stock, surplus and undivided profits, plus its long-term obligations, as the gross receipts of its local business bear to its total gross receipts from its entire business;[681] also by such proportion of the company's total capital stock as the value of its property in the taxing State and of the business done there bears to the total value of its property and of its business.[682] On the other hand, a "franchise" tax on the unapportioned gross receipts of railroad companies engaged in interstate commerce, was, as we saw above, held void;[683] as was also one which was measured by assigning to the company's property in the State the same proportion of the total value of its stocks and bonds as its mileage in the State bore to its total mileage, no account being taken of the greater cost of construction of the company's lines in other States or of its valuable terminals elsewhere.[684] Other examples were given earlier.[685]

GROSS RECEIPTS TAXES, CLASSES OF

The late Justice Rutledge classified gross receipts taxes which have been sustained by the Court as follows: (a) those which were judged to be fairly apportioned;[686] (b) those which were justified on a "local incidence" theory, or the burden of which on interstate commerce was held to be "remote";[687] (c) those which were justified as not inviting the danger of multiple taxation of interstate commerce.[688] Gross receipts taxes which, on the other hand, have been invalidated under the commerce clause he placed in the following groups: (a) those which were held not to [Pg 204] be fairly apportioned;[689] (b) those which were not apportioned at all and were bound to subject interstate commerce to the risk of multiple taxation;[690] (c) those in which a discriminatory element was detected in that they were directed exclusively at transportation or communication;[691] (d) those in which there was no discrimination but a possible multiple burden;[692] and, of course, any tax which it disallows the Court is always free to stigmatize as an unconstitutional attempt to tax or license the interstate commerce privilege.[693]

"MULTIPLE TAXATION" TEST

That the Depression—allowing for the customary judicial lag—greatly altered the Court's conception of Congress's powers under the commerce clause, was pointed out earlier.[694] To a less, but appreciable degree, it also affected its views as to the allowable scope under the clause of the taxing power of the States, a majority of which were on the verge of bankruptcy. The more [Pg 205] evident proofs of this fact occurred in relation to State taxation of the subject matter of interstate commerce, as is indicated above.[695] But a certain revision of doctrine, apparently temporary in nature, however, is to be seen in the connection with State taxes impinging on property engaged in interstate commerce and the revenues from such commerce, the principal manifestation of which is to be seen in the emphasis which was for a time given the "multiple taxation" test. Thus in his opinion in the Western Live Stock Case,[696] cited above, Justice Stone seems to be engaged in an endeavor to erect this into an almost exclusive test of the validity, or invalidity of State taxation affecting interstate commerce. "It was not," he there remarks, "the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of State tax burden even though it increases the cost of doing the business. 'Even interstate business must pay its way,' * * * and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of State taxation which add to the cost of his business."[697] Then citing cases, he continues: "All of these taxes in one way or another add to the expense of carrying on interstate commerce, and in that sense burden it; but they are not for that reason prohibited. On the other hand, local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed * * * [or added to] with equal right by every State which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. * * * The multiplication of State taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove," citing cases, most of which have been discussed above.[698] And speaking again for the Court eleven months later, in Gwin, White and Prince *v.* Henneford,[699] Justice Stone applied the test to invalidate a State of

Washington tax. "Such a tax," said he, "at least when not apportioned to the activities carried on within the State, * * * would, if sustained, expose it [interstate commerce] to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject." The tax thus discriminated against interstate commerce; and threatened to "reestablish the barriers to interstate trade which it was the object of the commerce clause to remove."[700]

The adoption by the Court of the multiple taxation principle as an exclusive test of State taxing [Pg 206] power in relation to interstate commerce would have enlarged the former; but this was not the sole reason for its temporary vogue with the Court, or at least a section of it. Discontent with the difficulties and uncertainties of the apportionment rule also played a great part. Thus in his concurring opinion in the Gwin case, Justice Butler, speaking for himself and Justice McReynolds after showing the instability of decisions in this area of Constitutional Law, contend that "the problems of conjectured 'multiple taxation' or 'apportionment'" should be left to Congress,[701] a suggestion which Justice Black, speaking also for Justices Frankfurter and Douglas a year later, made the basis of a dissenting opinion,[702] from the doctrines of which, however, Justice Frankfurter appears since to have recanted.[703]

RECENT CASES

In Freedman *v.* Hewit,[704] decided in 1946, the Court held void as an "unconstitutional burden on interstate commerce" an Indiana gross income tax of the proceeds from certain securities sent outside the State to be sold. Justice Frankfurter spoke for the Court; Justice Rutledge concurred in an opinion deploring the majority's failure to employ the multiple taxation test;[705] three Justices dissented.[706] In Joseph *v.* Carter and Weekes Stevedoring Co.,[707] also decided in 1947, the Court, reaffirming an earlier ruling, held void the application of a Washington gross receipts tax to the receipts of a stevedoring company from loading and unloading vessels employed in interstate and foreign commerce, or to the privilege of engaging in such business measured by their receipts. Said Justice Reed for the Court: "Although State laws do not discriminate against interstate commerce or * * * subject it to the cumulative burden of multiple levies, those laws may be unconstitutional because they burden or interfere with [interstate] commerce."[708] This time Justice Rutledge was among the dissenters so far as interstate commerce was concerned.[709] In Central Greyhound Lines, Inc. *v.* Mealey,[710] decided in 1948, five members of the Court ruled that a New York tax on the gross income of public utilities doing business in the State could not be constitutionally imposed on a carrier's unapportioned receipts from continuous transportation between termini in the State over a route a material part of which passes through other States. Justice Frankfurter, speaking for the Court, held, however, that the [Pg 207] tax was sustainable as to receipts apportioned as to the mileage within the State.[711] Justice Rutledge concurred without opinion. Justice Murphy, for himself and Justices Black and Douglas, thought the tax was on an essentially local activity and that the transportation through other States was "a mere geographic incident," conceding at the same time, that this view invited the other States involved to levy similar taxes and exposed the company to the danger of multiple taxation. In Memphis Natural Gas Co. *v.* Stone,[712] also of the 1948 grist, a Mississippi franchise tax, measured by the value of capital invested or employed in the State, was sustained in the case of a gas pipeline company a portion of whose line passed through the State but which did no local business there. Three Justices, speaking by Justice Reed, held that the tax was on the intrastate activities of the company in maintaining its facilities there, and was no more burdensome than the concededly valid *ad valorem* tax on the company's property in the State. Justice Rutledge held that the tax was valid because it did not discriminate against interstate commerce nor invite multiple taxation, while Justice Black concurred without opinion. Four Justices, speaking by Justice Frankfurter, contended that the pipeline already paid the *ad valorem* tax to which Justice Reed had adverted, and that the franchise tax must therefore be regarded as being on the interstate commerce privilege.

This survey of recent cases leaves the impression that the Court is at loose ends for intermediate guiding principles in this field of Constitutional Law. The "leave it to Congress" formula is evidently in the discard, although Justice Black's successive dissents without opinion may indicate that he still thinks it sound. The multiple tax test seems to be in an equally bad way, with both Chief Justice Stone and Justice Rutledge in the grave. The concept of an apportioned tax still [Pg 208] has some vitality however, although just how much is difficult to assess. Thus in Interstate Oil Pipe Line Co. *v.* Stone,[713] which was decided in 1949, we find Justice Rutledge, speaking for himself and Justices Black, Douglas, and Murphy, endorsing the view that Mississippi was within her rights in imposing on a Delaware corporation, as a condition of doing a local business, a "privilege" tax equal to two per cent of its intrastate business even though the exaction amounted to "a 'direct' tax on the 'privilege' of engaging in interstate commerce," an assertion which was countered by one just as positive, and also endorsed by four Justices, that no State may "levy privilege, excise or franchise taxes on a foreign corporation for the privilege of carrying on or the actual doing of solely interstate business," even though the tax is not discriminatory and is fairly apportioned between the corporation's intrastate and interstate business. The tax in controversy was sustained by the vote of the ninth Justice, who construed it as being levied only on the privilege of engaging in intrastate commerce, a conclusion which obviously ignores the question of the tax's actual impact on interstate commerce, the precise question on which many previous decisions have turned.[714]

TAXES ON NET INCOME

The leading case under this caption is United States Glue Co. *v.* Oak Creek[715] where it was held that the State of Wisconsin, in laying a general income tax upon the gains and profits of a domestic corporation, was entitled to include in the computation the net income derived from transportations in interstate commerce. Pointing out the difference between such a tax and one on gross receipts, the Court said the latter "affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large." Such a tax "constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted * * * because they happen to be engaged in commerce among the States."[716]

Adhering to this precedent, the Court has held that a tax upon the net income of a nonresident from business carried on by him in the State is not a burden on interstate commerce merely because the products of the business are shipped out of the State;[717] also that a tax which is [Pg 209] levied upon the proportion of the net profits of a foreign corporation earned by operations conducted within the taxing State is valid, if the method of allocation employed be not arbitrary or unreasonable.[718] Where, however, the method of allocating the net income of a foreign corporation attributed to the State an amount of income out of all proportion to the business there transacted by the corporation, it was held void.[719]

Also, a State may impose a tax upon the net income of property, as distinguished from the net income of him who owns or operates it, although the property is used in interstate commerce;[720] also a "franchise tax" measured by the net income justly attributable to business done by corporations within the State, although part of the income so attributable comes from interstate and foreign commerce;[721] also a tax on corporate net earnings derived from business done wholly within the State may be applied to the income of a foreign pipeline corporation which is commercially domiciled there and which pipes natural gas into that State for delivery to, and sale by, a local distributing corporation to local consumers.[722] Indeed it was asserted that even if the taxpayer's business were wholly interstate commerce, such a nondiscriminatory tax upon its net income "is not prohibited by the commerce clause," there being no showing that the income was not on net earnings partly attributable to the taxing State;[723] but a more recent holding appears to contradict this position.[724]

MISCELLANEOUS TAXES AFFECTING INTERSTATE COMMERCE

Vessels

In Gloucester Ferry Company *v.* Pennsylvania,[725] decided in 1885, the Court held inapplicable to a New Jersey corporation which was engaged solely in transporting passengers across the [Pg 210] Delaware River and entered Pennsylvania only to discharge and receive passengers and freight, a statute which taxed the capital stock of all corporations doing business within the State. Such transactions, the Court held, were interstate commerce; nor were the company's vessels subject to taxation by Pennsylvania, their taxing *situs* being in the company's home State. The only property held by the company in Pennsylvania was the lease there of a wharf which could be taxed by the State according to its appraised value; and the State could also levy reasonable charges by way of tolls for the use of such facilities as it might itself furnish for the carrying on of commerce. This ruling rested on two earlier ones. In 1855, the Court had held that vessels registered in New York, owned by a New York corporation, and plying between New York City and San Francisco had the former city for their home port, and were not taxable by California where they remained no longer than necessary to discharge passengers and freight;[726] and in 1877 it had sustained Keokuk, Iowa in charging tolls for the use by vessels plying the Mississippi of wharves owned by the municipality, said tolls being reasonable and not discriminatory as between interstate and intrastate commerce.[727] Today it is still the general rule as to vessels plying between ports of different States and engaged in the coastwise trade, that the domicile of the owner is deemed to be the *situs* of the vessel for purposes of taxation,[728] unless the vessel has acquired actual *situs* in another State, by continuous employment there, in which event it may be taxed there.[729] Recently, however, this long standing rule has been amended by the addition to it of the apportionment rule as developed in the Pullman case. This occurred in Ott *v.* Mississippi Barge Line Co.,[730] decided in 1949, in which the Court sustained Louisiana in levying an *ad valorem* tax on vessels owned by an interstate carrier and used within the State, the assessment for the tax being based on the ratio between the number of miles of the carrier's lines within the State and its total mileage.

Airplanes

When, however, it was confronted by an attempt on the part of the State of Minnesota to impose a personal property tax on the entire air fleet owned and operated by a company in interstate

commerce although only a part of it was in the State on tax day, the Court found itself unable to recruit a majority for any of the above formulas.[731] Pointing to the fact that the company was a Minnesota corporation and that its principal place of business was located in the State, Justice Frankfurter for himself and three others wished to stress the prerogatives of the State of domicile.[732] Justice Black, concurring in this view, added the caveat that the taxing rights of other States should not be foreclosed and made reference to his "leave it to Congress" notion.[733] Justice Jackson, after speaking lightly of the apportionment theory,[734] joined the affirming brethren on the ground that the record seemed "to establish Minnesota as a 'home port' within the meaning of the old and somewhat neglected but to me wise authorities cited," to wit, the Hays case and those decided by analogy to it.[735] Four Justices, speaking by Chief Justice Stone dissented, urging the Pullman Case[736] as an applicable model and the fact that "the rationale found necessary to support the present tax leaves other States free to impose comparable taxes on the same property."[737] Evidently in this area of Constitutional Law the Court is still much at sea or better perhaps, "up in the air." [Pg 211]

Motor Vehicles

In the matter of motor vehicle taxation, on the other hand, durable and consistent results have been achieved. This is because most such taxation has been readily classifiable as the exaction of a toll for the use of the State's highways, and the only question was whether the toll was exorbitant. Moreover, such taxation is apt to be designed not merely to raise revenue but to promote safety on the highways. In the leading case, Hendrick *v.* Maryland,[738] decided in 1915, the Court took cognizance of the fact that "the movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves";[739] and on this factual basis it has held that registration may be required by a State for out-of-State vehicles operated therein,[740] or passing through from one State to another;[741] that a special fee may be exacted for the privilege of transporting motor vehicles on their own wheels in caravans,[742] unless excessive;[743] that taxes may also be imposed on carriers based on capacity[744] or mileage,[745] or as a flat fee;[746] but that a privilege tax on motor busses operated exclusively in interstate commerce, cannot be sustained unless it appears affirmatively in some way, that it is levied only as compensation for use of the highways in the State or to defray the expense of regulating motor traffic.[747] Later decisions follow in the same general track,[748] the most recent one being Capitol Greyhound Lines *v.* Brice,[749] in which the Court, speaking by Justice Black passed upon a Maryland excise tax on the fair market value of motor vehicles used in interstate commerce as a condition to the issuance of certificates of title as prerequisites to the registration and operation of motor vehicles in the State. Because the tax was applied to vehicles used in both interstate and intrastate commerce and the proceeds were used for road purposes and because the Court considered the tax, though actually separate, to be an adjunct of Maryland's mileage tax, it was able to find that the total charge varied substantially with the mileage travelled, and on that ground sustained it, being constant, it said with "rough approximation rather than precision," no showing having been made that Maryland's taxes considered as a whole exceeded "fair compensation for the privilege of using State roads." Justice Frankfurter, who was joined by Justice Jackson, dissented, and in so doing contributed as an Appendix to his opinion a useful analysis of decisions involving State taxation of motor vehicles engaged in interstate commerce, for highway purposes.[750] [Pg 212]

Public Utilities; Regulatory Charges [Pg 213]

"The principles governing decision [in this class of cases] have repeatedly been announced and were not questioned below.[751] In the exercise of its police power the State may provide for the supervision and regulation of public utilities, such as railroads; may delegate the duty to an officer or commission; and may exact the reasonable cost of such supervision and regulation from the utilities concerned and allocate the exaction amongst the members of the affected class without violating the rule of equality imposed by the Fourteenth Amendment.[752] The supervision and regulation of the local structures and activities of a corporation engaged in interstate commerce, and the imposition of the reasonable expense thereof upon such corporation, is not a burden upon, or regulation of, interstate commerce in violation of the commerce clause of the Constitution.[753] A law exhibiting the intent to impose a compensatory fee for such a legitimate purpose is *prima facie* reasonable.[754] If the exaction be so unreasonable and disproportionate to the service as to impugn the good faith of the law[755] it cannot stand either under the commerce clause or the Fourteenth Amendment.[756] The State is not bound to adjust the charge after the fact, but may, in anticipation, fix what the legislature deems to be a fair fee for the expected service, the presumption being that if, in practice, the sum charged appears inordinate the legislative body will reduce it in the light of experience.[757] Such a statute may, in spite of the presumption of validity, show on its face that some part of the exaction is to be used for a purpose other than the legitimate one of supervision and regulation and may, for that reason, be void.[758] And a statute fair upon its face may be shown to be void and unenforceable on account of its actual operation.[759] If the exaction be clearly excessive it is bad *in toto* and the State cannot collect any part of it."[760]

Dominance of Congress [Pg 214]

The Supreme Court has never forgotten the lesson which was administered it by the act of Congress of August 31, 1852,[761] which pronounced the Wheeling Bridge "a lawful structure," thereby setting aside the Court's determination to the contrary earlier the same year.[762] This lesson, stated in the Court's own language thirty years later, was, "It is Congress, and not the Judicial Department, to which the Constitution has given the power to regulate commerce * * *."[763] A parallel to the Wheeling Bridge episode occurred in 1945.

THE McCARRAN ACT: REGULATION OF INSURANCE

Less than a year after the ruling in United States *v.* South-Eastern Underwriters Association[764] that insurance transactions across State lines constituted interstate commerce, thereby logically establishing their immunity from discriminatory State taxation, Congress passed the McCarran Act[765] authorizing State regulation and taxation of the insurance business; and in Prudential Insurance Co. *v.* Benjamin,[766] a statute of South Carolina which imposed on foreign insurance companies, as a condition of their doing business in the State, an annual tax of three per cent of premiums from business done in South Carolina, while imposing no similar tax on local corporations, was sustained. "Obviously," said Justice Rutledge for the Court, "Congress' purpose was broadly to give support to the existing and future State systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise [Pg 215] expressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued State regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several States in these respects. * * * The power of Congress over commerce exercised entirely without reference to coordinated action of the States is not restricted, except as the Constitution expressly provides, by any limitation which forbids it to discriminate against interstate commerce and in favor of local trade. Its plenary scope enables Congress not only to promote but also to prohibit interstate commerce, as it has done frequently and for a great variety of reasons. * * * This broad authority Congress may exercise alone, subject to those limitations, or in conjunction with coordinated action by the States, in which case limitations imposed for the preservation of their powers become inoperative and only those designed to forbid action altogether by any power or combination of powers in our governmental system remain effective."[767] The generality of this language enforces again the sweeping nature of Congress's power to prohibit interstate commerce.[768]

The Police Power and Foreign Commerce

ORIGIN OF POLICE POWER

In Gibbons *v.* Ogden[769] cognizance was taken of the existence in the States of an "immense mass" of legislative power to be used for the protection of their welfare and the promotion of local interests.[770] In Marshall's opinion in Brown *v.* Maryland[771] this power is christened "the Police Power," a name which has since come to supply one of the great titles of Constitutional Law. Counsel for Maryland had argued that if the State was not permitted to *tax* imports in the original package before they left the hands of the importer, it would also be unable to prevent their introduction into its midst although they might comprise articles dangerous to the public health and safety. "The power to direct the removal of gunpowder," the Chief Justice answered, "is a branch of the police power, which unquestionably remains, and ought to remain, with the States;" and the power to direct "the removal or destruction of infectious or unsound articles" fell within the same category.[772]

STATE CURBS ON ENTRY OF FOREIGNERS [Pg 216]

In short, the power to tax was one thing, the police power something quite different. To concede the former would be to concede a power which could be exercised to any extent and at the will of its possessor;[773] to concede the latter was to concede a power which was limited of its own inherent nature to certain necessary objectives. In New York *v.* Miln,[774] however, the Court which came after Marshall inclined toward the notion of a power of internal police which was also unlimited; and on this ground upheld a New York statute which required masters of all vessels arriving at the port of New York to make reports as to passengers carried, and imposed fines for failure to do so. "We are of opinion," the Court said, "that the act is not a regulation of commerce, but of police." But, when New York, venturing a step further, passed an act to authorize State health commissioners to collect certain fees from captains arriving in ports of that State, and when Massachusetts enacted a statute requiring captains of ships to give bonds as to immigrants landed, both measures were pronounced void, either as conflicting with treaties and laws of the United States or as invading the "exclusive" power of Congress to regulate foreign commerce.[775] Following the Civil War, indeed, New York *v.* Miln was flatly overruled, and a New York statute similar to the one sustained in 1837 was pronounced void as intruding upon Congress's powers.[776] Nothing was gained, said the Court, by invoking "[the police power] * * *, it is clear, from the nature of our complex form of government, that, whenever the statute of

a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the States."[777] At the same time a California statute requiring a bond from shipowners as a condition precedent to their being permitted to land persons whom a State commissioner of immigration might choose to consider as coming within certain enumerated classes, e.g., "debauched women," was also disallowed. Said the Court: "If the right of the States to pass statutes to protect themselves in regard to the criminal, the pauper, and the diseased foreigner, landing within their borders, exists at all, it is limited to such laws as are absolutely necessary for that purpose; and this mere police regulation cannot extend so far as to prevent or obstruct other classes of persons from the right to hold personal and commercial intercourse with the people of the United States."[778]

STATE QUARANTINE LAWS

[Pg 217]

On the other hand, it has been repeatedly held that the States may, in the absence of legislation by Congress, enact quarantine laws, even though in effect they thereby regulate foreign commerce; and furthermore that such legislation may be, in the interest of effective enforcement, applied beyond the mere exclusion of diseased persons. Thus in the leading case the State of Louisiana was sustained in authorizing its Board of Health in its discretion to prohibit the introduction into any infected portion of the State of "persons acclimated, unacclimated or said to be immune, when in its judgment the introduction of such persons would add to or increase the prevalence of the disease."[779] At the same time it was emphasized that all such legislation was subject to be supplanted by Congress at any time.

STATE GAME PROTECTION AND FOREIGN COMMERCE

The Court's tolerance of legal provisions which might not standing alone be constitutional, when they are designed to make legislation within the police power practically enforceable, is also illustrated in connection with State game laws. In the case of Silz *v.* Hesterberg[780] the Court was confronted with a New York statute establishing a closed season for certain game, during which season it was a penal offense to take or possess any of the protected animals, fish or birds; and providing farther that the ban should equally apply "to such fish, game or flesh coming from without the State as to that taken within the State." This provision was held to have been validly applied in the case of a dealer in imported game who had in his possession during the closed season "one dead body of an imported grouse, ..., and taken in Russia." Again the absence of conflicting legislation by Congress was adverted to.[781]

The Police Power and Interstate Commerce

GENERAL PRINCIPLES

In Southern Pacific Co. *v.* Arizona,[782] decided in 1945, Chief Justice Stone made the following systematic statement of principles which have guided the Court in the exercise of its power of judicial review of State legislation affecting interstate commerce: "Although the commerce clause conferred on the national government power to regulate commerce, its possession of the power does not exclude all state power of regulation. Ever since Willson *v.* Black-Bird Creek Marsh Co., [Pg 218]
2 Pet. 245, and Cooley *v.* Board of Wardens, 12 How. 299, it has been recognized that, in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it.[783] Thus the states may regulate matters which, because of their number and diversity, may never be adequately dealt with by Congress.[784] When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority.[785]

"But ever since Gibbons *v.* Ogden, 9 Wheat. 1, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.[786] Whether or not this long-recognized distribution of power between the national and the state governments is predicated upon the implications of the commerce clause itself,[787] or upon the presumed intention of Congress, where Congress has not spoken,[788] the result is the same.

"In the application of these principles some enactments may be found to be plainly within and [Pg 219]
others plainly without state power. But between these extremes lies the infinite variety of cases, in which regulation of local matters may also operate as a regulation of commerce, in which reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved.[789]

"For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation

inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.[790]

"Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible,[791] or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce.[792]

"But in general Congress has left it to the courts to formulate the rules thus interpreting the [Pg 220] commerce clause in its application, doubtless because it has appreciated the destructive consequences to the commerce of the nation if their protection were withdrawn,[793] and has been aware that in their application state laws will not be invalidated without the support of relevant factual material which will 'afford a sure basis' for an informed judgment.[794] Meanwhile, Congress has accommodated its legislation, as have the states, to these rules as an established feature of our constitutional system. There has thus been left to the states wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern."

State Regulation of Agencies of Interstate Commerce

RAILWAY RATE REGULATION

In one of the Granger Cases decided in 1877 the Court upheld the power of the legislature of Wisconsin in the absence of legislation by Congress, to prescribe by law the maximum charges to be made by a railway company for fare and freight upon the transportation of persons and property within the State, or taken up outside the State and brought within it, or taken up inside and carried without it.[795] Ten years later, in Wabash, St. Louis and Pacific Railway Co. *v.* Illinois[796] this decision was reversed as to persons and property taken up within the State and transported out of it and as to persons and property brought into the State from outside. As to these, the Court held that the regulation of rates and charges must be uniform and that, therefore, the States had no power to deal with the subject even when Congress had not acted. The following year Congress passed the Interstate Commerce Act[797] to fill the gap created by the Wabash decision. Today, the States still exercise the power to regulate railway rates for the carriage of persons and property taken up and put down within their borders, but do so subject to the rule, which is enforced by the Interstate Commerce Commission, that such rates may not discriminate against interstate commerce.[798]

ADEQUATE SERVICE REGULATIONS [Pg 221]

In many other respects the power still remains with the States to require by statute or administrative order a fair and adequate service for their inhabitants from railway companies, including interstate carriers operating within their borders, so long as the burdens thus imposed upon interstate commerce are, in the judgment of the Court, "reasonable." In an instructive brace of cases the Court was asked to say whether a carrier, in the interest of providing proper local facilities of commerce, could be required to stop its interstate trains. In one case a State regulation requiring all regular passenger trains operating wholly within the State to stop at all county seats was held to have been validly applied to interstate connection trains;[799] while in the other case a statute requiring *all* passenger trains to stop at county seats was held invalid, there being "other and ample accommodation."[800] Comparing these and other like decisions, the Court has stated "the applicable general doctrine" to be as follows: (1) It is competent for a State to require adequate local facilities, even to the stoppage of interstate trains or the rearrangement of their schedules. (2) Such facilities existing—that is, the local conditions being adequately met—the obligation of the railroad is performed, and the stoppage of interstate trains becomes an improper and illegal interference with interstate commerce. (3) And this, whether the interference be directly by the legislature or by its command through the orders of an administrative body. (4) The fact of local facilities this court may determine, such fact being necessarily involved in the determination of the Federal question whether an order concerning an interstate train does or does not directly regulate interstate commerce, by imposing an arbitrary requirement.[801] "There is, however," it later added, "no inevitable test of the instances; the facts in each must be considered."[802]

In the same way a State regulation requiring intersecting railways to make track connections was held valid,[803] as was also a regulation requiring equality of car service between shippers;[804] while a regulation requiring the delivery of shipments on private sideways[805] and one requiring cars for local shipments to be furnished on demand, were held to be invalid.[806] In the first brace of decisions, the application of the local regulation to interstate commerce was found not to be [Pg 222] "unduly" burdensome; in the second brace the contrary conclusion was reached.

SAFETY AND OTHER REGULATIONS

A class of regulations as to which the Court has exhibited marked tolerance although they "incidentally" embrace interstate transportation within their operation are those which purport to be in furtherance of "public safety."[807] The leading case is Smith *v.* Alabama,[808] in which the Court held it to be within the police power of the State to require locomotive engineers to be examined and licensed, and to enforce this requirement until Congress should decree otherwise in the case of an engineer employed exclusively in interstate transportation. Also upheld as applicable to interstate trains were a statute which forbade the heating of passenger cars by stoves;[809] a municipal ordinance restricting the speed of trains within city limits;[810] the order of a public utility commission requiring the elimination of grade crossings;[811] a statute requiring electric headlights of a specified minimum capacity;[812] a statute requiring three brakemen on freight trains of over twenty-five cars.[813] In the last case the Court admitted that "under the evidence," there was "some room for controversy" as to whether the statute was necessary, but thought it "not so unreasonable as to justify the Court in adjudging it" to be "merely an arbitrary exercise of power" and "not germane" to objects which the State was entitled to accomplish.[814] And in 1943 the Court sustained, though again in somewhat doubtful terms, the order of a State railroad commission requiring a terminal railroad which served both interstate and local commerce to provide caboose cars for its employees.[815] At times, indeed, the Court has made surprising concession to local views that had nothing to do with safety. Hennington *v.* Georgia,[816] decided in 1896, where was sustained a Georgia statute forbidding freight trains to run on Sunday, is perhaps the supreme example. Whether such an act would pass muster today is doubtful. And earlier statutes reinforcing the legal liability of railroads as common carriers and the carriers of passengers were sustained in the absence of legislation by Congress.[817]

INVALID STATE REGULATIONS [Pg 223]

"The principle that, without controlling Congressional action, a State may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation is not to be avoided by 'simply invoking the convenient apologetics of the police power.'" So remarks Chief Justice Stone in his summarizing opinion cited above, in Southern Pacific Co. *v.* Arizona.[818] Among others he lists the following instances in which State legislation was invalidated on the basis of this rule: "In the Kaw Valley case[819] the Court held that the State was without constitutional power to order a railroad to remove a railroad bridge over which its interstate trains passed, as a means of preventing floods in the district and of improving its drainage, because it was 'not pretended that local welfare needs the removal of the defendants' bridges at the expense of the dominant requirements of commerce with other States, but merely that it would be helped by raising them.' And in Seaboard Air Line R. Co. *v.* Blackwell,[820] it was held that the interference with interstate rail transportation resulting from a State statute requiring as a safety measure that trains come almost to a stop at grade crossings, outweigh the local interest in safety, when it appealed that compliance increased the scheduled running time more than six hours in a distance of one hundred and twenty-three miles."[821] And "more recently in Kelly *v.* Washington,"[822] the Chief Justice continued, "we have pointed out that when a State goes beyond safety measures which are permissible because only local in their effect upon interstate commerce, and 'attempts to impose particular standards as to structure, design, equipment and operation [of vessels plying interstate] which in the judgment of its authorities [Pg 224] may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule. Whether the State in a particular matter goes too far must be left to be determined when the precise question arises.'"

STATE REGULATION OF LENGTH OF TRAINS

Applying the test of these precedents, the Chief Justice concluded that Arizona, in making it unlawful to operate within the State a railroad train of more than fourteen passenger or seventy freight cars, had gone "too far"; and in support of this conclusion he recites the following facts: "In Arizona, approximately 93% of the freight traffic and 95% of the passenger traffic is interstate. Because of the Train Limit Law appellant is required to haul over 30% more trains in Arizona than would otherwise have been necessary. The record shows a definite relationship between operating costs and the length of trains, the increase in length resulting in a reduction of operating costs per car. The additional cost of operation of trains complying with the Train Limit Law in Arizona amounts for the two railroads traversing that State to about $1,000,000 a year. The reduction in train lengths also impedes efficient operation. More locomotives and more manpower are required; the necessary conversion and reconversion of train lengths at terminals and the delay caused by breaking up and remaking long trains upon entering and leaving the state in order to comply with the law, delays the traffic and diminishes its volume moved in a given time, especially when traffic is heavy.

"At present the seventy freight car laws are enforced only in Arizona and Oklahoma, with a fourteen car passenger car limit in Arizona. The record here shows that the enforcement of the Arizona statute results in freight trains being broken up and reformed at the California border and in New Mexico, some distance from the Arizona line. Frequently it is not feasible to operate a newly assembled train from the New Mexico yard nearest to Arizona, with the result that the

Arizona limitation governs the flow of traffic as far east as El Paso, Texas. For similar reasons the Arizona law often controls the length of passenger trains all the way from Los Angeles to El Paso.

"If one State may regulate train lengths, so may all the others, and they need not prescribe the same maximum limitation. The practical effect of such regulation is to control train operations [Pg 225] beyond the boundaries of the State exacting it because of the necessity of breaking up and reassembling long trains at the nearest terminal points before entering and after leaving the regulating State. The serious impediment to the free flow of commerce by the local regulation of train lengths and the practical necessity that such regulation, if any, must be prescribed by a single body having a nation-wide authority are apparent.

"The trial court found that the Arizona law had no reasonable relation to safety, and made train operation more dangerous. Examination of the evidence and the detailed findings makes it clear that this conclusion was rested on facts found which indicate that such increased danger of accident and personal injury as may result from the greater length of trains is more than offset by the increase in the number of accidents resulting from the larger number of trains when train lengths are reduced. In considering the effect of the statute as a safety measure, therefore, the factor of controlling significance for present purposes is not whether there is basis for the conclusion of the Arizona Supreme Court that the increase in length of trains beyond the statutory maximum has an adverse effect upon safety of operation. The decisive question is whether in the circumstances the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it and subject it to local regulation which does not have a uniform effect on the interstate train journey which it interrupts."[823]

THE LESSON OF SOUTHERN PACIFIC CO. *v.* ARIZONA

The lesson to be extracted from Southern Pacific Co. *v.* Arizona is a threefold one: 1) Where uniformity is judged by the Court to be "essential for the functioning of commerce, a State may not interpose its regulation"; 2) in resolving this question the Court will canvass what it considers to be relevant facts extensively; 3) its task is, however, in the last analysis, one of weighing competing values, in brief, arbitral rather than strictly judicial.

The lesson of Southern Pacific is further exemplified by the more recent holding in Morgan *v.* Virginia,[824] in which the Court was confronted with a State statute which, in providing for the segregation of white and colored passengers, required passengers to change seats from time to time as might become necessary to increase the number of seats available to the one race or the other. First, reciting the rule of uniformity, Justice Heed, for the Court, said: "Congress, within the limits of the Fifth Amendment, has authority to burden [interstate] commerce if that seems to it a desirable means of accomplishing a permitted end. * * * As no State law can reach beyond its [Pg 226] own border nor bar transportation of passengers across its boundaries, diverse seating requirements for the races in interstate journeys result. As there is no federal act dealing with the separation of races in interstate transportation, we must decide the validity of this Virginia statute on the challenge that it interferes with commerce, as a matter of balance between the exercise of the local police power and the need for national uniformity in the regulations for interstate travel. It seems clear to us that seating arrangements for the different races in interstate motor travel require a single, uniform rule to promote and protect national travel. Consequently, we hold the Virginia statute in controversy invalid."

STATE REGULATION OF MOTOR VEHICLES; VALID REGULATIONS

Cases arising under this caption further illustrate the competition for judicial recognition between the interstate commerce interest and local interests, especially that of public safety. A new element enters the problem, however, which lends some added weight to the claims of the police power, the fact, namely, that motor vehicles use highways furnished and maintained by the State.

A State is entitled to enact a comprehensive scheme for the licensing and regulation of motor vehicles using its highways with a view to insuring itself of reasonable compensation for the facilities afforded and to providing adequate protection of the public safety; and such scheme may embrace out-of-State vehicles using the State's highways.[825] Thus legislation limiting the net loads of trucks using the State's highways is valid;[826] as are also, in the absence of national legislation on the subject, State regulations limiting the weight and width of the vehicles themselves, provided such regulations are applied without discrimination as between vehicles moving in interstate commerce and those operating only intrastate.[827] Likewise, a State may deny a certificate of public convenience and necessity to one desiring to operate a common carrier over a particular highway to an out-of-State destination in an adjacent State, on the ground that the specified route is already congested. So it was held in Bradley *v.* Public Utilities Commission of Ohio,[828] in which the Court took cognizance of the full hearing accorded the appellant, and of his failure to choose another route, although he was at liberty to do so. And in Maurer *v.* Hamilton a Pennsylvania[829] statute prohibiting the operation over its highways of any motor vehicle carrying any other vehicle over the head of the operator was upheld in the absence of conflicting Congressional legislation. Similarly, in Welch *v.* New Hampshire[830] a statute of

that State establishing maximum hours for drivers of motor vehicles was held not to be superseded by the Federal Motor Carrier Act prior to the effective date of regulations by the Interstate Commerce Commission dealing with the subject. Nor was pendency before the [Pg 227] Interstate Commerce Commission of an application under the Motor Carrier Act for a license to operate a motor carrier in interstate commerce found to supersede as to the applicant the authority of a State to enforce "reasonable regulations" of traffic upon its highways. "In the absence of the exercise of federal authority," said the Court, "and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected."[831] And for the same reason New York City was entitled to apply to trucks engaged in the delivery of goods from New Jersey a traffic regulation forbidding the operation on the streets of an advertising vehicle.[832] Said Justice Douglas for the Court: "Many of these trucks are engaged in delivering goods in interstate commerce from New Jersey to New York. Where traffic control and the use of highways are involved and where there is no conflicting federal regulation, great leeway is allowed local authorities, even though the local regulation materially interferes with interstate commerce."[833] Also, the Court has consistently sustained State regulations requiring motor carriers to provide adequate insurance protection for injuries caused by the negligent operation of their vehicles.[834]

INVALID STATE ACTS AFFECTING MOTOR CARRIERS

A State law which imposes upon all persons engaged in transporting for hire by motor vehicle over the public highways of the State the burdens and duties of common carriers and requires them to furnish bonds to secure the payment of claims and liabilities resulting from injury to property carried, may not be validly applied to a private carrier which is engaged exclusively in hauling from one State to another State the goods of particular factories under standing contracts with their owners, the said carrier enjoying neither a special franchise nor using the eminent domain power.[835] On the other hand, a State statute which prohibits common carriers [Pg 228] for hire from using the highways of the State between fixed termini or over regular routes without having first obtained from a director of public works a certificate of public convenience, is primarily not a regulation to secure safety on the highways or to conserve them, but a ban on competition and, as applied to a common carrier by motor vehicle of passengers and express purely in interstate commerce, is both violation of the Commerce Clause and defeats the express purpose of Congressional legislation rendering federal aid for the construction of interstate highways.[836]

TRANSPORTATION AGENCIES

The special characteristics of motor travel have brought about a reversal of the Court's attitude toward State control of transportation agencies. Sustaining in 1941 a California statute requiring that agents engaged in negotiating for the transportation of passengers in motor vehicles over the highways of the State take out a license, Justice (later Chief Justice) Stone, speaking for the Court, said: "In Di Santo *v.* Pennsylvania,[837] this Court took a different view * * *, it held that a Pennsylvania statute requiring others than railroad or steamship companies, who engage in the intrastate sale of steamship tickets or of orders for transportation to and from foreign countries, to procure a license by giving proof of good moral character and filing a bond as security against fraud and misrepresentation to purchasers, was an infringement of the Commerce Clause. Since the decision in that case this Court has been repeatedly called upon to examine the constitutionality of numerous local regulations affecting interstate motor vehicle traffic. It has uniformly held that in the absence of pertinent Congressional legislation there is constitutional power in the States to regulate interstate commerce by motor vehicle wherever it affects the safety of the public or the safety and convenient use of its highways, provided only that the regulation does not in any other respect unnecessarily obstruct interstate commerce."[838]

NAVIGATION; GENERAL DOCTRINE

In Gibbons *v.* Ogden[839] the Court, speaking by Chief Justice Marshall, held that New York legislation which excluded from the navigable waters of that State steam vessels enrolled and [Pg 229] licensed under an act of Congress to engage in the coasting trade was in conflict with the act of Congress and hence void. In Willson *v.* Blackbird Creek and Marsh Co.[840] the same Court held that in the absence of an act of Congress, "the object of which was to control State legislation over those small navigable creeks into which the tide flows," the State of Delaware was entitled to incorporate a company vested with the right to erect a dam across such a creek. From these two cases the Court in Cooley *v.* the Board of Wardens,[841] decided in 1851, extracted the rule that in the absence of conflicting legislation by Congress States were entitled to enact legislation adapted to the local needs of interstate and foreign commerce, that a pilotage law was of this description, and was, accordingly, constitutionally applicable until Congress acted to the contrary to vessels engaged in the coasting trade. In the main, these three holdings have controlled the decision of cases under the above and the following caption, there being generally no applicable act of Congress involved. But the power which the rule attributed to the States, they must use "reasonably," something they have not always done in the judgment of the Court.

Thus an Alabama statute which required that owners of vessels using the public waters of the enacting State be enrolled, pay fees, file statements as to ownership, etc., was held to be

inapplicable to vessels licensed under the act of Congress to engage in the coasting trade;[842] as was also a Louisiana statute ordering masters and wardens of the port of Orleans to survey the hatches of all vessels arriving there and to enact a fee for so doing.[843] "The unreason and the oppressive character of the act" was held to take it out of the class of local legislation protected by the rule of the Cooley case.[844] Likewise, while control by a State of navigable waters wholly within its borders has been often asserted to be complete in the absence of regulation by Congress,[845] Congress may assume control at any time;[846] and when such waters connect with other similar waters "so as to form a waterway to other States or foreign nations, [they] cannot be obstructed or impeded so as to impair, defeat, or place any burden upon a right to their navigation granted by Congress."[847]

On the other hand, in Kelly *v.* Washington,[848] decided in 1937, the Court sustained the State in [Pg 230] applying to motor-driven tugs operating in navigable waters of the United States legislation which provided for the inspection and regulation of every vessel operated by machinery if the same was not subject to inspection under the laws of the United States. It was conceded that there was "elaborate" federal legislation in the field, but it was asserted that the Washington statute filled a gap. "The principle is thoroughly established," said Chief Justice Hughes for the Court, "that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'"[849] And in Bob-Lo Excursion Co. *v.* Michigan,[850] the Court, elbowing aside a decision of many years standing,[851] ruled that the commerce clause does not preclude a State, in the absence of federal statute or treaty, from forbidding racial discrimination by one carrying passengers by vessel to and from a port in the United States to an island situated in Canadian territory.

BRIDGES, DAMS, FERRIES, WHARVES

The holding in Willson *v.* Blackbird Creek Marsh Co.[852] has been invoked by the Court many times in support of State legislation permitting the construction across navigable streams of dams, booms, and other shore protections,[853] as well as in support of State legislation authorizing the erection of bridges and the operation of ferries across such streams.[854] Bridges, it is true, may obstruct some commerce, but they may more than compensate for this by aiding other commerce.[855] In Justice Field's words in Huse *v.* Glover,[856] it should not be forgotten that: "the State is interested in the domestic as well as in the interstate and foreign commerce conducted on the Illinois River, and to increase its facilities, and thus augment its growth, it has full power. It is only when, in the judgment of Congress, its action is deemed to encroach upon the navigation of the river as a means of interstate and foreign Commerce, that that body may interfere and control or supersede it. * * * How the highways of a State, whether on land or by water, shall be best improved for the public good is a matter for State determination, subject always to the right of Congress to interpose in the cases mentioned."[857] The same principle applies to the construction of piers and wharves in a navigable stream,[858] as well as to harbor improvements by a State for the aid and protection of navigation;[859] and reasonable tolls may [Pg 231] be charged for the use of such aids, and reasonable regulations laid down governing their employment.[860]

Ferries

A State may license individuals to operate a ferry across an interstate river bounding its territory, or may incorporate a company for the purpose.[861] Nor may a neighbor State make the securing of its consent and license a condition precedent to the operation of such a ferry to one of its towns.[862] Earlier the right of a State to regulate the rates to be charged by an interstate bridge company for passage across its structure was denied by a closely divided Court.[863] The ruling does not, however, control the regulation of rates to be charged by an interstate ferry company. These the chartering State may, in the absence of action by Congress, regulate except in the case of ferries operated in connection with railroads,[864] as to which Congress has acted with the result of excluding all State action.[865] A State may also regulate the rates of a vessel plying between two points within the State although the journey is over the high seas; although again action by Congress may supersede State action at any time.[866]

TELEGRAPHS AND TELEPHONES

An Indiana statute which required telegraph companies to deliver dispatches by messenger to [Pg 232] the persons to whom they were addressed if the latter resided within one mile of the telegraph station or within the city or town where it was located, and which prescribed the order of preference to be given various kinds of messages, was held to be an unconstitutional interference with interstate commerce;[867] as was also the order of the Massachusetts Public Service Commission interfering with the transmission to firms within the State's borders of continuous quotations of the New York Stock Exchange by means of ticker service.[868] But a Virginia statute which imposed a penalty on a telegraph company for failure in its "clear common-law duty" of transmitting messages without unreasonable delay, was held, in the absence of legislation by

Congress, to be valid;[869] as was also a Michigan statute which prohibited the stipulation by a company against liability for nonperformance of such duty.[870] However, a South Carolina statute which sought to make mental anguish caused by the negligent nondelivery of a telegram a cause of action, was held to be, as applied to messages transmitted from one State to another or to the District of Columbia, an unconstitutional attempt to regulate interstate commerce.[871] A State has no authority to interfere with the operation of the lines of telegraph companies constructed along postal routes within its borders under the authority of the Post Road Act of 1866,[872] nor to exclude altogether a company proposing to take advantage of the act;[873] but that act does not deprive the State or a municipality of the right to subject telegraph companies to reasonable regulations, and an ordinance regulating the erection and use of poles and wires in the streets does not interfere with the exercise of authority under that act.[874] The jurisdiction conferred by The Transportation Act of 1920 upon the Interstate Commerce Commission, and since transferred to the Federal Communications Commission, over accounts and depreciation rates of telephone companies does not, in the absence of exercise by the federal agency of its power, operate to curtail the analogous State authority;[875] nor is an unconstitutional burden laid upon interstate commerce by the action of a State agency in requiring a telephone company to revise its intrastate toll rates so as to conform to rates charged for comparable distances in interstate service.[876]

GAS AND ELECTRICITY

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The business of piping natural gas from one State to another to local distributors which sell it locally to consumers is a branch of interstate commerce which a State may not regulate.[877] Likewise, an order by a State commission fixing rates on electric current generated within the States and sold to a distributor in another State, imposes an unconstitutional burden on interstate commerce, although the regulation of such rates would necessarily benefit local consumers of electricity furnished by the same company.[878] In the absence, on the other hand, of contrary regulation by Congress a State may regulate the sale to consumers in its cities of natural gas produced in and transmitted from another State;[879] nor did Congress, by the National Gas Act of 1938, impose any such contrary regulation.[880] Likewise, a State is left free by the same act to require a gas company engaged in interstate commerce to obtain a certificate of convenience before selling directly to customers in the State.[881] And where a pipe line is used to distribute both gas that is brought in from without the State and gas that is produced and used within the State, and the two are commingled, but their proportionate quantities are known, an order by the State commission directing the gas company to continue supplying gas from the line to a certain community does not burden interstate commerce.[882] The transportation of natural gas from sources outside the State to local consumers in its municipalities ceases to be interstate commerce at the point where it passes from a pressure producing station into local distributing stations, and from that point is subject to State regulation.[883] A State public utilities commission is entitled to require a natural gas distributing company seeking an increase of rates to show the fairness and reasonableness of the rate paid by it to the pipe line company from which it obtains its supplies, both companies being subsidiaries of a third.[884] A State agency may require a company which sells natural gas to local consumers and distributing companies, transporting it in pipe lines from other States, to file contracts, agreements, etc., for sales and deliveries to the distributing companies;[885] nor does the fact that a natural gas pipe line from the place of production to the distributing points in the same State cuts across a corner of another State render it improper, in determining maximum rates for gas sold by the owner of the pipe line to distributing companies, to include the value of the total line in the rate base.[886] A State may, as a conservation measure, fix the minimum prices at the wellhead on natural gas produced in the State and sold interstate.[887]

FOREIGN CORPORATIONS

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A State may require that a foreign corporation as a condition of its being admitted to do a local business or to having access to its courts obtain a license, and in connection therewith furnish information as to its home State or country, the location of its principal office, the names of its officers and directors, its authorized capitalization, and the like, and that it pay a reasonable license fee;[888] nor is a corporation licensed by the National Government to act as a customs broker thereby relieved from meeting such conditions.[889] So it was decided in 1944. The holding does not necessarily disturb one made thirty years earlier in which the Court ruled that a statute which closed the courts of the enacting State to any action on any contract in the State by a foreign corporation unless it had previously appointed a resident agent to accept process, could not be constitutionally applied to the right of a foreign corporation to sue on an interstate transaction.[890] A suit brought in a State court by a foreign corporation having its principal place of business in the State against another foreign corporation engaged in interstate commerce on a cause of action arising outside the State does not impose an undue burden on such commerce; and the forum being in other respects appropriate, its jurisdiction is not forfeited because the property attached is an instrumentality of interstate commerce.[891] There is nothing in the commerce clause which immunizes a foreign corporation doing business in a State from any fair inquiry, judicial or legislative, that is required by local laws.[892]

MISCELLANEOUS

Banks and Banking

A State statute which forbids individuals or partnerships to engage in the banking business without a license is not, as to one whose business chiefly consists in receiving deposits for periodic shipment to other States and to foreign countries, invalid as a regulation of interstate and foreign commerce.[893]

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Brokers

A statute which requires dealers in securities evidencing title or interest in property to obtain a license from a State officer, is not invalid as applied to dispositions within the State securities transported from other States.[894]

Commission Men

A statute requiring commission merchants to give bonds for the protection of consignees may be validly applied to commission merchants handling produce shipped to them from without the State.[895]

Attachment and Garnishment

Railway cars are not exempt from attachment under State laws, although they may have been or are intended to be used in interstate commerce.[896]

Statutory Liens

A State statute which gives a lien upon all vessels whether domestic or foreign, and whether engaged in interstate commerce or not, for injuries to persons and property within the State, does not as applied to nonmaritime torts offend the commerce clause, there being no act of Congress in conflict.[897] Nor can the enforcement of a lien for materials used in the construction of a vessel be avoided because the vessel is engaged in interstate commerce.[898]

The Police Power and the Subject-Matter of Commerce

SCOPE OF THE POLICE POWER

"Quarantine regulations are essential measures of protection which the States are free to adopt when they do not come into conflict with Federal action. In view of the need of conforming such measures to local conditions, Congress from the beginning has been content to leave the matter for the most part, notwithstanding its vast importance, to the States and has repeatedly acquiesced in the enforcement of State laws. * * * Such laws undoubtedly operate upon interstate and foreign commerce. They could not be effective otherwise. They cannot, of course, be made the cover for discriminations and arbitrary enactments having no reasonable relation to health * * *; but the power of the State to take steps to prevent the introduction or spread of disease, although interstate and foreign commerce are involved (subject to the paramount authority of Congress if it decides to assume control), is beyond question.[899] * * * State inspection laws and statutes designed to safeguard the inhabitants of a State from fraud and imposition are valid when reasonable in their requirements and not in conflict with Federal rules, although they may affect interstate commerce in their relation to articles prepared for export or by including incidentally those brought into the State and held for sale in the original imported packages."[900]

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QUARANTINE LAWS

In two earlier cases a Missouri statute which prohibited the driving of all Texan, Mexican, and Indian cattle into the state during certain seasons of the year was held void;[901] while a statute making anybody in the State who had Texas cattle which had not wintered north of a certain line liable for damage through the communication of disease from these to other cattle was sustained;[902] as were also the regulations of a sanitary commission which excluded all cattle, horses, and mules, from the State at a certain period when anthrax was prevalent.[903] Reviewing previous cases in the one last cited, the Court declared their controlling principle to be simply whether the police power of the State had been exerted to exclude "*beyond what is necessary for any proper quarantine*," a question predominantly of fact, and one therefore to be determined for each case with only general guidance from earlier decisions.[904]

More recent cases conform to the same pattern. Among measures sustained are the following: an Ohio statute forbidding the sale in that State of condensed milk unless made from unadulterated milk;[905] a New York statute penalizing the sale with intent to defraud of preparations falsely represented to be Kosher;[906] a New York statute requiring that cattle shall not be imported for dairy or breeding purposes unless accompanied by the certificate of a proper sanitary official in the State of origin, in order to prevent the spread of an infectious disease;[907] an order of a State

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Department of Agriculture, pursuant to a State law, regulating the standards of containers in which agricultural products (berries) may be marketed within the State;[908] a State statute restricting the processing of fish found within the waters of the State with the purpose of conserving it for food, even though it also operates upon fish brought into the State from without;[909] the price fixing and licensing provisions of a State Milk and Cream Act, not applicable to transactions in interstate commerce, by declaration of the act;[910] a Maine statute requiring the registration with the State Health Department of cosmetic preparations for the purpose of ascertaining whether the products are harmless;[911] an Indiana Animals Disposal Act requiring that animal carcasses, not promptly disposed of by the owner, be delivered to the representative of a disposal plant licensed by the State, and prohibiting their transportation on the public highways for any other purpose;[912] a Pennsylvania statute providing for the licensing and bonding of all milk dealers and fixing a minimum price to be paid producers, as applied to a dealer purchasing milk within the State for shipment to points outside it.[913]

STATE INSPECTION LAWS

The application of State inspection laws to imports from outside the State has been sustained as warranted by local interests and as not discriminating against out-of-state products, in the following instances: A North Carolina statute providing that "every bag, barrel, or other package" of commercial fertilizer offered for sale in the State should bear a label truly describing its chemical composition, which must comply with certain requirements, and charging 25 cents per ton to meet the cost of inspection;[914] an Indiana statute forbidding the sale in the original package of concentrated feeding stuffs prior to inspection and analysis for the purpose of ascertaining whether certain minimum standards as to composition had been met;[915] a Minnesota statute requiring as a precondition of its being offered for sale in the State, the inspection of illuminating oil and gasoline;[916] a Kansas statute forbidding any moving picture film or reel to be exhibited in the State unless it had been examined by the State Superintendent of Instruction and certified by him as moral and instructive and not tending to debase or corrupt the morals.[917] A Minnesota statute, on the other hand, which forbade the sale in any city of the State of any beef, mutton, lamb, or pork which, had not been inspected on the hoof by local [Pg 238] inspectors within twenty-four hours of slaughter, was held void.[918] Its "necessary operation," said the Court, was to ban from the State wholesome and properly inspected meat from other States.[919] Also a Virginia statute which required the inspection and labelling of all flour brought into the State for sale was disallowed because flour produced in the State was not subject to inspection;[920] likewise a Florida statute providing for the inspection of all cement imported into the State and enacting a fee therefor, but making no provision for the inspection of the local product, met a like fate;[921] as did also a Madison, Wisconsin ordinance which sought to exclude a foreign corporation from selling milk in that city solely because its pasteurization plants were more than five miles away.[922]

STATE PROHIBITION LAWS; THE ORIGINAL PACKAGE DOCTRINE

The original package doctrine made its debut in Brown *v.* Maryland,[923] where it was applied to remove imports from abroad which were still in the hands of the importer in the original package, out of the reach of the State's taxing power. This rule the Court, overriding a dictum in Marshall's opinion in Brown *v.* Maryland,[924] rejected outright after the Civil War as to imports from sister States.[925] However, when in the late eighties and early nineties State-wide Prohibition laws began making their appearance, the Court seized on the rejected dictum and began applying it as a brake on the operation of such laws with respect to interstate commerce in intoxicants, which the Court denominated "legitimate articles of commerce." While holding that a State was entitled to prohibit the manufacture and sale within its limits of intoxicants,[926] even for an outside market—manufacture being no part of commerce[927]—it contemporaneously laid down the rule, in Bowman *v.* Chicago and Northwestern Railroad Co.,[928] that so long as Congress remained silent in the matter, a State lacked the power, even as part and parcel of a program of Statewide prohibition of the traffic in intoxicants, to prevent the shipment into it of intoxicants from a sister State; and this holding was soon followed by another to the effect that, so long as Congress remained silent, a State had no power to prevent the sale in the original package of liquors introduced from another State.[929] The effect of the latter decision was soon [Pg 239] overcome by an act of Congress, the so-called Wilson Act, repealing its alleged silence,[930] but the Bowman decision still stood, the act in question being interpreted by the Court not to subject liquors from sister States to local authority until their arrival in the hands of the person to whom consigned.[931] Not till 1913 was the effect of the decision in the Bowman case fully nullified by the Webb-Kenyon Act,[932] which placed intoxicants entering a State from another State under the control of the former for all purposes whatsoever.

OLEOMARGARINE AND CIGARETTES

Long before this the immunity temporarily conferred by the original package doctrine upon liquors had been extended to cigarettes[933] and, with an instructive exception, to oleomargarine.

The exception referred to was made in Plumley *v.* Massachusetts,[934] where the Court held that a statute of that State forbidding the sale of oleomargarine colored to look like butter could validly be applied to oleomargarine brought from another State and still in the original package. The justification of the statute to the Court's mind was that it sought "to suppress false pretenses and promote fair dealing in the sale of an article of food." Nor did Leisy and Co. *v.* Hardin[935] apply, said Justice Harlan for the Court, because the beer in that case was "genuine beer, and not a liquid or drink colored artificially so as to cause it to look like beer." That decision was never intended, he continued, to hold that "a State is powerless to prevent the sale of articles manufactured in or brought from another State, and subjects of traffic and commerce, if their sale may cheat the people into purchasing something they do not intend to buy * * *."[936] Obviously, the argument was conclusive only on the assumption that a State has a better right to prevent frauds than it has to prevent drunkenness and like evils; and doubtless that is the way the Court felt about the matter at that date. On the one hand, the liquor traffic was a very ancient, if not an altogether, venerable institution, while oleomargarine was then a relatively novel article of commerce whose wholesomeness was suspect. On the other hand, laws designed to secure fair dealing and condemnatory of fraud followed closely the track of the common law, while anti-liquor laws most decidedly did not. The real differentiation of the two cases had to be sought in historical grounds. Yet the State must not put unreasonable burdens upon interstate commerce even in oleomargarine. Thus a Pennsylvania statute forbidding the sale of this product even in the unadulterated condition was pronounced invalid so far as it operated to prevent the introduction of such oleomargarine from another State and its sale in the original package;[937] as was also a New Hampshire statute which required that all oleomargarine marketed in the State be colored pink.[938] A little later in the case above mentioned involving cigarettes, the Court discovered some of the difficulties of the original package doctrine when applied to interstate commerce, in which the package is not so apt to be standardized as it is in foreign commerce.[939]

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DEMISE OF THE ORIGINAL PACKAGE DOCTRINE

What importance has the original package doctrine today as a restraint on State legislation affecting interstate commerce? The answer is, very little, if any. State laws prohibiting the importation of intoxicating liquor, have since the passage of the Twenty-first Amendment consistently been upheld, even when imposing a burden on interstate commerce or discriminating against liquor imported from another State.[940] Indeed the Court has, without appealing to the Twenty-first Amendment, even gone so far as to uphold a statute requiring a permit for transportation of liquor through the enacting State.[941] In Whitfield *v.* Ohio,[942] moreover, the Court upheld a State law prohibiting the sale in open market of convict-made goods including sales of goods imported from other States and still in the original package. While the decision is based on the Hawes-Cooper Act of 1929,[943] which follows the pattern of the Webb-Kenyon Act, Justice Sutherland speaking for the Court, takes pains to disparage the "unbroken-package doctrine, as applied to interstate commerce, * * *, as more artificial than sound."[944] Indeed, earlier cases make it clear that the enforcement of State quarantine and inspection acts, otherwise constitutional, is not to be impeded by the doctrine in any way.[945]

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CURBS ON THE INTERSTATE MOVEMENT OF PERSONS

Prior to the Civil War the slaveholding States, ever fearful of a slave uprising, adopted legislation meant to exclude from their borders free Negroes whether hailing from abroad or from sister States, and in 1823 a South Carolina Negro Seamen's Act embodying this objective was held void by Justice William Johnson, himself a South Carolinian, in a case arising in the Carolina circuit and involving a colored British sailor.[946] The basis of the ruling, which created tremendous uproar in Charleston,[947] was the commerce clause and certain treaties of the United States. There followed two rulings of Attorneys General, the earlier by Attorney General Wirt, denouncing such legislation as unconstitutional;[948] the latter by Attorney General Berrien, sustaining it;[949] and in City of New York *v.* Miln[950] the Court, speaking by Justice Barbour of Virginia, asserted, six years after Nat Turner's rebellion, the power of the States to exclude undesirables in sweeping terms, which in the Passenger Cases,[951] decided in 1840, a narrowly divided Court considerably qualified. Shortly after the Civil War the Court overturned a Nevada statute which sought to halt the further loss of population by a special tax on railroads on every passenger carried out of the State.[952] This time only two Justices invoked the commerce clause; the majority, speaking by Justice Miller held the measure to be an unconstitutional interference with a right of national citizenship—a holding today translatable, in the terminology of the Fourteenth Amendment, as an abridgment of a privilege or immunity of citizens of the United States.

Against this background the Court in 1941, in Edwards *v.* California,[953] held void a statute which penalized the bringing into that State, or the assisting to bring into it, any nonresident knowing him to be "an indigent person." Five Justices, speaking by Justice Byrnes, held the act to be even as to "persons who are presently destitute of property and without resources to obtain the necessities of life, and who have no relatives or friends able and willing to support them,"[954] an unconstitutional interference with interstate commerce. "The State asserts," Justice Byrnes

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recites, "that the huge influx of migrants into California in recent years has resulted in problems of health, morals, and especially finance, the proportions of which are staggering. It is not for us to say that this is not true. We have repeatedly and recently affirmed, and we now reaffirm, that we do not conceive it our function to pass upon 'the wisdom, need, or appropriateness' of the legislative efforts of the States to solve such difficulties. * * * But this does not mean that there are no boundaries to the permissible area of State legislative activity. There are. And none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders. 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'."[955] Four of the Justices would have preferred to rest the holding of unconstitutionality on the rights of national citizenship under the privileges and immunities clause of Amendment XIV.[956]

STATE CONSERVATION AND EMBARGO MEASURES

In Geer *v.* Connecticut[957] the Court sustained the right of the State to forbid the shipment beyond its borders of game taken within the State—this on the ground, in part, that a State has an underlying property right to wild things found within its limits, and so is entitled to qualify the [Pg 243] right of individual takers thereof to any extent it chooses; and a similar ruling was laid down in a later case as to the prohibition by a State of the transportation out of it of water from its important streams.[958] In Oklahoma *v.* Kansas Natural Gas Co.,[959] however, this doctrine was held inapplicable to the case of natural gas, on the ground: first, that "gas, when reduced to possession, is a commodity, the individual property" of the owner; and secondly, that "the business welfare of the State," is subordinated by the commerce clause to that of the nation as a whole. If the States had the power asserted in the Oklahoma statute, said Justice McKenna, "a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? * * * And yet we have said that 'in matters of foreign and interstate commerce there are no State lines.' In such commerce, instead of the States, a new power appears and a new welfare, a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all the States and that of each State is made greater by a division of its resources, * * *, with every other State, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States."[960] In Pennsylvania *v.* West Virginia[961] the same doctrine was enforced in disallowance of a West Virginia statute whereby that State sought to require that a preference be accorded local consumers of gas produced within the State. West Virginia's argument that the supply of gas within the State was waning and no longer sufficed for both the local and the interstate markets, and that therefore the statute was a legitimate measure of conservation in the interest of the people of the State, was answered in the words just quoted.

In the above cases the State prohibition overturned was directed specifically to shipments beyond the State. In two other cases the State enactments involved reached all commerce, both domestic and interstate without discrimination. In the first of these, Sligh *v.* Kirkwood,[962] the Court upheld the application to oranges which were intended for the interstate market of a Florida statute prohibiting the sale, shipment, or delivery for shipment of any citrus fruits which were immature or otherwise unfit for consumption. The burden thus imposed upon interstate commerce was held by the Court to be incidental merely to the effective enforcement of a measure intended to safeguard the health of the people of Florida. Moreover, said the Court, "we may take judicial notice of the fact that the raising of citrus fruits is one of the great industries of the State of Florida. It was competent for the legislature to find that it was essential for the [Pg 244] success of that industry that its reputation be preserved in other States wherein such fruits find their most extensive market."[963] In Lemke *v.* Farmers Grain Co.,[964] on the other hand, a North Dakota statute which confined the purchase of grain within that State to those holding licenses from the State and which regulated prices, was pronounced void under the commerce clause. To the argument that such legislation was "in the interest of the grain growers and essential to protect them from fraudulent purchases, and to secure payment to them of fair prices for the grain actually sold," the Court answered that, "Congress is amply authorized to pass measures to protect interstate commerce if legislation of that character is needed."

The differentiation of the above two cases is twofold. The statute under review in the earlier one was of the ordinary type of inspection law and was applied without discrimination to fruits designed for the home and the interstate market. The North Dakota act was far more drastic, approximating an attempt on the part of the State to license interstate commerce. What is even more important, however, the later case represents a new rule of law, and one which at the time the Florida act was before the Court had not yet been heard of. This is embodied in the head note of the case in the following words: "The business of buying grain in North Dakota, practically all of which is intended for shipment to, and sale at, terminal markets in other States, conformably to the usual and general course of business in the grain trade, is interstate commerce."[965] The application of this rule in the field of state taxation was mentioned on a previous page.[966]

STATE CONSERVATION AND EMBARGO MEASURES: THE MILK CASES

Certain recent cases have had to deal with State regulation of the milk business. In Nebbia *v.* New York,[967] decided in 1934, that State's law regulating the price of milk was sustained by the Court against objections based on the due process clause of Amendment XIV. A year later, in Baldwin *v.* Seelig[968] the refusal of a license under the same act to a dealer who had procured his milk at a lower minimum price than producers were guaranteed in New York, was set aside as an unconstitutional interference with interstate commerce. However, a Pennsylvania statute requiring dealers to obtain licenses was sustained as to one who procured milk from neighboring farms and shipped it all into a neighboring State for sale.[969] The purpose of the act, explained Justice Roberts, was to control "a domestic situation in the interest of the welfare of the producers and consumers," and its application to the kind of case before the Court was essential to its effective enforcement and affected interstate commerce only incidentally.[970] But when a distributor of milk in Massachusetts, who already had two milk stations in Eastern New York, was refused a license for a third on the ground, among others, that the further diversion of milk to Massachusetts would deprive the local market of a supply needed during the short season, a narrowly divided Court interposed its veto on the basis of Oklahoma *v.* Kansas Natural Gas Co.[971]

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STATE CONSERVATION AND EMBARGO MEASURES: THE SHRIMP CASES

Meantime, Geer *v.* Connecticut has been somewhat overcast by subsequent rulings. In a case, decided in 1928, it was held that a Louisiana statute which permitted the shipment of shrimp taken in the tidal waters of Louisiana marshes only if the heads and hulls have been previously removed was unconstitutional.[972] Distinguishing Geer *v.* Connecticut the Court said: "As the representative of its people, the State might have retained the shrimp for [local] consumption and use therein." But the object of the Louisiana statute was in direct opposition to the conservation of a local food supply. Its object was to favor the canning of shrimp for the interstate market. "* * * by permitting its shrimp to be taken and all the products thereof to be shipped and sold in interstate commerce, the State necessarily releases its hold and, as to the shrimp so taken, definitely terminates its control. * * * And those taking the shrimp under the authority of the act necessarily thereby become entitled to the rights of private ownership and the protection of the commerce clause."[973] On the same reasoning a South Carolina statute which required that owners of shrimp boats, fishing in the marine waters off the coast of the State, dock at a State port and unload, pack and stamp their catch with a tax stamp before shipping or transporting it to another State, was pronounced void in 1948.[974] However, a California statute which restricted the processing of fish, both that taken in the waters of the State and that brought into the State in a fresh condition, was found by the Court to be purely a food conservation measure, and hence valid.[975] The application of the act to fish brought from outside was held to be justified "by rendering evasion of it less easy."[976]

Concurrent Federal and State Legislation

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THE GENERAL ISSUE

Since the turn of the century federal legislation under the commerce clause has penetrated more and more deeply into areas once occupied exclusively by the police power of the States. The result has been that State laws have come under increasingly frequent attack as being incompatible with acts of Congress operating in the same general field. The Court's decisions resolving such alleged conflicts fall into three groups: *first*, those which follow Webster's theory, advanced in Gibbons *v.* Ogden, that when Congress acts upon a particular phase of interstate commerce, it designs to appropriate the entire field with the result that no room is left for supplementary State action; *second*, those in which, in the absence of conflict between specific provisions of the State and Congressional measures involved, the opposite result is reached; *third*, those in which the State legislation involved is found to conflict with certain acts of Congress, and in which the principle of national supremacy is invoked by the Court. Most of the earlier cases stemming from State legislation affecting interstate railway transportation fall in the first class; while illustrations of the second category usually comprise legislation intended to promote the public health and fair dealing. More recent cases are more difficult to classify, especially as between the first and third categories.

THE HEPBURN ACT

No act ever passed by Congress was more destructive of legislation on the State statute books than the Hepburn Act of 1906,[977] amending the Interstate Commerce Act. Thus a State statute which, while prohibiting a railway from giving free passes or free transportation, authorized the issuance of transportation in payment for printing and advertising, was found to conflict with the unqualified prohibition by Congress of free interstate transportation.[978] Likewise, a State statute which penalized a carrier for refusing to receive freight for transportation whenever tendered at a regular station was found to conflict with the Congressional provision that no carrier "shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier

have been filed and published in accordance with the provisions of this act."[979] In enacting this provision, the Court found, Congress had intended to occupy the entire field. In a third case, it was held that the Hepburn Act had put it outside the power of a State to regulate the delivery of cars for interstate shipments;[980] and on the same ground, a State statute authorizing recovery of a penalty for delay in giving notice of the arrival of freight was disallowed;[981] as was also the similar rule of a State railroad commission with respect to failure to deliver freight at depots and warehouses within a stated time limit.[982] And in Adams Express Co. *v.* Croninger[983] it was sweepingly ruled that the so-called Carmack Amendment to the Hepburn Act, which puts the responsibility for loss of, or injury to, cargo upon the initial carrier, had superseded all State statutes limiting recovery for loss or injury to goods in transportation to an agreed or declared value. Substantially contemporaneous with these holdings were others in which the Court ruled that the federal Employers' Liability Act of 1908, as amended in 1910;[984] the federal Hours of Service Act (Railroads) of 1907;[985] and the federal Safety Appliance Acts of 1893, as amended in 1903[986] superseded all State legislation dealing with the same subjects so far as such legislation affected interstate commerce.[987] However, the States were still able to regulate the time and manner of payment of the employees of railroads, including those engaged in interstate commerce,[988] Congress having not legislated on the subject. [Pg 247]

QUARANTINE CASES [Pg 248]

In 1904 it was held that a New York statute prohibiting the manufacture or sale of any adulterated food or drug, or the coloring or coating of food whereby it is made to appear better than it really is, was not, as applied to imported coffee, repugnant to either the commerce clause or the Meat Inspection Act of 1890,[989] prohibiting the importation into the United States of adulterated and unwholesome food, but as exertion by the State of power to legislate for the protection of the health and safety of the community and to provide against deception and fraud. [990] And in 1912 it was held that an Indiana statute regulating the sale of concentrated commercial feeding stuff and requiring the disclosure of ingredients by certificate and label, and providing for inspection and analysis, was not in conflict with the Pure Food and Drugs Act of 1906.[991] However, when Wisconsin about the same time passed an act requiring that when certain commodities were offered for sale in that State they should bear the label required by State law and no other, she was informed that she could not validly apply it to articles which had been labeled in accordance with the federal statute nor did it make any difference that the goods in question had been removed from the container in which they had been shipped into the State, inasmuch as they could still be proceeded against under the act of Congress.[992] The original package doctrine, it was added, "was not intended to limit the right of Congress, * * *, to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles and to choose appropriate means to that end."[993] But a North Dakota statute requiring that lard compound or substitutes, unless sold in bulk, should be put up in pails or containers holding one, three, or five pounds net weight, or some multiple of these numbers, was held not to be repugnant to the Pure Food and Drugs Act.[994] On the other hand, a decade later the Court found that the Plant Quarantine Act of 1912, as amended in 1917,[995] had so completely occupied the field indicated by its title that a State was left without power to prevent the importation of plants infected by a particular disease to which the Secretary of Agriculture's regulations did not apply.[996] Congress promptly intervened by further amending the federal statute to permit the States to impose quarantines in such overlooked cases.[997]

RECENT CASES SUSTAINING STATE LEGISLATION [Pg 249]

In 1935, it was held[998] that an order of the New York Commissioner of Agriculture prohibiting the importation of cattle for dairy or breeding purposes unless such cattle and the herds from which they come had been certified by the chief sanitary officer of the State of origin as being free from Bang's disease, was not in conflict with the Cattle Contagious Diseases Acts.[999] In 1937, it was ruled[1000] that a Georgia statute fixing maximum charges for handling and selling leaf tobacco did not, as applied to sales of tobacco destined for export, conflict with the Tobacco Inspection Act.[1001] In 1942,[1002] it was held that an order of the Wisconsin Employment Relations Board which commanded a union, its agents, and members, to desist from mass picketing of a factory, threatening personal injury or property damage to employees desiring to work, obstructing the streets about the factory, and picketing the homes of employees, was not in conflict with the National Labor Relations Act,[1003] to which the employer was admittedly subject but which had not been invoked. An "intention of Congress," said the Court, "to exclude States from exerting their police power must be clearly manifested."[1004] In 1943,[1005] the Court sustained the marketing program for the 1940 California raisin crop, adopted pursuant to the California Agricultural Prorate Act. Although it was conceded that the program and act operated to eliminate competition among producers concerning terms of sale and price as to product destined for the interstate market, they were held not to conflict with the commerce clause or with the Sherman Act or the Agricultural Marketing Agreement Act.[1006] To the contrary, said Chief Justice Stone, speaking for the unanimous court, the program "is one which it has been the policy of Congress to aid and encourage through federal agencies" under federal

act.[1007] The case was not one, he further observed, which was to be resolved by "mechanical test," but with the object in view of accommodating "the competing demands of the State and national interests involved."[1008] In 1944,[1009] the Court upheld the right of Minnesota to exclude from its courts a firm licensed by the National Government to carry on the business of customs broker because of its failure to comply with a State statute requiring foreign corporations to obtain a license to do business in the State. Speaking for the Court, Justice Frankfurter, again disparaged "the generalities" to which certain cases had given utterance. Actually, he asserted, "the fate of State legislation in these cases has not been determined by these generalities but by the weight of the circumstances and the practical and experienced judgment in applying these generalities to the particular instances."[1010] In cases, decided in 1947,[1011] the Court ruled that Indiana had not violated the Natural Gas Act[1012] by attempting [Pg 250] to regulate the rates for natural gas sold within the State by an interstate pipe line company to local industrial consumers; and that Illinois was not precluded by the Commodity Exchange Act[1013] from imposing upon grain exchanges doing business within her borders regulations not at variance with the provisions of the act or with regulations promulgated under it by the Secretary of Agriculture. Nor, it was held by a bare majority of the Court in 1949, did the Motor Carrier Act of 1935, as amended in 1942,[1014] prevent California from prohibiting the sale or arrangement of any transportation over its public highways if the transporting carrier has no permit from the Interstate Commerce Commission.[1015] The opposed opinions line up most of the cases on either side of the question.

RECENT CASES NULLIFYING STATE ACTION

On the other side of the ledger appear the following cases, decided contemporaneously with those just reviewed: one in 1942 in which it was held that a gas company engaged in the business of piping natural gas from without the State of Illinois and selling it wholesale to distributors in that State was subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act,[1016] and hence could not be required by the Illinois Commerce Commission to extend its facilities in the absence of a certificate of convenience from the Federal Power Commission;[1017] one, in the same year, in which it was held, by a sharply divided Court, that federal regulation of the production of renovated butter under the Internal Revenue Code[1018] prevented the State of Alabama from inspecting, seizing and detaining stock butter from which such butter was made, some of it being intended for interstate commerce;[1019] one in 1947 holding that the United States Warehouse Act, as amended,[1020] must be construed as superseding State authority to [Pg 251] regulate licenses thereunder, and hence overruled the stricter requirements of Illinois law dealing with such subject as rate discrimination, the dual position of grain warehousemen storing their own grain, the mixing of inferior grain owned by the warehousemen with superior grain of other users of the facility, delay in loading grain, the sacrificing or rebating of storage charges, retraining desirable transit tonnage, utilizing preferred storage space, maintenance of unsafe and inadequate grain elevators, inadequate and ineffectual warehouse service, the obtaining of a license, the abandonment of warehousing service, and the rendition of warehousing service without filing and publishing rate schedules;[1021] one decided the same year in which it was held that the authority of the Federal Power Commission under the Natural Gas Act[1022] extended to and superseded State regulatory power over sales made within a State by a natural gas producing company to pipe line companies which transported the purchased gas to markets in other States;[1023] one in 1948, in which a sharply divided Court held that Michigan law governing the rights of dissenting stockholders could not be applied to embarrass a merger agreement between two railroad companies which had been approved by the Interstate Commerce Commission under the Interstate Commerce Act[1024] as "just and reasonable";[1025] and finally one decided the same year in which it was held by a unanimous Court that the Interstate Commerce Commission may, in approving the acquisition by a railroad corporation of one State of railroad lines in another, relieve such corporation from being incorporated under the laws of the latter State.[1026]

FEDERAL VERSUS STATE LABOR LAWS

One group of cases, which has caused the Court some difficulty and its attitude in which has perhaps shifted in some measure, deals with the question of the effect of the Wagner, and, latterly, of the Taft-Hartley Act on State power to govern labor union activities. In a case decided [Pg 252] in 1945[1027] it was held that a Florida statute which required business agents of a union operating in the State to file annual reports and pay an annual fee of one dollar conflicted with the Wagner Act,[1028] standing, as the Court put it, "'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[1029] In two cases decided in 1949, however, State legislation regulative of labor relations was sustained. In one a "cease and desist" order of the Wisconsin Employment Relations Board[1030] implementing the State Employment Peace Act, which made it an unfair labor practice for an employee to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike, was found not to conflict with either the Wagner or the Taft-Hartley Act,[1031] both of which, the Court asserted, designedly left open an area for State control. In the other,[1032] the Wisconsin board, acting under the same statute, was held to be within its powers in labelling as "an unfair

labor practice" the discharge by an employer of an employee under a maintenance of membership clause which had been inserted in the contract of employment in 1943 under pressure from the National War Labor Board, but which was contrary to provisions of the Wisconsin Act. On the other hand, in 1950, the Court invalidated a Michigan mediation statute, and in 1951, a Wisconsin Public Utility Anti-Strike Act, on the ground that these matters were governed by the policies embodied in the Wagner and Taft-Hartley Acts.[1033]

Commerce With Indian Tribes

UNITED STATES *v.* KAGAMA

Congress is given power to regulate commerce "with the Indian tribes." Faced in 1886 with a Congressional enactment which prescribed a system of criminal laws for Indians living on their reservations, the Court rejected the government's argument which sought to base the act on the commerce clause. It sustained the act, however, on the following grounds: "From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this Court, whenever the question has arisen. * * * The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their [Pg 253] protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes." Moreover, such power was operative within the States.[1034]

Obviously, this line of reasoning renders the commerce clause superfluous as a source of power over the Indian tribes; and some years earlier, in 1871, Congress had forbidden the further making of treaties with them.[1035] However, by a characteristic judicial device the effort has been made at times to absorb the doctrine of the Kagama case into the commerce clause,[1036] although more commonly the Court, in sustaining Congressional legislation, prefers to treat the commerce clause and "the recognized relations of tribal Indians," as joint sources of Congress's power.[1037] Most of the cases have arisen, in fact, in connection with efforts by Congress to ban the traffic in "fire water" with tribal Indians. In this connection it has been held that even though an Indian has become a citizen, yet so long as he remains a member of his tribe, under the charge of an Indian agent, and so long as the United States holds in trust the title to land which has been allotted him, Congress can forbid the sale of intoxicants to him.[1038] Also Congress can prohibit the introduction of intoxicating liquors into land occupied by a tribe of uncivilized Indians within territory admitted to statehood.[1039] Nor can a State withdraw Indians within its borders from the operation of acts of Congress regulating trade with them by conferring on them rights of citizenship and suffrage, whether by its constitution or its statutes.[1040] And when a State is admitted into the Union Congress may, in the enabling act, reserve authority to legislate in the future respecting the Indians residing within the new State, and may declare that existing acts of Congress relating to traffic and intercourse with them shall remain in force.[1041]

> Clause 4. *The Congress shall have Power* * * * To establish an uniform Rule of [Pg 254] Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.

Naturalization and Citizenship

CATEGORIES OF NATURALIZED PERSONS

Naturalization has been defined by the Supreme Court as "the act of adopting a foreigner, and clothing him with the privileges of a native citizen, * * *"[1042] In the Dred Scott Case,[1043] the Court asserted that the power of Congress under this clause applies only to "persons born in a foreign country, under a foreign government."[1044] These dicta are much too narrow to sustain the power which Congress has actually exercised on the subject. The competence of Congress in this field merges, in fact, with its indefinite, inherent powers in the field of foreign relations. In the words of the Court: "As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries."[1045] By the Immigration and Nationality Act of June 27, 1952,[1046] which codifies much previous legislation, it is enacted that the following shall be citizens of the United States at birth:

"(1) a person born in the United States, and subject to the jurisdiction thereof;

"(2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

"(3) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States

or one of its outlying possessions, prior to the birth of such person;

"(4) a person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

"(5) a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person;

"(6) a person of unknown parentage found in the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States; [Pg 255]

"(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided*, That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph."[1047] By the same act, "persons born in the Canal Zone and Panama after February 26, 1904, one or both of whose parents were at the time of birth of such person citizens of the United States, are declared to be citizens of the United States; as likewise are of certain categories of persons born in Puerto Rico, Alaska, Hawaii, the Virgin Islands and Guam on or after certain stated dates."[1048]

WHO ARE ELIGIBLE FOR NATURALIZATION

Naturalization is a privilege to be given, qualified, or withheld as Congress may determine, which an alien may claim only upon compliance with the terms which Congress imposes. Earlier the privilege was confined to white persons and persons of African descent, but was extended by the Act of December 17, 1943, to descendants of races indigenous to the Western Hemisphere and Chinese persons or persons of Chinese descent;[1049] and by the Act of June 27, 1952, "the rights of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because the person is married."[1050] But, any person "who advocates or teaches or who is a member of or affiliated with any organization that advocates or teaches * * *" opposition to all organized government, or "who advocates or teaches or who is a member [Pg 256] of or affiliated with any organization that advocates or teaches the overthrow by force or violence or other unconstitutional means of the Government of the United States" may not be naturalized as a citizen of the United States.[1051] These restrictive provisions are, moreover, "applicable to any applicant for naturalization who at any time within a period of ten years immediately preceding the filing of the petition for naturalization or after such filing and before taking the final oath of citizenship is, or has been found to be within any of the classes enumerated within this section, notwithstanding that at the time the petition is filed he may not be included within such classes."[1052]

THE PROCEDURE OF NATURALIZATION

This involves as its principal and culminating event the taking in open court by the applicant of an oath: "(1) to support the Constitution of the United States; (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or citizen; (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic; (4) to bear true faith and allegiance to the same; and (5)(A) to bear arms on behalf of the United States when required by the law, or (B) to perform noncombatant service in the Armed Forces of the United States when required by the law, or (C) to perform work of national importance under civilian direction when required by law."[1053] Any naturalized person who takes this oath with mental reservations or conceals beliefs and affiliations which under the statute disqualify one for naturalization, is subject, upon these facts being shown in a proceeding brought for the purpose, to have his certificate of naturalization cancelled.[1054] Furthermore, if a naturalized person shall within five years "following his naturalization become a member of or affiliated with any organization, membership in or affiliation with which at the time of naturalization would have precluded such person from naturalization under the provisions of section 313, it shall be considered prima facie evidence that such person was not attached to the principles of the Constitution of the United States and was not well disposed to the good order and happiness of the United States at the time of naturalization, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material fact or by willful misrepresentation. * * *" [1055] [Pg 257]

RIGHTS OF NATURALIZED PERSONS

Chief Justice Marshall early stated the dictum that "a naturalized citizen * * * become[s] a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual."[1056] A similar idea was expressed in 1946 in Knauer *v.* United States:[1057] "Citizenship obtained through naturalization is not a second-class citizenship. * * * [It] carries with it the privilege of full participation in the affairs of our society, including the right to speak freely, to criticize officials and administrators, and to promote changes in our laws including the very Charter of our Government."[1058] But, as shown above, a naturalized citizen is subject at any time to have his good faith in taking the oath of allegiance to the United States inquired into, and to lose his citizenship if lack of such faith is shown in proper proceedings.[1059] Also, "a person who has become a national by naturalization" may lose his nationality by "having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated," or by "having a continuous residence for five years in any other foreign state or states."[1060] However, in the absence of treaty or statute to the contrary effect, a child born in the United States who is taken during minority to the country of his parents' origin, where his parents resume their former allegiance, does not thereby lose his American citizenship provided that on attaining his majority he elects to retain it and returns to the United States to assume its duties.[1061]

CONGRESS' POWER EXCLUSIVE

[Pg 258]

Congress' power over naturalization is an exclusive power. A State cannot denationalize a foreign subject who has not complied with federal naturalization law and constitute him a citizen of the United States, or of the State, so as to deprive the federal courts of jurisdiction over a controversy between him and a citizen of a State.[1062] But power to naturalize aliens may be, and early was, devolved by Congress upon state courts having a common law jurisdiction.[1063] Also States may confer the right of suffrage upon resident aliens who have declared their intention to become citizens, and have frequently done so.[1064]

RIGHT OF EXPATRIATION: LOSS OF CITIZENSHIP

Notwithstanding evidence in early court decisions[1065] and in the Commentaries of Chancellor Kent of a brief acceptance of the ancient English doctrine of perpetual and unchangeable allegiance to the government of one's birth, whereby a citizen is precluded from renouncing his allegiance without permission of that government, the United States, since enactment of the act of 1868,[1066] if indeed not earlier, has expressly recognized the right of everyone to expatriate himself and choose another country. Retention of citizenship is not dependent entirely, however, upon the desires of the individual; for, although it has been "conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen," the United States, by virtue of the powers which inhere in it as a sovereign nation, has been deemed competent to provide that an individual voluntarily entering into certain designated conditions shall, as a consequence thereof, suffer the loss of citizenship.[1067]

Exclusion of Aliens

[Pg 259]

The power of Congress "to exclude aliens from the United States and to prescribe the terms and conditions on which they come in" is absolute, being an attribute of the United States as a sovereign nation. In the words of the Court: "That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power. * * * The United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory."[1068] By the Immigration and Nationality Act of June 27, 1952, some thirty-one categories of aliens are excluded from the United States[1069] including "aliens who are, or at any time have been, members * * * of or affiliated with any organization that advocates or teaches * * * the overthrow by force, violence, or other unconstitutional means of the Government of the United States * * *"[1070]

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With this power of exclusion goes also the power to assert a considerable degree of control over aliens after their admission to the country. By the Alien Registration Act of 1940[1071] it was provided that all aliens in the United States, fourteen years of age and over, should submit to registration and finger printing, and wilful failure to do so was made a criminal offense against the United States. This Act, taken in conjunction with other laws regulating immigration and naturalization, has constituted a comprehensive and uniform system for the regulation of all aliens and precludes enforcement of a State registration act. Said the Court, speaking by Justice Black: "With a view to limiting prospective residents from foreign lands to those possessing the qualities deemed essential to good and useful citizenship in America, carefully defined

qualifications are required to be met before aliens may enter our country. These qualifications include rigid requirements as to health, education, integrity, character, and adaptability to our institutions. Nor is the alien left free from the application of federal laws after entry and before naturalization. If during the time he is residing here he should be found guilty of conduct contrary to the rules and regulations laid down by Congress, he can be deported. At the time he enters the country, at the time he applies for permission to acquire the full status of citizenship, and during the intervening years, he can be subjected to searching investigations as to conduct and suitability for citizenship."[1072] The Act of June 27, 1952, repeats these requirements of the Act of 1940.[1073]

Recent cases underscore the sweeping nature of the powers of the National Government to exclude aliens from the United States and to deport by administrative process members of excluded classes. In Knauff *v.* Shaughnessy,[1074] decided early in 1950, an order of the Attorney General excluding, on the basis of confidential information, a wartime bride who was prima facie entitled to enter the United States under The War Brides Act of 1945,[1075] was held to be not reviewable by the courts; nor were regulations on which the order was based invalid as representing an undue delegation of legislative power. Said the Court: "Normally Congress supplies the conditions of the privilege of entry into the United States. But because the power of exclusion of aliens is also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise the power, e.g., as was done here, for the best interests of the country during a time of national emergency. Executive officers may be entrusted with the duty of specifying the procedures for carrying out the congressional intent."[1076]

In cases decided in March and April, 1952, comparable results were reached: The Internal Security Act of 1950, section 23, in authorizing the Attorney General to hold in custody, without bail, aliens who are members of the Communist Party of the United States, pending determination as to their deportability, is not unconstitutional.[1077] Nor was it unconstitutional to deport under the Alien Registration Act of 1940[1078] a legally resident alien because of membership in the Communist Party, although such membership ended before the enactment of the Act. Such application of the Act did not make it *ex post facto*, being but an exercise of the power of the United States to terminate its hospitality *ad libitum*.[1079] And a statutory provision[1080] which makes it a felony for an alien against whom a specified order of deportation is outstanding "to willfully fail or refuse to make timely application for travel or other documents necessary to his departure" is not on its face void for "vagueness."[1081] [Pg 261]

The power of Congress to legislate with respect to the conduct of alien residents is, however, a concomitant of its power to prescribe the terms and conditions on which they may enter the United States; to establish regulations for sending out of the country such aliens as have entered in violation of law; and to commit the enforcement of such conditions and regulations to executive officers. It is not a power to lay down a special code of conduct for alien residents or to govern private relations with them. Purporting to enforce the above distinction, the Court, in 1909, held void a statutory provision which, in prohibiting the importation of "any alien woman or girl for the purpose of prostitution," provided further that whoever should keep for the purpose of prostitution "any alien woman or girl within three years after she shall have entered the United States" should be deemed guilty of a felony and punished therefor.[1082] Three Justices, however, thought the measure justifiable on the principle that "for the purpose of excluding those who unlawfully enter this country Congress has power to retain control over aliens long enough to make sure of the facts. * * * To this end it may make their admission conditional for three years. * * *" [And] "if Congress can forbid the entry * * *, it can punish those who cooperate in their fraudulent entry."[1083]

Bankruptcy [Pg 262]

PERSONS WHO MAY BE RELEASED FROM DEBT

In an early case on circuit Justice Livingston suggested that inasmuch as the English statutes on the subject of bankruptcy from the time of Henry VIII down had applied only to traders it might "well be doubted, whether an act of Congress subjecting to such a law every description of persons within the United States, would comport with the spirit of the powers vested in them in relation to this subject."[1084] Neither Congress nor the Supreme Court has ever accepted this limited view. The first bankruptcy law, passed in 1800, departed from the English practice to the extent of including bankers, brokers, factors and underwriters as well as traders.[1085] Asserting that the narrow scope of the English statutes was a mere matter of policy, which by no means entered into the nature of such laws, Justice Story defined a law on the subject of bankruptcies in the sense of the Constitution as a law making provisions for cases of persons failing to pay their debts.[1086] This interpretation has been ratified by the Supreme Court. In Hanover National Bank *v.* Moyses,[1087] it held valid the Bankruptcy Act of 1898 which provided that persons other than traders might become bankrupts and that this might be done on voluntary petition. The Court has given tacit approval to the extension of the bankruptcy laws to cover practically all classes of persons and corporations,[1088] including even municipal corporations.[1089]

LIBERALIZATION OF RELIEF GRANTED

As the coverage of the bankruptcy laws has been expanded, the scope of the relief afforded to debtors has been correspondingly enlarged. The act of 1800, like its English antecedents, was designed primarily for the benefit of creditors. Beginning with the act of 1841, which opened the door to voluntary petitions, rehabilitation of the debtor has become an object of increasing concern to Congress. An adjudication in bankruptcy is no longer requisite to the exercise of bankruptcy jurisdiction. In 1867 the debtor for the first time was permitted, either before or after adjudication of bankruptcy, to propose terms of composition which would become binding upon acceptance by a designated majority of his creditors and confirmation by a bankruptcy court. This measure was held constitutional,[1090] as were later acts which provided for the reorganization of corporations which are insolvent or unable to meet their debts as they mature, [Pg 263] [1091] and for the composition and extension of debts in proceedings for the relief of individual farmer-debtors.[1092] Nor is the power of Congress limited to adjustment of the rights of creditors. The Supreme Court has also ruled that the rights of a purchaser at a judicial sale of the debtor's property are within reach of the bankruptcy power, and may be modified by a reasonable extension of the period for redemption from such sale.[1093] The sympathetic attitude with which the Court has viewed these developments is reflected in the opinion in Continental Illinois National Bank and Trust Co. *v.* Chicago, R.I. and P.R. Co.,[1094] where Justice Sutherland wrote, on behalf of a unanimous court: "* * * these acts, far-reaching though they may be, have not gone beyond the limit of Congressional power; but rather have constituted extensions into a field whose boundaries may not yet be fully revealed."[1095]

CONSTITUTIONAL LIMITATIONS ON THE POWER

In the exercise of its bankruptcy powers Congress must not transgress the Fifth and Tenth Amendments. It may not take from a creditor specific property previously acquired from a debtor nor circumscribe the creditor's right to such an unreasonable extent as to deny him due process of law;[1096] neither may it subject the fiscal affairs of a political subdivision of a State to the control of a federal bankruptcy court.[1097] Since Congress may not supersede the power of a State to determine how a corporation shall be formed, supervised and dissolved, a corporation which has been dissolved by a decree of a State court may not file a petition for reorganization under the Bankruptcy Acts.[1098] But Congress may impair the obligation of a contract and may extend the provisions of the bankruptcy laws to contracts already entered into at the time of their passage.[1099] It may also empower courts of bankruptcy to entertain petitions by taxing agencies or instrumentalities for a composition of their indebtedness where the State has consented to the proceeding and the federal court is not authorized to interfere with the fiscal or governmental affairs of the petitioner.[1100] Also bankruptcy legislation must be uniform, but the uniformity required is geographic, not personal. Congress may recognize the laws of the States relating to dower, exemption, the validity of mortgages, priorities of payment and similar matters, even [Pg 264] though such recognition leads to different results from State to State.[1101]

THE POWER NOT EXCLUSIVE

Prior to 1898 Congress exercised the power to establish "uniform laws on the subject of bankruptcies" only very intermittently. The first national bankruptcy law was not enacted until 1800 to be repealed in 1803; the second was passed in 1841 and repealed two years later; the third was enacted in 1867 and repealed in 1878.[1102] Thus during the first 89 years under the Constitution a national bankruptcy law was in existence only sixteen years altogether. Consequently the most important problems of interpretation which arose during that period concerned the effect of this clause on State law. The Supreme Court ruled at an early date that in the absence of Congressional action the States may enact insolvency laws since it is not the mere existence of the power but rather its exercise which is incompatible with the exercise of the same power by the States.[1103] Later cases were to settle further that the enactment of a national bankruptcy law does not invalidate State laws in conflict therewith but serves only to relegate them to a state of suspended animation with the result that upon repeal of the national statute they again come into operation without reenactment.[1104]

CONSTITUTIONAL STATUS OF STATE INSOLVENCY LAWS

A State is, of course, without power to enforce any law governing bankruptcies which impairs the obligation of contracts,[1105] extends to persons or property outside its jurisdiction,[1106] or conflicts with the national bankruptcy laws.[1107] Giving effect to the policy of the federal statute, the Supreme Court has held that a State statute regulating the distribution of property of an insolvent was suspended by that law,[1108] and that a State court was without power to proceed with pending foreclosure proceedings after a farmer-debtor had filed a petition in the federal bankruptcy court for a composition or extension of time to pay his debts.[1109] A State law governing fraudulent transfers was found to be compatible with the act of Congress,[1110] as was [Pg 265] a statute which provided that a discharge in bankruptcy should be unavailing to terminate the suspension of the driver's license of a person who failed to pay a judgment rendered against him for damages resulting from his negligent operation of a motor vehicle.[1111] If a State desires to participate in the assets of a bankrupt it must submit to the appropriate requirements of the

Bankruptcy Court with respect to the filing of claims by a designated date; it cannot assert a claim for taxes by filing a demand therefor at a later date.[1112]

> Clauses 5 and 6. *The Congress shall have Power* * * * To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures.
>
> * * * To provide for the Punishment of counterfeiting the Securities and current Coin of the United States.

Fiscal and Monetary Powers of Congress

COINAGE, WEIGHTS AND MEASURES

The power "to coin money" and "regulate the value thereof" has been broadly construed to authorize regulation of every phase of the subject of currency. Congress may charter banks and endow them with the right to issue circulating notes,[1113] and may restrain the circulation of notes not issued under its own authority.[1114] To this end it may impose a prohibitive tax upon the circulation of the notes of State banks[1115] or of municipal corporations.[1116] It may require the surrender of gold coin and of gold certificates in exchange for other currency not redeemable in gold. A plaintiff who sought payment for the gold coin and certificates thus surrendered in an amount measured by the higher market value of gold, was denied recovery on the ground that he had not proved that he would suffer any actual loss by being compelled to accept an equivalent amount of other currency.[1117] Inasmuch as "every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power,"[1118] the Supreme Court sustained the power of Congress to make Treasury notes legal tender in satisfaction of antecedent debts,[1119] and, many years later, to abrogate the clauses in private contracts calling for payment in gold coin, even though such contracts were executed before the legislation was passed.[1120] The power to coin money also imports authority to maintain such coinage as a medium of exchange at home, and to forbid its diversion to other uses by defacement, melting or exportation.[1121]

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THE PUNISHMENTS OF COUNTERFEITING

In its affirmative aspect this clause has been given a narrow interpretation; it has been held not to cover the circulation of counterfeit coin or the possession of equipment susceptible of use for making counterfeit coin.[1122] At the same time the Supreme Court has rebuffed attempts to read into this provision a limitation upon either the power of the States or upon the powers of Congress under the preceding clause. It has ruled that a State may punish the utterance of forged coins.[1123] On the ground that the power of Congress to coin money imports "the correspondent and necessary power and obligation to protect and to preserve in its purity this constitutional currency for the benefit of the nation,"[1124] it has sustained federal statutes penalizing the importation or circulation of counterfeit coin,[1125] or the willing and conscious possession of dies in the likeness of those used for making coins of the United States.[1126] In short, the above clause is entirely superfluous. Congress would have had the power which it purports to confer under the necessary and proper clause; and the same is the case with the other enumerated crimes which it is authorized to punish. The enumeration was unnecessary and is not exclusive.[1127]

THE BORROWING POWER VERSUS THE FISCAL POWER

Usually the aggregate of the fiscal and monetary powers of the National Government—to lay and collect taxes, to borrow money and to coin money and regulate the value thereof—have reinforced each other, and, cemented by the necessary and proper clause, have provided a secure foundation for acts of Congress chartering banks and other financial institutions,[1128] or making its treasury notes legal tender in the payment of antecedent debts.[1129] But in 1935 the opposite situation arose—one in which the power to regulate the value of money collided with the obligation incurred in the exercise of the power to borrow money. By a vote of eight-to-one the Supreme Court held that the obligation assumed by the exercise of the latter was paramount, and could not be repudiated to effectuate the monetary policies of Congress.[1130] In a concurring opinion Justice Stone declined to join with the majority in suggesting that "the exercise of the sovereign power to borrow money on credit, which does not override the sovereign immunity from suit, may nevertheless preclude or impede the exercise of another sovereign power, to regulate the value of money; or to suggest that although there is and can be no present cause of action upon the repudiated gold clause, its obligation is nevertheless, in some manner and to some extent, not stated, superior to the power to regulate the currency which we now hold to be superior to the obligation of the bonds."[1131]

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> Clause 7. *The Congress shall have Power* * * * To establish Post Offices and post Roads.

"ESTABLISH"

The great question raised in the early days with reference to the postal clause concerned the meaning to be given to the word "establish"—did it confer upon Congress the power to *construct* post offices and post roads, or only the power to *designate* from existing places and routes those that should serve as post offices and post roads? As late as 1855 Justice McLean stated that this power "has generally been considered as exhausted in the designation of roads on which the mails are to be transported," and concluded that neither under the commerce power nor the power to establish post roads could Congress construct a bridge over a navigable water.[1132] A decade earlier, however, the Court, without passing upon the validity of the original construction of the Cumberland Road, held that being "charged, * * *, with the transportation of the mails," Congress could enter a valid compact with the State of Pennsylvania regarding the use and upkeep of the portion of the road lying in that State.[1133] The debate on the question was terminated in 1876 by the decision in Kohl *v.* United States[1134] sustaining a proceeding by the United States to appropriate a parcel of land in Cincinnati as a site for a post office and courthouse.

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POWER TO PROTECT THE MAILS

The postal powers of Congress embrace all measures necessary to insure the safe and speedy transit and prompt delivery of the mails.[1135] And not only are the mails under the protection of the National Government, they are in contemplation of law its property. This principle was recognized by the Supreme Court in 1845 in holding that wagons carrying United States mail were not subject to a State toll tax imposed for use of the Cumberland Road pursuant to a compact with the United States.[1136] Half a century later it was availed of as one of the grounds on which the national executive was conceded the right to enter the national courts and demand an injunction against the authors of any wide-spread disorder interfering with interstate commerce and the transmission of the mails.[1137]

ANTI-SLAVERY AND THE MAILS

Prompted by the efforts of Northern anti-slavery elements to disseminate their propaganda in the Southern States through the mails, President Jackson, in his annual message to Congress in 1835, suggested "the propriety of passing such a law as will prohibit, under severe penalties, the circulation in the Southern States, through the mail, of incendiary publications intended to instigate the slaves to insurrection."[1138] In the Senate John C. Calhoun resisted this recommendation, taking the position that it belonged to the States and not to Congress to determine what is and what is not calculated to disturb their security. He expressed the fear that if Congress might determine what papers were incendiary, and as such prohibit their circulation through the mail, it might also determine what were not incendiary and enforce their circulation.[1139]

POWER TO PREVENT HARMFUL USE OF THE POSTAL FACILITIES

Some thirty years later Congress passed the first of a series of acts to exclude from the mails publications designed to defraud the public or corrupt its morals. In the pioneer case of Ex parte Jackson,[1140] the Court sustained the exclusion of circulars relating to lotteries on the general ground that "the right to designate what shall be carried necessarily involves the right to determine what shall be excluded."[1141] The leading fraud order case, decided in 1904, holds to the same effect.[1142] Pointing out that it is "an indispensable adjunct to a civil government," to supply postal facilities, the Court restated its premise that the "legislative body in thus establishing a postal service, may annex such conditions to it as it chooses."[1143] Later cases appear to have qualified these sweeping declarations. In upholding requirements that publishers of newspapers and periodicals seeking second-class mailing privileges file complete information regarding ownership, indebtedness and circulation and that all paid advertisements in such publications be marked as such, the Court emphasized that these provisions were reasonably designed to safeguard the second-class privilege from exploitation by mere advertising publications. Chief Justice White warned that the Court by no means intended to imply that it endorsed the government's "broad contentions concerning the existence of arbitrary power through the classification of the mails, or by way of condition * * *"[1144] Again, in Milwaukee Social Democratic Publishing Co. *v.* Burleson,[1145] where the Court sustained an order of the Postmaster General excluding from the second-class privilege a newspaper which he found to have systematically published matter banned by the Espionage Act of 1917, the claim of absolute power in Congress to withhold this privilege was sedulously avoided. More recently, when reversing an order denying the second-class privilege to a mailable publication because of the poor taste and vulgarity of its contents, on the ground that the Postmaster General exceeding his statutory authority, Justice Douglas assumed, in the opinion of the Court, "that Congress has a broad power of classification and need not open second-class mail to publications of all types."[1146]

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THE EXCLUSION POWER AS AN ADJUNCT TO OTHER POWERS

In the cases just reviewed the mails were closed to particular types of communication which were deemed to be harmful. A much broader power of exclusion was asserted in the Public Utility Holding Company Act of 1935.[1147] To induce compliance with the regulatory requirements of that act, Congress denied the privilege of using the mails for any purpose to holding companies which failed to obey that law, irrespective of the character of the material to be carried. Viewing the matter realistically, the Supreme Court treated this provision as a penalty. While it held this [Pg 270] statute constitutional because the regulations whose infractions were thus penalized were themselves valid,[1148] it declared that "Congress may not exercise its control over the mails to enforce a requirement which lies outside its constitutional province, * * *."[1149]

STATE REGULATIONS AFFECTING THE MAILS

In determining the extent to which State laws may impinge upon persons or corporations whose services are utilized by Congress in executing its postal powers, the task of the Supreme Court has been to determine whether particular measures are consistent with the general policies indicated by Congress. Broadly speaking, the Court has approved regulations which have a trivial or remote relation to the operation of the postal service, while disallowing those which constitute a serious impediment to it. Thus a State statute which granted to one company an exclusive right to operate a telegraph business in the State was found to be incompatible with a federal law which, in granting to any telegraph company the right to construct its lines upon post roads, was interpreted as a prohibition of State monopolies in a field which Congress was entitled to regulate in the exercise of its combined power over commerce and post roads.[1150] An Illinois statute which, as construed by the State courts, required an interstate mail train to make a detour of seven miles in order to stop at a designated station, also was held to be an unconstitutional interference with the power of Congress under this clause.[1151] But a Minnesota statute which required intrastate trains to stop at county seats was found to be unobjectionable.[1152] Local laws classifying postal workers with railroad employees for the purpose of determining a railroad's liability for personal injuries,[1153] or subjecting a union of railway mail clerks to a general law forbidding any "labor organization" to deny any person membership because of his race, color or creed,[1154] have been held not to conflict with national legislation or policy in this field. Despite the interference *pro tanto* with the performance of a federal function, a State may arrest a postal employee charged with murder while he is engaged in carrying out his official duties,[1155] but it cannot punish a person for operating a mail truck over its highways without procuring a driver's license from State authorities.[1156]

> Clause 8. *The Congress shall have Power* * * * 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. [Pg 271]

Copyrights and Patents

SCOPE OF THE POWER

This clause is the foundation upon which the national patent and copyright laws rest, although it uses neither of those terms. So far as patents are concerned, modern legislation harks back to the Statute of Monopolies of 1624, whereby Parliament endowed inventors with the sole right to their inventions for fourteen years.[1157] Copyright law, in turn, traces back to the statute of 1710 which secured to authors of books the sole right of publishing them for designated periods.[1158] Congress was not, however, by this provision, vested with anything akin to the royal prerogative in the creation and bestowal of monopolistic privileges. Its power is limited as to subject matter, and as to the purpose and duration of the rights granted. Only the writings and discoveries of authors and inventors may be protected, and then only to the end of promoting science and the useful arts.[1159] While Congress may grant exclusive rights only for a limited period, it may extend the term upon the expiration of the period originally specified, and in so doing may protect the rights of purchasers and assignees.[1160] The copyright and patent laws do not have, of their own force, any extraterritorial operation.[1161]

PATENTABLE DISCOVERIES

The protection afforded by acts of Congress under this clause is limited to new and useful inventions,[1162] and while a patentable invention is a mental achievement,[1163] yet for an idea to be patentable it must have first taken physical form.[1164] Despite the fact that the Constitution uses the term "discovery" rather than "invention," a patent may not issue for the discovery of a hitherto unknown phenomenon of nature; "if there is to be invention from such a discovery, it must come from the application of the law of nature to a new and useful end."[1165] Conversely, the mental processes which are thus applied must display "more ingenuity * * * than the work of a mechanic skilled in the art";[1166] and while combination patents have been at times sustained, [Pg 272] [1167] the accumulation of old devices is patentable "only when the whole in some way exceeds

the sum of its parts."[1168] The Court's insistence on the presence of "inventive genius" as the test of patentability goes far back and has been reiterated again and again in slightly varying language,[1169] although it seems to have had little effect on the point of view of the Patent Office.[1170]

PROCEDURE IN ISSUING PATENTS

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The standard of patentability is a constitutional standard, and the question of the validity of a patent is a question of law.[1171] Congress may authorize the issuance of a patent for an invention by a special, as well as by general law, provided the question as to whether the patentees device is in truth an invention is left open to investigation under the general law.[1172] The function of the Commissioner of Patents in issuing letters patent is deemed to be quasi-judicial in character. Hence an act granting a right of appeal from the Commission to the Court of Appeals for the District of Columbia is not unconstitutional as conferring executive power upon a judicial body.[1173]

NATURE AND SCOPE OF THE RIGHT SECURED

The leading case bearing on the nature of the rights which Congress is authorized to *secure* is that of Wheaton *v.* Peters. Wheaton charged Peters with having infringed his copyright on the twelve volumes of "Wheaton's Reports" wherein are reported the decisions of the United States Supreme Court for the years from 1816 to 1827 inclusive. Peters's defense turned on the proposition that inasmuch as Wheaton had not complied with all of the requirements of the act of Congress, his alleged copyright was void. Wheaton, while denying this assertion of fact, further contended that the statute was only intended to *secure* him in his pre-existent rights at common law. These at least, he claimed, the Court should protect. A divided Court held in favor of Peters on the legal question. It denied, in the first place, that there was any principle of the common law which protected an author in the sole right to continue to publish a work once published. It denied, in the second place, that there is any principle of law, common or otherwise, which pervades the Union except such as are embodied in the Constitution and the acts of Congress. Nor, in the third place, it held, did the word "securing" in the Constitution recognize the alleged common law principle which Wheaton invoked. The exclusive right which Congress is authorized to *secure* to authors and inventors owes its existence solely to the acts of Congress securing it,[1174] from which it follows that the rights granted by a patent or copyright are subject to such qualifications and limitations as Congress, in its unhampered consultation of the public interest, sees fit to impose.[1175]

In giving to authors the exclusive right to dramatize any of their works, Congress did not exceed [Pg 275] its powers under this clause. Even as applied to pantomime dramatization by means of silent motion pictures, the act was sustained against the objection that it extended the copyright to ideas rather than to the words in which they were clothed.[1176] But the copyright of the description of an art in a book was held not to lay a foundation for an exclusive claim to the art itself. The latter can be protected, if at all, only by letters patent.[1177] Since copyright is a species of property distinct from the ownership of the equipment used in making copies of the matter copyrighted, the sale of a copperplate under execution did not pass any right to print and publish the map which the copperplate was designed to produce.[1178] A patent right may, however, be subjected, by bill in equity, to payment of a judgment debt of the patentee.[1179]

POWER OF CONGRESS OVER PATENT RIGHTS

Letters patent for a new invention or discovery in the arts confer upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the Government without just compensation.[1180] Congress may, however, modify rights under an existing patent, provided vested property rights are not thereby impaired,[1181] but it does not follow that it may authorize an inventor to recall rights which he has granted to others or reinvest in him rights of property which he had previously conveyed for a valuable and fair consideration.[1182] Furthermore, the rights which the present statutes confer are subject to the Anti-Trust Acts, though it can be hardly said that the cases in which the Court has endeavored to draw the line between the rights claimable by patentees and the kind of monopolistic privileges which are forbidden by those acts exhibit entire consistency in their holdings.[1183]

STATE POWER AFFECTING PATENTS AND COPYRIGHTS

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Nor do the patent laws displace the police or taxing powers of the States. Whatever rights are secured to inventors must be enjoyed in subordination to the general authority of the State over all property within its limits. A statute of Kentucky requiring the condemnation of illuminating oils which were inflammable at less than 130 degrees Fahrenheit, was held not to interfere with any right secured by the patent laws, although the oil for which the patent was issued could not be made to comply with State specifications.[1184] In the absence of federal legislation, a State may prescribe reasonable regulations for the transfer of patent rights so as to protect its citizens from fraud. Hence a requirement of State law that the words "given for a patent right" appear on

the face of notes given in payment for such right is not unconstitutional.[1185] Royalties received from patents or copyrights are subject to a nondiscriminating State income tax, a holding to the contrary in 1928 having been subsequently overruled.[1186]

TRADE-MARKS AND ADVERTISEMENTS

In the famous Trade-Mark Cases,[1187] decided in 1879, the Supreme Court held void acts of Congress which, in apparent reliance upon this clause, extended the protection of the law to trade-marks registered in the Patent Office. "The ordinary trade-mark" said Justice Miller for the Court, "has no necessary relation to invention or discovery"; nor is it to be classified "under the head of writings of authors." It does not "depend upon novelty, invention, discovery, or any work of the brain."[1188] Not many years later the Court, again speaking through Justice Miller, ruled that a photograph may be constitutionally copyright,[1189] while still more recently a circus poster was held to be entitled to the same protection. In answer to the objection of the Circuit Court that a lithograph which "has no other use than that of a mere advertisement * * * (would not be within) the meaning of the Constitution," Justice Holmes summoned forth the shades of Velasquez, Whistler, Rembrandt, Ruskin, Degas, and others in support of the proposition that it is not for the courts to attempt to judge the worth of pictorial illustrations outside the narrowest and most obvious limits.[1190]

Clause 9. *The Congress shall have Power* * * * To constitute Tribunals inferior to the supreme Court; *See* article III, p. 528. [Pg 277]

Clause 10. *The Congress shall have Power* * * * To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.

Piracies, Felonies, and Offenses Against the Law of Nations

ORIGIN OF THE CLAUSE

"When the United States ceased to be a part of the British empire, and assumed the character of an independent nation, they became subject to that system of rules which reason, morality, and custom had established among civilized nations of Europe, as their public law. * * * The faithful observance of this law is essential to national character, * * *"[1191] These words of Chancellor Kent expressed the view of the binding character of International Law which was generally accepted at the time the Constitution was adopted. During the Revolutionary War, Congress took cognizance of all matters arising under the law of nations and professed obedience to that law.[1192] Under the Articles of Confederation, it was given exclusive power to appoint courts for the trial of piracies and felonies committed on the high seas, but no provision was made for dealing with offenses against the law of nations.[1193] The draft of the Constitution submitted to the Convention of 1787 by its Committee of Detail empowered Congress "to declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offences against the law of nations."[1194] In the debate on the floor of the Convention the discussion turned on the question as to whether the terms, "felonies" and the "law of nations," were sufficiently precise to be generally understood. The view that these terms were often so vague and indefinite as to require definition eventually prevailed and Congress was authorized to define as well as punish piracies, felonies and offenses against the law of nations.[1195]

DEFINITION OF OFFENSES

The fact that the Constitutional Convention considered it necessary to give Congress authority to define offenses against the law of nations does not mean that in every case Congress must undertake to codify that law or mark its precise boundaries before prescribing punishments for infractions thereof. An act punishing "the crime of piracy, as defined by the law of nations" was held to be an appropriate exercise of the constitutional authority to "define and punish" the offense, since it adopted by reference the sufficiently precise definition of International Law.[1196] Similarly, in Ex parte Quirin,[1197] the Court found that by the reference in the Fifteenth Article of War to "offenders or offenses that * * * by the law of war may be triable by such military commissions * * *," Congress had "exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals."[1198] Where, conversely, Congress defines with particularity a crime which is "an offense against the law of nations," the law is valid, even if it contains no recital disclosing that it was enacted pursuant to this clause. Thus the duty which the law of nations casts upon every government to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof, was found to furnish a sufficient justification for the punishment of the counterfeiting within the United States, of notes, bonds and other securities of foreign governments.[1199] [Pg 278]

EXTRATERRITORIAL REACH OF THE POWER

Since this clause contains the only specific grant of power to be found in the Constitution for the punishment of offenses outside the territorial limits of the United States, a lower federal court held in 1932[1200] that the general grant of admiralty and maritime jurisdiction by article III, section 2, could not be construed as extending either the legislative or judicial power of the United States to cover offenses committed on vessels outside the United States but not on the high seas. Reversing that decision, the Supreme Court held that this provision "cannot be deemed to be a limitation on the powers, either legislative or judicial, conferred on the National Government by article III, § 2. The two clauses are the result of separate steps independently taken in the Convention, by which the jurisdiction in admiralty, previously divided between the Confederation and the States, was transferred to the National Government. It would be a surprising result, and one plainly not anticipated by the framers or justified by principles which ought to govern the interpretation of a constitution devoted to the redistribution of governmental [Pg 279] powers, if part of them were lost in the process of transfer. To construe the one clause as limiting rather than supplementing the other would be to ignore their history, and without effecting any discernible purpose of their enactment, to deny to both the States and the National Government powers which were common attributes of sovereignty before the adoption of the Constitution. The result would be to deny to both the power to define and punish crimes of less gravity than felonies committed on vessels of the United States while on the high seas, and crimes of every grade committed on them while in foreign territorial waters."[1201] Within the meaning of this section an offense is committed on the high seas even where the vessel on which it occurs is lying at anchor on the road in the territorial waters of another country.[1202]

Clauses 11, 12, 13, and 14. *The Congress shall have power* * * *:

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years.

To provide and maintain a Navy.

To make Rules for the Government and Regulation of the land and naval Forces.

The War Power

SOURCE AND SCOPE

Three different views regarding the source of the war power found expression in the early years of the Constitution and continued to vie for supremacy for nearly a century and a half. Writing in The Federalist,[1203] Hamilton elaborated the theory that the war power is an aggregate of the particular powers granted by article I, section 8. Not many years later, in 1795, the argument was advanced that the war power of the National Government is an attribute of sovereignty and hence not dependent upon the affirmative grants of the written Constitution.[1204] Chief Justice Marshall appears to have taken a still different view, namely that the power to wage war is implied from the power to declare it. In McCulloch *v.* Maryland[1205] he listed the power "to declare *and conduct* a war"[1206] as one of the "enumerated powers" from which the authority to charter the Bank of the United States was deduced. During the era of the Civil War the two latter [Pg 280] theories were both given countenance by the Supreme Court. Speaking for four Justices in Ex Parte Milligan, Chief Justice Chase described the power to declare war as "necessarily" extending "to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and conduct of campaigns."[1207] In another case, adopting the terminology used by Lincoln in his Message to Congress on July 4, 1861,[1208] the Court referred to "the war power" as a single unified power.[1209]

AN INHERENT POWER

Thereafter we find the phrase, "the war power," being used by both Chief Justice White[1210] and Chief Justice Hughes,[1211] the former declaring the power to be "complete and undivided."[1212] Not until 1936 however did the Court explain the logical basis for imputing such an inherent power to the Federal Government. In United States *v.* Curtiss-Wright Export Corp.,[1213] the reasons for this conclusion were stated by Justice Sutherland as follows: "As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. * * * It results that the investment of the Federal Government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The power to

declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the Federal Government as necessary concomitants of nationality."[1214]

A COMPLEXUS OF GRANTED POWERS

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In the more recent case of Lichter *v.* United States,[1215] on the other hand, the Court speaks of the "war powers" of Congress. Upholding the Renegotiation Act, it declared that: "In view of this power 'To raise and support Armies, * * *' and the power granted in the same Article of the Constitution 'to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, * * *' the only question remaining is whether the Renegotiation Act was a law 'necessary and proper for carrying into Execution' the war powers of Congress and especially its power to support armies."[1216] In a footnote it listed the Preamble, the necessary and proper clause, the provisions authorizing Congress to lay taxes and provide for the common defense, to declare war, and to provide and maintain a navy, together with the clause designating the President as Commander in Chief of the Army and Navy, as being "among the many other provisions implementing the Congress and the President with powers to meet the varied demands of war, * * *"[1217]

A DECLARATION OF WAR, WHEN REQUIRED

In the first draft of the Constitution presented to the Convention of 1787 by its Committee of Detail Congress was empowered "to make war."[1218] On the floor of the Convention according to Madison's Journal "Mr. Madison and Mr. Gerry, moved to insert '*declare*' striking out '*make*' war; leaving to the Executive the power to repel sudden attacks"[1219] and their motion was adopted. When the Bey of Tripoli declared war upon the United States in 1801 a sharp debate was precipitated as to whether a formal declaration of war by Congress was requisite to create the legal status of war. Jefferson sent a squadron of frigates to the Mediterranean to protect our commerce but its mission was limited to defense in the narrowest sense of the term. After one of the vessels in this squadron had been engaged by, and had defeated, a Tripolitan cruiser, the latter was permitted to return home. Jefferson defended this course in a message to Congress saying, "Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defence, the vessel being disabled from committing further hostilities, was liberated with its crew."[1220] Hamilton promptly espoused a different interpretation of the power given to Congress to declare war. "It is the peculiar and exclusive province of Congress," he declared "*when the nation is at peace* to change that state into a state of war; whether from calculations of policy, or from provocations, or injuries received; in other words, it belongs to Congress only *to go to War*. But when a foreign nation declares or openly and avowedly makes war upon the United States, they are then by the very fact *already at war*, and any declaration on the part of Congress is nugatory; it is at least unnecessary."[1221] Apparently Congress shared the view that [Pg 282] a formal declaration of war was unnecessary. It enacted a statute which authorized the President to instruct the commanders of armed vessels of the United States to "seize and make prize of all vessels, goods and effects, belonging to the Bey of Tripoli, * * *; and also to cause to be done all such other acts of precaution or hostility as *the state of war* will justify, * * *"[1222]

THE PRIZE CASES, 1863

Sixty years later the Supreme Court, in sustaining the blockade of the Southern ports which Lincoln had instituted in April 1861, at a time when Congress was not in session, adopted virtually the same line of reasoning as Hamilton had advanced. "This greatest of civil wars" said the Court "was not gradually developed * * * it * * * sprung forth suddenly from the parent brain, a Minerva in the full panoply of *war*. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact."[1223] This doctrine was sharply challenged by a powerful minority of the Court on the ground that while the President could unquestionably adopt such measures as the statutes permitted for the enforcement of the laws against insurgents, Congress alone could stamp an insurrection with the character of war and thereby authorize the legal consequences which ensue a state of war.[1224] Inasmuch as the Court finally conceded that the blockade had been retroactively sanctioned by Congress, that part of its opinion dealing with the power of the President, acting alone, was really *obiter*. But a similar opinion was voiced by Chief Justice Chase on behalf of a unanimous Court, after the war was over. In Freeborn *v.* The "Protector,"[1225] it became necessary to ascertain the exact dates on which the war began and ended in order to determine whether the statute of limitation had run against the asserted claim. To answer this question the Chief Justice said that "it is necessary, therefore, to refer to some public act of the political departments of the government to fix the dates; and, for obvious reasons, those of the executive department, which may be, and, in fact, was, at the commencement of hostilities, obliged to act during the recess of Congress, must be taken. The proclamation of intended blockade by the President may therefore be assumed as marking the first of these dates, and the proclamation that the war had closed, as marking the second."[1226]

The Power To Raise and Maintain Armed Forces

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PURPOSE OF SPECIFIC GRANTS

The clauses of the Constitution which give Congress authority "to raise and support armies, to provide and maintain a navy" and so forth, were not inserted for the purpose of endowing the National Government with power to do these things, but rather to designate the department of government which should exercise such powers. Moreover, they permit Congress to take measures essential to the national defense in time of peace as well as during a period of actual conflict. That these provisions grew out of the conviction that the Executive should be deprived of the "sole power of raising and regulating fleets and armies" which Blackstone attributed to the King under the British Constitution,[1227] was emphasized by Story in his Commentaries. He wrote: "Our notions, indeed, of the dangers of standing armies, in time of peace, are derived in a great measure from the principles and examples of our English ancestors. In England, the King possessed the power of raising armies in the time of peace according to his own good pleasure. And this prerogative was justly esteemed dangerous to the public liberties. Upon the revolution of 1688, Parliament wisely insisted upon a bill of rights, which should furnish an adequate security for the future. But how was this done? Not by prohibiting standing armies altogether in time of peace; but (as has been already seen) by prohibiting them *without the consent of Parliament*. This is the very proposition contained in the Constitution; for Congress can alone raise armies; and may put them down, whenever they choose."[1228]

THE TIME LIMIT ON APPROPRIATIONS FOR THE ARMY

Prompted by the fear of standing armies to which Story alluded, the framers inserted the limitation that "no appropriation of money to that use shall be for a longer term than two years." In 1904 the question arose whether this provision would be violated if the Government contracted to pay a royalty for use of a patent in constructing guns and other equipment where the payments were likely to continue for more than two years. Solicitor-General Hoyt ruled that such a contract would be lawful; that the appropriations limited by the Constitution "are those only which are to raise and support armies in the strict sense of the word 'support,' and that the inhibition of that clause does not extend to appropriations for the various means which an army may use in military operations, or which are deemed necessary for the common defense, * * *"[1229] Relying on this earlier opinion, Attorney General Clark ruled in 1948 that there was "no legal objection to a request to the Congress to appropriate funds to the Air Force for the procurement of aircraft and aeronautical equipment to remain available until expended."[1230]

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ESTABLISHMENT OF THE AIR FORCE

By the National Security Act of 1947[1231] there was established within the National Military Establishment "an executive department to be known as the Department of the Air Force" which was made coordinate with the Departments of the Army and the Navy. Shortly after the passage of this Act a Joint Resolution was offered in the House of Representatives, proposing an amendment to the Constitution whereby Congress would be authorized to "provide and maintain an Air Force and to make rules for the government and regulation thereof," and the President would be designated as Commander in Chief of the Air Force.[1232] Apparently in the belief that the broad sweep of the war power warranted the creation of the Air Force, without a constitutional amendment, Congress took no action on this proposal.

CONSCRIPTION

The constitutions adopted during the Revolutionary War by at least nine of the States sanctioned compulsory military service.[1233] Towards the end of the War of 1812, conscription of men for the army was proposed by James Monroe, then Secretary of War, but opposition developed and peace came before the bill could be enacted.[1234] In 1863 a compulsory draft law was adopted and put into operation without being challenged in the federal courts.[1235] Not so the Selective Service Act of 1917. This measure was attacked on the grounds that it tended to deprive the States of the right to "a well-regulated militia," that the only power of Congress to exact compulsory service was the power to provide for calling forth the militia for the three purposes specified in the Constitution, which did not comprehend service abroad, and finally that the compulsory draft imposed involuntary servitude in violation of the Thirteenth Amendment. The Supreme Court rejected all of these contentions. It held that the powers of the States with respect to the militia were exercised in subordination to the paramount power of the National Government to raise and support armies, and that the power of Congress to mobilize an army was distinct from its authority to provide for calling the militia and was not qualified or in any wise limited thereby.[1236] Before the United States entered the first World War, the Court had anticipated the objection that compulsory military service would violate the Thirteenth Amendment and had answered it in the following words: "It introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers."[1237] Accordingly, in the Selective Draft Law Cases[1238] it dismissed the objection under that amendment as a contention that was "refuted by its mere statement."[1239]

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CARE OF ARMED FORCES

Congress has a plenary and exclusive power to determine the age at which a soldier or seaman shall be received, the compensation he shall be allowed and the service to which he shall be assigned. This power may be exerted to supersede parents' control of minor sons who are needed for military service. Where the statute which required the consent of parents for enlistment of a minor son did not permit such consent to be qualified, their attempt to impose a condition that the son carry war risk insurance for the benefit of his mother was not binding on the Government.[1240] Since the possession of government insurance payable to the person of his choice, is calculated to enhance the morale of the serviceman, Congress may permit him to designate any beneficiary he desires, irrespective of State law, and may exempt the proceeds from the claims of creditors.[1241] To safeguard the health and welfare of the armed forces, Congress may authorize the suppression of houses of ill fame in the vicinity of the places where such forces are stationed.[1242]

TRIAL AND PUNISHMENT OF OFFENSES

Under its power to make rules for the Government and regulation of the land and naval forces, Congress may provide for the trial and punishment of military and naval offenses in the manner practiced by civilized nations. This authority is independent of the judicial power conferred by article III.[1243] "Cases arising in the land and naval forces" are expressly excepted from the provision of the Fifth Amendment requiring presentment by a grand jury for capital or infamous and by implication they are also excepted from Amendment VI,[1244] which relates to the trial of criminal offenses. Also the Fifth Amendment's provision against double-jeopardy apparently does not apply to military courts.[1245] A statute which provided that offenses not specifically mentioned therein should be punished "according to the laws and customs of such cases at sea" was held sufficient to give a naval court-martial jurisdiction to try a seaman of the United States Navy for the unspecified offense of attempted desertion.[1246] In *habeas corpus* proceedings a court can consider only whether the military tribunal had jurisdiction to act in the case under consideration.[1247] The acts of a court-martial, within the scope of its jurisdiction and duty, cannot be controlled or reviewed in the civil courts, by a writ of prohibition or otherwise.[1248]

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War Legislation

THE REVOLUTIONARY WAR LEGISLATION

The American Revolution affords many precedents for extensive and detailed regulation of the nation's economy in time of war. But since the resolves of Congress under the Articles of Confederation were in practical effect mere recommendations to the State legislatures, it was the action of the latter which made these policies effective. On November 22, 1777, for example, Congress recommended to the States that they take steps "to regulate and ascertain the price of labour, manufactures, [and] internal produce."[1249] A month later the same body further recommended "to the respective legislatures of the United States, forthwith to enact laws, appointing suitable persons to seize and take, for the use of the continental army of the said States, all woolen cloths, blankets, linens, shoes, stockings, hats, and other necessary articles of clothing, * * *"[1250] Responding to such appeals, or acting on their own initiative, the State legislatures enacted measure after measure which entrenched upon the normal life of the community very drastically. Laws were passed forbidding the distillation of whiskey and other spirits in order to conserve grain supplies;[1251] fixing prices of labor and commodities, sometimes in greatest detail;[1252] levying requisitions upon the inhabitants for supplies needed by the army;[1253] and so on. In one instance a statute authorized the erection of an arms manufactory for the United States;[1254] in another, Negro Slaves were impressed for labor on fortifications.[1255] The fact that all this legislation came from the State legislatures whereas the war power was attributed to the "United States in Congress assembled" served to obscure the fact that the former was really an outgrowth of the latter.

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CIVIL WAR LEGISLATION

The most pressing economic problem of the Civil War was that of finance. When Congress found itself unable to raise money to pay the soldiers in the field, it authorized the issuance of Treasury notes which, although not redeemable in specie, were made legal tender in payment of private debts. Upon its first consideration of this measure, the Supreme Court held it unconstitutional. It concluded that even if the circulation of such notes was facilitated by giving them the quality of legal tender, that result did not suffice to make the expedient an appropriate and plainly adapted means for the execution of the power to declare and carry on war.[1256] Three of the seven Justices then constituting the Court dissented from this decision,[1257] and it was reversed within a little more than a year, after two vacancies in the membership of the Court had been filled. One of the grounds relied upon by the new majority to sustain the statute was that the exigencies of war justified its enactment under the necessary and proper clause.[1258]

WORLD WAR I LEGISLATION

In meeting the strain which World War I put on our national resources of men and material, the economic activities of the people were directed or restricted by the Government on a scale previously unparalleled. The most sweeping measure of control was the Lever Food and Fuel Control Act,[1259] which authorized the President to regulate by license the importation, manufacture, storage, mining or distribution of necessaries; to requisition foods, feeds, and fuels; to take over and operate factories, packinghouses, pipelines, mines or other plants; to fix a minimum price for wheat; to limit, regulate or prohibit the use of food materials in the production of alcoholic beverages; and to fix the price of coal and coke and to regulate the production, sale and distribution thereof. Other statutes clothed him with power to determine priority in car service,[1260] to license trade with the enemy and his allies,[1261] and to take over and operate the rail and water transportation system,[1262] and the telephonic and telegraphic communication systems,[1263] of the country. [Pg 288]

WORLD WAR II LEGISLATION

Several of these World War I measures were still on the statute books when World War II broke out. Moreover, in the period of preparation preceding the latter, Congress had enacted the Priorities Act of May 31, 1941[1264] which gave the President power to allocate any material where necessary to facilitate the defense effort. By the Second War Powers Act,[1265] passed early in 1942, the authority to allocate materials was extended to facilities. These two acts furnished the statutory foundation for the extensive system of consumer rationing administered by the Office of Price Administration, as well as for the comprehensive control of industrial materials and output which was exercised by the War Production Board. Under the Emergency Price Control Act[1266] the Office of Price Administration regulated the price of almost all commodities, as well as the rentals for housing accommodations in scores of defense rental areas. The War Labor Disputes Act[1267] permitted the President to commandeer plants which were closed by strikes.

MOBILIZATION OF INDUSTRIAL RESOURCES

While the validity of several of the measures just reviewed was assailed on one constitutional ground or another, the general power of Congress to regulate their subject matter in time of war was not disputed. Not until the Government sought to recover excessive profits realized on war contracts did the Supreme Court have occasion to affirm the broad authority of the National Government to mobilize the industrial resources of the nation in time of war. Using the power of Congress to conscript men for the armed forces as a measure of its power to regulate industry, the Court sustained the legislation, saying: "The Renegotiation Act was developed as a major wartime policy of Congress comparable to that of the Selective Service Act. The authority of Congress to authorize each of them sprang from its war powers. * * * With the advent of * * * [global] warfare, mobilized property in the form of equipment and supplies became as essential as mobilized manpower. Mobilization of effort extended not only to the uniformed armed services but to the entire population. Both Acts were a form of mobilization. The language of the Constitution authorizing such measures is broad rather than restrictive. * * * [It] * * * places [Pg 289] emphasis upon the supporting as well as upon the raising of armies. The power of Congress as to both is inescapably express, not merely implied."[1268]

DELEGATION OF LEGISLATIVE POWER IN WARTIME

While insisting that, "in peace or in war it is essential that the Constitution be scrupulously obeyed, and particularly that the respective branches of the Government keep within the powers assigned to each,"[1269] the Supreme Court has recognized that in the conduct of a war delegations of power may be valid which would not be admissible in other circumstances. The cases in which this issue has been raised have been few in number. In one, the Selective Draft Law cases,[1270] the objection was dismissed without discussion. In a second, the price-fixing authority exercised by the Office of Price Administration during the second world war, was, on the issue of delegation of power, sustained by reference to peace time precedents.[1271] Where the war power has been the basis of decision, two different theories concerning its significance can be recognized. The first is that since the war power is an inherent power shared by the legislative and executive departments rather than an enumerated power granted to the former, Congress does not delegate *legislative* power when it authorizes the President to exercise the war power in a prescribed manner. Opposed to this is the view that the right of Congress to delegate power to the President is limited in this as in other cases but that where the validity of the delegation depends upon whether or not too great a latitude of discretion has been conferred upon the Executive, the existence of a state of war is a factor to be considered in determining whether the delegation in the particular case is necessary and hence permissible.

The idea that a delegation of discretion in the exercise of the war power stands on a different footing than delegation of authority to levy a tax is implicit in Justice Bradley's opinion in Hamilton *v.* Dillin.[1272] The plaintiffs in that case contended that the sum they were required to pay for the privileges of buying cotton in the South was a tax, which, since it was imposed by the Secretary of the Treasury, was invalid because the taxing power was not susceptible of

delegation to the Executive Department. To this argument the Court replied: "It is hardly necessary, under the view we have taken of the character of the regulations in question, * * *, to discuss the question of the constitutionality of the act of July 13th, 1861, regarded as authorizing such regulations. * * *, the power of the Government to impose such conditions upon commercial intercourse with an enemy in time of war * * * does not belong to the same category as the power to levy and collect taxes, duties, and excises. It belongs to the war powers of the Government * * *."[1273] [Pg 290]

The Mergence of Legislative and Executive in Wartime

Both theories receive countenance in different passages in the opinion of Chief Justice Stone in Hirabayashi *v.* United States.[1274] In disposing of the contention that the curfew imposed upon a citizen of Japanese descent involved an invalid delegation of legislative power, the Chief Justice said: "The question then is not one of Congressional power to delegate to the President the promulgation of the Executive Order, but whether, acting in cooperation, Congress and the Executive have constitutional authority to impose the curfew restriction here complained of. * * *, we conclude that it was within the constitutional power of Congress and the executive arm of the Government to prescribe this curfew order for the period under consideration and that its promulgation by the military commander involved no unlawful delegation of legislative power. * * * Where, as in the present case, the standard set up for the guidance of the military commander, and the action taken and the reasons for it, are in fact recorded in the military orders, so that Congress, the courts and the public are assured that the orders, in the judgment of the commander, conform to the standards approved by the President and Congress, there is no failure in the performance of the legislative function."[1275] He went on to say, however, that: "The essentials of [the legislative] * * * function are the determination by Congress of the legislative policy and its approval of a rule of conduct to carry that policy into execution. The very necessities which attend the conduct of military operations in time of war in this instance as in many others preclude Congress from holding committee meetings to determine whether there is danger, before it enacts legislation to combat the danger."[1276]

Doctrine of Lichter *v.* United States

A similar ambiguity is found in Lichter *v.* United States,[1277] but on the whole the opinion seems to espouse the second theory, as the following excerpts indicate: "*A constitutional power implies a power of delegation of authority under it sufficient to effect its purposes*.—This power is especially significant in connection with constitutional war powers under which the exercise of broad discretion as to methods to be employed may be essential to an effective use of its war powers by Congress. The degree to which Congress must specify its policies and standards in order that the administrative authority granted may not be an unconstitutional delegation of its own legislative power is not capable of precise definition.[1278] * * * Thus, while the constitutional structure and controls of our Government are our guides equally in war and in peace, they must be read with the realistic purposes of the entire instrument fully in mind. In 1942, in the early stages of total global warfare, the exercise of a war power such as the power 'To raise and support Armies, * * *' and 'To provide and maintain a Navy; * * *,' called for the production by us of war goods in unprecedented volume with the utmost speed, combined with flexibility of control over the product and with a high degree of initiative on the part of the producers. Faced with the need to exercise that power, the question was whether it was beyond the constitutional power of Congress to delegate to the high officials named therein the discretion contained in the Original Renegotiation Act of April 28, 1942, and the amendments of October 21, 1942. We believe that the administrative authority there granted was well within the constitutional war powers then being put to their predestined uses."[1279] [Pg 291]

WAR POWERS IN TIME OF PEACE

To some indeterminate extent the power to wage war embraces the power to prepare for it and the further power to deal with the problem of adjustment after hostilities have ceased. In his Commentaries, Justice Story wrote as follows with specific reference to the question of preparation for war: "'It is important also to consider, that the surest means of avoiding war is to be prepared for it in peace. * * * How could a readiness for war in time of peace be safely prohibited, unless we could in like manner prohibit the preparations and establishments of every hostile nation? The means of security can be only regulated by the means and the danger of attack. * * * It will be in vain to oppose constitutional barriers to the impulse of self-preservation.'"[1280] Authoritative judicial recognition of the power is found in Ashwander *v.* Tennessee Valley Authority,[1281] where, in sustaining the power of the Government to construct and operate Wilson Dam and the power plant connected with it, pursuant to the National Defense Act of June 3, 1916,[1282] the Court said: "While the District Court found that there is no intention to use the nitrate plants or the hydroelectric units installed at Wilson Dam for the production of war materials in time of peace, 'the maintenance of said properties in operating condition and the assurance of an abundant supply of electric energy in the event of war, constitute national defense assets.' This finding has ample support."[1283] [Pg 292]

Atomic Energy Act

By far the most significant example of legislation adopted at a time when no actual "shooting war" was in progress, with the object of providing for the national defense, is the Atomic Energy Act of 1946.[1284] That law establishes an Atomic Energy Commission of five members which is empowered to conduct through its own facilities, or by contracts with, or loans to private persons, research and developmental activity relating to nuclear processes, the theory and production of atomic energy and the utilization of fissionable and radioactive materials for medical, industrial and other purposes. The act further provides that the Commission shall be the exclusive owner of all facilities (with minor exceptions) for the production of fissionable materials; that all fissionable material produced shall become its property; that it shall allocate such materials for research and developmental activities, and shall license all transfer of source materials. The Commission is charged with the duty of producing atomic bombs, bomb parts, and other atomic military weapons at the direction of the President. Patents relating to fissionable materials must be filed with the Commission, the "just compensation" payable to the owners to be determined by a Patent Compensation Board designated by the Commission from among its employees.

POSTWAR LEGISLATION

The war power "is not limited to victories in the field. * * * It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress."[1285] Accordingly, the Supreme Court held in 1871 that it was within the competence of Congress to deduct from the period limited by statute for the bringing of an action the time during which plaintiff had been unable to prosecute his suit in consequence of the Civil War. This principle was given a much broader application after the first world war in Hamilton *v.* Kentucky Distilleries and Wine Co.,[1286] where the War Time Prohibition Act adopted after the signing of the Armistice was upheld as an appropriate measure for increasing war efficiency. It was conceded that the measure was valid when enacted, since the mere cessation of hostilities did not end the war or terminate the war powers of Congress. The plaintiff contended however that in October 1919, when the suit was brought, the war emergency had in [Pg 293] fact passed, and that the law was therefore obsolete. Inasmuch as the treaty of peace had not yet been concluded and other war activities had not been brought to a close, the Court said it was "unable to conclude" that the act had ceased to be valid. But in 1924 it held upon the facts that we judicially know that the rent control law for the District of Columbia, which had previously been upheld,[1287] had ceased to operate because the emergency which justified it had come to an end.[1288] A similar issue was present after World War II in Woods *v.* Miller,[1289] where the Supreme Court reversed a decision of a lower court to the effect that the authority of Congress to regulate rents by virtue of the war power ended with the Presidential proclamation terminating hostilities on December 31, 1946. This decision was coupled with a warning that: "We recognize the force of the argument that the effects of war under modern conditions may be felt in the economy for years and years, and that if the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and the Tenth Amendments as well. There are no such implications in today's decision."[1290] In 1948, a sharply divided Court further ruled that the power which Congress has conferred upon the President to deport enemy aliens in time of a declared war was not exhausted when the shooting war stopped. Speaking for the majority of five, Justice Frankfurter declared: "It is not for us to question a belief by the President that enemy aliens who were justifiably deemed fit subjects for internment during active hostilites [sic] do not lose their potency for mischief during the period of confusion and conflict which is characteristic of a state of war even when the guns are silent but the peace of Peace has not come."[1291]

Private Rights in Wartime

ENEMY COUNTRY

Although, broadly speaking, the constitutional provisions designed for the protection of individual rights are operative in war as well as in peace, the incidents of war repeatedly give rise to situations in which judicially enforceable constitutional restraints are inapplicable. In the first place persons in enemy territory are entirely beyond the reach of constitutional limitations. They are subject, in relation to the war powers of the National Government, to the laws of war as [Pg 294] interpreted and applied by Congress and by the President as Commander in Chief. To the question: "What is the law which governs an army invading an enemy's country?" the Court gave the following answer in Dow *v.* Johnson:[1292] "It is not the civil law of the invaded country; it is not the civil law of the conquering country: it is military law,—the law of war,—and its supremacy for the protection of the officers and soldiers of the army, when in service in the field in the enemy's country, is as essential to the efficiency of the army as the supremacy of the civil law at home, and, in time of peace, is essential to the preservation of liberty."[1293]

THEATRE OF MILITARY OPERATIONS

That substantially the same rule, resting on the same considerations, applies in the field of active military operations, was assumed by all members of the Court in Ex parte Milligan.[1294] There

the Court held that the trial by a military commission of a civilian charged with acts of disloyalty committed in a part of the country which was remote from the theatre of military operations, and in which the civil courts were open and functioning, was invalid under the Fifth and Sixth Amendments. Although unanimous in holding that the military tribunal lacked jurisdiction to try the case, the Court divided, five-to-four, as to the grounds of the decision. The point on which the Justices differed was which department of the Government had authority to say with finality what regions lie within the theatre of military operation. Claiming this as a function of the courts, the majority held that the theatre of war did not embrace an area in which the civil courts were open and functioning.[1295] The minority argued that this was a question to be determined by Congress.[1296] All rejected the argument of the government that the President's determination was conclusive in the absence of restraining legislation. A similar result was reached in Duncan *v.* Kahanamoku[1297] where, upon an examination of the circumstances existing in Hawaii after Pearl Harbor, a divided Court found that the authority which Congress had granted to the Territorial Governor to declare martial law "in case of rebellion or invasion, or imminent danger thereof," did not warrant the trial of civilians by military tribunals.

ENEMY PROPERTY

The position of enemy property was dealt with by Chief Justice Marshall in the early case of Brown *v.* United States.[1298] Here it was held that the mere declaration of war by Congress does not effect a confiscation of enemy property situated within the territorial jurisdiction of the [Pg 295] United States, but the right of Congress by further enactment to subject such property to confiscation was asserted in the most positive terms. Being an exercise of the war powers of the Government, such confiscation is not affected by the restrictions of the Fifth and Sixth Amendments. Since it has no relation to the personal guilt of the owner, it is immaterial whether the property belongs to an alien, a neutral, or even to a citizen of the United States. The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which, by depriving an enemy of property within the reach of his power, whether within his territory or without it, impairs his ability to resist the confiscating government, while at the same time it furnishes to that government means for carrying on the war. Any property which the enemy can use, either by actual appropriation, or by the exercise of control over the owner, no matter what his nationality, is a proper subject of confiscation. Congress may provide for immediate seizure of property which the President or his agent determines to be enemy property, leaving the question of enemy ownership to be settled later at the suit of a claimant. For these reasons the Confiscation Act of 1862,[1299] and the Trading with the Enemy Act of 1917 and amendments thereto, were held to be within the power of Congress to "make rules concerning captures on land and water."[1300]

PRIZES OF WAR

The power of Congress with respect to prizes is plenary; no one can have any interest in prizes captured except by permission of Congress.[1301] Nevertheless, since International Law is a part of our law, the Court will administer it so long as it has not been modified by treaty or by legislative or executive action. Thus, during the Civil War, the Court found that the Confiscation Act of 1861, and the Supplementary Act of 1863, which, in authorizing the condemnation of vessels, made provision for the protection of interests of loyal citizens, merely created a municipal forfeiture and did not override or displace the law of prize. It decided, therefore, that when a vessel was liable to condemnation under either law, the government was at liberty to proceed under the more stringent rules of International Law, with the result that the citizen would be deprived of the benefit of the protective provisions of the statute.[1302] Similarly, when Cuban ports were blockaded during the Spanish-American War, the Court held, over the vigorous dissent of three of its members, that the rule of International Law exempting unarmed fishing [Pg 296] vessels from capture was applicable in the absence of any treaty provision, or other public act of the Government in relation to the subject.[1303]

POLICE REGULATIONS; RENT CONTROL

In enforcing the requirement of due process of law in its modern expanded sense of "reasonable law" the Court has recognized that a war emergency may justify legislation which would otherwise be an unconstitutional invasion of private rights. Shortly after the first world war, it sustained, by a narrow margin, a rent control law for the District of Columbia, which not merely limited the rents which might be charged but which also gave the existing tenants the right to continue in occupancy of their dwellings at their own option, provided they paid rent and performed other stipulated conditions. The Court, while conceding that ordinarily such legislation would transcend constitutional limitations, declared that "a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation. * * * A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change."[1304] During World War II an apartment house owner who complained that the rentals allowed by the Office of Price Administration did not afford a "fair return" on the property was told by the Court that, "a nation which can demand the lives of its men and women in the waging of * * * war is under no constitutional necessity of providing a system of price control * * * which will assure each landlord a 'fair return' on his property."[1305] Moreover, such

rentals may be established without a prior hearing because "national security might not be able to afford the luxuries of litigation and the long delays which preliminary hearings traditionally have entailed. * * * Where Congress has provided for judicial review after the regulations or orders have been made effective it has done all that due process under the war emergency requires."[1306] The more specific clauses of the Bill of Rights yield less readily, however, to the impact of a war emergency. In United States *v.* Cohen Grocery Company,[1307] the Court held that a statute which penalized the making of "'any unjust or unreasonable rate or charge in handling * * * any necessaries,'" was void on the ground that it set up no "ascertainable standard of guilt" and so was "repugnant to the Fifth and Sixth Amendments * * * which require due process of law and that persons accused of crime shall be adequately informed of the nature and cause of the accusation."[1308]

PERSONAL LIBERTY IN WARTIME [Pg 297]

That the power of Congress to punish seditious utterances in time of war is limited by the First Amendment was assumed by the Supreme Court in the series of cases[1309] in which it affirmed convictions for violation of the Espionage Act of 1917.[1310] But in the famous opinion of Justice Holmes in Schenck *v.* United States,[1311] it held that: "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."[1312] A State also has power to make it unlawful to advocate that citizens of the State should not assist in prosecuting a war against public enemies of the United States.[1313] The most drastic restraint of personal liberty imposed during World War II was the detention and relocation of the Japanese residents of the Western States, including those who were native-born citizens of the United States. When various phases of this program were challenged, the Court held that in order to prevent espionage and sabotage, the freedom of movement of such persons could be restricted by a curfew order,[1314] even by a regulation excluding them from a defined area,[1315] but that a citizen of Japanese ancestry whose loyalty was concerned could not be detained against her will in a relocation camp.[1316]

ALIEN ENEMIES

The status of alien enemies was first considered in connection with the passage of the Alien Act of 1798,[1317] whereby the President was authorized to deport any alien or to license him to reside within the United States at any place to be designated by the President. Critics of the measure conceded its constitutionality so far as enemy aliens were concerned, because, as Madison wrote, "The Constitution having expressly delegated to Congress the power to declare war against any nation, and, of course, to treat it and all its members as enemies."[1318] The substance of this early law was reenacted during the first world war. Under it the President is authorized, in time of war, to prescribe "the manner and degree of the restraint to which [alien enemies] shall be subject and in what cases, and upon what security their residence shall be [Pg 298] permitted," or to provide for their removal from the United States.[1319] This measure was held valid in Ludecke *v.* Watkins.[1320]

EMINENT DOMAIN

An often-cited dictum uttered shortly after the Mexican War asserted the right of an owner to compensation for property destroyed to prevent its falling into the hands of the enemy, or for that taken for public use.[1321] In United States *v.* Russell,[1322] decided following the Civil War, a similar conclusion was based squarely on the Fifth Amendment, although the case did not necessarily involve the point. Finally, in United States *v.* Pacific Railroad,[1323] also a Civil War case, the Court held that the United States was not responsible for the injury or destruction of private property by military operations, but added that it did not have in mind claims for property of loyal citizens which was taken for the use of the national forces. "In such cases," the Court said, "it has been the practice of the government to make compensation for the property taken. * * *, although the seizure and appropriation of private property under such circumstances by the military authorities may not be within the terms of the constitutional clauses."[1324] Meantime, however, in 1874, a committee of the House of Representatives, in an elaborate report on war claims growing out of the Civil War, had voiced the opinion that the Fifth Amendment embodied the distinction between a taking of property in the course of military operations or other urgent military necessity, and other takings for war purposes, and required compensation of owners in the latter class of cases.[1325] In determining what constitutes just compensation for property requisitioned for war purposes during World War II, the Court has assumed that the Fifth Amendment is applicable to such takings.[1326]

Clause 15. *The Congress shall have Power* * * * To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions. [Pg 299]

Clause 16. *The Congress shall have Power* * * * 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.

The Militia Clauses

CALLING OUT THE MILITIA

The States as well as Congress may prescribe penalties for failure to obey the President's call of the militia. They also have a concurrent power to aid the National Government by calls under their own authority, and in emergencies may use the militia to put down armed insurrection.[1327] The Federal Government may call out the militia in case of civil war; its authority to suppress rebellion is found in the power to suppress insurrection and to carry on war.[1328] The act of February 28, 1795,[1329] which delegated to the President the power to call out the militia, was held constitutional.[1330] A militiaman who refused to obey such a call was not "employed in the service of the United States so as to be subject to the article of war," but was liable to be tried for disobedience of the act of 1795.[1331]

REGULATION OF THE MILITIA

The power of Congress over the militia "being unlimited, except in the two particulars of officering and training them, * * *, it may be exercised to any extent that may be deemed necessary by Congress. * * * The power of the State government to legislate on the same subjects, having existed prior to the formation of the Constitution, and not having been prohibited by that instrument, it remains with the States, subordinate nevertheless to the paramount law of the General Government, * * *"[1332] Under the National Defense Act of 1916, [1333] the militia, which hitherto had been an almost purely State institution, was brought under [Pg 300] the control of the National Government. The term "militia of the United States" was defined to comprehend "all able-bodied male citizens of the United States and all other able-bodied males who have * * * declared their intention to become citizens of the United States," between the ages of eighteen and forty-five. The act reorganized the National Guard, determined its size in proportion to the population of the several States, required that all enlistments be for "three years in service and three years in reserve," limited the appointment of officers to those who "shall have successfully passed such tests as to * * * physical, moral and professional fitness as the President shall prescribe," and authorized the President in certain emergencies to "draft into the military service of the United States to serve therein for the period of the war unless sooner discharged, any and all members of the National Guard and National Guard Reserve," who thereupon should "stand discharged from the militia."

> Clause 17. *Congress shall have power* * * * 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

The Seat of Government

The jurisdiction of the United States over the District of Columbia vested on the first Monday of December, 1800.[1334] By the act of February 27, 1801,[1335] the District was divided into two counties and in the following year the city of Washington was erected into a municipality.[1336] The present form of government dates from 1876; all legislative powers with respect to District affairs are retained by Congress, while an executive board of three commissioners vested with ordinance powers is appointed by the President.[1337] As a municipal corporation, the District has the legal capacity to sue and be sued.[1338] But the District Commissioners are merely administrative officers, having only the ministerial powers given them by statute; accordingly they were found to have no power to submit a claim against the District to arbitration.[1339]

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NATURE AND EXTENT OF RIGHTS CEDED TO UNITED STATES

In ceding the territory which became the District of Columbia, both Maryland and Virginia provided that the United States should not acquire any right of property in the soil except by transfer by the individual owner. This proviso was held not to prevent the Federal Government from exercising the power of eminent domain within the District.[1340] Under the agreement made between the original proprietors of the land on which the city of Washington was laid out, and the Commissioners appointed by the President to survey, define and locate the district for the seat of government, the United States became the owner in fee of the streets of the city although the trustees never carried out their agreement to convey them.[1341] Both the right of dominion and of property of navigable waters and of the soil under them in the District, which originally had been granted by Charles I, King of England to the Lord Proprietary of Maryland,

and to which Maryland succeeded upon the American Revolution, became vested in the United States by the cession from Maryland.[1342]

RETROCESSION OF ALEXANDRIA COUNTY

Originally the District of Columbia embraced the maximum area permitted by the Constitution. In 1846, however, Congress authorized a referendum on the question of retroceding Alexandria County to Virginia, and declared that jurisdiction should be relinquished to that State if a majority of the voters in the county voted in favor of the change. The proposal was approved, whereupon, without any further action by Congress, Virginia declared the county annexed and resumed full jurisdiction over it. Thirty years later, in a suit to recover taxes paid to the State, the Supreme Court called the retrocession "a violation of the Constitution" but held that since Congress had recognized the transfer as a settled fact, a resident of the county was estopped from challenging it.[1343]

CONTINUANCE OF STATE LAWS

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Under the act of July 16, 1790,[1344] which provided for the establishment of the seat of government, State laws were continued in operation until Congress created a government for the District. The Supreme Court intimated that this was "perhaps, only declaratory of a principle which would have been in full operation without such declaration."[1345] In 1801 Congress declared that the laws of Virginia and Maryland "as they now exist, shall be and continue in force" in the respective portions of the District ceded by those States.[1346] The only effect of the cession upon individuals was to terminate their State citizenship and the jurisdiction of the State governments over them;[1347] contract obligations were not affected,[1348] and liens on property for debt were continued.[1349]

STATUS OF THE DISTRICT TODAY

Chief Justice Marshall ruled in the early case of Hepburn *v.* Ellzey[1350] that the District of Columbia is not a State within the meaning of the diversity of citizenship clause of article III. This view was consistently adhered to for nearly a century and a half in the interpretation of later acts of Congress regulating the jurisdiction of federal courts.[1351] In 1940, however, Congress expressly authorized those courts to take jurisdiction of nonfederal controversies between residents of the District of Columbia and citizens of a State. By a five-to-four decision that statute was held constitutional, but the Justices who voted to sustain it were not in agreement as to the grounds of the decision.[1352] Three found it to be an appropriate exercise of the power of Congress to legislate for the District of Columbia without reference to article III.[1353] Six members of the Court rejected this theory, but two of the six joined in upholding the act on another ground which seven of their brethren considered untenable,—namely, that Hepburn *v.* Ellzey was erroneously decided and that the District of Columbia should be deemed to be a "State" within the meaning of article III, section 2.[1354]

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It is not disputed that the District is a part of "the United States," and that its residents are entitled to the privilege of trial by jury, whether in civil or criminal cases,[1355] and of presentment by a grand jury.[1356] Legislation which is restrictive of the rights of liberty and property in the District must find justification in facts adequate to support like legislation by a State in the exercise of its police power.[1357]

LEGISLATIVE POWER OVER DISTRICT OF COLUMBIA

Congress possesses over the District of Columbia the blended powers of a local and national legislature.[1358] Even when legislating for the District, Congress remains the legislature of the Union, with the result that it may give its enactments nation-wide operations so far as is "necessary and proper" in order to make them locally effective. As was pointed out in Cohens *v.* Virginia,[1359] if a felon escapes from the State in which the crime was committed, the government of such State cannot pursue him into another State and there apprehend him, "but must demand him from the executive power of that other State." On the other hand, a felon escaping from the District of Columbia or any other place subject to the exclusive power of Congress, may be apprehended by the National Government anywhere in the United States. "And the reason," declared Chief Justice Marshall, "is, that Congress is not a local legislature, but exercises this particular power, [of exclusive legislation], like all its other powers, in its high character, as the legislature of the Union."[1360]

TAXATION IN THE DISTRICT

Persons and property within the District of Columbia are subject to taxation by Congress under both the first and seventeenth clauses of this section. A general tax levied throughout the United States may be applied to the District of Columbia upon the same conditions as elsewhere;—e.g., if a direct tax, it must be levied in proportion to the census.[1361] But in laying taxes for District purposes only, "Congress, like any State legislature unrestricted by constitutional provisions, may

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its discretion wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property."[1362] It is no impediment to the exercise of either power that residents of the District lack the suffrage and have politically no voice in the expenditure of the money raised by taxation.[1363]

DELEGATION OF LEGISLATIVE POWER TO MUNICIPAL OFFICERS

Congress may delegate to municipal authorities legislative functions which are strictly local in character.[1364] It may confer upon them the power to improve or repair streets, to assess adjacent property therefor,[1365] and to regulate public markets.[1366] It may confirm assessments previously made by the District government without authority of law.[1367] But in Stoutenburgh *v.* Hennick,[1368] the Court held that Congress would not, and did not intend to, delegate to the District the power to impose a license tax on commercial agents who offered merchandise for sale by sample, since such a license amounted to a regulation of interstate commerce.

COURTS OF THE DISTRICT

In its capacity as a local legislature Congress may create courts for the District of Columbia and may confer upon them powers and duties which lie outside the judicial power vested in "constitutional" courts. On appeal from an order of the District Public Utilities Commission, a court for the District of Columbia may be empowered to modify valuations, rates and regulations established by the Commission and to make such orders as in its judgment the Commission should have made. But inasmuch as the issuance of such orders is a legislative as distinguished from a judicial function, the provision for an appeal from them to the Supreme Court was held unconstitutional.[1369]

Despite the fact that Congress, acting under this clause, imposed nonjudicial duties upon the Supreme Court and the Court of Appeals for the District of Columbia, those tribunals were held [Pg 305] to be constitutional courts, established under article III, with the result that the compensation of the judges thereof may not be diminished during their continuance in office.[1370] Since the courts established for the District are courts of the United States, their judgments stand upon the same footing, so far as concerns the obligations created by them, as domestic judgments of the States, wherever rendered and wherever sought to be enforced.[1371]

Authority Over Places Purchased

"PLACES"

This clause has been broadly construed to cover all structures necessary for carrying on the business of the National Government.[1372] It includes post offices,[1373] a hospital and a hotel located in a national park,[1374] and locks and dams for the improvement of navigation.[1375] But it does not cover lands acquired for forests, parks, ranges, wild life sanctuaries or flood control.[1376] Nevertheless the Supreme Court has held that a State may convey, and that Congress may accept, either exclusive or qualified jurisdiction over property acquired within the geographical limits of a State, for purposes other than those enumerated in Clause 17.[1377]

After exclusive jurisdiction over lands within a State has been ceded to the United States, Congress alone has the power to punish crimes committed within the ceded territory.[1378] Private property located thereon is not subject to taxation by the State,[1379] nor can State statutes enacted subsequent to the transfer have any operation therein.[1380] But the local laws in force at the date of cession which are protective of private rights continue in force until abrogated by Congress.[1381]

DURATION OF FEDERAL JURISDICTION

A State may qualify its cession of territory by a condition that jurisdiction shall be retained by the United States only so long as the place is used for specified purposes.[1382] Such a provision operates prospectively and does not except from the grant that portion of a described tract which [Pg 306] is then used as a railroad right of way.[1383] In 1892, the Court upheld the jurisdiction of the United States to try a person charged with murder on a military reservation, over the objection that the State had ceded jurisdiction only over such portions of the area as were used for military purposes, and that the particular place on which the murder was committed was used solely for farming. The Court held that the character and purpose of the occupation having been officially established by the political department of the government, it was not open to the Court to inquire into the actual uses to which any portion of the area was temporarily put.[1384] A few years later, however, it ruled that the lease to a city, for use as a market, of a portion of an area which had been ceded to the United States for a particular purpose, suspended the exclusive jurisdiction of the United States.[1385]

Recently the question arose whether the United States retains jurisdiction over a place which

was ceded to it unconditionally after it has abandoned the use of the property for governmental purposes and entered into a contract for the sale thereof to private persons. Minnesota asserted the right to tax the equitable interest of the purchaser in such land, and the Supreme Court upheld its right to do so. The majority assumed that "the Government's unrestricted transfer of property to nonfederal hands is a relinquishment of the exclusive legislative power."[1386] In separate concurring opinions Chief Justice Stone and Justice Frankfurter reserved judgment on the question of territorial jurisdiction.[1387]

RESERVATION OF JURISDICTION BY STATES

For more than a century the Supreme Court kept alive, by repeated dicta,[1388] the doubt expressed by Justice Story "whether Congress are by the terms of the Constitution, at liberty to purchase lands for forts, dockyards, etc., with the consent of a State legislature, where such consent is so qualified that it will not justify the 'exclusive legislation' of Congress there. It may well be doubted if such consent be not utterly void."[1389] But when the issue was squarely presented in 1937, the Court ruled that where the United States purchases property within a State with the consent of the latter, it is valid for the State to convey, and for the United States to accept, "concurrent jurisdiction" over such land, the State reserving to itself the right to execute process "and such other jurisdiction and authority over the same as is not inconsistent with the jurisdiction ceded to the United States."[1390] The holding logically renders the second half of Clause 17 superfluous. In a companion case, the Court ruled further that even if a general State statute purports to cede exclusive jurisdiction, such jurisdiction does not pass unless the United States accepts it.[1391]

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> Clause 18. *The Congress shall have Power* * * * 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.

The Coefficient or Elastic Clause

SCOPE OF INCIDENTAL POWERS

That this clause is an enlargement, not a constriction, of the powers expressly granted to Congress, that it enables the lawmakers to select any means reasonably adapted to effectuate those powers, was established by Marshall's classic opinion in McCulloch *v.* Maryland.[1392] "Let the end be legitimate," he wrote, "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."[1393] Moreover, this provision gives Congress a share in the responsibilities lodged in other departments, by virtue of its right to enact legislation necessary to carry into execution all powers vested in the National Government. Conversely, where necessary for the efficient execution of its own powers, Congress may delegate some measure of legislative power to other departments.[1394]

OPERATION OF COEFFICIENT CLAUSE

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Practically every power of the National Government has been expanded in some degree by the coefficient clause. Under its authority Congress has adopted measures requisite to discharge the treaty obligations of the nation;[1395] it has organized the federal judicial system and has enacted a large body of law defining and punishing crimes. Effective control of the national economy has been made possible by the authority to regulate the internal commerce of a State to the extent necessary to protect and promote interstate commerce.[1396] Likewise the right of Congress to utilize all known and appropriate means for collecting the revenue, including the distraint of property for Federal taxes,[1397] and its power to acquire property needed for the operation of the government by the exercise of the power of eminent domain,[1398] have greatly extended the range of national power. But the widest application of the necessary and proper clause has occurred in the field of monetary and fiscal controls. Inasmuch as the various specific powers granted by article I, section 8, do not add up to a general legislative power over such matters, the Court has relied heavily upon this clause in sustaining the comprehensive control which Congress has asserted over this subject.[1399]

DEFINITION AND PUNISHMENT OF CRIMES

Although the only crimes which Congress is expressly authorized to punish are piracies, felonies on the high seas, offenses against the law of nations, treason and counterfeiting of the securities and current coin of the United States, its power to create, define and punish crimes and offenses whenever necessary to effectuate the objects of the Federal Government is universally conceded.[1400] Illustrative of the offenses which have been punished under this power are the alteration of registered bonds;[1401] the bringing of counterfeit bonds into the country;[1402] conspiracy to injure prisoners in custody of a United States marshal;[1403] impersonation of a federal officer with intent to defraud;[1404] conspiracy to injure a citizen in the free exercise or enjoyment of any

right or privilege secured by the Constitution or laws of the United States;[1405] the receipt by government officials of contributions from government employees for political purposes;[1406] advocating, etc., the overthrow of the Government by force.[1407] Part I of Title 18 of the United States Code comprises more than 500 sections defining penal offenses against the United States.

CHARTERING OF BANKS

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As an appropriate means for executing "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 * * *" Congress may incorporate banks and kindred institutions.[1408] Moreover, it may confer upon them private powers which, standing alone, have no relation to the functions of the Federal Government, if those privileges are essential to the effective operation of such corporations.[1409] Where necessary to meet the competition of State banks, Congress may authorize national banks to perform fiduciary functions, even though, apart from the competitive situation, federal instrumentalities might not be permitted to engage in such business.[1410] The Court will not undertake to assess the relative importance of the public and private functions of a financial institution which Congress has seen fit to create. It sustained the act setting up the Federal Farm Loan Banks to provide funds for mortgage loans on agricultural land against the contention that the right of the Secretary of the Treasury, which he had not exercised, to use these banks as depositaries of public funds, was merely a pretext for chartering these banks for private purposes.[1411]

CURRENCY REGULATIONS

Reinforced by the necessary and proper clause, the powers "'to lay and collect taxes, to pay the debts and provide for the common defence and general welfare of the United States,' and 'to borrow money on the credit of the United States and to coin money and regulate the value thereof * * *'";[1412] have been held to give Congress virtually complete control over money and currency. A prohibitive tax on the notes of State banks;[1413] the issuance of treasury notes [Pg 310] impressed with the quality of legal tender in payment of private debts[1414] and the abrogation of clauses in private contracts which called for payment in gold coin,[1415] were sustained as appropriate measures for carrying into effect some or all of the foregoing powers.

POWER TO CHARTER CORPORATIONS

In addition to the creation of banks, Congress has been held to have authority to charter a railroad corporation,[1416] or a corporation to construct an interstate bridge,[1417] as instrumentalities for promoting commerce among the States, and to create corporations to manufacture aircraft[1418] or merchant vessels[1419] as incidental to the war power.

COURTS AND JUDICIAL PROCEEDINGS

Inasmuch as the Constitution "delineated only the great outlines of the judicial power * * *, leaving the details to Congress, * * * The distribution and appropriate exercise of the judicial power must * * * be made by laws passed by Congress, * * *"[1420] As a necessary and proper provision for the exercise of the jurisdiction conferred by article III, section 2 Congress may direct the removal from a State to a federal court of a criminal prosecution against a federal officer for acts done under color of federal law,[1421] and may authorize the removal before trial of civil cases arising under the laws of the United States.[1422] It may prescribe the effect to be given to judicial proceedings of the federal courts,[1423] and may make all laws necessary for carrying into execution the judgments of federal courts.[1424] When a territory is admitted as a State, Congress may designate the Court to which the records of the territorial courts shall be transferred, and may prescribe the mode for enforcement and review of judgments rendered by those courts.[1425] In the exercise of other powers conferred by the Constitution, apart from article III, Congress may create legislative courts and "clothe them with functions deemed essential or helpful in carrying those powers into execution."[1426]

SPECIAL ACTS CONCERNING CLAIMS

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This clause enables Congress to pass special laws to require other departments of the Government to prosecute or adjudicate particular claims, whether asserted by the Government itself or by private persons. In 1924,[1427] Congress adopted a Joint Resolution directing the President to cause suit to be instituted for the cancellation of certain oil leases alleged to have been obtained from the Government by fraud, and to prosecute such other actions and proceedings, civil and criminal, as were warranted by the facts. This resolution also authorized the appointment of special counsel to have charge of such litigation. Private acts providing for a review of an order for compensation under the Longshoreman's and Harbor Workers' Compensation Act,[1428] or conferring jurisdiction upon the Court of Claims to hear and determine certain claims of a contractor against the Government, in conformity with directions given by Congress, after that court had denied recovery on such claims, have been held

constitutional.[1429]

MARITIME LAW

Congress may implement the admiralty and maritime jurisdiction conferred upon the federal courts by revising and amending the maritime law which existed at the time the Constitution was adopted, but in so doing, it cannot go beyond the reach of that jurisdiction.[1430] This power cannot be delegated to the States; hence acts of Congress which purported to make State Workmen's Compensation laws applicable to maritime cases were held unconstitutional.[1431]

> SECTION 9. Clause 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.

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Powers Denied to Congress

GENERAL PURPOSE OF THE SECTION

This section of the Constitution (containing eight clauses restricting or prohibiting legislation affecting the importation of slaves, the suspension of the writ of *habeas corpus*, the enactment of bills of attainder or *ex post facto* laws, the levying of taxes on exports, the granting of preference to ports of one State over another, the granting of titles of nobility, etc.,) is devoted to restraints upon the power of Congress and of the National Government,[1432] and in no respect affects the States in the regulation of their domestic affairs.[1433]

The above clause, which sanctioned the importation of slaves by the States for twenty years after the adoption of the Constitution, when considered with the section requiring escaped slaves to be returned to their masters (art. IV, § 1, cl. 3), was held by Chief Justice Taney in Scott *v.* Sanford, [1434] to show conclusively that such persons and their descendants were not embraced within the term "citizen" as used in the Constitution. Today is interesting only as an historical curiosity.

> Clause 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.

HABEAS CORPUS

Purpose of the Writ

This section, which restricts only the Federal Government and not the States,[1435] is the only place in the Constitution where the writ of *habeas corpus* is mentioned. The framers took for granted that the courts of the United States would be given jurisdiction to issue this, the greatest of the safeguards of personal liberty embodied in the common law, and the Judiciary Act of 1789[1436] provided for the issuance of the writ according to "the usages and principles of law." At common law the purpose of such a proceeding was to obtain the liberation of persons who were imprisoned without just cause.[1437] While the Supreme Court conceded at an early date that the authority of the federal courts to entertain petitions for *habeas corpus* derived solely from acts of Congress,[1438] a narrow majority recently asserted the right to expand the scope of the writ by judicial interpretation and to sanction its use for a purpose unknown to the common law, i.e., to bring a prisoner into court to argue his own appeal. Speaking for the majority Justice Murphy declared that: "However, we do not conceive that a circuit court of appeals, in issuing a writ of *habeas corpus* under § 262 of the Judicial Code, is necessarily confined to the precise forms of that writ in vogue at the common law or in the English judicial system. Section 262 says that the writ must be agreeable to the usages and principles of 'law,' a term which is unlimited by the common law or the English law. And since 'law' is not a static concept, but expands and develops as new problems arise, we do not believe that the forms of the *habeas corpus* writ authorized by § 262 are only those recognized in this country in 1789, when the original Judiciary Act containing the substance of this section came into existence."[1439]

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Errors Which May Be Corrected on Habeas Corpus

The writ of *habeas corpus* provides a remedy for jurisdictional and constitutional errors at the trial without limit as to time.[1440] It may be used to correct errors of that order made by military as well as by civil courts.[1441] Under the common law and the Act 31 Car. II c. 2 (1679), where a person was detained pursuant to a conviction by a court having jurisdiction of the subject matter, *habeas corpus* was available only if a want of jurisdiction appeared on the face of the record of the Court which convicted him. A showing in a return to a writ that the prisoner was held under final process based upon a judgment of a court of competent jurisdiction closed the inquiry.[1442] Under the Judiciary Act of 1789[1443] the same rule obtained.[1444] But by the act of February 5,

1867,[1445] Congress extended the writ to all persons restrained of their liberty in violation of the Constitution or a law or treaty of the United States, and required the Court to ascertain the facts and to "dispose of the party as law and justice require." This gave the prisoner a right to have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention. The Supreme Court has said that there is "no doubt of the authority of the Congress to thus liberalize the common law procedure on *habeas corpus* * * *" .[1446]

Habeas Corpus Not a Substitute for Appeal

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Since the writ of *habeas corpus* is appellate in nature, Congress may confer jurisdiction to issue it upon the Supreme Court as well as upon the inferior federal courts.[1447] The proceeding may not, however, be used as a substitute for an appeal or writ of error.[1448] But if special circumstances make it advantageous to use this writ in aid of a just disposition of a cause pending on appeal it may be used for that purpose.[1449] Where facts dehors the record, which are not open to consideration upon appeal, are alleged to show a denial of constitutional rights, a judicial hearing must be granted to ascertain the truth or falsity of the allegations.[1450]

Issuance of the Writ

On application for a writ of *habeas corpus*, the Court may either issue the writ, and, on the return, dispose of the case, or it may waive the issuing of the writ and consider whether, upon the facts presented in the petition, the prisoner, if brought before it, could be discharged.[1451] The proceeding may not be used to secure an adjudication of a question which, if determined in the prisoner's favor, could not result in his immediate release.[1452] A discharge of a prisoner on *habeas corpus* is granted only in the exercise of a sound judicial discretion.[1453] While the strict doctrine of *res judicata* does not apply to this proceeding,[1454] the Court may, in its discretion, dismiss a petition for *habeas corpus* where the ground on which it is sought had been alleged in a prior application, but the evidence to support it had been unjustifiably withheld for use on a second attempt if the first failed.[1455] Where the Government did not deny the allegation in a prisoner's fourth petition for *habeas corpus*, but sought dismissal of the proceedings on the ground that the prisoner had abused the writ, the prisoner was held to be entitled to a hearing to determine whether the charge of abusive use of the writ was well founded.[1456]

Suspension of the Privilege

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A critical question under this section is who determines with finality whether the circumstances warrant suspension of the privilege of the writ. In England the writ may be suspended only by Act of Parliament,[1457] and in an early case Chief Justice Marshall asserted that the decision as to when public safety calls for this drastic action depends "on political considerations, on which the legislature is to decide."[1458] At the beginning of the Civil War Lincoln authorized the Commanding General of the Army of the United States to suspend the writ along any military line between Philadelphia and Washington.[1459] In Ex parte Merryman,[1460] Chief Justice Taney strongly denounced the President's action and reasserted the proposition that only Congress could suspend the writ. Attorney General Bates promptly challenged Taney's opinion. Noting that in Ex parte Bollman, Marshall did "not speak of suspending the *privilege* of the writ, but of suspending the *powers vested in the Court* by the act," he took the position that the constitutional provision was itself the equivalent of an Act of Parliament.[1461] Thereafter, by an express provision of the act of March 3, 1863, Congress declared, "That, during the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of *habeas corpus* in any case throughout the United States, or any part thereof."[1462] The validity of this statute was assumed in Ex parte Milligan,[1463] but a narrow majority of the Court declared that the suspension of the writ did not authorize the arrest of any one, but simply denied to one arrested the privilege of the writ in order to obtain his liberty.[1464]

Clause 3. No Bill of Attainder or ex post facto Law shall be passed.

BILLS OF ATTAINDER

Historically, the term "bills of attainder" was applied to "such special acts of the legislature as inflict capital punishment upon persons supposed to be guilty of high offences, such as treason and felony, without any conviction in the ordinary course of judicial proceedings." An act which inflicted a milder degree of punishment was called a bill of pains and penalties.[1465] Within the meaning of the Constitution, however, bills of attainder include bills of pains and penalties.[1466] As interpreted by the Supreme Court, this clause prohibits all legislative acts, "no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial * * *"[1467] Two acts of Congress—one which required attorneys practicing in the federal courts to take an oath that they had never given aid to persons engaged in hostility to the United States,[1468] and another which prohibited the payment of compensation to certain named government employees who have been

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charged with subversive activity,[1469]—have been held unconstitutional on the ground that they amounted to bills of attainder.

EX POST FACTO LAWS

Definition

At the time the Constitution was adopted, many persons understood the terms *ex post facto* laws, to "embrace all retrospective laws, or laws governing or controlling past transactions, whether * * * of a civil or a criminal nature."[1470] But in the early case of Calder *v.* Bull,[1471] the Supreme Court decided that the phrase, as used in the Constitution, applies only to penal and criminal statutes. But although it is inapplicable to retroactive legislation of any other kind,[1472] the constitutional prohibition may not be evaded by giving a civil form to a measure which is essentially criminal.[1473] Every law which makes criminal an act which was innocent when done, or which inflicts a greater punishment than the law annexed to the crime when committed, is an *ex post facto* law within the prohibition of the Constitution.[1474] A prosecution under a temporary statute which was extended before the date originally set for its expiration does not offend this provision even though it is instituted subsequent to the extension of the statute's duration for a violation committed prior thereto.[1475] Since this provision has no application to crimes committed outside the jurisdiction of the United States against the laws of a foreign country, it is immaterial in extradition proceedings whether the foreign law is *ex post facto* or not.[1476]

What Constitutes Punishment

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An act of Congress which prescribed as a qualification for practice before the federal courts an oath that the attorney had not participated in the Rebellion was found unconstitutional since it operated as a punishment for past acts.[1477] But a statute which denied to polygamists the right to vote in a territorial election, was upheld even as applied to a person who had not practiced polygamy since the act was passed, because the law did not operate as an additional penalty for the offense of polygamy but merely defined it as a disqualification of a voter.[1478] A deportation law authorizing the Secretary of Labor to expel aliens for criminal acts committed before its passage is not *ex post facto* since deportation is not a punishment.[1479] Likewise an act permitting the cancellation of naturalization certificates obtained by fraud prior to the passage of the law was held not to impose a punishment but simply to deprive the alien of his ill-gotten privileges.[1480]

Change in Place or Mode of Trial

A change of the place of trial of an alleged offense after its commission, is not an *ex post facto* law. If no place of trial was provided when the offense was committed, Congress may designate the place of trial thereafter.[1481] A law which alters the rule of evidence to permit a person to be convicted upon less or different evidence than was required when the offense was committed is invalid,[1482] but a statute which simply enlarges the class of persons who may be competent to testify in criminal cases is not *ex post facto* as applied to a prosecution for a crime committed prior to its passage.[1483]

> Clause 4. No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

DIRECT TAXES

The Hylton Case

The crucial problem under this section is to distinguish "direct" from other taxes. In its opinion in Pollock *v.* Farmers' Loan and Trust Co., we find the Court declaring: "It is apparent * * * that the [Pg 318] distinction between direct and indirect taxation was well understood by the framers of the Constitution and those who adopted it."[1484] Against this confident dictum may be set the following brief excerpt from Madison's Notes on the Convention: "Mr. King asked what was the precise meaning of *direct* taxation? No one answered."[1485] The first case to come before the Court on this issue was Hylton *v.* United States,[1486] which was decided early in 1796. Congress had levied, according to the rule of uniformity, a specific tax upon all carriages, for the conveyance of persons, which shall be kept by, or for any person, for his own use, or to be let out for hire, or for the conveying of passengers. In a fictitious statement of facts, it was stipulated that the carriages involved in the case were kept exclusively for the personal use of the owner and not for hire. The principal argument for the constitutionality of the measure was made by Hamilton, who treated it as an "excise tax,"[1487] while Madison both on the floors of Congress and in correspondence attacked it as "direct" and so void, inasmuch as it was levied without apportionment.[1488] The Court, taking the position that the direct tax clause constituted in practical operation an exception to the general taxing powers of Congress, held that no tax ought

to be classified as "direct" which could not be conveniently apportioned, and on this basis sustained the tax on carriages as one on their "use" and therefore an "excise." Moreover, each of the judges advanced the opinion that the direct tax clause should be restricted to capitation taxes and taxes on land, or that at most, it might cover a general tax on the aggregate or mass of things which generally pervade all the States, especially if an assessment should intervene; while Justice Paterson, who had been a member of the Federal Convention, testified to his recollection that the principal purpose of the provision had been to allay the fear of the Southern States lest their Negroes and lands should be subjected to a specific tax.[1489]

From the Hylton to the Pollock Case

The result of the Hylton case was not challenged until after the Civil War. A number of the taxes imposed to meet the demands of that war were assailed during the postwar period as direct taxes, but without result. The Court sustained successively as "excises" or "duties," a tax on an [Pg 319] insurance company's receipts for premiums and assessments;[1490] a tax on the circulating notes of State banks,[1491] an inheritance tax on real estate,[1492] and finally a general tax on incomes.[1493] In the last case, the Court took pains to state that it regarded the term "direct taxes" as having acquired a definite and fixed meaning-to-wit, capitation taxes, and taxes on hand.[1494] Then, almost one hundred years after the Hylton case, the famous case of Pollock *v.* Farmers' Loan and Trust Company[1495] arose under the Income Tax Act of 1894.[1496] Undertaking to correct "a century of error" the Court held, by a vote of five-to-four, that a tax on income from property was a direct tax within the meaning of the Constitution and hence void because not apportioned according to the census.

Restriction of the Pollock Decision

The Pollock decision encouraged taxpayers to challenge the right of Congress to levy by the rule of uniformity numerous taxes which had always been reckoned to be excises. But the Court evinced a strong reluctance to extend the doctrine to such exactions. Purporting to distinguish taxes levied "because of ownership" or "upon property as such" from those laid upon "privileges,"[1497] it sustained as "excises" a tax on sales on business exchanges;[1498] a succession tax which was construed to fall on the recipients of the property transmitted, rather than on the estate of the decedent,[1499] and a tax on manufactured tobacco in the hands of a dealer, after an excise tax had been paid by the manufacturer.[1500] Again, in Thomas *v.* United States,[1501] the validity of a stamp tax on sales of stock certificates was sustained on the basis of a definition of "duties, imposts and excises." These terms, according to the Chief Justice, "were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like."[1502] On the same day it ruled, in Spreckels Sugar Refining Co. *v.* McClain,[1503] that an exaction denominated a special excise tax imposed on the business of refining sugar and measured by the gross receipts thereof, was in truth an excise and hence properly levied by the rule of uniformity. The lesson of Flint *v.* Stone Tracy Co.[1504] is the same. Here what was in form an income tax was sustained as a tax on the privilege of doing business as a corporation, the value of the privilege being measured by the income, including income from investments. Similarly, in Stanton *v.* Baltic Mining Co.[1505] a tax on the annual production of mines was held to be "independently of the effect of the operation of the Sixteenth Amendment * * * not a tax [Pg 320] upon property as such because of its ownership, but a true excise levied on the results of the business of carrying on mining operations."[1506]

A convincing demonstration of the extent to which the Pollock decision had been whittled down by the time the Sixteenth Amendment was adopted is found in Billings *v.* United States.[1507] In challenging an annual tax assessed for the year 1909 on the use of foreign built yachts—a levy not distinguishable in substance from the carriage tax involved in the Hylton case as construed by the Supreme Court-counsel did not even suggest that the tax should be classed as a direct tax. Instead, he based his argument that the exaction constituted a taking of property without due process of law upon the premise that it was an excise, and the Supreme Court disposed of the case upon the same assumption.

In 1921 the Court cast aside the distinction drawn in Knowlton *v.* Moore between the right to transmit property on the one hand and the privilege of receiving it on the other, and sustained an estate tax as an excise. "Upon this point" wrote Justice Holmes for a unanimous court, "a page of history is worth a volume of logic."[1508] This proposition being established, the Court has had no difficulty in deciding that the inclusion in the computation of the estate tax of property held as joint tenants,[1509] or as tenants by the entirety,[1510] or the entire value of community property owned by husband and wife,[1511] or the proceeds of insurance upon the life of the decedent,[1512] did not amount to direct taxation of such property. Similarly it upheld a graduated tax on gifts as an excise, saying that it was "a tax laid only upon the exercise of a single one of those powers incident to ownership, the power to give the property owned to another."[1513] In vain did Justice Sutherland, speaking for himself and two associates, urge that "the right to give away one's property is as fundamental as the right to sell it or, indeed, to possess it."[1514]

The power of Congress to levy direct taxes is not confined to the States which are represented in that body. Such a tax may be levied in proportion to population in the District of Columbia.[1515] A penalty imposed for nonpayment of a direct tax is not a part of the tax itself and hence is not subject to the rule of apportionment. Accordingly, the Supreme Court sustained the penalty of fifty percent which Congress exacted for default in the payment of the direct tax on land in the aggregate amount of twenty million dollars which was levied and apportioned among the States during the Civil War.[1516]

> Clause 5. No Tax or Duty shall be laid on Articles exported from any State.

TAXES ON EXPORTS

This prohibition applies only to the imposition of duties on goods by reason of exportation.[1517] The word "export" signifies goods exported to a foreign country, not to an unincorporated territory of the United States.[1518] A general tax laid on all property alike, including that intended for export, is not within the prohibition, if it is not levied on goods in course of exportation nor because of their intended exportation.[1519] Where the sale to a commission merchant for a foreign consignee was consummated by delivery of the goods to an exporting carrier, the sale was held to be a step in the exportation and hence exempt from a general tax on sales of such commodity.[1520] The giving of a bond for exportation of distilled liquor is not the commencement of exportation so as to exempt from an excise tax spirits which were not exported pursuant to such bond.[1521] A tax on the income of a corporation derived from its export trade is not a tax on "articles exported" within the meaning of the Constitution.[1522]

Stamp Taxes [Pg 322]

A stamp tax imposed on foreign bills of lading,[1523] charter parties,[1524] or marine insurance policies,[1525] is in effect a tax or duty upon exports, and so void; but an act requiring the stamping of all packages of tobacco intended for export in order to prevent fraud was held not to be forbidden as a tax on exports.[1526]

> Clause 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.

THE "NO PREFERENCE" CLAUSE

The limitations imposed by this section were designed to prevent preferences as between ports on account of their location in different States. They do not forbid such discriminations as between individual ports. Acting under the commerce clause, Congress may do many things which benefit particular ports and which incidentally result to the disadvantage of other ports in the same or neighboring States. It may establish ports of entry, erect and operate lighthouses, improve rivers and harbors, and provide structures for the convenient and economical handling of traffic.[1527] A rate order of the Interstate Commerce Commission which allowed an additional charge to be made for ferrying traffic across the Mississippi to cities on the east bank of the river was sustained over the objection that it gave an unconstitutional preference to ports in Texas.[1528] Although there were a few early intimations that this clause was applicable to the States as well as to Congress,[1529] the Supreme Court declared emphatically in 1886 that State legislation was unaffected by it.[1530] After more than a century the Court confirmed, over the objection that this clause was offended, the power which the First Congress had exercised[1531] in sanctioning the continued supervision and regulation of pilots by the States.[1532] Alaska is not deemed to be a State within the meaning of this clause.[1533]

> Clause 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. [Pg 323]

APPROPRIATIONS

This clause is a limitation upon the power of the executive department and does not restrict Congress in appropriating moneys in the Treasury.[1534] That body may recognize and pay a claim of an equitable, moral or honorary nature. Where it directs a specific sum to be paid to a certain person, neither the Secretary of the Treasury nor any court has discretion to determine whether the person is entitled to receive it.[1535] In making appropriations to pay claims arising out of the Civil War, the Court held that it was lawful to provide that certain persons, i.e., those who had aided the rebellion, should not be paid out of the funds made available by the general appropriation, but that such persons should seek relief from Congress.[1536] The Court has also

recognized that Congress has a wide discretion as to the extent to which it shall prescribe details of expenditures for which it appropriates funds and has approved the frequent practice of making general appropriations of large amounts to be allotted and expended as directed by designated government agencies. Citing as an example the act of June 17, 1902[1537] where all moneys received from the sale and disposal of public lands in a large number of States and territories were set aside as a special fund to be expended under the direction of the Secretary of the Interior upon such projects as he determined to be practicable and advisable for the reclamation of arid and semi-arid lands within those States and territories, the Court declared: "The constitutionality of this delegation of authority has never been seriously questioned."[1538]

PAYMENT OF CLAIMS [Pg 324]

No officer of the Federal Government is authorized to pay a debt due from the United States, whether reduced to judgment or not, without an appropriation for that purpose.[1539] After the Civil War, a number of controversies arose out of attempts by Congress to restrict the payment of the claims of persons who had aided the Rebellion, but had thereafter received a pardon from the President. The Supreme Court held that Congress could not prescribe the evidentiary effect of a pardon in a proceeding in the Court of Claims for property confiscated during the Civil War,[1540] but that where the confiscated property had been sold and the proceeds paid into the Treasury, a pardon did not of its own force authorize the restoration of such proceeds.[1541] It was within the competence of Congress to declare that the amounts due to persons thus pardoned should not be paid out of the Treasury and that no general appropriation should extend to their claims.[1542]

> Clause 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.

In 1871 the Attorney General of the United States ruled that: "A minister of the United States abroad is not prohibited by the Constitution from rendering a friendly service to a foreign power, even that of negotiating a treaty for it, provided he does not become an officer of that power, but the acceptance of a formal commission, as minister plenipotentiary, creates an official relation between the individual thus commissioned and the government which in this way accredits him as its representative, which is prohibited by this clause of the Constitution."[1543]

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> Section 10. 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.

Powers Denied to the States

TREATIES, ALLIANCES OR CONFEDERATIONS

At the time of the Civil War this clause was one of the provisions upon which the Court relied in holding that the Confederation formed by the seceding States could not be recognized as having any legal existence.[1544] Today, its practical significance lies in the limitations which it implies upon the power of the States to deal with matters having a bearing upon international relations. In the early case of Holmes *v.* Jennison,[1545] Chief Justice Taney invoked it as a reason for holding that a State had no power to deliver up a fugitive from justice to a foreign State. Recently the kindred idea that the responsibility for the conduct of foreign relations rests exclusively with the Federal Government prompted the Court to hold that, since the oil under the three mile marginal belt along the California coast might well become the subject of international dispute and since the ocean, including this three mile belt, is of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world, the Federal Government has paramount rights in and power over that belt, including full dominion over the resources of the soil under the water area.[1546] In Skiriotes *v.* Florida,[1547] the Court, on the other hand, ruled that this clause did not disable Florida from regulating the manner in which its own citizens may engage in sponge fishing outside its territorial waters. Speaking for a unanimous Court, Chief Justice Hughes declared: "When its action does not conflict with federal legislation, the sovereign authority of the State over the conduct of its citizens upon the high seas is analogous to the sovereign authority of the United States over its citizens in like circumstances."[1548]

BILLS OF CREDIT [Pg 326]

Within the sense of the Constitution, bills of credit signify a paper medium of exchange, intended to circulate between individuals; and between the Government and individuals, for the ordinary purposes of society. It is immaterial whether the quality of legal tender is imparted to such paper. Interest bearing certificates, in denominations not exceeding ten dollars, which were issued by loan offices established by the State of Missouri, and made receivable in payment of

taxes or other moneys due to the State, and in payment of the fees and salaries of State officers, were held to be bills of credit whose issuance was banned by this section.[1549] The States are not forbidden, however, to issue coupons receivable for taxes,[1550] nor to execute instruments binding themselves to pay money at a future day for services rendered or money borrowed.[1551] Bills issued by State banks are not bills of credit;[1552] it is immaterial that the State is the sole stockholder of the bank,[1553] that the officers of the bank were elected by the State legislature,[1554] or that the capital of the bank was raised by the sale of State bonds.[1555]

LEGAL TENDER

Relying on this clause, which applies only to the States and not to the Federal Government,[1556] the Supreme Court has held that where the marshal of a State court received State bank notes in payment and discharge of an execution, the creditor was entitled to demand payment in gold or silver.[1557] Since, however, there is nothing in the Constitution which prohibits a bank depositor from consenting when he draws a check, that payment may be made by draft, a State law which provided that checks drawn on local banks should, at the option of the bank, be payable in exchange drafts was held valid.[1558]

BILLS OF ATTAINDER

Statutes passed after the Civil War with the intent and result of excluding persons who had aided the Confederacy from following certain callings, by the device of requiring them to take an oath that they had never given such aid, were held invalid as being bills of attainder, as well as *ex post facto* laws.[1559] [Pg 327]

EX POST FACTO LAWS

Scope of Provision

This clause, like the cognate restriction imposed on the Federal Government by section 9, relates only to penal and criminal legislation and not to civil laws which affect private rights adversely.[1560] It is directed only against legislative action and does not touch erroneous or inconsistent decisions by the courts.[1561] Even though a law is *ex post facto* and invalid as to crimes committed prior to its enactment, it is nonetheless valid as to subsequent offenses.[1562] If it mitigates the rigor of the law in force at the time the crime was committed,[1563] or if it merely penalizes the continuance of conduct which was lawfully begun before its passage, the statute is not *ex post facto*. Thus measures penalizing the failure of a railroad to cut drains through existing embankments,[1564] or making illegal the continued possession of intoxicating liquors which were lawfully acquired,[1565] have been held valid.

Denial of Future Privileges to Past Offenders

The right to practice a profession may be denied to one who was convicted of an offense before the statute was enacted if the offense may reasonably be regarded as a continuing disqualification for the profession. Without offending the Constitution, a statute making it a misdemeanor to practice medicine after conviction of a felony may be enforced against a person so convicted before the act was passed.[1566] But the test oath prescribed after the Civil War, whereby office holders, teachers, or preachers were required to swear that they had not participated in the Rebellion, were held invalid on the ground that it had no reasonable relation to fitness to perform official or professional duties, but rather was a punishment for past offenses.[1567] A similar oath required of suitors in the courts also was held void.[1568]

Changes in Punishment [Pg 328]

Statutes which changed an indeterminate sentence law to require a judge to impose the maximum sentence, whereas formerly he could impose a sentence between the minimum and maximum;[1569] abolished a rule which prevented a subsequent conviction of first-degree murder after a jury had found the accused guilty in the second-degree by a verdict which had been set aside;[1570] required criminals sentenced to death to be kept thereafter in solitary confinement,[1571] or allowed a warden to fix, within limits of one week, and keep secret the time of execution,[1572] were held to be *ex post facto* as applied to offenses committed prior to their enactment. But laws providing heavier penalties for new crimes thereafter committed by habitual criminals;[1573] changing the punishment from hanging to electrocution, fixing the place therefor in the penitentiary, and permitting the presence of a greater number of invited witnesses;[1574] or providing for close confinement of six to nine months in the penitentiary, in lieu of three to six months in jail prior to execution, and substituting the warden for the sheriff as hangman, have been sustained.[1575]

Changes in Procedure

An accused person does not have a right to be tried in all respects in accordance with the law in force when the crime charged was committed.[1576] The mode of procedure may be changed so long as the substantial rights of the accused are not curtailed.[1577] Laws shifting the place of trial from one county to another,[1578] increasing the number of appellate judges and dividing the appellate court into divisions,[1579] granting a right of appeal to the State,[1580] changing the method of selecting and summoning jurors,[1581] making separate trials for persons jointly indicted a matter of discretion for the trial court rather than a matter of right,[1582] and allowing a comparison of handwriting experts[1583] have been sustained over the objection that they were *ex post facto*. The contrary conclusion was reached with respect to the application to felonies committed before a Territory was admitted to the Union, of the provision in the State constitution which permitted the trial of criminal cases by a jury of eight persons, instead of the common law jury of twelve which was guaranteed by the Sixth Amendment during the period of territorial government.[1584]

OBLIGATION OF CONTRACTS

[Pg 329]

Definition of Terms

"Law."—The term comprises statutes, constitutional provisions,[1585] municipal ordinances,[1586] and administrative regulations having the force and operation of statutes.[1587] How is it as to judicial decisions? Not only does the abstract principle of the separation of powers forbid the idea that the courts "make" law, but the word "pass" in the above clause seems to confine it to the formal and acknowledged methods of exercise of the law-making function. Accordingly, the Court has frequently said that the clause does not cover judicial decisions, however erroneous, or whatever their effect on existing contract rights.[1588] Nevertheless, there are important exceptions to this rule which are hereinafter set forth.

Status of Judicial Decisions.—Also, while the highest State court usually has final authority in determining the construction as well as the validity of contracts entered into under the laws of the State, and the national courts will be bound by their decision of such matters, nevertheless, for reasons which are fairly obvious, this rule does not hold when the contract is one whose obligation is alleged to have been impaired by State law.[1589] Otherwise, the challenged State [Pg 330] authority could be vindicated through the simple device of a modification or outright nullification by the State court of the contract rights in issue. Likewise, the highest State court usually has final authority in construing State statutes and determining their validity in relation to the State constitution. But this rule too has had to bend to some extent to the Supreme Court's interpretation of the obligation of contracts clause.[1590]

Suppose the following situation: (1) a municipality, acting under authority conferred by a State statute, has issued bonds in aid of a railway company; (2) the validity of this statute has been sustained by the highest State court; (3) later the State legislature passes an act to repeal certain taxes to meet the bonds; (4) it is sustained in doing so by a decision of the highest State court holding that the statute authorizing the bonds was unconstitutional *ab initio*. In such a case the Supreme Court would take an appeal from the State court and would reverse the latter's decision of unconstitutionally because of its effect in rendering operative the act to repeal the tax.[1591]

Suppose further, however, that the State court has reversed itself on the question of the constitutionality of the bonds in a suit by a creditor for payment without there having been an act of repeal. In this situation, as the cases stand today, the Supreme Court will still afford relief if the case is one between citizens of different States, which reaches it via a lower federal court.[1592] This is because in cases of this nature the Court formerly felt free to determine questions of fundamental justice for itself. Indeed, in such a case, the Court has apparently in the past regarded itself as free to pass upon the constitutionality of the State law authorizing the bonds even though there has been no prior decision by the highest State court sustaining them, the idea being that contracts entered into simply on the faith of the *presumed* constitutionality of a State [Pg 331] statute are entitled to this protection.[1593]

In other words, in cases of which it has jurisdiction because of diversity of citizenship, the Court has held that the obligation of contracts is capable of impairment by subsequent judicial decisions no less than by subsequent statutes and that it is able to prevent such impairment. In cases, on the other hand, of which it obtains jurisdiction only on the constitutional ground, and by appeal from a State court, it has always adhered in terms to the doctrine that the word "laws" as used in article I, section 10, does not comprehend judicial decisions. Yet even in these cases, it will intervene to protect contracts entered into on the faith of existing decisions from an impairment which is the direct result of a reversal of such decisions, but there must be in the offing, as it were, a statute of some kind—one possibly many years older than the contract rights involved—on which to pin its decision.[1594]

In 1922 Congress, through an amendment to the Judicial Code, endeavored to extend the reviewing power of the Supreme Court to suits involving "'* * * the validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest court of a State applicable to such contract would be repugnant to the Constitution of the United States * * *'" This appeared to be an invitation to the Court to say frankly that the obligation of a

contract can be impaired as well by a subsequent decision as by a subsequent statute. The Court, however, declined the invitation in an opinion by Chief Justice Taft which reviewed many of the cases covered in the preceding paragraphs. Dealing with the Gelpcke and adherent decisions, Chief Justice Taft said: "These cases were not writs of error to the Supreme Court of a State. They were appeals or writs of error to federal courts where recovery was sought upon municipal or county bonds or some other form of contracts, the validity of which had been sustained by decisions of the Supreme Court of a State prior to their execution, and had been denied by the same court after their issue or making. In such cases the federal courts exercising jurisdiction between citizens of different States held themselves free to decide what the State law was, and to enforce it as laid down by the State Supreme Court before the contracts were made rather than [Pg 332] in later decisions. They did not base this conclusion on Article I, § 10, of the Federal Constitution, but on the State law as they determined it, which, in diverse citizenship cases, under the third Article of the Federal Constitution they were empowered to do. Burgess *v.* Seligman, 107 U.S. 20 (1883)."[1595] While doubtless this was an available explanation in 1924, the decision in 1938 in Erie Railroad Co. *v.* Tompkins, 304 U.S. 64, so cuts down the power of the federal courts to decide diversity of citizenship cases according to their own notions of "general principles of common law" as to raise the question whether the Court will not be required eventually to put Gelpcke and its companions and descendants squarely on the obligation of contracts clause, or else abandon them.

"Obligation."—A contract is analyzable into two elements: the *agreement*, which comes from the parties, and the *obligation* which comes from the law and makes the agreement binding on the parties. The concept of obligation is an importation from the Civil Law and its appearance in the contracts clause is supposed to have been due to James Wilson, a graduate of Scottish universities and a Civilian. Actually the term as used in the contracts clause has been rendered more or less superfluous by the doctrine that the law in force when a contract is made enters into and comprises a part of the contract itself.[1596] Hence the Court sometimes recognizes the term in its decisions applying the clause, sometimes ignores it. In Sturges *v.* Crowninshield,[1597] decided in 1819, Marshall defines "obligation of contract" as "the law which binds the parties to perform their agreement"; but a little later the same year he sets forth the points presented for consideration in Trustees of Dartmouth College *v.* Woodward[1598] to be: "1. Is this contract protected by the Constitution of the United States? 2. Is it impaired by the acts under which the defendant holds?"[1599] The word "obligation" undoubtedly does carry the implication that the Constitution was intended to protect only *executory* contracts—i.e., contracts still awaiting performance; but as is indicated in a moment, this implication was early rejected for a certain class of contracts, with immensely important result for the clause.

"Impair."—"The obligations of a contract," says Chief Justice Hughes for the Court in Home Building and Loan Association *v.* Blaisdell,[1600] "are impaired by a law which renders them invalid, or releases or extinguishes them * * * and impairment, * * *, has been predicated of laws which without destroying contracts derogate from substantial contractual rights."[1601] But he [Pg 333] straight-away adds: "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while,—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of State power has had progressive recognition in the decisions of this Court."[1602] In short, the law from which the obligation stems must be understood to include Constitutional Law and, moreover, a "progressive" Constitutional Law.[1603]

"Contracts," Extended to Cover Public Contracts.—Throughout the first century of government under the Constitution, according to Benjamin F. Wright, the contract clause had been considered in almost forty per cent of all cases involving the validity of State legislation, and of these the vast proportion involved legislative grants of one type or other, the most important category being charters of incorporation.[1604] Nor does this numerical prominence of such grants in the cases overrate their relative importance from the point of view of public interest. The question consequently arises whether the clause was intended to be applied solely in protection of private contracts, or in the protection also of public grants or, more broadly, in protection of public contracts, in short, those to which a State is party?

Writing late in life, Madison explained the clause by allusion to what had occurred "in the internal administration of the States," in the years immediately preceding the Constitutional Convention, in regard to private debts. "A violation of contracts," said he, "had become familiar in the form of depreciated paper made a legal tender, of property substituted for money, and installment laws, and the occlusions of the courts of justice."[1605] He had, in fact, written to the same effect in The Federalist, while the adoption of the Constitution was pending.[1606]

The broader view of the intended purpose of the clause is, nevertheless, not without considerable [Pg 334] support. For one thing, the clause departs from the comparable provision in the Northwest Ordinance (1787) in two respects: First, in the *presence* of the word "obligation"; secondly, in the *absence* of the word "private"; and there is good reason for believing that Wilson may have been responsible for both alterations, inasmuch as two years earlier he had denounced a current proposal to repeal the Bank of North America's Pennsylvania charter, in the following words: "If

the act for incorporating the subscribers to the Bank of North America shall be repealed in this manner, a precedent will be established for repealing, in the same manner, every other legislative charter in Pennsylvania. A pretence, as specious as any that can be alleged on this occasion, will never be wanting on any future occasion. Those acts of the State, which have hitherto been considered as the sure anchors of privilege and of property, will become the sport of every varying gust of politics, and will float wildly backwards and forwards on the irregular and impetuous tides of party and faction."[1607]

Furthermore, in its first important constitutional case, that of Chisholm *v.* Georgia,[1608] the Court ruled that its original jurisdiction extended to an action in assumpsit brought by a citizen of South Carolina against the State of Georgia. This construction of the federal judicial power was, to be sure, promptly repealed by the Eleventh Amendment, but without affecting the implication that the contracts protected by the Constitution included public contracts.

One important source of this diversity of opinion is to be found in that ever welling spring of constitutional doctrine in early days, the prevalence of Natural Law notions and the resulting vague significance of the term "law." In Sturges *v.* Crowninshield, as we saw, Marshall defined the *obligation of contracts* as "the law which binds the parties to perform their undertaking." Whence, however, comes this law? If it comes from the State alone, which Marshall was later to deny even as to private contracts,[1609] then it is hardly possible to hold that the States' own contracts are covered by the clause, which manifestly does not *create* an obligation for contracts but only protects such obligation as already exists. But if, on the other hand, the law furnishing the obligation of contracts comprises Natural Law and kindred principles, as well as law which springs from State authority, then, inasmuch as the State itself is presumably bound by such principles, the State's own obligations, so far as harmonious with them, are covered by the clause.

Fletcher *v.* Peck

[Pg 335]

Fletcher *v.* Peck,[1610] which was decided in 1810, has the double claim to fame that it was the first case in which the Supreme Court held a State enactment to be in conflict with the Constitution,[1611] and also the first case to hold that the contracts clause protected public grants. By an act passed on January 7, 1795, the Georgia Legislature directed the sale to four land companies of public lands comprising most of what are now the States of Alabama and Mississippi. As soon became known, the passage of the measure had been secured by open and wholesale bribery. So when a new legislature took over in the winter of 1795-1796, almost its first act was to revoke the sale made the previous year.

Meantime, however, the land companies had disposed of several millions of acres of their holdings to speculators and prospective settlers, and following the rescinding act some of these took counsel with Alexander Hamilton as to their rights. In an opinion which was undoubtedly known to the Court when it decided Fletcher *v.* Peck, Hamilton characterized the repeal as contravening "the first principles of natural justice and social policy," especially so far as it was made, "to the prejudice * * * of third persons * * * innocent of the alleged fraud or corruption; * * * [Moreover, he added,] the Constitution of the United States, article first, section tenth, declares that no State shall pass a law impairing the obligations of contract. This must be equivalent to saying no State shall pass a law revoking, invalidating, or altering a contract. Every grant from one to another, whether the grantor be a State or an individual, is virtually a contract that the grantee shall hold and enjoy the thing granted against the grantor, and his representatives. It, therefore, appears to me that taking the terms of the Constitution in their large sense, and giving them effect according to the general spirit and policy of the provisions, the revocation of the grant by the act of the legislature of Georgia may justly be considered as contrary to the Constitution of the United States, and, therefore null. And that the courts of the United States, in cases within their jurisdiction, will be likely to pronounce it so."[1612] In the debate to which the "Yazoo Land Frauds," as they were contemporaneously known, gave rise in Congress, Hamilton's views were quoted frequently.

So far as it invokes the obligation of contracts clause, Marshall's opinion in Fletcher *v.* Peck performs two creative acts. He recognizes that an obligatory contract is one still to be performed —in other words, is an executory contract; also that a grant of land is an executed contract—a [Pg 336] conveyance. But, he asserts, every grant is attended by "an implied contract" on the part of the grantor not to claim again the thing granted. Thus, grants are brought within the category of contracts having continuing obligation and so within article I, § 10. But the question still remained of the nature of this obligation. Marshall's answer to this can only be inferred from his statement at the end of his opinion. The State of Georgia, he says, "was restrained" from the passing of the rescinding act "either by general principles which are common to our free institutions, or by particular provisions of the Constitution of the United States."[1613]

New Jersey *v.* Wilson

The protection thus thrown about land grants was presently extended, in the case of New Jersey *v.* Wilson,[1614] to a grant of immunity from taxation which the State of New Jersey had accorded certain Indian lands; and several years after that, in the Dartmouth College Case,[1615] to the charter privileges of an eleemosynary corporation.

Corporate Charters, Different Ways of Regarding

There are three ways in which the charter of a corporation may be regarded. In the first place, it may be thought of simply as a license terminable at will by the State, like a liquor-seller's license or an auctioneer's license, but affording the incorporators, so long as it remains in force, the privileges and advantages of doing business in the form of a corporation. Nowadays, indeed, when corporate charters are usually issued to all legally qualified applicants by an administrative officer who acts under a general statute, this would probably seem to be the natural way of regarding them were it not for the Dartmouth College decision. But in 1819 charters were granted directly by the State legislatures in the form of special acts, and there were very few profit-taking corporations in the country.[1616] The later extension of the benefits of the Dartmouth College decision to corporations organized under general law took place without discussion. [Pg 337]

Secondly, a corporate charter may be regarded as a franchise constituting a vested or property interest in the hands of the holders, and therefore as forfeitable only for abuse or in accordance with its own terms. This is the way in which some of the early State courts did regard them at the outset.[1617] It is also the way in which Blackstone regards them in relation to the royal prerogative, although not in relation to the sovereignty of Parliament; and the same point of view finds expression in Story's concurring opinion in Dartmouth College *v.* Woodward, as it did also in Webster's argument in that case.[1618] [Pg 338]

The Dartmouth College Case

The third view is the one formulated by Chief Justice Marshall in his controlling opinion in Trustees of Dartmouth College *v.* Woodward.[1619] This is that the charter of Dartmouth College, a purely private institution, was the outcome and partial record of a contract between the donors of the college, on the one hand, and the British Crown, on the other, which contract still continued in force between the State of New Hampshire, as the successor to the Crown and Government of Great Britain, and the trustees, as successors to the donors. The charter, in other words, was not simply a grant—rather it was the documentary record of a still existent agreement between still existent parties.[1620] Taking this view, which he developed with great ingenuity and persuasiveness, Marshall was able to appeal to the obligation of contracts clause directly, and without further use of his fiction in Fletcher *v.* Peck of an executory contract accompanying the grant.

A difficulty still remained, however, in the requirement that a contract must, before it can have obligation, import consideration, that is to say, must be shown not to have been entirely gratuitous on either side. Nor was the consideration which induced the Crown to grant a charter to Dartmouth College a merely speculative one. It consisted of the donations of the donors to the important public interest of education. Fortunately or unfortunately, in dealing with this phase of the case, Marshall used more sweeping terms than were needful. "The objects for which a corporation is created," he wrote, "are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and in most cases, the sole consideration of the grant." In other words, the simple fact of the charter having been granted imports consideration from the point of view of the State.[1621] With this doctrine before it, the Court in Providence Bank *v.* Billings,[1622] and again in Charles River Bridge Company *v.* Warren Bridge Company,[1623] admitted, without discussion of the point, the applicability of the Dartmouth College decision to purely business concerns. [Pg 339]

Classes of Cases Under the Clause

The cases just reviewed produce two principal lines of decisions stemming from the obligation of contracts clause: first, public grants; second, private executory contracts. The chief category of the first line of cases consists, in turn, of those involving corporate privileges, both those granted directly by the States and those granted by municipalities by virtue of authority conferred upon them by the State;[1624] while private debts, inclusive of municipal debts, exhaust for the most part the second line.

Public Grants

Municipal Corporations.—Not all grants by a State constitute "contracts" within the sense of article I, section 10. In his Dartmouth College decision Chief Justice Marshall conceded that "if the act of incorporation be a grant of political power, if it creates a civil institution, to be employed in the administration of the government, * * *, the subject is one in which the legislature of the State may act according to its own justment," unrestrained by the Constitution[1625]—thereby drawing a line between "public" and "private" corporations which remained undisturbed for more than half a century.[1626] It has been subsequently held many times that municipal corporations are mere instrumentalities of the State for the more convenient administration of local governments, whose powers may be enlarged, abridged, or entirely withdrawn at the pleasure of the legislature.[1627] The same principle applies, moreover, to the property rights which the municipality derives either directly or indirectly from the State. This was first held as to the grant of a franchise to a municipality to operate a ferry, and has since

then been recognized as the universal rule.[1628] As was stated in a case decided in 1923: "The distinction between the municipality as an agent of the State for governmental purposes and as an organization to care for local needs in a private or proprietary capacity," while it limits the legal liability of municipalities for the negligent acts or omissions of its officers or agents, does [Pg 340] not, on the other hand, furnish ground for the application of constitutional restraints against the State in favor of its own municipalities.[1629] Thus no contract rights are impaired by a statute removing a county seat, even though the former location was by law to be "permanent" when the citizens of the community had donated land and furnished bonds for the erection of public buildings.[1630] Likewise a statute changing the boundaries of a school district, giving to the new district the property within its limits which had belonged to the former district, and requiring the new district to assume the debts of the old district, does not impair the obligation of contracts.[1631] Nor was the contracts clause violated by State legislation authorizing State control over insolvent communities through a Municipal Finance Commission.[1632]

Public Offices.—On the same ground of public agency, neither appointment nor election to public office creates a contract in the sense of article I, section 10, whether as to tenure, or salary, or duties, all of which remain, so far as the Constitution of the United States is concerned, subject to legislative modification or outright repeal.[1633] Indeed there can be no such thing in this country as property in office, although the common law sustained a different view which sometimes found reflection in early cases.[1634] When, however, services have once been rendered, there arises an implied contract that they shall be compensated at the rate which was in force at the time they were rendered.[1635] Also, an express contract between the State and an [Pg 341] individual for the performance of specific services falls within the protection of the Constitution. Thus a contract made by the governor pursuant to a statute authorizing the appointment of a commissioner to conduct, over a period of years, a geological, mineralogical, and agricultural survey of the State, for which a definite sum had been authorized, was held to have been impaired by repeal of the statute.[1636] But a resolution of a New Jersey local board of education reducing teachers' salaries for the school year 1933-1934, pursuant to an act of the legislature authorizing such action, was held not to impair the contract of a teacher who, having served three years, was by earlier legislation exempt from having his salary reduced except for inefficiency or misconduct.[1637] Similarly, it was held that an Illinois statute which reduced the annuity payable to retire teachers under an earlier act did not violate the contracts clause, since it had not been the intention of the earlier act to propose a contract but only to put into effect a general policy.[1638] On the other hand, the right of one, who had become a "permanent teacher" under the Indiana Teachers Tenure Act of 1927, to continued employment was held to be contractual and to have been impaired by the repeal in 1933 of the earlier act.[1639]

Revocable Privileges Versus "Contracts": Tax Exemptions.—From a different point of view, the Court has sought to distinguish between grants of privileges, whether to individuals or to corporations, which are contracts and those which are mere revocable licenses, although on account of the doctrine of presumed consideration mentioned earlier, this has not always been easy to do. In pursuance of the precedent set in New Jersey *v.* Wilson,[1640] the legislature of a State "may exempt particular parcels of property or the property of particular persons or corporations from taxation, either for a specified period or perpetually, or may limit the amount or rate of taxation, to which such property shall be subjected," and such an exemption is frequently a contract within [Pg 342] the sense of the Constitution. Indeed this is always so when the immunity is conferred upon a corporation by the clear terms of its charter.[1641] When, on the other hand, an immunity of this sort springs from general law, its precise nature is more open to doubt, as a comparison of decisions will serve to illustrate.

In Piqua Branch of the State Bank *v.* Knoop,[1642] a closely divided Court held that a general banking law of the State of Ohio which provided that companies complying therewith and their stockholders should be exempt from all but certain taxes, was, as to a bank organized under it and its stockholders, a contract within the meaning of article I, section 10. "The provision was not," the Court said, "a legislative command nor a rule of taxation until changed, but a contract stipulating against any change, from the nature of the language used and the circumstances under which it was adopted."[1643] When, however, the State of Michigan pledged itself, by a general legislative act, not to tax any corporation, company, or individual undertaking to manufacture salt in the State from water there obtained by boring on property used for this purpose and, furthermore, to pay a bounty on the salt so manufactured, it was held not to have engaged itself within the constitutional sense. "General encouragements," said the Court, "held out to all persons indiscriminately, to engage in a particular trade or manufacture, whether such encouragement be in the shape of bounties or drawbacks, or other advantage, are always under the legislative control, and may be discontinued at any time."[1644] So far as exemption from taxation is concerned the difference between these two cases is obviously slight; but the later one is unquestionable authority for the proposition that legislative bounties are repealable at will.

Furthermore, exemptions from taxation have in certain cases been treated as gratuities repealable at will, even when conferred by specific legislative enactments. This would seem always to be the case when the beneficiaries were already in existence when the exemption was created and did nothing of a more positive nature to qualify for it than to continue in existence.[1645] Yet the cases are not always easy to explain in relation to each other, except in light of the [Pg 343]

fact that the Court's wider point of view has altered from time to time.[1646]

Vested Rights.—Lastly, the term "contracts" is used in the contracts clause in its popular sense of an agreement of minds. The clause therefore does not protect vested rights that are not referable to such an agreement between the State and an individual, such as the right to recovery under a judgment. The individual in question may have a case under the Fourteenth Amendment, but not one under article I, section 10.[1647]

Reservation of the Right to Alter and Repeal

So much for the meaning of the word "contract" when public grants are meant. It is next in order to consider four principles or doctrines whereby the Court has itself broken down the force of the Dartmouth College decision in great measure in favor of State legislative power. By the logic of the Dartmouth College decision itself the State may reserve in a corporate charter the right to "amend, alter, and repeal" the same, and such reservation becomes a part of the contract between the State and the incorporators, the obligation of which is accordingly not impaired by the exercise of the right.[1648] Later decisions recognize that the State may reserve the right to amend, alter, and repeal by general law, with the result of incorporating the reservation in all charters of subsequent date.[1649] There is, however, a difference between a reservation by a statute and one by constitutional provision. While the former may be repealed as to a subsequent charter by the specific terms thereof, the latter may not.[1650]

The Right to Reserve: When Limited.—Is the right which is reserved by a State to "amend" or "alter" a charter without restriction? When it is accompanied, as it generally is, by the right to "repeal," one would suppose that the answer to this question was self-evident. None the less, [Pg 344] there are a number of judicial dicta to the effect that this power is not without limit, that it must be exercised reasonably and in good faith, and that the alterations made must be consistent with the scope and object of the grant, etc.[1651] Such utterances amount, apparently, to little more than an anchor to windward, for while some of the State courts have applied tests of this nature to the disallowance of legislation, it does not appear that the Supreme Court of the United States has ever done so.[1652]

Quite different is it with the distinction pointed out in the cases between the franchises and privileges which a corporation derives from its charter and the rights of property and contract which accrue to it in the course of its existence. Even the outright repeal of the former does not wipe out the latter or cause them to escheat to the State. The primary heirs of the defunct organization are its creditors; but whatever of value remains after their valid claims are met goes to the former shareholders.[1653] By the earlier weight of authority, on the other hand, persons who contract with companies whose charters are subject to legislative amendment or repeal do so at their own risk: any "such contracts made between individuals and the corporation do not vary or in any manner change or modify the relation between the State and the corporation in respect to the right of the State to alter, modify, or amend such a charter, * * *"[1654] But later holdings becloud this rule.[1655]

Corporations As Persons Subject To The Law.—But suppose the State neglects to reserve the right [Pg 345] to amend, alter, or repeal—is it, then, without power to control its corporate creatures? By no means. Private corporations, like other private persons, are always presumed to be subject to the legislative power of the State; from which it follows that immunities conferred by charter are to be treated as exceptions to an otherwise controlling rule. This principle was recognized by Chief Justice Marshall in the case of Providence Bank *v.* Billings,[1656] in which he held that in the absence of express stipulation or reasonable implication to the contrary in its charter, the bank was subject to the taxing power of the State, notwithstanding that the power to tax is the power to destroy.

Corporations and the Police Power.—And of course the same principle is equally applicable to the exercise by the State of its police powers. Thus, in what was perhaps the leading case before the Civil War, the Supreme Court of Vermont held that the legislature of that State had the right, in furtherance of the public safety, to require chartered companies operating railways to fence in their tracks and provide cattle yards. In a matter of this nature, said the Court, corporations are on a level with individuals engaged in the same business, unless, from their charter, they can prove the contrary.[1657] Since then the rule has been applied many times in justification of State regulation of railroads,[1658] and even of the application of a State prohibition law to a company which had been chartered expressly to manufacture beer.[1659]

The Strict Construction of Public Grants [Pg 346]

Long, however, before the cases last cited were decided, the principle which they illustrate had come to be powerfully reinforced by two others, the first of which is that all charter privileges and immunities are to be strictly construed as against the claims of the State; or as it is otherwise often phrased, "nothing passes by implication in a public grant."

The Charles River Bridge Case.—The leading case is that of the Charles River Bridge Company *v.* Warren Bridge Company,[1660] which was decided shortly after Chief Justice Marshall's death by a substantially new Court. The question at issue was whether the charter of the complaining

company, which authorized it to operate a toll bridge, stood in the way of the State's permitting another company of later date to operate a free bridge in the immediate vicinity. Inasmuch as the first company could point to no clause in its charter which specifically vested it with an exclusive right, the Court held the charter of the second company to be valid on the principle just stated. Justice Story, who remained from the old Bench, presented a vigorous dissent, in which he argued cogently, but unavailingly, that the monopoly claimed by the Charles River Bridge Company was fully as reasonable an implication from the terms of its charter and the circumstances surrounding its concession as perpetuity had been from the terms of the Dartmouth College charter and the environing transaction.

The Court was in fact making new law, because it was looking at things from a new point of view. This was the period when judicial recognition of the Police Power began to take on a doctrinal character. It was also the period when the railroad business was just beginning. Chief Justice Taney's opinion evinces the influence of both these developments. The power of the State to provide for its own internal happiness and prosperity was not, he asserted, to be pared away by mere legal intendments; nor was its ability to avail itself of the lights of modern science to be frustrated by obsolete interests such as those of the old turnpike companies, the charter privileges of which, he apprehended, might easily become a bar to the development of transportation along new lines.[1661]

Applications of the Strict Construction Rule.—The rule of strict construction has been reiterated by the Court many times. A good illustration is afforded by the following passage from its opinion in [Pg 347] Blair *v.* Chicago,[1662] decided nearly seventy years after the Charles River Bridge Case: "Legislative grants of this character should be in such unequivocal form of expression that the legislative mind may be distinctly impressed with their character and import, in order that the privileges may be intelligently granted or purposely withheld. It is a matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed. * * * 'The principle is this, that all rights which are asserted against the State must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the State; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the State.'"[1663]

Strict Construction of Tax Exemptions.—An excellent illustration of the operation of the rule in relation to tax exemptions is furnished by the derivative doctrine that an immunity of this character must be deemed as intended solely for the benefit of the corporation receiving it and hence may not, in the absence of express permission by the State, be passed on to a successor.[1664] Thus, where two companies, each exempt from taxation, were permitted by the legislature to consolidate the new corporation was held to be subject to taxation.[1665] Again, a statute which granted a corporation all "the rights and privileges" of an earlier corporation was held not to confer the latter's "immunity" from taxation.[1666] Yet again, a legislative authorization of the transfer by one corporation to another of the former's "estate, property, right, privileges, and franchises" was held not to clothe the later company with the earlier one's exemption from taxation.[1667]

Furthermore, an exemption from taxation is to be strictly construed even in the hands of one [Pg 348] clearly entitled to it. So the exemption conferred by its charter on a railway company was held not to extend to branch roads constructed by it under a later statute.[1668] Also, a general exemption of the property of a corporation from taxation was held to refer only to the property actually employed in its business.[1669] Also, the charter exemption of the capital stock of a railroad from taxation "for ten years after completion of the said road" was held not to become operative until the completion of the road.[1670] So also the exemption of the campus and endowment fund of a college was held to leave other lands of the college, though a part of its endowment, subject to taxation.[1671] Likewise, provisions in a statute that bonds of the State and its political subdivisions are not to be taxed and shall not be taxed were held not to exempt interest on them from taxation as income of the owners.[1672]

Strict Construction and the Police Power.—The police power, too, has frequently benefited from the doctrine of strict construction, although, for a reason pointed out below, this recourse is today seldom, if ever, necessary in this connection. Some of the more striking cases may be briefly summarized. The provision in the charter of a railway company permitting it to set reasonable charges still left the legislature free to determine what charges were reasonable.[1673] On the other hand, when a railway agreed to accept certain rates for a specified period, it thereby foreclosed the question of the reasonableness of such rates.[1674] The grant to a company of the right to supply a city with water for twenty-five years was held not to prevent a similar concession to another company by the same city.[1675] The promise by a city in the charter of a water company not to make a similar grant to any other person or corporation was held not to prevent the city itself from engaging in the business.[1676] A municipal concession to a water company which was to run for thirty years and which was accompanied by the provision that the

"said company shall charge the following rates," was held not to prevent the city from reducing such rates.[1677] But more broadly, the grant to a municipality of the power to regulate the charges of public service companies was held not to bestow the right to contract away this power.[1678] Indeed, any claim by a private corporation that it received the rate-making power from a municipality must survive a two-fold challenge: first, as to the right of the municipality under its charter to make such a grant; secondly, as to whether it has actually done so; and in both respects an affirmative answer must be based on express words and not on implication.[1679] [Pg 349]

The Doctrine of Inalienable State Powers

The second of the doctrines mentioned above whereby the principle of the subordination of all persons, corporate and individual alike, to the legislative power of the State has been fortified, is the doctrine that certain of the State's powers are inalienable, and that any attempt by a State to alienate them, upon any consideration whatsoever, is *ipso facto* void, and hence incapable of producing a "contract" within the meaning of article I, section 10. One of the earliest cases to assert this principle occurred in New York in 1826. The corporation of the City of New York, having conveyed certain lands for the purposes of a church and cemetery together with a covenant for quiet enjoyment, later passed a by-law forbidding their use as a cemetery. In denying an action against the city for breach of covenant, the State court said the defendants "had no power as a party, [to the covenant] to make a contract which should control or embarrass their legislative powers and duties."[1680]

The Eminent Domain Power Inalienable.—The Supreme Court first applied similar doctrine in 1848 in a case involving a grant of exclusive right to construct a bridge at a specified locality. Sustaining the right of the State of Vermont to make a new grant to a competing company, the Court held that the obligation of the earlier exclusive grant was sufficiently recognized in making just compensation for it; and that corporate franchises, like all other forms of property, are subject to the overruling power of eminent domain.[1681] This reasoning was reinforced by an appeal to the theory of State sovereignty, which was held to involve the corollary of the inalienability of all the principal powers of a State. [Pg 350]

The subordination of all charter rights and privileges to the power of eminent domain has been maintained by the Court ever since; not even an explicit agreement by the State to forego the exercise of the power will avail against it.[1682] Conversely, the State may revoke an improvident grant of the public petitionary without recourse to the power of eminent domain, such a grant being inherently beyond the power of the State to make. So when the legislature of Illinois in 1869 devised to the Illinois Central Railroad Company, its successors and assigns, the State's right and title to nearly a thousand acres of submerged land under Lake Michigan along the harbor front of Chicago, and four years later sought to repeal the grant, the Court, in a four-to-three decision, sustained an action by the State to recover the lands in question. Said Justice Field, speaking for the majority: "Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. * * * Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time."[1683] The case affords an interesting commentary on Fletcher *v.* Peck.[1684]

The Taxing Power Not Inalienable.—On the other hand, repeated endeavors to subject tax exemptions to the doctrine of inalienability though at times supported by powerful minorities on the Bench, have always failed.[1685] As recently as January, 1952, the Court ruled that the Georgia Railway Company was entitled to seek an injunction in the federal courts against an attempt by Georgia's Revenue Commission to compel it to pay *ad valorem* taxes contrary to the terms of its special charter issued in 1833. To the argument that this was a suit contrary to the Eleventh Amendment it returned the answer that the immunity from Federal jurisdiction created by the Amendment "does not extend to individuals who act as officers without constitutional authority."[1686]

The Police Power; When Inalienable.—The leading case involving the police power is Stone *v.* Mississippi, 101 U.S. 814, decided in 1880. In 1867 the legislature of Mississippi chartered a company to which it expressly granted the power to conduct a lottery. Two years later the State adopted a new Constitution which contained a provision forbidding lotteries; and a year later the legislature passed an act to put this provision into effect. In upholding this act and the constitutional provision on which it was based, the Court said: "The power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights," and these agencies can neither give away nor sell their discretion. All that one can get by a charter permitting the business of conducting a lottery "is suspension of certain governmental rights in his favor, subject to withdrawal at will."[1687] [Pg 351]

The Court shortly afterward applied the same reasoning in a case in which was challenged the right of Louisiana to invade the exclusive privilege of a corporation engaged in the slaughter of

cattle in New Orleans by granting another company the right to engage in the same business. Although the State did not offer to compensate the older company for the lost monopoly, its action was sustained on the ground that it had been taken in the interest of the public health.[1688] When, however, the City of New Orleans, in reliance on this precedent, sought to repeal an exclusive franchise which it had granted a company for fifty years to supply gas to its inhabitants, the Court interposed its veto, explaining that in this instance neither the public health, the public morals, nor the public safety was involved.[1689]

Later decisions, nonetheless, apply the principle of inalienability broadly. To quote from one: "It is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power to the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and all contract and property rights are held subject to its fair exercise."[1690] Today, indeed, it [Pg 352] scarcely pays a company to rely upon its charter privileges or upon special concessions from a State in resisting the application to it of measures claiming to have been enacted by the police power thereof. For if this claim is sustained by the Court, the obligation of the contract clause will not avail; while if it is not, the due process of law clause of the Fourteenth Amendment will furnish a sufficient reliance. That is to say, the discrepancy which once existed between the Court's theory of an overriding police power in these two adjoining fields of Constitutional Law is today apparently at an end. Indeed, there is usually no sound reason why rights based on public grant should be regarded as more sacrosanct than rights which involve the same subject matter but are of different provenience.

Private Contracts

Scope of the Term.—The term "private contracts" is, naturally, not all-inclusive. A judgment, though granted in favor of a creditor, is not a contract in the sense of the Constitution;[1691] nor is marriage.[1692] And whether a particular agreement is a valid contract is a question for the courts, and finally for the Supreme Court, when the protection of the contract clause is invoked.[1693]

Source of the Obligation.—The question of the nature and source of the obligation of a contract, which went by default in Fletcher *v.* Peck and the Dartmouth College case, with such vastly important consequences, had eventually to be met and answered by the Court in connection with private contracts. The first case involving such a contract to reach the Supreme Court was Sturges *v.* Crowninshield[1694] in which a debtor sought escape behind a State insolvency act of later date than his note. The act was held inoperative; but whether this was because of its [Pg 353] retroaction in this particular case or for the broader reason that it assumed to excuse debtors from their promises, was not at the time made clear. As noted earlier, Chief Justice Marshall's definition on this occasion of the obligation of a contract as the law which binds the parties to perform their undertakings was not free from ambiguity, owing to the uncertain connotation of the term *law*.

Ogden *v.* Saunders.—These obscurities were finally cleared up for most cases in Ogden *v.* Saunders,[1695] in which the temporal relation of the statute and the contract involved was exactly reversed—the former antedating the latter. Marshall contended, but unsuccessfully, that the statute was void, inasmuch as it purported to release the debtor from that original, intrinsic obligation which always attaches under natural law to the acts of free agents. "When," he wrote, "we advert to the course of reading generally pursued by American statesmen in early life, we must suppose that the framers of our Constitution were intimately acquainted with the writings of those wise and learned men whose treatises on the laws of nature and nations have guided public opinion on the subjects of obligation and contract," and that they took their views on these subjects from those sources. He also posed the question of what would happen to the obligation of contracts clause if States might pass acts declaring that all contracts made subsequently thereto should be subject to legislative control.[1696]

For the first and only time majority of the Court abandoned the Chief Justice's leadership. Speaking by Justice Washington it held that the obligation of private contracts is derived from the municipal law—State statutes and judicial decisions—and that the inhibition of article I, section 10, is confined to legislative acts made after the contracts affected by them, with one exception. For by a curiously complicated line of reasoning it was also held in this same case that when the creditor is a nonresident, then a State may not by an insolvent law rights under a contract, albeit one of later date.

With the proposition established that the obligation of a private contract comes from the *municipal* law in existence when the contract is made, a further question presents itself, namely, what part of the municipal law is referred to? No doubt, the law which determines the validity of the contract itself is a part of such law. Also, the law which interprets the terms used in the contract, or which supplies certain terms when others are used; as for instance, constitutional provisions or statutes which determine what is "legal tender" for the payment of debts; or judicial [Pg 354] decisions which construe the term "for value received" as used in a promissory note, and so on. In short, any law which at the time of the making of a contract goes to measure the rights and duties of the parties to it in relation to each other enters into its obligation.

Remedy a Part of the Obligation

Suppose, however, that one of the parties to a contract fails to live up to his obligation as thus determined. The contract itself may now be regarded as at an end; but the injured party, nevertheless, has a new set of rights in its stead, those which are furnished him by the remedial law, including the law of procedure. In the case of a mortgage, he may foreclose; in the case of a promissory note, he may sue; in certain cases, he may demand specific performance. Hence the further question arises, whether this remedial law is to be considered a part of the law supplying the obligation of contracts. Originally, the predominating opinion was negative, since as we have just seen, this law does not really come into operation until the contract has been broken. Yet it is obvious that the sanction which this law lends to contracts is extremely important—indeed, indispensable. In due course it became the accepted doctrine that that part of the law which supplies one party to a contract with a remedy if the other party does not live up to his agreement, as authoritatively interpreted, entered into the "obligation of contracts" in the constitutional sense of this term, and so might not be altered to the material weakening of existing contracts. In the court's own words, "Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, * * *"[1697]

Establishment Of The Rules.—This rule was first definitely announced in 1843 in the case of Bronson *v.* Kinzie.[1698] Here an Illinois mortgage giving the mortgagee an unrestricted power of sale in case of the mortgagor's fault was involved, along with a later act of the legislature which required mortgaged premises to be sold for not less than two-thirds of the appraised value, and allowed the mortgagor a year after the sale to redeem them. It was held that the statute, in altering the preexisting remedies to such an extent, violated the constitutional prohibition, and hence was void. The year following a like ruling was made in the case of McCracken *v.* Hayward[1699] as to a statutory provision that personal property should not be sold under execution for less than two-thirds of its appraised value.

Qualifications Of The Rule.—But the rule illustrated by these cases does not signify that a State may make no changes in its remedial or procedural law which affect existing contracts. "Provided," the Court has said, "a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract, the Legislature may modify or change existing remedies or prescribe new modes of procedure."[1700] Thus States are constantly remodelling their judicial systems and modes of practice unembarrassed by the obligation of contracts clause.[1701] The right of a State to abolish imprisonment for debt was early asserted.[1702] Again the right of a State to shorten the time for the bringing of actions has been affirmed even as to existing causes of action, but with the proviso added that a reasonable time must be left for the bringing of such actions.[1703] On the other hand, a statute which withdrew the judicial power to enforce satisfaction of a certain class of judgments by mandamus was held invalid.[1704] In the words of the Court: "Every case must be determined upon its own circumstances;"[1705] and it later added: "In all such cases the question becomes, * * *, one of reasonableness, and of that the legislature is primarily the judge."[1706] [Pg 355]

The Municipal Bond Cases.—There is one class of cases resulting from the doctrine that the law of remedy constitutes a part of the obligation of a contract to which a special word is due. This comprises cases in which the contracts involved were municipal bonds. While a city is from one point of view but an emanation from the government's sovereignty and an agent thereof, when it borrows money it is held to be acting in a corporate or private capacity, and so to be suable on its contracts. Furthermore, as was held in the leading case of Von Hoffman *v.* Quincy,[1707] "where a State has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied." In this case the Court issued a mandamus compelling the city officials to levy taxes for the satisfaction of a judgment on its bonds in accordance with the law as it stood when the bonds were issued.[1708] Nor may a State by dividing an indebted municipality among others enable it to escape its obligations. In such a case the debt follows the territory, and the duty of assessing and collecting taxes to satisfy it devolves upon the succeeding corporations and their officers.[1709] But where a municipal organization has ceased practically to exist through the vacation of its offices, and the government's function is exercised once more by the State directly, the Court has thus far found itself powerless to frustrate a program of repudiation.[1710] However, there is no reason why the State should enact the role of *particeps criminis* in an attempt to relieve its municipalities of the obligation to meet their honest debts. Thus in 1931, during the Great Depression, New Jersey created a Municipal Finance Commission with power to assume control over its insolvent municipalities. To the complaint of certain bondholders that this legislation impaired the contract obligations of their debtors, the Court, speaking by Justice Frankfurter, pointed out that the practical value of an unsecured claim against a city is "the effectiveness of the city's taxing power," which the legislation under review was designed to conserve.[1711] [Pg 356]

Private Contracts and the Police Power [Pg 357]

The increasing subjection of public grants to the State's police power has been previously pointed out. That purely private contracts should be in any stronger situation in this respect would obviously be anomalous in the extreme. In point of fact, the ability of private parties to curtail governmental authority by the easy devise of contracting with one another is, with an exception to be noted, even less than that of the State to tie its own hands by contracting away its own powers. So, when it was contended in an early Pennsylvania case, than an act prohibiting the issuance of notes by unincorporated banking associations was violative of the obligation of contracts clause because of its effect upon certain existing contracts of members of such associations, the State Supreme Court answered: "But it is said, that the members had formed a contract *between themselves*, which would be dissolved by the stoppage of their business; and what then? Is that such a violation of contracts as is prohibited by the Constitution of the United States? Consider to what such a construction would lead. Let us suppose, that in one of the States there is no law against gaming, cock-fighting, horse-racing or public masquerades, and that companies should be formed for the purpose of carrying on these practices; * * *" Would the legislature then be powerless to prohibit them? The answer returned, of course, was no.[1712]

The prevailing doctrine is stated by the Supreme Court of the United States in the following words: "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. * * * In other words, that parties by entering into contracts may not estop the legislature from enacting laws intended for the public good."[1713]

So, in an early case we find a State recording act upheld as applying to deeds dated before the passage of the act.[1714] Later cases have brought the police power in its more customary phases into contact with private, as well as with public contracts. Lottery tickets, valid when issued, were necessarily invalidated by legislation prohibiting the lottery business;[1715] contracts for the sale of beer, valid when entered into, were similarly nullified by a State prohibition law;[1716] and contracts of employment were modified by later laws regarding the liability of employers and workmen's compensation.[1717] Likewise a contract between plaintiff and defendant did not prevent the State from making the latter a concession which rendered the contract worthless;[1718] nor did a contract as to rates between two railway companies prevent the State from imposing different rates;[1719] nor did a contract between a public utility company and a customer protect the rates agreed upon from being superseded by those fixed by the State.[1720] Similarly, a contract for the conveyance of water beyond the limits of a State did not prevent the State from prohibiting such conveyance.[1721]

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Emergency Legislation.—But the most striking exertions of the police power touching private contracts, as well as other private interests, within recent years have been evoked by war and economic depression. Thus in World War I the State of New York enacted a statute which, declaring that a public emergency existed, forbade the enforcement of covenants for the surrender of the possession of premises on the expiration of leases, and wholly deprived for a period owners of dwellings, including apartment and tenement houses, within the City of New York and contiguous counties of possessory remedies for the eviction from their premises of tenants in possession when the law took effect, providing the latter were able and willing to pay a reasonable rent. In answer to objections leveled against this legislation on the basis of the obligation of contracts clause, the Court said: "But contracts are made subject to this exercise of the power of the State when otherwise justified, as we have held this to be."[1722] In a subsequent case, however, the Court added that, while the declaration by the legislature of a justifying emergency was entitled to great respect, it was not conclusive; that a law "depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change," and that whether they have changed was always open to judicial inquiry.[1723]

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Individual Rights Versus Public Welfare.—Summing up the result of the cases above referred to, Chief Justice Hughes, speaking for the Court in Home Building and Loan Association *v.* Blaisdell,[1724] remarked in 1934: "It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends. * * * The principle of this development is, * * * [he added] that the reservation of the reasonable exercise of the protective power of the States is read into all contracts * * *."[1725]

Evaluation of the Clause Today

Yet it should not be inferred that the obligation of contracts clause is today totally moribund even in times of stress. As we have just seen it still furnishes the basis for some degree of judicial review as to the substantiality of the factual justification of a professed exercise by a State legislature of its police power; and in the case of legislation affecting the remedial rights of creditors, it still affords a solid and palpable barrier against legislative erosion. Nor is this surprising in view of the fact that, as we have seen, such rights were foremost in the minds of the framers of the clause. The court's attitude toward insolvency laws, redemption laws, exemption laws, appraisement laws and the like has always been that they may not be given retroactive operation;[1726] and the general lesson of these earlier cases is confirmed by the court's decisions between 1934 and 1945 in certain cases involving State moratorium statutes. In Home Building and Loan Association *v.* Blaisdell,[1727] the leading case, a closely divided Court sustained the Minnesota Moratorium Act of April 18, 1933, which, reciting the existence of a severe financial and economic depression for several years and the frequent occurrence of mortgage foreclosure sales for inadequate prices, and asserting that these conditions had created an economic emergency calling for the exercise of the State's police power, authorized its courts to extend the period for redemption from foreclosure sales for such additional time as they might deem just and equitable, although in no event beyond May 1, 1935. The act also left the mortgagor in possession during the period of extension, subject to the requirement that he pay a reasonable rental for the property as fixed by the Court, at such time and in such manner as should be determined by the Court. Contemporaneously, however, less carefully drawn statutes from Missouri and Arkansas, acts which were less considerate of creditor's rights, were set aside as violative of the contracts clause.[1728] "A State is free to regulate the procedure in its courts even with reference to contracts already made," said Justice Cardozo for the Court, "and moderate extensions of the time for pleading or for trial will ordinarily fall within the power so reserved. A different situation is presented when extensions are so piled up as to make the remedy a shadow. * * * What controls our judgment at such times is the underlying reality rather than the form or label. The changes of remedy now challenged as invalid are to be viewed in combination, with the cumulative significance that each imparts to all. So viewed they are seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security."[1729] On the other hand, in the most recent of this category of cases, the Court gave its approval to an extension by the State of New York of its moratorium legislation. While recognizing that business conditions had improved, the Court was of the opinion that there was reason to believe that "'the sudden termination of the legislation which has damned up normal liquidation of these mortgages for more than eight years might well result in an emergency more acute than that which the original legislation was intended to alleviate.'"[1730] [Pg 360]

And meantime the Court had sustained legislation of the State of New York under which a mortgagee of real property was denied a deficiency judgment in a foreclosure suit where the State court found that the value of the property purchased by the mortgagee at the foreclosure sale was equal to the debt secured by the mortgage.[1731] "Mortgagees," the Court said, "are constitutionally entitled to no more than payment in full. * * * To hold that mortgagees are entitled under the contract clause to retain the advantages of a forced sale would be to dignify into a constitutionally protected property right their chance to get more than the amount of their contracts. * * * The contract clause does not protect such a strategical, procedural advantage." [1732] [Pg 361]

Statistical Data Pertinent to the Clause

The obligation of contracts clause attained the high point of its importance in our Constitutional Law in the years immediately following the Civil War.[1733] Between 1865 and 1873 there were twenty cases in which State acts were held invalid under the clause, of which twelve involved public contracts. During the next fifteen years, which was the period of Waite's chief justiceship, twenty-nine cases reached the Court in which State legislation was set aside under the clause. Twenty-four of these involved public contracts. The decline of the importance of the clause as a title in Constitutional Law began under Chief Justice Fuller (1888 to 1910). During this period less than 25% of the cases involving the validity of State legislation involved this rubric. In twenty-eight of these cases, of which only two involved private contracts, the statute involved was set aside. During Chief Justice White's term (1910 to 1921) the proportion of contract cases shrank to 15%, and in that of Chief Justice Taft, to 9%.[1734]

In recent years the clause has appeared to undergo something of a revival, not however as a protection of public grants, but as a protection of private credits. During the Depression, which began in 1929 and deepened in 1932, State legislatures enacted numerous moratorium statutes, and beginning with Home Loan Association *v.* Blaisdell, which was decided in 1934, the Court was required to pass upon several of these. At the same time the clause was, in effect, treated by the Court in two important cases as interpretive of the due process clause, Amendment V, and thus applied indirectly as a restriction on the power of Congress.[1735] But this emergence of the clause into prominence was a flash in the pan. During the last decade hardly a case a term involving the clause has reached the Court, counting even those in which it is treated as a tail to the due process of law kite.[1736] The reason for this declension has been twofold: first, the subordination of public grants to the police power; secondly, the expansion of the due process clause, which has largely rendered it a fifth wheel to the Constitutional Law coach. [Pg 362]

> Clause 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 it's 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.

DUTIES ON EXPORTS AND IMPORTS

Scope

Only articles imported from or exported to a foreign country, or "a place over which the Constitution has not extended its commands with respect to imports and their taxation," e.g., the Philippine Islands, are comprehended by the terms "imports" and "exports,"[1737] goods brought [Pg 363] from another State are not affected by this section.[1738] To determine how long imported wares remain under the protection of this clause, the Supreme Court enunciated the original package doctrine in the leading case of Brown *v.* Maryland.[1739] "When the importer has so acted upon the thing imported," wrote Chief Justice Marshall, "that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the Constitution."[1740] A box, case or bale in which separate parcels of goods have been placed by the foreign seller is regarded as the original package, and upon the opening of such container for the purpose of using the separate parcels, or of exposing them for sale, each parcel loses its character as an import and becomes subject to taxation as a part of the general mass of property in the State.[1741] Imports for manufacture cease to be such when the intended processing takes place,[1742] or when the original packages are broken.[1743] Where a manufacturer imports merchandise and stores it in his warehouse in the original packages, that merchandise does not lose its quality as an import, at least so long as it is not required to meet such immediate needs.[1744] The purchaser of imported goods is deemed to be the importer if he was the efficient cause of the importation, whether the title to the goods vested in him at the time of shipment, or after its arrival in this country.[1745] A State franchise tax measured by properly apportioned gross receipts may be imposed upon a railroad company in respect of the company's receipts for services in handling imports and exports at its marine terminal.[1746]

Privilege Taxes

A State law requiring importers to take out a license to sell imported goods amounts to an indirect tax on imports and hence is unconstitutional.[1747] Likewise, a franchise tax upon foreign corporations engaged in importing nitrate and selling it in the original packages,[1748] [Pg 364] a tax on sales by brokers[1749] and auctioneers[1750] of imported merchandise in original packages, and a tax on the sale of goods in foreign commerce consisting of an annual license fee plus a percentage of gross sales,[1751] have been held invalid. On the other hand, pilotage fees,[1752] a tax upon the gross sales of a purchaser from the importer,[1753] a license tax upon dealing in fish which, through processing, handling, and sale, have lost their distinctive character as imports,[1754] an annual license fee imposed on persons engaged in buying and selling foreign bills of exchange,[1755] and a tax upon the right of an alien to receive property as heir, legatee, or donee of a deceased person[1756] have been held not to be duties on imports or exports.

Property Taxes

Property brought into the United States from without is immune from *ad valorem* taxation so long as it retains its character as an import,[1757] but the proceeds of the sale of imports, whether in the form of money or notes, may be taxed by a State.[1758] A property tax levied on warehouse receipts for whiskey exported to Germany was held unconstitutional as a tax on exports.[1759]

Inspection Laws

Inspection laws "are confined to such particulars as, in the estimation of the legislature and according to the customs of trade, are deemed necessary to fit the inspected article for the market, by giving the purchaser public assurance that the article is in that condition, and of that quality, which makes it merchantable and fit for use or consumption."[1760] In Turner *v.* Maryland[1761] the Supreme Court listed as recognized elements of inspection laws, the "quality of the article, form, capacity, dimensions, and weight of package, mode of putting up, and marking and branding of various kinds, * * *" .[1762] It sustained as an inspection law a charge for storage and inspection imposed upon every hogshead of tobacco grown in the State and intended for export, which the law required to be brought to a State warehouse to be inspected and [Pg 365] branded. The Court has cited this section as a recognition of a general right of the States to pass

inspection laws, and to bring, within their reach articles of interstate, as well as of foreign, commerce.[1763] But on the ground that, "it has never been regarded as within the legitimate scope of inspection laws to forbid trade in respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature and the injurious consequences of its use or abuse," it held that a State law forbidding the importation of intoxicating liquors into the State could not be sustained as an inspection law.[1764] Since the adoption of the Twenty-first Amendment, such State legislation is valid whether classified as an inspection law or not.

> Clause 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.

TONNAGE DUTIES

The prohibition against tonnage duties embraces all taxes and duties, regardless of their name or form, whether measured by the tonnage of the vessel or not, which are in effect charges for the privilege of entering, trading in, or lying in a port.[1765] But it does not extend to charges made by State authority, even if graduated according to tonnage,[1766] for services rendered to the vessel, such as pilotage, towage, charges for loading and unloading cargoes, wharfage, or storage.[1767] For the purpose of determining wharfage charges, it is immaterial whether the wharf was built by the State, a municipal corporation or an individual; where the wharf is owned by a city, the fact that the city realized a profit beyond the amount expended does not render the toll objectionable.[1768] The services of harbor masters for which fees are allowed must be actually rendered, and a law permitting harbor masters or port wardens to impose a fee in all cases is void.[1769] A State may not levy a tonnage duty to defray the expenses of its quarantine system,[1770] but it may exact a fixed fee for examination of all vessels passing quarantine.[1771] A State license fee for ferrying on a navigable river is not a tonnage tax, but rather is a proper [Pg 366] exercise of the police power, and the fact that a vessel is enrolled under federal law does not exempt it.[1772] In the State Tonnage Tax Cases,[1773] an annual tax on steamboats measured by their registered tonnage was held invalid despite the contention that it was a valid tax on the steamboat as property.

KEEPING TROOPS

This provision contemplates the use of the State's military power to put down an armed insurrection too strong to be controlled by civil authority;[1774] and the organization and maintenance of an active State militia is not a keeping of troops in time of peace within the prohibition of this clause.[1775]

INTERSTATE COMPACTS

Background of Clause

Except for the single limitation that the consent of Congress must be obtained, the original inherent sovereign rights of the States to make compacts with each other was not surrendered under the Constitution.[1776] "The compact," as the Supreme Court has put it, "adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations."[1777] In American history the compact technique can be traced back to the numerous controversies which arose over the ill-defined boundaries of the original colonies. These disputes were usually resolved by negotiation, with the resulting agreement subject to approval by the Crown.[1778] When the political ties with Britain were broken the Articles of Confederation provided for appeal to Congress in all disputes between two or more States over boundaries or [Pg 367] "any cause whatever"[1779] and required the approval of Congress for any "treaty confederation or alliance" to which a State should be a party.[1780] The framers of the Constitution went further. By the first clause of this section they laid down an unqualified prohibition against "any treaty, alliance or confederation"; and by the third clause they required the consent of Congress for "any agreement or compact." The significance of this distinction was pointed out by Chief Justice Taney in Holmes *v.* Jennison.[1781] "As these words ('agreement or compact') could not have been idly or superfluously used by the framers of the Constitution, they cannot be construed to mean the same thing with the word treaty. They evidently mean something more, and were designed to make the prohibition more comprehensive. * * * The word 'agreement,' does not necessarily import and direct any express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding, to which both parties have assented, and upon which both are acting, it is an 'agreement.' And the use of all of these terms, 'treaty,' 'agreement,' 'compact,' show that it was the intention of the framers of the Constitution to use the broadest and most comprehensive terms; and that they anxiously desired to cut off all connection or communication between a State and a foreign power; and we shall fail to execute that evident intention, unless we give to the word 'agreement' its most extended signification; and so apply it

as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties."[1782] But in Virginia *v.* Tennessee,[1783] decided more than a half century later, the Court shifted position, holding that the unqualified prohibition of compacts and agreements between States without the consent of Congress did not apply to agreements concerning such minor matters as adjustments of boundaries, which have no tendency to increase the political powers of the contractant States or to encroach upon the just supremacy of the United States. This divergence of doctrine may conceivably have interesting consequences.[1784]

Subject Matter of Interstate Compacts

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For many years after the Constitution was adopted, boundary disputes continued to predominate as the subject matter of agreements among the States. Since the turn of the twentieth century, however, the interstate compact has been used to an increasing extent as an instrument for State cooperation in carrying out affirmative programs for solving common problems. The execution of vast public undertakings, such as the development of the Port of New York by the Port Authority created by compact between New York and New Jersey, flood control, the prevention of pollution, and the conservation and allocation of water supplied by interstate streams, are among the objectives accomplished by this means.[1785] Another important use of this device was recognized by Congress in the act of June 6, 1934,[1786] whereby it consented in advance to agreements for the control of crime. The first response to this stimulus was the Crime Compact of 1934, providing for the supervision of parolees and probationers, to which forty-five States had given adherence by 1949.[1787] Subsequently Congress has authorized, on varying conditions, compacts touching the production of tobacco, the conservation of natural gas, the regulation of fishing in inland waters, the furtherance of flood and pollution control, and other matters. Moreover, since 1935 at least thirty-six States, beginning with New Jersey, have set up permanent commissions for interstate cooperation, which have led to the formation of a Council of State Governments ("Cosgo" for short), the creation of special commissions for the study of the crime problem, the problem of highway safety, the trailer problem, problems created by social security legislation, etc., and the framing of uniform State legislation for dealing with some of these.[1788]

Consent of Congress

The Constitution makes no provision as to the time when the consent of Congress shall be given or the mode or form by which it shall be signified.[1789] While the consent will usually precede the compact or agreement, it may be given subsequently where the agreement relates to a matter which could not be well considered until its nature is fully developed.[1790] The required consent is not necessarily an expressed consent; it may be inferred from circumstances.[1791] It is sufficiently indicated, when not necessary to be made in advance, by the approval of proceedings taken under it.[1792] The consent of Congress may be granted conditionally "upon terms appropriate to the subject and transgressing no constitutional limitations."[1793] And in a recent instance it has not been forthcoming at all. In Sipuel *v.* Board of Regents,[1794] decided in 1948, the Supreme Court ruled that the equal protection clause of Amendment XIV requires a State maintaining a law school for white students to provide legal education for a Negro applicant, and to do so as soon as it does for applicants of any other group. Shortly thereafter the governors of 12 Southern States convened to canvass methods for meeting the demands of the Court. There resulted a compact to which 13 State legislatures have consented and by which a Board of Control for Southern Regional Education is set up. Although some early steps were taken toward obtaining Congress's consent to the agreement, the effort was soon abandoned, but without affecting the cooperative educational program, which to date has not been extended to the question of racial segregation.[1795] Finally, Congress does not, by giving its consent to a compact, relinquish or restrict its own powers, as for example, its power to regulate interstate commerce.[1796]

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Grants of Franchise to Corporation by Two States

It is competent for a railroad corporation organized under the laws of one State, when authorized so to do by the consent of the State which created it, to accept authority from another State to extend its railroad into such State and to receive a grant of powers to own and control, by lease or purchase, railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second State. Such legislation on the part of two or more States is not, in the absence of inhibitory legislation by Congress, regarded as within the constitutional prohibition of agreements or compacts between States.[1797]

Legal Effect of Interstate Compacts

Whenever, by the agreement of the States concerned and the consent of Congress, an interstate compact comes into operation, it has the same effect as a treaty between sovereign powers. Boundaries established by such compacts become binding upon all citizens of the signatory States and are conclusive as to their rights.[1798] Private rights may be affected by agreements for the equitable apportionment of the water of an interstate stream, without a judicial

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determination of existing rights.[1799] Valid interstate compacts are within the protection of the obligation of contracts clause and specific enforcement of them is within the original jurisdiction of the Supreme Court.[1800] Congress also has authority to compel compliance with such a compact.[1801]

ADDENDUM

Nor may a State read herself out of a compact which she has ratified and to which Congress has consented by pleading that under the State's constitution as interpreted by the highest State court she had lacked power to enter into such an agreement and was without power to meet certain obligations thereunder. The final construction of the State constitution in such a case rests with the Supreme Court.[1802]

Notes

[1] 4 Wheat. 316, 405 (1819).

[2] *See* pp. 378-379.

[3] 206 U.S. 46, 82 (1907).

[4] 4 Wheat. at 407.

[5] Ibid. 411.

[6] Ibid. 421.

[7] 2 Story, Commentaries, § 1256. *See also* ibid. §§ 1286 and 1330.

[8] 1 Pet. 511 (1828).

[9] Ibid. at 542.

[10] Ibid. 543.

[11] Prigg *v.* Pennsylvania, 16 Pet. 539, 616, 618-619 (1842).

[12] Juilliard *v.* Greenman, 110 U.S. 421, 449-450 (1884). *See also* Justice Bradley's concurring opinion in Knox *v.* Lee, 12 Wall. 457, 565 (1871).

[13] United States *v.* Jones, 109 U.S. 513 (1883).

[14] United States *v.* Kagama, 118 U.S. 375 (1886).

[15] Fong Yue Ting *v.* United States, 149 U.S. 698 (1893).

[16] Hines *v.* Davidowitz et al., 312 U.S. 52 (1941).

[17] 299 U.S. 304 (1936).

[18] Ibid. 315, 316-317, 318 *passim*. For anticipations of this conception of the powers of the National Government in the field of foreign relations, *see* Penhallow *v.* Doane, 3 Dall. 54, 80, 81 (1795); *also* ibid. 74 and 76 (argument of counsel); *also* Chief Justice Taney's opinion in Holmes *v.* Jennison, 14 Pet. 540, 575-576 (1840).

[19] Locke, Second Treatise on Government, Chapter XI § 141 (1691).

[20] 276 U.S. 394 (1928).

[21] Ibid. 405, 406.

[22] Wayman *v.* Southard, 10 Wheat. 1 (1825).

[23] The Brig Aurora, 7 Cr. 382 (1813).

[24] Wayman *v.* Southard, 10 Wheat. 1, 42 (1825).

[25] Sunshine Anthracite Coal Co. *v.* Adkins, 310 U.S. 381, 398 (1940); United States *v.* Rock Royal Co-operative, 307 U.S. 533, 577 (1939).

[26] United States *v.* Rock Royal Co-operative, 307 U.S. 533, 576 (1939).

[27] Schechter Poultry Corp. *v.* United States, 295 U.S. 495, 539 (1935); Opp Cotton Mills *v.* Administrator, 312 U.S. 126, 144 (1941); American Power & Light Co. *v.* Securities & Exchange Comm., 329 U.S. 90, 107, 108 (1946). *Cf.* Wichita R. & L. Co. *v.* Public Utilities Comm., 260 U.S. 48, 59 (1922).

[28] New York Cent. Securities Corp. *v.* United States, 287 U.S. 12, 24 (1932).

[29] Federal Radio Commission *v.* Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 285 (1933); National Broadcasting Co. *v.* United States, 319 U.S. 190, 225 (1943); Federal Communications Commission *v.* Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940).

[30] Lichter *v.* United States, 334 U.S. 742, 783 (1948).

[31] Panama Refining Co. *v.* Ryan, 293 U.S. 388 (1935); Schechter Poultry Corp. *v.* United States, 295 U.S. 495 (1985).

[32] United States *v.* Rock Royal Co-operative, 307 U.S. 533 (1939); Sunshine Anthracite Coal Co. *v.* Adkins, 310 U.S. 381 (1940); Bowles *v.* Willingham, 321 U.S. 503, 514 (1944); Yakus *v.* United States, 321 U.S. 414, 424 (1944).

[33] Fahey *v.* Mallonee, 332 U.S. 245 (1947).

[34] Ibid. 250.

[35] Ex parte Kollock, 165 U.S. 526 (1897).

[36] Buttfield *v.* Stranahan, 192 U.S. 470 (1904).

[37] United States *v.* Grimaud, 220 U.S. 506 (1911).

[38] United States *v.* Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932).

[39] Currin *v.* Wallace, 306 U.S. 1 (1939).

[40] Avent *v.* United States, 266 U.S. 127 (1924).

[41] United States *v.* Rock Royal Co-operative, 307 U.S. 533 (1939).

[42] Yakus *v.* United States, 321 U.S. 414 (1944).

[43] Bowles *v.* Willingham, 321 U.S. 503 (1944).

[44] Sunshine Anthracite Coal Co. *v.* Adkins, 310 U.S. 381, 397 (1940).

[45] Hirabayashi *v.* United States, 320 U.S. 81, 104 (1943); Korematsu *v.* United States, 323 U.S. 214 (1944).

[46] Fahey *v.* Mallonee, 332 U.S. 245 (1947).

[47] Mulford *v.* Smith, 307 U.S. 38 (1939).

[48] Interstate Commerce Comm'n. *v.* Goodrich Transit Co., 224 U.S. 194, 214 (1912).

[49] Although reversing the decision of the State supreme court that rates fixed by the commission were not subject to judicial review, the Supreme Court implicitly sanctioned the exercise of rate-making power by such bodies. Chicago, M. & St. P.R. Co. *v.* Minnesota, 134 U.S. 418 (1890).

[50] Hampton & Co. *v.* United States, 276 U.S. 394, 408 (1928).

[51] State of Minnesota *v.* Chicago, M. & St. P.R. Co. 38 Minn. 281, 301 (1888).

[52] Interstate Commerce Commission *v.* Louisville & N.R. Co., 227 U.S. 88 (1913); New York *v.* United States, 331 U.S. 284, 340-350 (1947) and cases cited therein. *See also* New York et al. *v.* United States, 342 U.S. 882 (1951).

[53] Union Bridge Co. *v.* United States, 204 U.S. 364 (1907).

[54] First Nat. Bank *v.* Fellows, ex rel. Union Trust Co., 244 U.S. 416 (1917).

[55] Mahler *v.* Eby, 264 U.S. 32 (1924); United States ex rel. Tisi *v.* Tod, 264 U.S. 131 (1924).

[56] New York Central Securities Corp. *v.* United States, 287 U.S. 12, 25 (1932).

[57] Federal Radio Comm'n. *v.* Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933).

[58] National Broadcasting Co. *v.* United States, 319 U.S. 190 (1943).

[59] 50 Stat. 246, as amended, 7 U.S.C. § 601 *et seq.*

[60] Brannan *v.* Stark, 342 U.S. 451 (1952). Justice Black, with whom Justices Reed and Douglas concurred, dissented, saying: "In striking down these provisions of the Secretary's order, the Court has departed from many principles it has previously announced in connection with its supervision over administrative agents. Under these principles, the Court would refrain from setting aside administrative findings of fact when supported by substantial evidence; we would give weight to the interpretation of a statute by its administrators; when, administrators have interpreted broad statutory terms, such, as here involved, we would recognize that it is our duty to accept this interpretation even though it was not 'the only reasonable one' or the one 'we would have reached had the question arisen in the first instance in judicial proceedings.' Unemployment Comm'n *v.* Aragon, 329 U.S. 143, 153 (1946)." Ibid. 484.

[61] Jackson *v.* Roby, 109 U.S. 440 (1883); Erhardt *v.* Boaro, 113 U.S. 527 (1885); Butte City Water Co. *v.* Baker, 196 U.S. 119 (1905).

[62] St. Louis, I.M. & S.R. Co. *v.* Taylor, 210 U.S. 281, 286 (1908).

[63] 295 U.S. 495, 537 (1935).

[64] 298 U.S. 238, 311 (1936).

[65] Currin *v.* Wallace, 306 U.S. 1 (1939); United States *v.* Rock Royal Co-operative, 307 U.S. 533, 577 (1939).

[66] Currin *v.* Wallace, 306 U.S. 1, 15, 16 (1939).

[67] 7 Cr. 382 (1813).

[68] Ibid. 388.

[69] 143 U.S. 649 (1892).

[70] Ibid. 691.

[71] Ibid. 692, 693.

[72] Hampton Jr. & Co. *v.* United States, 276 U.S. 394 (1928).

[73] 299 U.S. 304, 312 (1936).

[74] Ibid. 319-322.—United States *v.* Chemical Foundation, 272 U.S. 1 (1926) presented the anomalous situation of the United States suing to set aside a sale of alien property sold by one of its agents, the Alien Property Custodian, by authority of the President. The government contended that statute under which the sale was made was unconstitutional because, in giving the President full power of disposition of the property, it delegated legislative power to the President. Declaring that "It was peculiarly within the province of the Commander-in-Chief to know the facts and to determine what disposition should be made of enemy properties in order effectively to carry on the war," the Court affirmed a decree dismissing the suit. Ibid. 12.

[75] 293 U.S. 388 (1935).

[76] 312 U.S. 126 (1941).

[77] Ibid. 144, 145.

[78] White House Digest of Provisions of Law Which Would Become Operative upon Proclamation of a National Emergency by the President. The Digest is dated December 11, 1950. It was released to the press on December 16th. 15 F.R. 9029.

[79] United States *v.* Grimaud, 220 U.S. 506 (1911).

[80] Steuart & Bros. Inc. *v.* Bowles, 322 U.S. 398, 404 (1944).

[81] United States *v.* Eaton, 144 U.S. 677 (1892).

[82] Steuart & Bros. Inc. *v.* Bowles, 322 U.S. 398 (1944).

[83] Kraus & Bros. *v.* United States, 327 U.S. 614 (1946).

[84] Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harvard Law Review, 153, 159-166 (1926).

[85] 3 Annals of Congress, 493 (1792).

[86] In 1800, Secretary of the Treasury, Oliver Wolcott, Jr., addressed a letter to the House of Representatives advising them of his resignation from office and inviting an investigation of his office. Such an inquiry was made. 10 Annals of Congress 786-788 (1800).

[87] 8 Cong. Deb. 2160 (1832).

[88] 13 Cong. Deb. 1057 (1836).

[89] H.R. Rep. No. 194, 24th Cong., 2d sess., Ser. No. 307, 1, 12, 31 (1837).

[90] Cong. Globe, 36th Cong. 1st sess. 1100-1109 (1860).

[91] 103 U.S. 168 (1881).

[92] 273 U.S. 135, 177, 178 (1927).

[93] 4 Cong. Deb. 862, 868, 888, 889 (1827).

[94] 103 U.S. 168 (1881).

[95] 154 U.S. 447 (1894).

[96] Ibid. 478. *See also* Harriman *v.* Interstate Commerce Commission, 211 U.S. 407 (1908); Smith *v.* Interstate Commerce Commission, 245 U.S. 33 (1917).

[97] 273 U.S. 135 (1927).

[98] Ibid. 154, 175.

[99] 103 U.S. 168, 192-196 (1881).

[100] 166 U.S. 661 (1897).

[101] Ibid. 670.

[102] 273 U.S. 135, 178 (1927).

[103] 279 U.S. 263 (1929).

[104] Ibid. 295.

[105] In re Chapman, 166 U.S. 661 (1897).

[106] 279 U.S. 597 (1929).

[107] 6 Wheat. 204 (1821).

[108] 243 U.S. 521 (1917).

[109] Ibid. 542.

[110] 294 U.S. 125 (1935).

[111] Ibid. 147, 150.

[112] 6 Wheat. 204, 231 (1821).

[113] In re Chapman, 166 U.S. 661, 671-672 (1897).

[114] United States *v.* Bryan, 339 U.S. 323, 330 (1950); United States *v.* Fleischman, 339 U.S. 349 (1950).

[115] Christoffel *v.* United States, 338 U.S. 84, 89, 90 (1949).

[116] Minor *v.* Happersett, 21 Wall. 162, 171 (1875); Breedlove *v.* Suttles, 302 U.S. 277 (1937).

[117] Ex parte Yarbrough, 110 U.S. 651 (1884); Wiley *v.* Sinkler, 179 U.S. 58, 62 (1900); Swafford *v.* Templeton, 185 U.S. 487 (1902); United States *v.* Classic, 313 U.S. 299 (1941).

[118] United States *v.* Classic, 313 U.S. 299, 315 (1941).

[119] United States *v.* Mosley, 238 U.S. 383 (1915); United States *v.* Saylor, 322 U.S. 385, 387 (1944).

[120] United States *v.* Classic, 313 U.S. 299 (1941).

[121] United States *v.* Mosley, 238 U.S. 383 (1915).

[122] 35 Stat. 1092 (1909); 18 U.S.C. § 51 (1946), superseded by 62 Stat. 696 (1948); 18 U.S.C. § 241 (Supp. II, 1946 ed.).

[123] United States *v.* Mosley, 238 U.S. 383 (1915).

[124] United States *v.* Saylor, 322 U.S. 385 (1944).

[125] United States *v.* Bathgate, 246 U.S. 220 (1918). *See also* United States *v.* Gradwell, 243 U.S. 476 (1917).

[126] Sen. Rep. 904, 74th Cong., 1st sess. (1935); 79 Cong. Rec. 9651-9653 (1935).

[127] No. LX.

[128] Hinds' Precedents of the House of Representatives, I: §§ 443, 448-458 (1907).

[129] 202 U.S. 344 (1906).

[130] Ibid. 369-370.

[131] Hinds' Precedents of the House of Representatives, I: §§ 474-477 (1907).

[132] 69 Cong. Rec. 1718 (1928).

[133] Hinds' Precedents of the House of Representatives, I: § 414 (1907).

[134] Ibid. §§ 415-417.

[135] The part of this clause relating to the mode of apportionment of Representative among the several States, was changed by the Fourteenth Amendment, § 2 (p. 1170) and as to taxes on incomes without apportionment,

by the Sixteenth Amendment (p. 1191).

[136] Legal Tender Cases, 12 Wall. 457, 536 (1871).

[137] 46 Stat. 21 (1929). This same act penalizes refusal to cooperate properly with the census taker by answering his questions and in other ways. 13 U.S.C. 209.

[138] The Senate is a "continuing body"—McGrain *v.* Daugherty, 273 U.S. 135, 181-182 (1927).

[139] 5 Stat. 491 (1842). This requirement was dropped in 1850 (9 Stat. 428, 432-433) but was renewed in 1862 (12 Stat. 572). *See also* Joel Francis Paschal, The House of Representatives "Grand Depository of the Democratic Principle", Spring 1952 Issue of Law and Contemporary Problems (Duke University School of Law), 276-289.

[140] 14 Stat. 243 (1866).

[141] 16 Stat. 144 (1870); 16 Stat. 254 (1870); 17 Stat. 347-349 (1872).

[142] 28 Stat. 36 (1894).

[143] United States *v.* Reese, 92 U.S. 214 (1876).

[144] Ex parte Siebold, 100 U.S. 371 (1880); Ex parte Clarke, 100 U.S. 399 (1880); United States *v.* Gale, 109 U.S. 65 (1883).

[145] 241 U.S. 565 (1916).

[146] Smiley *v.* Holm, 285 U.S. 355 (1932); Koenig *v.* Flynn, 285 U.S. 375 (1932); Carroll *v.* Becker, 285 U.S. 380 (1932).

[147] 46 Stat. 21 (1929).

[148] 37 Stat. 13, 14 (1911).

[149] Wood *v.* Broom, 287 U.S. 1 (1932).

[150] 328 U.S. 549 (1946).

[151] Ibid. 556, 566.

[152] Ibid. 570-571.

[153] Ex parte Yarbrough, 110 U.S. 651, 661 (1884); United States *v.* Mosley, 238 U.S. 383 (1915); United States *v.* Saylor, 322 U.S. 385 (1944).

[154] In re Coy, 127 U.S. 731, 752 (1888).

[155] Ex parte Siebold, 100 U.S. 371 (1880); Ex parte Clarke, 100 U.S. 309 (1880); United States *v.* Gale, 109 U.S. 65 (1883).

[156] United States *v.* Wurzbach, 280 U.S. 396 (1930).

[157] Newberry *v.* United States, 256 U.S. 232 (1921).

[158] United States *v.* Classic, 313 U.S. 299, 318 (1941).

[159] Barry *v.* United States ex rel. Cunningham, 279 U.S. 597, 616 (1929).

[160] In re Loney, 134 U.S. 372 (1890).

[161] Cannon's Precedents of the House of Representatives, VI: §§ 72-74, 180 (1936). *Cf.* Newberry *v.* United States, 256 U.S. 232, 258 (1921).

[162] Barry *v.* United States ex rel. Cunningham, 279 U.S. 597, 614 (1929).

[163] Ibid. 615.

[164] Hinds' Precedents of the House of Representatives, IV: § 2895-2905 (1907).

[165] 144 U.S. 1 (1892).

[166] Ibid. 5-6.

[167] Rule V.

[168] Hinds' Precedents of the House of Representatives, IV: § 2910-2915 (1907); Cannon's Precedents of the House of Representatives, VI: §§ 645, 646 (1936).

[169] United States *v.* Ballin, 144 U.S. 1, 5 (1892). It is, of course, by virtue of its power to determine "rules of its proceedings" that the Senate enables its members to prevent the transaction of business by what are termed "filibusters". The question has been raised whether the rules which support a filibuster are constitutionally compatible with the clause in the preceding section: "A majority of each [House] shall constitute a quorum to do business". *See* Franklin Burdette, Filibustering in the Senate (Princeton

University Press, 1940), 6, 61, 111-112, 227-229, 232-233, 237-238. The Senate is "a continuing body". McGrain *v.* Daugherty, 273 U.S. 139, 181-182 (1927). Hence its rules remain in force from Congress to Congress except as they are changed from time to time, whereas those of the House are readopted at the outset of each new Congress.

[170] 286 U.S. 6 (1932).

[171] 338 U.S. 84 (1949).

[172] Title 22, § 2501.

[173] 338 U.S. at 93-95, citing Field *v.* Clark, 143 U.S. 649, 669-673 (1892); United States *v.* Ballin, 144 U.S. 1, 5 (1892); and other cases.

[174] Burton *v.* United States, 202 U.S. 344, 356 (1906).

[175] In re Chapman, 166 U.S. 661, 669, 670 (1897).

[176] I Story, Constitution, § 840, quoted with approval in Field *v.* Clark, 143 U.S. 649, 670 (1892).

[177] United States *v.* Ballin, 144 U.S. 1, 4 (1892).

[178] Field *v.* Clark, 143 U.S. 649 (1892); Flint *v.* Stone Tracy Co., 220 U.S. 107, 143 (1911). A parallel rule holds in the case of a duly authenticated official notice to the Secretary of State that a State legislature has ratified a proposed amendment to the Constitution. Leser *v.* Garnett, 258 U.S. 130, 137 (1922); *see also* Coleman *v.* Miller, 307 U.S. 433 (1939). In Christoffel *v.* United States, 338 U.S. 84 (1949), a sharply divided Court ruled that, in a case brought under the Perjury Statute of the District of Columbia (§ 22-2501 of the D.C. Code) for alleged perjurious testimony before a Committee of the House of Representatives, the trial Court erred in charging the jury that it was free to ignore testimony that less than a quorum of the Committee was in attendance when the alleged perjury was committed. Four Justices dissented; and curiously enough only four of the majority were present when the opinion was delivered, the fifth being indisposed. Remarks Justice Jackson in his concurring opinion in United States *v.* Bryan (339 U.S. 323 (1950)), in which the ruling in Christoffel was held to be inapplicable: "It is ironic that this interference with legislative procedures was promulgated by exercise within the Court of the very right of absentee participation denied to Congressmen." Ibid. 344. It seems unlikely that the Christoffel decision seriously undermines Field *v.* Clark.

[179] Page *v.* United States, 127 U.S. 67 (1888).

[180] Long *v.* Ansell, 293 U.S. 76 (1934).

[181] Ibid. 83.

[182] United States *v.* Cooper, 4 Dall. 341 (1800).

[183] Williamson *v.* United States, 207 U.S. 425, 446 (1908).

[184] Kilbourn *v.* Thompson, 103 U.S. 168 (1881).

[185] Ibid.

[186] 4 Mass. 1 (1808).

[187] Kilbourn *v.* Thompson, 103 U.S. 168, 203, 204 (1881).

[188] Ibid. 205.

[189] Justice Frankfurter for the Court in Tenney *v.* Brandhove, 341 U.S. 367, 377 (1951). Justice Douglas dissented: "* * * I do not agree that all abuses of legislative committees are solely for the legislative body to police. We are dealing here with a right protected by the Constitution—the right of free speech. The charge * * * is that a legislative committee brought the weight of its authority down on respondent for exercising his right of free speech. Reprisal for speaking is as much an abridgment as a prior restraint. If a committee departs so far from its domain [as?] to deprive a citizen of a right protected by the Constitution, I can think of no reason why it should be immune". Ibid. 382. *See also* Barsky *v.* United States, 167 F. (2d) 241 (1948); certiorari denied, 334 U.S. 843 (1948).

[190] Hinds' Precedents of the House of Representatives, I: § 493 (1907); Cannon's Precedents of the House of Representatives, VI: §§ 63, 64 (1936).

[191] Hinds' Precedents of the House of Representatives, I: §§ 496-499 (1907).

[192] 34 Stat. 948 (1907).

[193] 35 Stat. 626 (1909).

[194] The situation gave rise to the case of Ex parte Albert Levitt, Petitioner, 302 U.S. 633 (1937). This was the case in which the Court declined to pass upon the validity of Justice Black's appointment. It seems curious that the Court, in rejecting petitioner's application, did not point out that it was being asked to assume original jurisdiction contrary to the decision in Marbury *v.* Madison, 1 Cr. 137 (1803).

[195] I Story, Constitution, § 880.

[196] Twin City Nat. Bank *v.* Nebeker, 167 U.S. 196 (1897).

[197] Millard *v.* Roberts, 202 U.S. 429 (1906).

[198] Flint *v.* Stone Tracy Co., 220 U.S. 107, 143 (1911).

[199] Rainey *v.* United States, 232 U.S. 310 (1914).

[200] La Abra Silver Mining Co. *v.* United States, 175 U.S. 423, 453 (1899).

[201] Edwards *v.* United States, 286 U.S. 482 (1932). On one occasion in 1936, delay in presentation of a bill enabled the President to sign it 23 days after the adjournment of Congress. Schmeckebier, Approval of Bills After Adjournment of Congress, 33 American Political Science Review 52 (1939).

[202] Gardner *v.* Collector, 6 Wall. 499 (1868).

[203] Ibid. 504. *See also* Burgess *v.* Salmon, 97 U.S. 381, 383 (1878).

[204] Matthews *v.* Zane, 7 Wheat. 164, 211 (1822).

[205] Lapeyre *v.* United States, 17 Wall. 191, 198 (1873).

[206] Okanogan Indians *v.* United States, 279 U.S. 655 (1929).

[207] Wright *v.* United States, 302 U.S. 583 (1938).

[208] Missouri P.R. Co. *v.* Kansas, 248 U.S. 276 (1919).

[209] 20 Wall. 92, 112, 113 (1874).

[210] 12 Stat. 589 (1862).

[211] 54th Cong., 2d sess., S. Doc. 1335; Hinds' Precedents of the House of Representatives, IV: § 3483 (1907).

[212] *See e.g.*, Lend Lease Act of March 11, 1941 (55 Stat. 31); First War Powers Act of December 18, 1941 (55 Stat. 838); Emergency Price Control Act of January 30, 1942 (56 Stat. 23); Stabilization Act of October 2, 1942 (56 Stat. 765); War Labor Disputes Act of June 25, 1943 (57 Stat. 163).

[213] Reorganization Act of June 20, 1949 (63 Stat. 203).

[214] Reorganization Act of April 3, 1939 (53 Stat. 561).

[215] Hollingsworth *v.* Virginia, 3 Dall. 378 (1798).

[216] License Tax Cases, 5 Wall. 462, 471 (1867).

[217] Brushaber *v.* Union Pac. R.R., 240 U.S. 1 (1916).

[218] Ibid. 12.

[219] 253 U.S. 245 (1920).

[220] 268 U.S. 501 (1925).

[221] 307 U.S. 277 (1939).

[222] 11 Wall. 113 (1871).

[223] Graves *v.* O'Keefe, 306 U.S. 466 (1939).

[224] 304 U.S. 405, 414 (1938).

[225] Veazie Bank *v.* Fenno, 8 Wall. 533 (1869).

[226] United States *v.* Baltimore & O.R. Co., 17 Wall. 322 (1873).

[227] 157 U.S. 429 (1895).

[228] 4 Wheat. 316 (1819).

[229] Indian Motorcycle Co. *v.* United States, 283 U.S. 570 (1931).

[230] 12 Wheat. 419, 444 (1827).

[231] Snyder *v.* Bettman, 190 U.S. 249, 254 (1903).

[232] South Carolina *v.* United States, 199 U.S. 437 (1905). *See also* Ohio *v.* Helvering, 292 U.S. 360 (1934).

[233] 220 U.S. 107 (1911).

[234] Greiner *v.* Lewellyn, 258 U.S. 384 (1922).

[235] Wheeler Lumber Bridge & Supply Co. *v.* United States, 281 U.S. 572 (1930).

[236] University of Illinois *v.* United States, 289 U.S. 48 (1933).

[237] Allen *v.* Regents, 304 U.S. 439 (1938).

[238] Wilmette Park District *v.* Campbell, 338 U.S. 411 (1949).

[239] Metcalf *v.* Mitchell, 269 U.S. 514 (1926).

[240] Helvering *v.* Powers, 293 U.S. 214 (1934).

[241] Willcutts *v.* Bunn, 282 U.S. 216 (1931).

[242] Helvering *v.* Mountain Producers Corp., 303 U.S. 376 (1938), overruling Burnet *v.* Coronado Oil & Gas Co., 285 U.S. 393 (1932).

[243] New York *v.* United States, 326 U.S. 572, 584 (1946), (concurring opinion of Justice Rutledge).

[244] 304 U.S. 405 (1938).

[245] Ibid. 419-420.

[246] 326 U.S. 572 (1946).

[247] Ibid. 584.

[248] Ibid. 589-590.

[249] Ibid. 596.

[250] Wilmette Park District *v.* Campbell, 338 U.S. 411 (1949).

[251] *See also* article I, section 9, clause 4.

[252] LaBelle Iron Works *v.* United States, 256 U.S. 377 (1921); Brushaber *v.* Union P.R. Co., 240 U.S. 1 (1916); Head Money Cases, 112 U.S. 580 (1884).

[253] Knowlton *v.* Moore, 178 U.S. 41 (1900).

[254] Fernandez *v.* Wiener, 326 U.S. 340 (1945); Riggs *v.* Del Drago, 317 U.S. 95 (1942); Phillips *v.* Commissioner of Internal Revenue, 283 U.S. 589 (1931); Poe *v.* Seaborn, 282 U.S. 101, 117 (1930).

[255] Florida *v.* Mellon, 273 U.S. 12 (1927).

[256] Downes *v.* Bidwell, 182 U.S. 244 (1901).

[257] 194 U.S. 486 (1904). The Court recognized that Alaska was an incorporated territory but took the position that the situation in substance was the same as if the taxes had been directly imposed by a territorial legislature for the support of the local government.

[258] License Tax Cases, 5 Wall. 462, 471 (1867).

[259] United States *v.* Yuginovich, 256 U.S. 450 (1921).

[260] United States *v.* Constantine, 296 U.S. 287, 293 (1935).

[261] License Tax Cases, 5 Wall. 462, 471 (1867).

[262] Felsenheld *v.* United States, 186 U.S. 126 (1902).

[263] In re Kollock, 105 U.S. 526 (1897).

[264] United States *v.* Doremus, 249 U.S. 86 (1919). *Cf.* Nigro *v.* United States, 276 U.S. 332 (1928).

[265] Sonzinsky *v.* United States, 300 U.S. 506 (1937).

[266] McCray *v.* United States, 195 U.S. 27 (1904).

[267] Justice Clark speaking for the Court in United States *v.* Sanchez, 340 U.S. 42, 44 (1950). *See also* Sonzinsky *v.* United States, 300 U.S. 506, 513-514 (1937).

[268] Sunshine Anthracite Coal Co. *v.* Adkins, 310 U.S. 381, 383 (1940). *See also* Head Money Cases, 112 U.S. 580, 596 (1884).

[269] Bailey *v.* Drexel Furniture Co., 259 U.S. 20 (1922); Hill *v.* Wallace, 259 U.S. 44 (1922); Helwig *v.* United States, 188 U.S. 605 (1903).

[270] 296 U.S. 287 (1935).

[271] 1 Stat. 24 (1789).

[272] 276 U.S. 394 (1928).

[273] Ibid. 411-412.

[274] III Writings of Thomas Jefferson, 147-149 (Library Edition, 1904).

[275] James Francis Lawson, The General Welfare Clause (1926).

[276] The Federalist Nos. 30 and 34.

[277] Ibid. No. 41.

[278] 1 Stat. 229 (1792).

[279] 2 Stat. 357 (1806).

[280] In an advisory opinion which it rendered for President Monroe at his request on the power of Congress to appropriate funds for public improvements, the Court answered that such appropriations might be properly made under the war and postal powers. *See* E.F. Albertsworth, "Advisory Functions in the Supreme Court," 23 Georgetown L.J. 643, 644-647 (1935). Monroe himself ultimately adopted the broadest view of the spending power, from which, however, he carefully excluded any element of regulatory or police power. *See* his "Views of the President of the United States on the Subject of Internal Improvements," of May 4, 1822, 2 Richardson, Messages and Papers of the Presidents, 713-752.

[281] The Council of State Governments, Federal Grants-in-Aid, 6-14 (1949).

[282] 127 U.S. 1 (1888).

[283] 255 U.S. 180 (1921).

[284] 262 U.S. 447 (1923). *See also* Alabama Power Co. *v.* Ickes, 302 U.S. 464 (1938).

[285] 160 U.S. 668 (1896).

[286] Ibid. 681.

[287] 297 U.S. 1 (1936). *See also* Cleveland *v.* United States, 323 U.S. 329 (1945).

[288] 297 U.S. 1, 65, 66 (1936).

[289] Justice Stone, speaking for himself and two other Justices, dissented on the ground that Congress was entitled when spending the national revenues for the "general welfare" to see to it that the country got its money's worth thereof, and that the condemned provisions were "necessary and proper" to that end. United States *v.* Butler, 297 U.S. 1, 84-86 (1936).

[290] 301 U.S. 548 (1937).

[291] Ibid. 591.

[292] Ibid. 590.

[293] Cincinnati Soap Co. *v.* United States, 301 U.S. 308 (1937).

[294] 301 U.S. 619 (1937).

[295] 301 U.S. 548, 589, 590 (1937).

[296] 330 U.S. 127 (1947).

[297] 54 Stat. 767 (1940).

[298] 330 U.S. 127, 143.

[299] United States *v.* Realty Co., 163 U.S. 427 (1896); Pope *v.* United States, 323 U.S. 1, 9 (1944).

[300] Cincinnati Soap Co. *v.* United States, 301 U.S. 308 (1937).

[301] Cr. 358 (1805).

[302] Ibid. 396.

[303] 2 Madison, Notes on the Constitutional Convention, 81 (Hunt's ed. 1908).

[304] Ibid. 181.

[305] Legal Tender Cases, 12 Wall. 457 (1871), overruling Hepburn *v.* Griswold, 8 Wall. 603 (1870).

[306] Perry *v.* United States, 294 U.S. 330, 351 (1935). *See also* Lynch *v.* United States, 292 U.S. 571 (1934).

[307] Prentice and Egan, The Commerce Clause of the Federal Constitution (1898) 14. The balance began inclining the other way with the enactment of the Interstate Commerce Act in 1887.

[308] 9 Wheat. 1, 189-192 (1824). *Cf.* Webster for the appellant: "Nothing was more complex than commerce; and in such an age as this, no words embraced a wider field than *commercial* regulation. Almost all the business and intercourse of life may be connected, incidently, more or less, with commercial regulations." (ibid. 9-10); also Justice Johnson, in his concurring opinion: "Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation. Shipbuilding, the carrying trade, and propagation of seamen, are such vital agents of commercial prosperity, that the nation which could not legislate over these subjects, would not possess power to regulate commerce." (ibid. 229-230). "It is all but impossible in our own age to sense fully its eighteenth-century meaning (i.e., the meaning of commerce). The Eighteenth Century did not separate by artificial lines aspects of a culture which are inseparable. It had no lexicon of legalisms extracted from the law reports in which judicial usage lies in a world apart from the ordinary affairs of life. Commerce was then more than we imply now by business or industry. It was a name for the economic order, the domain of political economy, the realm of a comprehensive public policy. It is a word which makes trades, activities and interests an instrument in the culture of a people. If trust was to be reposed in parchment, it was the only word which could catch up into a single comprehensive term all activities directly affecting the wealth of the nation," Walton H. Hamilton and Douglass Adair, The Power to Govern, 62-63 (New York: 1937).

[309] Ibid. 191.

[310] 9 Wheat. 1, 193 (1824).

[311] *See* Pennsylvania *v.* Wheeling & Belmont Bridge Co., 18 How. 421 (1856); Mobile *v.* Kimball, 102 U.S. 691 (1881); Covington Bridge Co. *v.* Kentucky, 154 U.S. 204 (1894); Kelley *v.* Rhoads, 188 U.S. 1 (1903); United States *v.* Hill, 248 U.S. 420 (1919); Edwards *v.* California, 314 U.S. 160 (1941).

[312] Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U.S. 1, 9 (1878); International Text Book Co. *v.* Pigg, 217 U.S. 91, 106-107 (1910); Western Union Tel. Co. *v.* Foster, 247 U.S. 105 (1918); Federal Radio Com. *v.* Nelson Bros., 289 U.S. 266 (1933).

[313] Swift & Co. *v.* United States, 196 U.S. 375, 398-399 (1905); Dahnke-Walker Milling Co. *v.* Bondurant, 257 U.S. 282, 290-291 (1921); Stafford *v.* Wallace, 258 U.S. 495 (1922); Federal Trade Com. *v.* Pacific States Paper Trade Assoc., 273 U.S. 52, 64-65 (1927).

[314] Kidd *v.* Pearson, 128 U.S. 1 (1888); Oliver Iron Co. *v.* Lord, 262 U.S. 172 (1923).

[315] Paul *v.* Virginia, 8 Wall. 168 (1869). *See also* New York L. Ins. Co. *v.* Deer Lodge County, 231 U.S. 495 (1913); New York L. Ins. Co. *v.* Cravens, 178 U.S. 389, 401 (1900); Fire Assoc. of Philadelphia *v.* New York, 119 U.S. 110 (1886); Bothwell *v.* Buckbee-Mears Co., 275 U.S. 274 (1927); Metropolitan Casualty Ins. Co. *v.* Brownell, 294 U.S. 580 (1935).

[316] Federal Baseball Club *v.* National League, 259 U.S. 200 (1922).

[317] Blumenstock Bros. *v.* Curtis Pub. Co., 252 U.S. 436 (1920).

[318] Williams *v.* Fears, 179 U.S. 270 (1900).

A contract entered into for the erection of a factory which was to be supervised and operated by the officers of a foreign corporation was held not a transaction of interstate commerce in the constitutional sense merely because of the fact that the products of the factory are largely to be sold and shipped to other factories. Diamond Glue Co. *v.* United States Glue Co., 187 U.S. 611, 616 (1903). In Browning *v.* Waycross, 233 U.S. 16 (1914), it was held that the installation of lightning rods sold by a foreign corporation was not interstate commerce, although provided for in the contract of purchase. Similarly in General Railway Signal Co. *v.* Virginia, 246 U.S. 500 (1918), where a foreign corporation installed signals in Virginia, bringing in materials, supplies, and machinery from without the State, the Court held that local business was involved, separate and distinct from interstate

commerce, and subject to the licensing power of the State. However, in an interstate contract for the sale of a complicated ice-making plant, where it was stipulated that the parts should be shipped into the purchaser's State and the plant there assembled and tested under the supervision of an expert to be sent by the seller, it was held that services of the expert did not constitute the doing of a local business subjecting the seller to regulations of Texas concerning foreign corporations. York Mfg. Co. *v.* Colley, 247 U.S. 21 (1918). *See also* Kansas City Structural Steel Co. *v.* Arkansas, 269 U.S. 148 (1925).

[319] Associated Press *v.* United States, 326 U.S. 1 (1945).

[320] American Medical Association *v.* United States, 317 U.S. 519 (1943). *Cf.* United States *v.* Oregon State Medical Society, 343 U.S. 326 (1952).

[321] United States *v.* South-Eastern Underwriters Assoc, 322 U.S. 533 (1944). The interstate character of the insurance business as today organized and carried on is stressed, although its intrastate elements are not overlooked. The Court's business is to determine in each case whether "the competing * * * State and national interests * * * can be accommodated." Ibid. 541 and 548.

[322] Article I, § 8, cl. 18.

[323] *See infra* CONGRESSIONAL REGULATIONS OF PRODUCTION AND INDUSTRIAL RELATIONS.

[324] 6 Wheat. 264, 413 (1821).

[325] 9 Wheat. 1, 195 (1824).

[326] New York *v.* Miln, 11 Pet. 102 (1837), overturned in Henderson *v.* New York, 92 U.S. 259 (1876); License Cases, 5 How. 504, 573-574, 588, 613 (1847); Passenger Cases, 7 How. 283, 399-400, 465-470 (1849); The Passaic Bridges, 3 Wall. 782 (Appendix), 793 (1866); United States *v.* Dewitt, 9 Wall. 41, 44 (1870); Patterson *v.* Kentucky, 97 U.S. 501, 503 (1879); Trade-Mark Cases, 100 U.S. 82 (1879); Kidd *v.* Pearson, 128 U.S. 1 (1888); Illinois Central R. Co. *v.* McKendree, 203 U.S. 514 (1906); Keller *v.* United States, 213 U.S. 138, 144-149 (1909); Hammer *v.* Dagenhart, 247 U.S. 251 (1918). *See also infra.*

[327] United States *v.* Wrightwood Dairy Co., 315 U.S. 110, 119 (1942).

[328] Gibbons *v.* Ogden, 9 Wheat. 1, 196. Commerce "among the several States" does not comprise commerce of the District of Columbia nor the territories of the United States. Congress's power over their commerce is an incident of its general power over them. Stoutenburgh *v.* Hennick, 129 U.S. 141 (1889); Atlantic Cleaners and Dyers, Inc. *v.* United States, 286 U.S. 427 (1932); In re Bryant, 4 Fed. Cas. No. 2067 (1865). Transportation between two points in the same State, when a large part of the route is a loop outside the State, is "commerce among the several States." Hanley *v.* Kansas City Southern R. Co., 187 U.S. 617 (1903); followed in Western Union Telegraph Co. *v.* Speight, 254 U.S. 17 (1920), as to a message sent from one point to another in North Carolina via a point in Virginia.

[329] 9 Wheat. 1, 196-197.

[330] Champion *v.* Ames (Lottery Case), 188 U.S. 321, 373-374.

[331] Brolan *v.* United States, 236 U.S. 216, 222 (1915).

[332] Thurlow *v.* Massachusetts (License Cases), 5 How. 504, 578 (1847).

[333] Pittsburgh & S. Coal Co. *v.* Bates, 156 U.S. 577, 587 (1895).

[334] United States *v.* Carolene Products Co., 304 U.S. 144, 147-148 (1938). *See also infra.*

[335] The "Daniel Ball," 10 Wall. 557, 564 (1871).

[336] Mobile County *v.* Kimball, 102 U.S. 691, 696, 697 (1881).

[337] Second Employers' Liability Cases, 223 U.S. 1, 47, 53-54 (1912).

[338] The above case. And *see infra*.

[339] 9 Wheat. 1, 217, 221 (1824).

[340] Pensacola Teleg. Co. *v.* Western Union Teleg. Co., 96 U.S. 1 (1878). *See also* Western Union Teleg. Co. *v.* Texas, 105 U.S. 460 (1882).

[341] Ibid. 9. "Commerce embraces appliances necessarily employed in carrying on transportation by land and water."—Chicago & N.W.R. Co. *v.* Fuller, 17 Wall. 560, 568 (1873).

[342] "No question is presented as to the power of the Congress, in its regulation of

interstate commerce, to regulate radio communications." Chief Justice Hughes speaking for the Court in Federal Radio Com *v.* Nelson Bros. B. & M. Co., 289 U.S. 266, 279 (1933). *Said* Justice Stone, speaking for the Court in 1936: "Appellant is thus engaged in the business of transmitting advertising programs from its stations in Washington to those persons in other States who 'listen in' through the use of receiving sets. In all essentials its procedure does not differ from that employed in sending telegraph or telephone messages across State lines, which is interstate commerce. Western Union Teleg. Co. *v.* Speight, 254 U.S. 17 (1920); New Jersey Bell Teleph. Co. *v.* State Bd. of Taxes & Assessments, 280 U.S. 338 (1930); Cooney *v.* Mountain States Teleph. & Teleg. Co., 294 U.S. 384 (1935); Pacific Teleph. & Teleg. Co. *v.* Tax Commission, 297 U.S. 403 (1936). In each, transmission is effected by means of energy manifestations produced at the point of reception in one State which are generated and controlled at the sending point in another. Whether the transmission is effected by the aid of wires, or through a perhaps less well understood medium, 'the ether,' is immaterial, in the light of those practical considerations which have dictated the conclusion that the transmission of information interstate is a form of 'intercourse,' which is commerce. *See* Gibbons *v.* Ogden, 9 Wheat. 1, 189." Fisher's Blend Station *v.* Tax Commission, 297 U.S. 650, 654-655 (1936).

[343] 13 How. 518.

[344] 10 Stat. 112 (1852).

[345] Pennsylvania *v.* Wheeling & Belmont Bridge Co., 18 How. 421, 430 (1856). "It is Congress, and not the Judicial Department, to which the Constitution has given the power to regulate commerce with foreign nations and among the several States. The courts can never take the initiative on this subject." Parkersburg & O. River Transportation Co. *v.* Parkersburg, 107 U.S. 691, 701 (1883). *See also* Prudential Insurance Co. *v.* Benjamin, 328 U.S. 408 (1946); and Robertson *v.* California, 328 U.S. 440 (1946).

[346] 3 Wall. 713.

[347] Ibid. 724-725.

[348] Union Bridge Co. *v.* United States, 204 U.S. 364 (1907). *See also* Monongahela Bridge Co. *v.* United States, 216 U.S. 177 (1910); and Wisconsin *v.* Illinois, 278 U.S. 367 (1929). Of collateral interest are the following: South Carolina *v.* Georgia, 93 U.S. 4, 13 (1876); Bedford *v.* United States, 192 U.S. 217 (1904); Jackson *v.* United States, 230 U.S. 1 (1913); United States *v.* Arizona, 295 U.S. 174 (1935).

[349] Gibson *v.* United States, 166 U.S. 269 (1897). *See also* Newport & Cincinnati Bridge Co. *v.* United States, 105 U.S. 470 (1882); United States *v.* Rio Grande Dam & Irrig. Co., 174 U.S. 690 (1899); United States *v.* Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); Seattle *v.* Oregon & W.R. Co., 255 U.S. 56, 63 (1921); Economy Light & Power Co. *v.* United States, 256 U.S. 113 (1921); United States *v.* River Rouge Improv. Co., 269 U.S. 411, 419 (1926); Henry Ford & Son *v.* Little Falls Fibre Co., 280 U.S. 369 (1930); United States *v.* Commodore Park, 324 U.S. 386 (1945).

[350] United States *v.* Cress, 243 U.S. 316 (1917).

[351] United States *v.* Chicago, M., St. P. & P.R. Co., 312 U.S. 592, 597 (1941); United States *v.* Willow River Power Co., 324 U.S. 499 (1945).

[352] United States *v.* Rio Grande Dam & Irrig. Co., 174 U.S. 690 (1899); and *cf.* below the discussion of United States *v.* Appalachian Electric P. Co., 311 U.S. 377 (1940).

[353] The "Daniel Ball" *v.* United States, 10 Wall. 557 (1871).

[354] Ibid. 560.

[355] Ibid. 565.

[356] Ibid. 566. "The regulation of commerce implies as much control, as far-reaching power, over an artificial as over a natural highway." Justice Brewer for the Court in Monongahela Navigation Co. *v.* United States, 148 U.S. 312, 342 (1893).

[357] Congress had the right to confer upon the Interstate Commerce Commission the power to regulate interstate ferry rates. (New York C. & H.R.R. Co. *v.* Board of Chosen Freeholders, 227 U.S. 248 (1913)); and to authorize the Commission to govern the towing of vessels between points in the same State but partly through waters of an adjoining State (Cornell Steamboat Co. *v.* United States, 321 U.S. 634 (1944)). *Also* Congress's power over navigation extends to persons furnishing wharfage, dock, warehouse, and other terminal

facilities to a common carrier by water. Hence an order of the United States Maritime Commission banning certain allegedly "unreasonable practices" by terminals in the Port of San Francisco, and prescribing schedules of maximum free time periods and of minimum charges was constitutional. (California *v.* United States, 320 U.S. 577 (1944)). The same power also comprises regulation of the registry, enrollment, license, and nationality of ships and vessels; the method of recording bills of sale and mortgages thereon; the rights and duties of seamen; the limitations of the responsibility of shipowners for the negligence and misconduct of their captains and crews; and many other things of a character truly maritime. *See* Rodd *v.* Heartt (The "Lottawanna"), 21 Wall. 558, 577 (1875); Providence & N.Y.S.S. Co. *v.* Hill Mfg. Co., 109 U.S. 578, 589 (1883); Old Dominion S.S. Co. *v.* Gilmore, 207 U.S. 398 (1907); O'Donnell *v.* Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943). *See also* below article III, § 2, (Admiralty and Maritime clause).

[358] Pollard *v.* Hagan, 3 How. 212 (1845); Shively *v.* Bowlby, 152 U.S. 1 (1894). "The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively; and the new States have the same rights, sovereignty, and jurisdiction over this subject as the original States." 3 How. 212, headnote 3.

[359] Green Bay & M. Canal Co. *v.* Patten Paper Co., 172 U.S. 58, 80 (1898).

[360] 229 U.S. 53 (1913).

[361] Ibid. 72-73, citing Kaukauna Water Power Co. *v.* Green Bay & M. Canal Co., 142 U.S. 254 (1891).

[362] 283 U.S. 423.

[363] 311 U.S. 377.

[364] 283 U.S. at 455, 456.

[365] 311 U.S. at 407, 409-410.

[366] 311 U.S. at 426.

[367] Oklahoma ex rel. Phillips *v.* Atkinson Co., 313 U.S. 508, 523-534 *passim* (1941).

[368] Ashwander *v.* Tennessee Valley Authority, 297 U.S. 288 (1936). *See infra.*

[369] 12 Stat. 489 (1862).

[370] Thomson *v.* Pacific Railroad, 9 Wall. 579, 589 (1870); California *v.* Central Pacific Railroad, 127 U.S. 1, 39 (1888); Cherokee Nation *v.* Southern Kansas R. Co., 135 U.S. 641 (1890); Luxton *v.* North River Bridge Co., 153 U.S. 525, 530 (1894).

[371] 14 Stat. 66 (1866). In his first annual message (December 4, 1865), President Johnson had asked Congress "to prevent any selfish impediment [by the States] to the free circulation of men and merchandise." 6 Richardson, Messages and Papers of the Presidents, 362.

[372] 14 Stat. 221; Pensacola Teleg. Co. *v.* Western Union Teleg. Co., 96 U.S. 1, 3-4, 11 (1878).

[373] R.S. Secs. 4386-4390; replaced today by the Live Stock Transportation Act of 1906 (34 Stat. 607).

[374] 94 U.S. 113 (1877).

[375] 118 U.S. 557.

[376] 24 Stat. 379 (1887).

[377] 154 U.S. 447.

[378] Interstate Commerce Com. *v.* Alabama Midland R. Co., 168 U.S. 144, 176 (1897). *See also* Cincinnati, N.O. & T.P.R. Co. *v.* Interstate Commerce Commission, 162 U.S. 184 (1896).

[379] 34 Stat. 584.

[380] 36 Stat. 539 (1910).

[381] By the Federal Communications Act of 1934 (48 Stat. 1081), this jurisdiction was handed over to the Federal Communications Commission, created by the act.

[382] 41 Stat. 474 § 400; 488 § 422. The act must today be read in conjunction with the Transportation Act of 1940 (54 Stat. 898), which "was intended, together with the old law, to provide a completely integrated interstate regulatory

system over motor, railroad, and water carriers." United States *v.* Pennsylvania R. Co., 323 U.S. 612, 618-619 (1945).

[383] Houston E. & W.T.R. Co. *v.* United States (Shreveport Case), 234 U.S. 342 (1914). Forty States, through their Attorneys General, intervened in the case against the Commission's order.

[384] Ibid. 351-352.

[385] Ibid. 353. *See* to the same effect American Express Co. *v.* Caldwell, 244 U.S. 617, 627 (1917); Pacific Teleph. & Teleg. Co. *v.* Tax Commission (Washington), 297 U.S. 403 (1936); Weiss *v.* United States, 308 U.S. 321 (1939); Bethlehem Steel Co. *v.* New York Labor Relations Bd., 330 U.S. 767, 772 (1947); and United States *v.* Walsh, 331 U.S. 432, 438 (1947).

[386] 257 U.S. 563 (1922).

[387] In North Carolina *v.* United States, 325 U.S. 507 (1945), the Court disallowed as *ultra vires* an order of the Interstate Commerce Commission, setting aside State-prescribed intrastate passenger rates, on the ground that it was unsupported by clear findings and evidence sufficient to show its necessity.

Among the various provisions of the Interstate Commerce Commission Act that have been sustained in specific decisions are the following: a provision penalizing shippers for obtaining transportation at less than published rates, Armour Packing Co. *v.* United States, 209 U.S. 56 (1908); the so-called "commodities clause" of the Hepburn Act of June 29, 1906, construed as prohibiting the hauling of commodities in which the carrier had at the *time of haul* a proprietary interest, United States *v.* Delaware & H. Co., 213 U.S. 366 (1909); a provision of the same act abrogating life passes, Louisville & N.R. Co. *v.* Mottley, 219 U.S. 467 (1911); a provision of the same act authorizing the Commission to regulate the entire system of bookkeeping of interstate carriers, including intrastate accounts, Interstate Commerce Commission *v.* Goodrich Transit Co., 224 U.S. 194 (1912); the "long and short haul" clause of the Interstate Commerce Act, United States *v.* Atchison, T. & S.F.R. Co. (Intermountain Rate Cases), 234 U.S. 476 (1914); an order of the Commission establishing the so-called uniform zone or block system of express rates, American Express Co. *v.* South Dakota ex rel. Caldwell, 244 U.S. 617 (1917); an order of the Commission directing the abandonment of an intrastate branch of an interstate railroad, Colorado *v.* United States, 271 U.S. 153 (1926); an order of the Commission fixing rates of a transportation company operating solely in the District of Columbia, on the ground that its carriage of passengers constituted part of an interstate movement, United States *v.* Capital Transit Co., 338 U.S. 286 (1949).

[388] United States *v.* Ohio Oil Co. (Pipe Line Cases), 234 U.S. 548 (1914).

[389] *See also* State Corp. Commission *v.* Wichita Gas Co., 290 U.S. 561 (1934); Eureka Pipe Line Co. *v.* Hallanan, 257 U.S. 265 (1921); United Fuel Gas Co. *v.* Hallanan, 257 U.S. 277 (1921); Pennsylvania *v.* West Virginia, 262 U.S. 553 (1923); Missouri ex rel. Barrett *v.* Kansas Natural Gas Co., 265 U.S. 298 (1924).

[390] Public Utilities Com. *v.* Attleboro Steam and Electric Co., 273 U.S. 83 (1927). *See also* Utah Power & Light Co. *v.* Pfost, 286 U.S. 165 (1932).

[391] 49 Stat. 838.

[392] The Natural Gas Act of 1938, 52 Stat. 821.

[393] 315 U.S. 575 (1942).

[394] Ibid. 582. Sales to distributors by a wholesaler of natural gas which is delivered to it from an out-of-State source are subject to the rate-making powers of the Federal Power Commission. Colorado-Wyoming Co. *v.* Comm'n., 324 U.S. 626 (1945). *See also* Illinois Natural Gas Co. *v.* Central Illinois Pub. Serv. Co., 314 U.S. 498 (1942); *also* Federal Power Commission *v.* East Ohio Gas Co., 338 U.S. 464, decided January 9, 1950, where it was held that a natural gas company which, while operating exclusively in one State, sold there directly to consumers gas transported into the State through the interstate lines of other companies, "a natural gas company" within the meaning of the act of 1938, and so could be required by the Commission to keep uniform accounts and submit reports.

[395] 48 Stat. 1064.

[396] 49 Stat. 543; since amended in some respects in 1938 (52 Stat. 973) and 1940 (54 Stat. 735).

[397] 52 Stat. 973.

[398] 27 Stat. 531. As early as 1838 laws were passed requiring the installation of safety devices on steam vessels. 5 Stat. 304 and 626. Along with the Safety Appliance Acts mention should also be made of acts requiring the use of ashpans on locomotives (35 Stat. 476 (1908)); the inspection of boilers (36 Stat. 913 (1911) and 38 Stat. 1192 (1915)); the use of ladders, drawbars, etc., on cars (36 Stat. 298 (1910)); etc.

[399] 32 Stat. 943.

[400] 222 U.S. 20 (1911).

[401] Ibid. 26-27. *See also* Texas & P.R. Co. *v.* Rigsby, 241 U.S. 33 (1916); and United States *v.* California, 297 U.S. 175 (1936). In the latter case the intrastate railway involved was property of the State.

[402] 34 Stat. 1415.

[403] Baltimore & O.R. Co. *v.* Interstate Commerce Com., 221 U.S. 612, 618-619 (1911).

[404] 34 Stat. 232, disallowed in part in Howard *v.* Illinois Central R. Co., 207 U.S. 463 (1908); 35 Stat. 65, sustained in the Second Employers' Liability Cases (Mondou *v.* New York, N.H. & H.R. Co.), 223 U.S. 1 (1912).

[405] *See* 223 U.S. at 19-22.

[406] Ibid. 48. Because the injured employee must, in order to benefit from the act, be employed at the time of his injury "in interstate commerce," the Court's application of it has given rise to some narrow distinctions. *See* Illinois Central R. Co. *v.* Peery, 242 U.S. 292 (1916); New York Central R. Co. *v.* White, 243 U.S. 188 (1917); Chicago, B. & Q.R. Co. *v.* Harrington, 241 U.S. 177 (1916); Louisville & N.R. Co. *v.* Parker, 242 U.S. 13 (1916); Illinois Central R. Co. *v.* Behrens, 233 U.S. 473 (1914); St. Louis, S.F. & T.R. Co. *v.* Seale, 229 U.S. 156 (1913); Pedersen *v.* Delaware, L. & W.R. Co., 229 U.S. 146 (1913); Shanks *v.* Delaware, L. & W.R. Co., 239 U.S. 556 (1916); Lehigh Valley R. Co. *v.* Barlow, 244 U.S. 183 (1917); Southern R. Co. *v.* Puckett, 244 U.S. 571 (1917); Reed *v.* Director General of Railroads, 258 U.S. 92 (1922). That Congress might "legislate as to the qualifications, duties, and liabilities of employes and others on railway trains engaged in that [interstate] commerce," was stated by the Court in Nashville, C. & St. L.R. Co. *v.* Alabama, 128 U.S. 96, 99 (1888).

[407] 208 U.S. 161 (1908).

[408] 30 Stat. 424.

[409] 44. Stat. 577.

[410] Texas & N.O.R. Co. *v.* Brotherhood of R. & S.S. Clerks, 281 U.S. 548 (1930). The provision of Railway Labor Act of 1926 (44 Stat. 577), preventing interference by either party with organization or designation of representatives by the other, is within the constitutional authority of Congress. Similarly, "back shop" employees of an interstate carrier, who engaged in making heavy repairs on locomotives and cars withdrawn from service for that purpose for long periods (an average of 105 days for locomotives and 109 days for cars), were held to be within the terms of the act as amended in 1934 (48 Stat. 1185). "The activities in which these employees are engaged have such a relation to the other confessedly interstate activities of the * * * [carrier] that they are to be regarded as a part of them. All taken together fall within the power of Congress over interstate commerce." Virginian R. Co. *v.* System Federation No. 40, 300 U.S. 515, 556 (1937).

By the Adamson Act of 1916 a temporary increase in wages was imposed upon the railways of the country in order to meet a sudden threat to strike by important groups of their employees. The act was assailed on the dual ground that it was not a regulation of commerce among the States and that it was violative of the carriers' rights under the Fifth Amendment. A closely divided Court, speaking through Chief Justice White, answered both objections by pointing to the magnitude of the emergency which had threatened the country with commercial paralysis and grave loss and suffering. To the familiar argument that "emergency may not create power" (Ex parte Milligan, 4 Wall. 2 (1806)), the Chief Justice answered that "it may afford a reason for exerting a power already enjoyed." A further answer to objections based on the rights of carriers under the Fifth Amendment, particularly the right of "freedom of contract," was that the situation met by the statute had arisen in consequence of a failure to exercise these rights—a far from satisfactory answer, as the dissent pointed out, since one element of a right is freedom of choice regarding its use or nonuse. Wilson *v.* New, 243 U.S. 332, 387 (1917).

[411] 48 Stat. 1283.

[412] 295 U.S. 330 (1935).

[413] Ibid. 374.

[414] Ibid. 384.

[415] 326 U.S. 446 (1946). Indeed, in a case decided in June, 1948, Justice Rutledge, speaking for a majority of the Court, listed the Alton case as one "foredoomed to reversal," though the formal reversal has never taken place. *See* Mandeville Is. Farms *v.* American C.S. Co., 334 U.S. 219, 230 (1948).

[416] 250 U.S. 199 (1919).

[417] Ibid. 203-204.

[418] 26 Stat. 209 (1890).

[419] 156 U.S. 1 (1895).

[420] Ibid. 13.

[421] 156 U.S. 1, 13-16 (1895). "Slight reflection will show that if the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries, whose ultimate result may effect external commerce, comparatively little of business operations and affairs would be left for State control."

[422] Ibid. 17. The doctrine of the case simmered down to the proposition that commerce was transportation only; a doctrine which Justice Harlan undertook to refute in his notable dissenting opinion: "Interstate commerce does not, therefore, consist in transportation simply. It includes the purchase and sale of articles that are intended to be transported from one State to another—every species of commercial intercourse among the States and with foreign nations." (p. 22). "Any combination, therefore, that disturbs or unreasonably obstructs freedom in buying and selling articles manufactured to be sold to persons in other States or to be carried to other States—a freedom that cannot exist if the right to buy and sell is fettered by unlawful restraints that crush out competition—affects, not incidentally, but directly, the people of all the States; and the remedy for such an evil is found only in the exercise of powers confided to a government which, this court has said, was the government of all, exercising powers delegated by all, representing all, acting for all. McCulloch *v.* Maryland, 4 Wheat. 316, 405." (p. 33). "It is said that manufacture precedes commerce and is not a part of it. But it is equally true that when manufacture ends, that which has been manufactured becomes a subject of commerce; that buying and selling succeed manufacture, come into existence after the process of manufacture is completed, precede transportation, and are as much commercial intercourse, where articles are bought *to be* carried from one State to another, as is the manual transportation of such articles after they have been so purchased. The distinction was recognized by this court in Gibbons *v.* Ogden, where the principal question was whether commerce included navigation. Both the Court and counsel recognized buying and selling or barter *as included in commerce*. * * * The power of Congress covers and protects the absolute freedom of such intercourse and trade among the States as may or must succeed manufacture and precede transportation from the place of purchase." (p. 35-36). "When I speak of trade I mean the buying and selling of articles of every kind that are recognized articles of interstate commerce. Whatever improperly obstructs the free course of interstate intercourse and trade, as involved in the buying and selling of articles to be carried from one State to another, may be reached by Congress, under its authority to regulate commerce among the States." (p. 37). "If the national power is competent to repress *State* action in restraint of interstate trade as it may be involved in purchases of refined sugar to be transported from one State to another State, surely it ought to be deemed sufficient to prevent unlawful restraints attempted to be imposed by combinations of corporations or individuals upon those identical purchases; otherwise, illegal combinations of corporations or individuals may—so far as national power and interstate commerce are concerned—do, with impunity, what no State can do." (p. 38). "Whatever a State may do to protect its completely interior traffic or trade against unlawful restraints, the general government is empowered to do for the protection of the people of all the States—for this purpose one people—against unlawful restraints imposed upon interstate traffic or trade in articles that are to enter into commerce among the several States." (p. 42).

[423] 175 U.S. 211 (1899).

[424] 196 U.S. 375.—The Sherman Act was applied to break up combinations of

interstate carriers in United States *v.* Trans-Missouri Freight Asso., 166 U.S. 290 (1897); United States *v.* Joint-Traffic Asso., 171 U.S. 505 (1898); and Northern Securities Co. *v.* United States, 193 U.S. 197 (1904). In the first of these cases the Court was confronted with the contention that the act had been intended only for the industrial combinations, and hence was not designed to apply to the railroads, for whose governance the Interstate Commerce Act had been enacted three years prior. Justice Peckham answered the argument by saying that "to exclude agreements as to rates by competing railroads * * * would leave [very] little for the act to take effect upon," referring in this connection to the decision in the Sugar Trust Case, 166 U.S. at 313.

Alluding in his opinion for the Court in Mandeville Island Farms *v.* American C.S. Co., 334 U.S. 219 (1948) to the Sugar Trust Case, Justice Rutledge said: "Like this one, that case involved the refining and interstate distribution of sugar. But because the refining was done wholly within a single state, the case was held to be one involving 'primarily' only 'production' or 'manufacturing,' although the vast part of the sugar produced was sold and shipped interstate, and this was the main end of the enterprise. The interstate distributing phase, however, was regarded as being only 'incidentally,' 'indirectly,' or 'remotely' involved; and to be 'incidental,' 'indirect,' or 'remote' was to be, under the prevailing climate, beyond Congress' power to regulate, and hence outside the scope of the Sherman Act. *See* Wickard *v.* Filburn, 317 U.S. at 119 et seq. (1942).

"The *Knight* decision made the statute a dead letter for more than a decade and, had its full force remained unmodified, the Act today would be a weak instrument, as would also the power of Congress, to reach evils in all the vast operations of our gigantic national industrial system antecedent to interstate sale and transportation of manufactured products. Indeed, it and succeeding decisions, embracing the same artificially drawn lines, produced a series of consequences for the exercise of national power over industry conducted on a national scale which the evolving nature of our industrialism foredoomed to reversal." Ibid. 229-230.

[425] Swift & Co. *v.* United States, 196 U.S. 375, 396 (1905).

[426] 196 U.S. at 398-399.

[427] Ibid. 399-401.

[428] Ibid. 400.

[429] Loewe *v.* Lawlor, 208 U.S. 274 (1908); Duplex Printing Press Co. *v.* Deering, 254 U.S. 443 (1921); Coronado Coal Co. *v.* United Mine Workers of America, 268 U.S. 295 (1925); United States *v.* Brime, 272 U.S. 549 (1926); Bedford Co. *v.* Stone Cutters Assn., 274 U.S. 37 (1927); Local 167 *v.* United States, 291 U.S. 293 (1934); Allen Bradley Co. *v.* Union, 325 U.S. 797 (1945).

[430] 42 Stat. 159.

[431] Ibid. 998 (1922).

[432] 258 U.S. 495 (1922).

[433] Ibid. 514.

[434] Ibid. 515-516. *See also* Lemke *v.* Farmers' Grain Co., 258 U.S. 50 (1922); Minnesota *v.* Blasius, 290 U.S. 1 (1933).

[435] 262 U.S. 1 (1923).

[436] Ibid. 35.

[437] Ibid. 40.

[438] 258 U.S. at 521; 262 U.S. at 37.

[439] 48 Stat. 881.

[440] 49 Stat. 803.

[441] Electric Bond Co. *v.* Comm'n., 303 U.S. 419 (1938); North American Co. *v.* S.E.C., 327 U.S. 686 (1946); American Power & Light Co. *v.* S.E.C., 329 U.S. 90 (1946).

[442] "The Bond and Share system, including American and Electric, possesses an undeniable interstate character which makes it properly subject, from the statutory standpoint, to the provisions of § 11 (b) (2). This vast system embraces utility properties in no fewer than 32 States, from New Jersey to Oregon and from Minnesota to Florida, as well as in 12 foreign countries. Bond and Share dominates and controls this system from its headquarters in

New York City. * * * the proper control and functioning of such an extensive multi-state network of corporations necessitates continuous and substantial use of the mails and the instrumentalities of interstate commerce. Only in that way can Bond and Share, or its subholding companies or service subsidiary, market and distribute securities, control and influence the various operating companies, negotiate inter-system loans, acquire or exchange property, perform service contracts, or reap the benefits of stock ownership. * * * Moreover, many of the operating companies on the lower echelon sell and transmit electric energy or gas in interstate commerce to an extent that cannot be described as spasmodic or insignificant. * * * Congress, of course, has undoubted power under the commerce clause to impose relevant conditions and requirements on those who use the channels of interstate commerce so that those channels will not be conduits for promoting or perpetuating economic evils. * * * Thus to the extent that corporate business is transacted through such channels, affecting commerce in more States than one, Congress may act directly with respect to that business to protect what it conceives to be the national welfare. * * * It may compel changes in the voting rights and other privileges of stockholders. It may order the divestment or rearrangement of properties. It may order the reorganization or dissolution of corporations. In short, Congress is completely uninhibited by the commerce clause in selecting the means considered necessary for bringing about the desired conditions in the channels of interstate commerce. Any limitations are to be found in other sections of the Constitution. Gibbons *v.* Ogden, 9 Wheat. 1, 196." American Power & Light Co. *v.* S.E.C., 329 U.S. 90, 98-100 (1946).

[443] Appalachian Coals, Inc. *v.* United States, 288 U.S. 344, 372 (1933).

[444] 48 Stat. 195.

[445] 295 U.S. 495 (1935).

[446] Ibid. 548. *See also* Ibid. 546.

[447] In United States *v.* Sullivan, 332 U.S. 689 (1948), the Court interpreted the Federal Food, Drug, and Cosmetics Act of 1938 as applying to the sale by a retailer of drugs purchased from his wholesaler within the State nine months after their interstate shipment had been completed. The Court, speaking by Justice Black, cited United States *v.* Walsh, 331 U.S. 432 (1947); Wickard *v.* Filburn, 317 U.S. 111 (1942); United States *v.* Wrightwood Dairy Co., 315 U.S. 110 (1942); United States *v.* Darby, 312 U.S. 100 (1941). The last three of these cases are discussed below. *See* pp. 155, 159. Justice Frankfurter dissented on the basis of Federal Trade Commission *v.* Bunte Bros., 312 U.S. 349 (1941). It is apparent that the Schechter case has been thoroughly repudiated so far as the distinction "direct" and "indirect" effects is concerned. *See also* McDermott *v.* Wisconsin, 228 U.S. 115 (1913), which preceded the Schechter decision by more than two decades.

The N.I.R.A., however, was found to have several other constitutional infirmities besides its disregard, as illustrated by the Live Poultry Code, of the "fundamental" distinction between "direct" and "indirect" effects, namely, the delegation of uncanalized legislative power; the absence of any administrative procedural safeguards; the absence of judicial review; and the dominant role played by private groups in the general scheme of regulation. These objections are dealt with elsewhere in this volume. *Supra*, pp. 75, 78, 80.

[448] 48 Stat 31 (1933).

[449] United States *v.* Butler, 297 U.S. 1, 63-64, 68 (1936).

[450] 49 Stat. 991.

[451] Carter *v.* Carter Coal Co., 298 U.S. 238 (1936).

[452] Ibid. 308-309.

[453] United States *v.* E.C. Knight Co., 156 U.S. 1 (1895).

[454] 301 U.S. 1 (1937).

[455] 49 Stat. 449.

[456] 301 U.S. at 38, 41-42 (1937).

[457] National Labor Relations Board *v.* Fruehauf Trailer Co., 301 U.S. 49 (1937); National Labor Relations Board *v.* Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937).

[458] National Labor Relations Board *v.* Fainblatt, 306 U.S. 601, 606 (1939).

[459] *See* Santa Cruz Fruit Packing Co. *v.* National Labor Relations Board, 303 U.S. 453, 465 (1938).

[460] 52 Stat. 1060.

[461] United States *v.* Darby, 312 U.S. 100, 115 (1941).

[462] *See* ibid. 113, 114, 118.

[463] Ibid. 123-124.

[464] Owen J. Roberts, The Court and the Constitution, The Oliver Wendell Holmes Lectures 1951, (Harvard University Press 1951), 56.

[465] The Act provided originally that "for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed * * * in any process or occupation necessary to the production thereof, in any State." By 63 Stat. 910 (1949), "necessary to the production thereof" becomes "directly essential to the production thereof." The effect of this change, which has not yet registered itself in judicial decision, seems likely to be slight, in view of the power, which the act gives the Administrator to lay down "such terms and conditions" as he "finds necessary to carry out the purposes of" his orders to prevent their evasion or circumvention. *See* Gemsco, Inc. *v.* Walling, 324 U.S. 244 (1945). The employees involved in the following cases have been held to be covered by the act:

(1) Operating and maintenance employees of the owner of a loft building, space in which is rented to persons producing goods principally for interstate commerce (Kirschbaum *v.* Walling, 316 U.S. 517 (1942));

(2) an employee of an interstate motor transportation company, who acted as rate clerk and performed other incidental duties (Overnight Motor Co. *v.* Missel, 316 U.S. 572 (1942));

(3) members of a rotary drilling crew, engaged within a State, as employees of an independent contractor, in partially drilling oil wells, a portion of the products from which later moved in interstate commerce (Warren-Bradshaw Co. *v.* Hall, 317 U.S. 88 (1942));

(4) employees of a wholesale paper company who are engaged in the delivery, from company warehouse within a State to customers within that State, after a temporary pause at such warehouses, of goods procured outside of the State upon prior orders from, or pursuant to contracts with, such customers (Walling *v.* Jacksonville Paper Co., 317 U.S. 564 (1943));

(5) employees of a private corporation who are engaged in the operation and maintenance of a drawbridge which is part of a toll road used extensively by persons and vehicles traveling in interstate commerce, and which spans an intercoastal waterway used in interstate commerce (Overstreet *v.* North Shore Corp., 318 U.S. 125 (1943));

(6) a night watchman employed in a plant in which veneer was manufactured from logs and from which a substantial portion of the manufactured product was shipped in interstate commerce (Walton *v.* Southern Package Corp., 320 U.S. 540 (1944));

(7) employees putting in stand-by time in the auxiliary fire-fighting service of an employer engaged in interstate commerce (Armour & Co. *v.* Wantock, 323 U.S. 126 (1944));

(8) warehouse and central office employees of an interstate retail chain store system (Phillips Co. *v.* Walling, 324 U.S. 490 (1945));

(9) employees of an independent contractor engaged in repairing abutments and substructures of bridges which were part of the line of an interstate railroad (Fitzgerald Co. *v.* Pedersen, 324 U.S. 720 (1945));

(10) maintenance employees of an office building which was owned and operated by a manufacturing corporation and in which 58 per cent of the rental space was used for its central offices, where its production of goods for interstate commerce was administered, managed and controlled, although the goods were actually produced at plants located elsewhere (Borden Company *v.* Borella, 325 U.S. 679 (1945));

(11) the employees of an electrical contractor, locally engaged in commercial and industrial wiring and dealing in electrical motors and generators for commercial and industrial uses, whose customers are engaged in the production of goods for interstate commerce (Roland Co. *v.* Walling, 326 U.S. 657-678 (1946));

(12) employees of a window-cleaning company, the greater part of whose work is done on the windows of industrial plants of producers of goods for interstate commerce (Martino *v.* Michigan Window Cleaning Company, 327

U.S. 173-178 (1946));

(13) mechanics engaged in servicing and maintaining equipment of a motor transportation company which is engaged in interstate commerce (Boutell *v.* Walling, 327 U.S. 463 (1946)). Nor does the maxim "*de minimis*" apply to the act. Hence the publishers of a daily newspaper only about one half of one per cent of whose circulation is outside the State of publication are not by that fact excluded from the operation of the act. (Mabee *v.* White Plains Publishing Co., 327 U.S. 178 (1946)). On the other hand, an employee whose work it is to prepare meals and serve them to maintenance-of-way employees of an interstate railroad in pursuance of a contract between his employer and the railroad company is not "engaged in commerce" within the meaning of §§ 6 and 7 of the Fair Labor Standards Act (McLeod *v.* Threlkeld, 319 U.S. 491 (1943)); nor are maintenance employees of a typical metropolitan office building operated as an independent enterprise, which is used and is to be used for offices by every variety of tenants, including some producers of goods for commerce (10 East 40th St. *v.* Callus, 325 U.S. 578 (1945)); nor are maintenance employees of a building corporation which furnishes loft space to tenants engaged in production for interstate commerce "unless an adequate proportion of such tenants are so engaged." (Schulte *v.* Gangi, 328 U.S. 108 (1946)). *Also* Section 12 (a) of the Fair Labor Standards Act, which provides that "no producer, * * * shall ship or deliver for shipment in commerce any goods produced in an establishment * * * in or about which * * * any oppressive child labor has been employed * * *" was held inapplicable to a company engaged in the transmission in interstate commerce of telegraph messages, (Western Union *v.* Lenroot, 323 U.S. 490 (1945)). The decision was a five-to-four one. It should be added that the Court has not always been unanimous in favoring coverage by the act. In the Borden case above, Chief Justice Stone, speaking for himself and Justice Roberts, protested, as follows: "No doubt there are philosophers who would argue, what is implicit in the decision now rendered, that in a complex modern society there is such interdependence of its members that the activities of most of them are necessary to the activities of most others. But I think that Congress did not make that philosophy the basis of the coverage of the Fair Labor Standards Act. It did not, by a 'house-that-Jack-built' chain of causation, bring within the sweep of the statute the ultimate *causa causarum* which result in the production of goods for commerce. Instead it defined production as a physical process. It said in § 3 (j) 'Produced means produced, manufactured, mined, handled, or in any other manner worked on' and declared that those who participate in any of these processes 'or in any process or occupation necessary to' them are engaged in production and subject to the Act." 325 U.S. 679, 685. On the other hand, the holding in 10 East 40th St., above, was a five-to-four decision, and Justice Frankfurter, speaking for the Court took pains to explain that Congress in enacting the Fair Labor Standards Act, "did not see fit, * * *, to exhaust its constitutional power over commerce." 325 U.S. 578-579. *See* 87 Law Ed. pp. 87-105 for a note reviewing both Supreme Court, lower Federal Court, and State court cases defining "engaged in commerce" as that term is used in the Fair Labor Standards Act.

[466] 50 Stat. 246.

[467] 315 U.S. 110 (1942).

[468] Ibid. 118-119.

[469] 317 U.S. 111 (1942).

[470] 52 Stat. 31.

[471] 317 U.S. at 128-129.

[472] Ibid. 120-124 *passim*. In United States *v.* Rock Royal Co-operative, 307 U.S. 533 (1939), the Court sustained an order under the Agricultural Marketing Agreement Act of 1937 (50 Stat. 752) regulating the price of milk in certain instances. Said Justice Reed for the majority of the Court: "The challenge is to the regulation 'of the price to be paid upon the sale by a dairy farmer who delivers his milk to some country plant.' It is urged that the sale, a local transaction, is fully completed before any interstate commerce begins and that the attempt to fix the price or other elements of that incident violates the Tenth Amendment. But where commodities are bought for use beyond State lines, the sale is a part of interstate commerce. We have likewise held that where sales for interstate transportation were commingled with intrastate transactions, the existence of the local activity did not interfere with the federal power to regulate inspection of the whole. Activities conducted within the State lines do not by this fact alone escape the sweep of the Commerce Clause. Interstate commerce may be dependent upon them. Power to establish quotas for interstate marketing gives power to name quotas for that

which is to be left within the State of production. Where local and foreign milk alike are drawn into a general plan for protecting the interstate commerce in the commodity from the interferences, burdens and obstructions, arising from excessive surplus and the social and sanitary evils of low values, the power of the Congress extends also to the local sales."' Ibid. 568-569. *See also* H.P. Hood & Sons *v.* United States, 307 U.S. 588 (1939), another milk case; and Mulford *v.* Smith, 307 U.S. 38 (1939), in which certain restrictions on the sale of tobacco, under the Agricultural Adjustment Act of 1938 (52 Stat. 31), were sustained in an opinion by Justice Roberts, who spoke for the Court in the latter case.

[473] United States *v.* The William, 28 Fed. Cas. No. 16,700, 614, 620-623 *passim* (1808). Other parts of this opinion are considered below in connection with the prohibiting of interstate commerce. *See also* Gibbons *v.* Ogden, 9 Wheat. 1, 191 (1824); United States *v.* Marigold, 9 How. 560 (1850).

[474] 289 U.S. 48 (1933).

[475] Ibid. 57, 58.

[476] 5 Stat. 566 § 28.

[477] 9 Stat. 237 (1848).

[478] 24 Stat. 409.

[479] 35 Stat. 614; 38 Stat. 275.

[480] 29 Stat. 605.

[481] 192 U.S. 470 (1904).

[482] 223 U.S. 166 (1912); *cf.* United States *v.* California, 332 U.S. 19 (1947).

[483] 239 U.S. 325 (1915).

[484] Ibid. 329.

[485] 236 U.S. 216 (1915).

[486] Ibid. 222. *See also* Robert B. Cushman, National Police Power Under the Commerce Clause, 3 Selected Essays on Constitutional Law, 62-79.

[487] Groves *v.* Slaughter, 15 Pet. 449, 488-489 (1841).

THE ISSUE

A little reflection will suffice to show that, as a matter of fact, any regulation at all of commerce implies some measure of power to prohibit it, since it is the very nature of regulation to lay down terms on which the activity regulated will be permitted and for noncompliance with which it will not be permitted. It is also evident that when occasion does arise for an outright prohibition of an activity, the power to enact the required prohibition ordinarily must belong to the body which is vested with authority to regulate it, which in this instance is Congress.

What, then, are the outstanding differences between such conditional prohibitions of commerce and that with which this résumé deals? There seem to be three such differences. First, there is often a difference of *modus operandi* between the statutes already considered and those about to be considered. The former impinge upon persons or agencies engaged in interstate commerce and their activities in connection therewith, whereas the latter look primarily to things, or the subject matter, of the trade or commerce prohibited. Secondly, there is a difference in purpose between the two categories of Congressional statutes. The purpose of the acts already treated is to lay down the conditions on which a designated branch of commerce among the States may be carried on; that of the acts now to be treated is to eliminate outright a designated branch of trade among the States. In other words, whereas the former acts were, in general, preservative of the commerce which they regulated because of its value to society, the latter regard the commerce which they reach as detrimental to society. The third, and most important difference from the point of view of Constitutional Law, is the difference in relation of the two categories of acts respectively to the reserved powers of the States. The enactments of Congress already dealt with frequently intrude upon the ordinary field of jurisdiction of the States; but when they do so, it is because the acts or things which they thus bring under national control are regarded as "local incidents" of interstate commerce itself. The relation of the enactments about to be considered to the reserved powers of the States is precisely the inverse of this. Their very purpose is to reach and control matters ordinarily governed by the State's police power, sometimes in order to make State policy more

effective, sometimes in order to supply a corrective to it.

The Argument Denying Congress' Power To Prohibit Interstate Commerce

The principal argument against the constitutionality of prohibitory Congressional legislation pivoted on the dual conception of the Federal System "The Federal Equilibrium". The Constitution, the argument ran, clearly contemplates two spheres of governmental activity, that of the States, that of the United States; and while the latter government is generally supreme when the two collide with one another in the exercise of their respective powers, yet collision is not contemplated as the rule of life of the system, but the contrary. And since there are these two spheres, the line to be drawn between them, in order to secure harmony instead of collision, should recognize that the objects which the National Government was established to promote are relatively few, while those which the States were retained to advance comprise the principal objectives of government, the protection of the public health, safety, morals, and welfare. The power to promote these ends is, indeed, the very definition of the police power of the States—that power for which all other powers of the States exist. Seriously to impair the police power of the States, or to diminish their autonomy in its employment, would be, in fact to remove their reason for being, and so the reason for the Federal System itself.

So while the power of Congress to regulate commerce among the States and with foreign nations is in terms a single power, in the intention of the framers it comprised two very different powers. In the field of foreign relations, the National Government is completely sovereign, and the power to regulate commerce with foreign nations is but a branch of this sovereign power. The power to regulate commerce among the States is, on the other hand, not a sovereign power except for purposes of commercial advantage; in other respects it is confronted at every turn by the police power of the States, and hence requires to be defined in relation to the known and frequently reiterated objectives of that power.

Indeed, it was urged on the authority of Madison that the power to regulate commerce among the States was not bestowed upon the National Government "to be used for * * * positive purposes," but merely as "a negative and preventive provision against injustice among the States themselves." Madison IV, Letters and Other Writings, 15 (Philadelphia, 1865). Furthermore, it is a power which was designed for the *promotion* and *advancement* of commerce, not a power to strike commerce down in order to advance other purposes and programs. Grant that the power to regulate commerce among the States is the power to prohibit it at the discretion of Congress, and you at once endow Congress with power which it may use as a weapon to consolidate substantially all power in the hands of the National Government.

Thus, if Congress may prohibit *ad libitum* the carrying on of interstate commerce, it may make deprivation of the right to engage in interstate commerce in any of its phases, even the right to move from one State to another, a sanction of ever-increasing efficacy for whatever standards of conduct it may choose to lay down in any field of human action; and since laws passed by Congress in pursuance of its powers are generally supreme over conflicting State laws, these standards would supersede the conflicting standards imposed under the police powers of the States. Henceforth, in effect, the police power would exist solely by "leave and license" of Congress —as "the power to govern men and things" it would be at an end; and by the same token the Federal System, which is the outstanding feature of government under the Constitution, would be at an end. In the First Employers' Liability Cases, (Howard *v.* Illinois Central R. Co., 207 U.S. 463 (1908)), the majority of the Court, speaking through Justice White, gave special attention to the Government's argument that though the act, in terms, governed the liability of "every" interstate carrier to "any" of its employees, whether engaged in interstate commerce or not when the liability fell, it was none the less constitutional "because one who engaged in interstate commerce thereby submits all his business concerns to the regulating power of Congress." Justice White answered: "To state the proposition is to refute it. It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely State concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of

Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which from the beginning have been, and must continue to be, under their control so long as the Constitution endures." Ibid. 502-503. *See also* Justice White's dissenting opinion, for himself, Chief Justice Fuller, and Justices Peckham and Holmes, in Northern Securities Co. *v.* United States, 193 U.S. 197, 396-397 (1904).

The Argument Asserting the Power

The thesis that the power to regulate commerce among the States comprises in general the power to prohibit it turns on the proposition stated by Marshall in his opinion in Gibbons *v.* Ogden, that this power 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 wisdom and discretion of Congress," Marshall continued, "their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse." 9 Wheat. 1, 196-197 (1824).

That the National Government is a government of limited powers, the advocates of this view conceded; but the powers which it uncontrovertibly possesses, they urged, may be utilized to promote all good causes, of which fact, it was asserted, the Preamble of the Constitution itself was proof. There the objectives of the Constitution and so, presumably, of the Government created by it, are stated to be "more perfect union," "justice," "domestic tranquillity," "the common defense," "the general welfare," and "liberty." It was to forward these broad general purposes, then, that the commercial power, like its other powers, was bestowed upon the National Government. No doubt it was expected that the States, too, would use the powers still left them to assist the same purposes, which indeed are those of good government always. Yet that circumstance should not operate to withdraw the powers delegated to the National Government from the service of these same ends. The fact, in other words, that the power to govern commerce among the States was bestowed by the Constitution on the National Government should not imply that it thereby became available merely for the purpose of fostering such commerce. It ought, on the contrary, to be applicable, as would be the equivalent power in England or France for instance, to aid and support all recognized objectives of government. *See* Juilliard *v.* Greenman (Legal Tender Case), 110 U.S. 421, 447-448 (1884). As originally possessed by the several States, the power to regulate commerce with one another included the power to prohibit it at discretion; on what principle, then, it was asked, can it be contended that the power delegated to Congress is not as exhaustive and complete as the power it was designed to supersede? *See* especially Justice Holmes' dissenting opinion in Hammer *v.* Dagenhart, 247 U.S. 251, 277-281 (1918).

And, the protagonists of this view continued, if the public health, safety, morals, and general welfare must depend solely upon the police powers of the States, they must in modern conditions, often fail of realization in this country. With goods flowing over State lines in ever-increasing quantities, and people in ever-increasing numbers, how was it possible to regard the States as watertight compartments? At least, then, when local legislative programs break down on account of the division of the country into States, it becomes the clear duty of Congress to adopt supplementary legislation to remedy the situation. In doing so, it is not undermining the Federal System; it is supporting it, by making it viable in modern conditions. The assemblage of the States in one Union was never intended to put one State at the mercy of another. If, however, well considered programs of legislation are rendered abortive in a State in consequence of the flow of commerce into it from other States, then it becomes the duty—certainly it is within the discretion of Congress—which alone can govern commerce among the States, to supply the required relief. *See* especially Assistant Attorney General Maury's argument. In re Rapier, 143 U.S. 110, 127-129 (1892).

In this connection the advocates of this view cited discussion contemporaneous with Jefferson's Embargo, and under the embargo itself, as supporting their position. In the case of the Brigantine William the validity of the embargo was challenged before the United States District Court of Massachusetts on the ground that the power to regulate commerce did not embrace the power to prohibit it. Judge Davis answered: "It will be admitted that partial prohibitions are authorized by this expression; and how shall the degree, or extent, of the prohibition be adjusted, but by the discretion of the National Government, to whom the subject appears to have been committed?

* * * The power to regulate commerce is not to be confined to the adoption of measures, exclusively beneficial to commerce itself, or tending to its advancement; but, in our national system, as in all modern sovereignties, it is also to be considered as an instrument for other purposes of general policy and interest. * * * the national right, or power, under the Constitution, to adapt regulations of commerce to other purposes, than the mere advancement of commerce, appears to be unquestionable. * * * The situation of the United States, in ordinary times, might render legislative interferences, relative to commerce, less necessary; but the capacity and power of managing and directing it, for the advancement of great national purposes, seems an important ingredient of sovereignty." And in confirmation of this argument Judge Davis cited the clause of § 9 of article I of the Constitution interdicting a prohibition of the slave trade till 1808. This clause clearly proves that those who framed the Constitution perceived that "under the power of regulating commerce, Congress would be authorized to abridge it, in favour of the great principles of humanity and justice." Fed. Cas. No. 16,700, 614, 621 (1808).

The embargo, to be sure, operated on foreign commerce; but that there is any difference between Congress's power in relation to foreign and to interstate commerce the advocates of the view under consideration denied. The power to "regulate" is the power which belongs to Congress as to the one as well as to the other; and if this comprehends the power to prohibit in the one case, it must equally, by acknowledged principles of statutory construction, comprehend it in the other case as well. Nor in fact, the argument continued, does it make any difference, by approved principles of statutory construction, what purposes the framers of the Constitution may have immediately in mind when they gave Congress power to regulate commerce among the States; the governing consideration is that they gave Congress the power, to be exercised in accordance with its judgment of what are proper occasions for its use. "The reasons which may have caused the framers of the Constitution to repose the power to regulate interstate commerce in Congress do not, however, affect or limit the extent of the power itself." Justice Peckham for the Court in Addyston Pipe & Steel Co. *v.* United States, 175 U.S. 211, 228 (1899).

References

See especially the arguments of counsel In re Rapier, 143 U.S. 110 (1892); Champion *v.* Ames (Lottery Case), 188 U.S. 321 (1903); Hammer *v.* Dagenhart, 247 U.S. 251 (1918); 3 Selected Essays on Constitutional Law, 103, 138, 165, 295, 314, 336. Indeed, regulation of interstate commerce by Congress may take the form of a positive adoption by it of a regime of State regulation in the form of statutes (e.g., pilotage) or of administrative regulations in some degree (as in the Motor Carrier Act of 1935); or Congress may "regulate" through the device of divestment of a subject matter of its interstate character, thus indirectly causing State laws to apply, as was done by the Wilson Act of 1890 in respect to intoxicating liquors, or by the McCarran Act of 1945 following the United States *v.* South-Eastern Underwriters Association, 322 U.S. 533 (1944), in respect to the insurance business. In a sense, Congress may delegate to the States its power to regulate interstate commerce.

[488] 23 Stat. 31.

[489] 32 Stat. 791.

[490] 33 Stat. 1264.

[491] 33 Stat. 1269.

[492] 37 Stat. 315.

[493] 39 Stat. 1165.

[494] Illinois Central R. Co. *v.* McKendree, 203 U.S. 514 (1906). *See also* United States *v.* DeWitt, 9 Wall. 41 (1870). Of the nature of a quarantine act is the Federal Firearms Act of 1938 (52 Stat 1250).

[495] Champion *v.* Ames (The Lottery Case), 188 U.S. 321 (1903).

[496] 28 Stat 963.

[497] 143 U.S. 110 (1892).

[498] Champion *v.* Ames (The Lottery Case), 188 U.S. 321 (1903).

[499] 9 Wheat. 1, 227 (1824).

[500] 114 U.S. 622, 630 (1885).

[501] 26 Stat. 313 (1890); 37 Stat. 699 (1913), "The Webb-Kenyon Act."

[502] 31 Stat. 188 (1900).

[503] 45 Stat. 1084 (1929), "The Hawes-Cooper Act."

[504] 36 Stat. 825 (1910), "The Mann Act."

[505] 41 Stat. 324 (1919).

[506] 47 Stat. 326 (1932).

[507] 48 Stat. 794 (1934).

[508] 48 Stat. 979 (1934).

[509] 54 Stat. 686 (1940).

[510] Hoke *v.* United States, 227 U.S. 308, 322 (1913). In Caminetti *v.* United States, 242 U.S. 470 (1917) the act was held to apply to the case of transportation of a woman for immoral purposes, although no commercial motive was present; and in Cleveland *v.* United States, 329 U.S. 14 (1946), to the transportation of a plural wife by the member of a religious sect a tenet of which is polygamy.

[511] United States *v.* Hill, 248 U.S. 420, 425 (1919).

[512] 247 U.S. 251 (1918).

[513] 39 Stat. 675 (1916).

[514] 247 U.S. at 275.

[515] Ibid. 271-272.

[516] 267 U.S. 432 (1925).

[517] 41 Stat. 324 (1919).

[518] 267 U.S. at 436-439. *See also* Kentucky Whip & Collar Co. *v.* Illinois C.R. Co., 299 U.S. 334 (1937).

[519] United States *v.* Darby, 312 U.S. 100, 116-117 (1941).

[520] Roland Co. *v.* Walling, 326 U.S. 657, 669 (1946).

[521] Polish Alliance *v.* Labor Board, 322 U.S. 643, 650 (1944). *Cf.* the opinion of Chief Justice Vinson for the Court in Bus Employees *v.* Wisconsin Board, 340 U.S. 383 (1951).

[522] Federalist No. 32.

[523] 9 Wheat. 1, 11, 226 (1824).

[524] Madison, IV, Letters and Other Writings, 14-15 (Philadelphia, 1865).

[525] 9 Wheat. 1, 203.

[526] 9 Wheat. at 210-211.

[527] 9 Wheat. at 13-14; *also* ibid. 16.

[528] 9 Wheat. 17-18, 209.

[529] 12 Wheat. 419 (1827).

[530] 12 How. 299 (1851).

[531] Congressional regulation of commerce, however, does not have to be uniform. The uniformity rule is a test of the invalidity of State legislation affecting commerce, not the validity of Congressional legislation regulating commerce. Clark Distilling Co. *v.* W.M.R. Co., 242 U.S. 311, 327 (1917); Currin *v.* Wallace, 306 U.S. 1, 14 (1939); Prudential Ins. Co. *v.* Benjamin, 328 U.S. 408 (1946).

[532] Simpson *v.* Shepard, 230 U.S. 352 (1913).

[533] Ibid. 400-402.

[534] McCarroll *v.* Dixie Greyhound Lines, 309 U.S. 176, 188-189 (1940). F.D.G. Ribble's *State and National Power Over Commerce* (Columbia University Press, 1937) is an excellent study both of the Court's formulas and of the arbitral character of its task in this field of Constitutional Law. On the latter point, see especially Chapters X and XII. The late Chief Justice Stone took repeated occasion to stress the "balancing" and "adjusting" role of the Court when applying the commerce clause in relation to State power. *See* his words in South Carolina State Highway Dept. *v.* Barnwell Bros., 303 U.S. 177, 184-192 (1938); California *v.* Thompson, 313 U.S. 109, 113-116 (1941); Parker *v.*

Brown, 317 U.S. 341, 362-363 (1943); and Southern Pacific *v.* Arizona, 325. U.S. 761, 766-770 (1945). *See also* Justice Black for the Court in United States *v.* South-Eastern Underwriters Assoc., 322 U.S. 533, 548-549 (1944).

[535] 12 Wheat. 419 (1827).

[536] Compare, for example, May *v.* New Orleans, 178 U.S. 496 (1900); and the recent case of Hooven & Allison Co. *v.* Evatt, 324 U.S. 652 (1945). In the latter case the benefits of the original package doctrine were extended to imports from the Philippine Islands title to which did not vest in the importer until their arrival in the United States.

[537] Freeman *v.* Hewit, 329 U.S. 249, 251 (1946).

[538] Philadelphia & R.R. Co. *v.* Pennsylvania (State Freight Tax Case), 15 Wall. 232 (1873).

[539] Headnotes. Said the Court: "The rule has been asserted with great clearness, that whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress. Surely transportation of passengers or merchandise through a State, or from one State to another, is of this nature. It is of national importance that over that subject there should be but one regulating power, for if one State can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between States remote from each other may be destroyed." 15 Wall. at 279-280, citing Cooley *v.* Port Wardens, 12 How. 299 (1851); Gilman. *v.* Philadelphia, 3 Wall. 713 (1866); Crandall *v.* Nevada, 6 Wall. 35, 42 (1868).

[540] 116 U.S. 517 (1886).

[541] Ibid. 527.

[542] Heisler *v.* Thomas Colliery Co., 260 U.S. 245 (1922).

[543] 262 U.S. 172 (1923).

[544] Ibid. 178. *See also* Diamond Match Co. *v.* Ontonagon 188 U.S. 82 (1903).

[545] Hope Natural Gas Co. *v.* Hall, 274 U.S. 284 (1927). *See also* American Manufacturing Co. *v.* St. Louis, 250 U.S. 459 (1919) in which there was imposed a license tax on manufacture of goods computed upon the amount of sales of the goods.

[546] 286 U.S. 165 (1932).

[547] Coverdale *v.* Arkansas-Louisiana Pipe Line Co., 303 U.S. 604 (1938).

[548] Toomer *v.* Witsell, 334 U.S. 385 (1948).

[549] Dahnke-Walker Milling Co. *v.* Bondurant, 257 U.S. 282 (1921). Here a Tennessee corporation, in pursuance of its practice of purchasing grain in Kentucky to be transported to and used in its Tennessee mill, made a contract for the purchase of wheat, to be delivered in Kentucky on the cars of a public carrier, intending to forward it as soon as delivery was made. It was held that the transaction was in interstate commerce, notwithstanding the contract was made and to be performed in Kentucky; and that the possibility that the purchaser might change its mind after delivery and sell the grains in Kentucky or consign it to some other place in that State did not affect the essential character of the transaction. Interstate commerce, said the Court, "is not confined to transportation from one State to another, but comprehends all commercial intercourse between different States and all the component parts of that intercourse." Ibid. 290. Followed in Lemke *v.* Farmers Grain Co., 258 U.S. 50 (1922); and Flanagan *v.* Federal Coal Co., 267 U.S. 222 (1925).

[550] Eureka Pipe Line Co. *v.* Hallanan, 257 U.S. 265 (1921).

[551] United Fuel Gas Co. *v.* Hallanan, 257 U.S. 277 (1921).

[552] Ibid. 281. *See also* State Tax Commission *v.* Interstate Natural Gas Co., 284 U.S. 41 (1931) holding invalid a State privilege tax imposed on a foreign corporation selling to distributors in the State natural gas piped in from another State, whose only activity was the use of a thermometer and meter and reduction of pressure to permit vendee to draw off the gas. "The work done by the plaintiff is done upon the flowing gas to help the delivery and seems to us plainly to be an incident to the interstate commerce between Louisiana and Mississippi." Ibid. 44.

[553] 12 Wheat. 419 (1827).

[554] Ibid. 449.

[555] 8 Wall. 123 (1860).

[556] Ibid. 140.

[557] 114 U.S. 622 (1885). *See also* Pittsburgh & S. Coal Co. *v.* Bates, 156 U.S. 577 (1895).

[558] 114 U.S. at 632-633.

[559] Ibid. 634.

[560] *See* Wagner *v.* Covington, 251 U.S. 95 (1919).

[561] Brimmer *v.* Rebman, 138 U.S. 78 (1891); Patapsco Guano Co. *v.* Board of Agriculture, 171 U.S. 345 (1898); Red "C" Oil Mfg. Co. *v.* Board of Agriculture, 222 U.S. 380 (1912); Savage *v.* Jones, 225 U.S. 501 (1912); Foote & Co. *v.* Stanley, 232 U.S. 494 (1914).

[562] Standard Oil Co. *v.* Graves, 249 U.S. 389 (1919); Askren *v.* Continental Oil Co., 252 U.S. 444 (1920); Bowman *v.* Continental Oil Co., 256 U.S. 642 (1921); Texas Co. *v.* Brown, 258 U.S. 466 (1922).

[563] Sonneborn Bros. *v.* Cureton, 262 U.S. 506 (1923). Reviewing cases. *Cf.* Phipps *v.* Cleveland Refining Co., 261 U.S. 449 (1923).

[564] *See* pp. 178, 238-239.

[565] Eastern Air Transport, Inc. *v.* South Carolina Tax Comm'n., 285 U.S. 147, 153 (1932).

[566] Rast *v.* Van Deman and Lewis, 240 U.S. 342 (1916). *See also* Tanner *v.* Little, 240 U.S. 369 (1916), and Pitney *v.* Washington, 240 U.S. 387 (1916) upholding a Washington statute imposing a prohibitive license tax upon merchants using trading stamps or coupons redeemable in merchandise.

[567] Howe Machine Co. *v.* Gage, 100 U.S. 676 (1880); Emert *v.* Missouri, 156 U.S. 296 (1895); Singer Sewing Machine Co. *v.* Brickell, 233 U.S. 304 (1914); Wagner *v.* City of Covington, 251 U.S. 95 (1919); Caskey Baking Co. *v.* Virginia, 313 U.S. 117 (1941).

[568] 197 U.S. 60 (1905). *See also* Armour Packing Co. *v.* Lacy, 200 U.S. 226 (1906).

[569] 91 U.S. 275 (1876); *see also* Ward *v.* Maryland, 12 Wall. 418 (1871).

[570] *See* Cook *v.* Pennsylvania, 97 U.S. 566 (1878); Guy *v.* Baltimore, 100 U.S. 434 (1880); Tiernan *v.* Rinker, 102 U.S. 123 (1880); Howe Machine Co. *v.* Gage, 100 U.S. 676 (1880); Webber *v.* Virginia, 103 U.S. 344 (1881); Walling *v.* Michigan, 116 U.S. 446 (1886); Darnell & Son Co. *v.* Memphis, 208 U.S. 113 (1908), where was held void a property tax on lumber which discriminated in favor of the local product: Bethlehem Motor Corp. *v.* Flynt, 256 U.S. 421 (1921), where a license tax on distributors was held to be invalidated by the provision made for a rebate under conditions that could be met only by manufacturers within the taxing State.

[571] Coe *v.* Errol, 116 U.S. 517 (1886).

[572] Ibid. 525.

[573] General Oil Co. *v.* Crain, 209 U.S. 211 (1908).

[574] American Steel & Wire Co. *v.* Speed, 192 U.S. 500 (1904); Bacon *v.* Illinois, 227 U.S. 504 (1913); Susquehanna Coal Co. *v.* South Amboy, 228 U.S. 665 (1913); Minnesota *v.* Blasius, 290 U.S. 1 (1933); Independent Warehouses *v.* Scheele, 331 U.S. 70 (1947).

[575] Nashville, C. & St. L.R. Co. *v.* Wallace, 288 U.S. 249 (1933).

[576] Edelman *v.* Boeing Air Transport, Inc., 289 U.S. 249 (1933). The Court also upheld a tax on the sale of gasoline for use by an air transport line in conducting interstate transportation across the State in Eastern Air Transport, Inc. *v.* South Carolina Tax Comm., 285 U.S. 147 (1932).

[577] Southern Pacific Co. *v.* Gallagher, 306 U.S. 167 (1939).

[578] Pacific Telephone & Telegraph Co. *v.* Gallagher, 306 U.S. 182 (1939).

[579] Southern Pacific Co. *v.* Gallagher, 306 U.S. 167 (1939), as formulated in the headnotes; *see also* Monamotor Oil Co. *v.* Johnson, 292 U.S. 86 (1934).

[580] Bingaman *v.* Golden Eagle Western Lines, 297 U.S. 626 (1936); McCarroll *v.* Dixie Greyhound Lines, 309 U.S. 176 (1940). In Helson *v.* Kentucky, 279 U.S.

245 (1929), the Court held that gasoline purchased in Illinois and used in an Illinois-Kentucky ferry could not be taxed by Kentucky, being, as it were, a part of the ferry, an instrument of commerce between the two States. *See also* Kelley *v.* Rhoads, 188 U.S. 1 (1903); Champlain Realty Co. *v.* Brattleboro, 260 U.S. 366 (1922); Hughes Bros. Timber Co. *v.* Minnesota, 272 U.S. 469 (1926); Carson Petroleum Co. *v.* Vial, 279 U.S. 95 (1929).

[581] 120 U.S. 489 (1887).

[582] Corson *v.* Maryland, 120 U.S. 502 (1887); Asher *v.* Texas, 128 U.S. 129 (1888); Stoutenburgh *v.* Hennick, 129 U.S. 141 (1889); Brennan *v.* Titusville, 153 U.S. 289 (1894); Stockard *v.* Morgan, 185 U.S. 27 (1902); Crenshaw *v.* Arkansas, 227 U.S. 389 (1913); Rogers *v.* Arkansas, 227 U.S. 401 (1913); Stewart *v.* Michigan, 232 U.S. 665 (1914); Western Oil Refining Co. *v.* Lipscomb, 244 U.S. 346 (1917); Cheney Bros. *v.* Massachusetts, 246 U.S. 147 (1918).

[583] Caldwell *v.* North Carolina, 187 U.S. 622 (1903).

[584] Norfolk & W.R. Co. *v.* Sims, 191 U.S. 441 (1903).

[585] Rearick *v.* Pennsylvania, 203 U.S. 507 (1906); Dozier *v.* Alabama, 218 U.S. 124 (1910); Davis *v.* Virginia, 236 U.S. 697 (1915).

[586] 203 U.S. at 512.

[587] Real Silk Hosiery Mills *v.* Portland, 268 U.S. 325 (1925).

[588] Heyman *v.* Hays, 236 U.S. 178 (1915). *See also* Hump Hairpin Co. *v.* Emmerson, 258 U.S. 290 (1922), holding that business done by a corporation through orders which were approved in a State where its tangible property and offices were located, but which were first taken by its salesmen in other States, was interstate, although the tax involved was sustained.

[589] Ficklen *v.* Shelby County Taxing District, 145 U.S. 1, 21 (1892).

[590] New York ex rel. Hatch *v.* Reardon, 204 U.S. 152 (1907); *Cf.* Nathan *v.* Louisiana, 8 How. 73 (1850).

[591] Ware *v.* Mobile County, 209 U.S. 405 (1908). *See also* Brodnax *v.* Missouri, 219 U.S. 285 (1911).

[592] 222 U.S. 210 (1911).

[593] 233 U.S. 16 (1914).

[594] Ibid. 23. *See also* Superior Oil *v.* Mississippi ex rel. Knox, 280 U.S. 390 (1930).

[595] Chassaniol *v.* Greenwood, 291 U.S. 584 (1934).

[596] Wiloil Corp. *v.* Pennsylvania, 294 U.S. 169, 173 (1935); *see also* Minnesota *v.* Blasius, 290 U.S. 1 (1933).

[597] 309 U.S. 33 (1940).

[598] Best & Co. *v.* Maxwell. 311 U.S. 454, 455 (1940).

[599] 300 U.S. 577 (1937). *Cf.* Hinson *v.* Lott, 8 Wall. 148 (1869). Here was involved a tax of fifty cents per gallon on all spiritous liquors brought into the State. Comparing the tax with a similar one imposed upon liquors manufactured in the State, the Court upheld the statute. "The taxes were complementary and were intended to effect equality."

[600] 300 U.S. at 583-584. Some subsequent use tax cases in the Henneford pattern are the following: Bacon & Sons *v.* Martin was decided in a unanimous *per curiam* opinion. It involved a Kentucky statute which imposed a tax "on the 'receipt' of cosmetics in the State by any Kentucky retailer" equal to twenty per cent of the invoice price plus transportation cost, if any to the Kentucky dealer. The Kentucky court held that "the imposition of the tax against the retailer is not on the act of receiving the cosmetics, but on the sale and use thereof, after the retailer has received them." On this interpretation the Supreme Court sustained the tax. Obviously, other things being equal, there is little difference between a tax on receiving and a tax on possession a moment later. 305 U.S. 380 (1939). In Felt & Tarrant Manufacturing Co. *v.* Gallagher, 306 U.S. 62 (1939), a California use tax was upheld applicable to a nonresident corporation which solicited orders from California purchasers through agents for whom it hired offices in the State and took orders subject to the vendor's approval. In Nelson *v.* Sears, Roebuck & Company and Nelson *v.* Montgomery Ward & Company, 312 U.S. 359 and 373 (1941) it was held that a foreign corporation which maintained retail stores in Iowa could be validly required to collect an Iowa use tax in respect of mail orders sent by

Iowa purchasers to out-of-state branches of the corporation and filled by direct shipment by mail or common carrier from those branches to the purchasers. In General Trading Company *v.* State Tax Commission, 322 U.S. 335 (1944), also involving the Iowa tax, it was held that a company carrying on no operations in Iowa other than the solicitation of orders by traveling salesmen was liable for collection of the tax on goods sold to Iowa residents, even though the corporation was not licensed to do business in the State and the orders were forwarded for acceptance to Minnesota where they were filled by direct shipment to Iowa customers.

[601] 309 U.S. 33 (1940).

[602] Ibid. 53-54.

[603] Ibid. 57, citing Ficklen *v.* Shelby County Taxing District, 145 U.S. 1 (1892); Howe Machine Co. *v.* Gage, 100 U.S. 676 (1880); and Wagner *v.* Covington, 251 U.S. 95 (1919). In the first it was held that the Robbins case did not apply to a firm of agents and brokers maintaining an office and samples throughout the year in the taxing district. The other two cases were totally irrelevant.

[604] 309 U.S. 70 and 430.

[605] Ibid. 414.

[606] 322 U.S. 327 (1944).

[607] Ibid. 330.

[608] Ibid. 332.

[609] 327 U.S. 416 (1946).

[610] Ibid. 417-418.

[611] Ibid. 435.

[612] Memphis Steam Laundry *v.* Stone, 342 U.S. 389 (1952).

[613] Norton Co. *v.* Dept. of Revenue, 340 U.S. 534 (1951), although decided by a closely divided Court, further confirms this impression.

[614] 9 Wheat. 1, 217-219 (1824).

[615] Smith *v.* Turner (Passenger Cases), 7 How. 283 (1849).

[616] Henderson *v.* Mayor of New York, 92 U.S. 259 (1876); New York *v.* Compagnie Générale Transatlantique, 107 U.S. 59 (1883).

[617] 6 Wall. 35 (1868).

[618] Ibid. 49.

[619] 114 U.S. 196 (1885).

[620] Ibid. 203.

[621] *See* Covington & C. Bridge Co. *v.* Kentucky, 154 U.S. 204 (1894); *also* Edwards *v.* California, 314 U.S. 160 (1941), the decision in which represents the exact inverse of that in the Crandall Case, being based by the majority on the commerce clause, while several of the Justices preferred to put it on the broader grounds invoked by Justice Miller in the Crandall Case.

[622] Western Union Telegraph Company *v.* Texas, 105 U.S. 460 (1882) State Freight Tax Case, 15 Wall. 232 (1873) and Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U.S. 1 (1878) were the precedents principally relied on.

[623] 8 Wall. 168 (1869).

[624] Ibid. 181.

[625] Ibid. 182.

[626] 15 Wall. 232, 233-234, 278-279 (1873).

[627] 127 U.S. 640 (1888).

[628] Ibid. 645.

[629] Crutcher *v.* Kentucky, 141 U.S. 47 (1891).

[630] Ibid. 57.

[631] 266 U.S. 555 (1925).

[632] 268 U.S. 203 (1925); followed in Cudahy Packing Co. *v.* Hinkle, 278 U.S. 460

(1929). *Cf.*, however, Western Live Stock *v.* Bureau of Revenue, 303 U.S. 250, 255 (1938).

[633] Anglo-Chilean Nitrate Sales Corp. *v.* Alabama, 288 U.S. 218 (1933).

[634] Cooney *v.* Mountain States Telephone & Telegraph Co., 294 U.S. 384 (1935).

[635] Fisher's Blend Station *v.* State Tax Commission, 297 U.S. 650, 656 (1936).

[636] Puget Sound Stevedoring Co. *v.* Tax Commission of Washington, 302 U.S. 90 (1937).

[637] Adams Mfg. Co. *v.* Storen, 304 U.S. 307 (1938).

[638] McCarroll *v.* Dixie Greyhound Lines, 309 U.S. 176 (1940). *See also* the following cases in which the Court found a tax to be an unconstitutional interference with the interstate commerce privilege: Tax on maintenance of office in Pennsylvania for use of stockholders, officers, employees, and agents of railroad not operating in Pennsylvania but a link in a line operating therein, Norfolk & W.R. Co. *v.* Pennsylvania, 136 U.S. 114 (1890); license tax on sale of liquor as applied to a sale out of State by mail, Heyman *v.* Hays, 236 U.S. 178 (1915); tax on pipe lines transporting oil or gas produced in State but which might pass out of State, Eureka Pipe Line Co. *v.* Hallanan, 257 U.S. 265 (1921); United Fuel Gas Co. *v.* Hallanan, 257 U.S. 277 (1921); Kentucky tax on gasoline purchased in Illinois and used in an Illinois-Kentucky ferry, Helson & Randolph *v.* Kentucky, 279 U.S. 245 (1929); tax laid on privilege of operating a bus in interstate commerce because not imposed solely as compensation for use of highways or to defray expenses of regulating motor traffic, Interstate Transit, Inc. *v.* Lindsey, 283 U.S. 183 (1931); tax on gas pipe line whose only activity in State was the use of a thermometer and reduction of pressure to permit a vendee to draw off gas, State Tax Commission *v.* Interstate Natural Gas Co., 284 U.S. 41 (1931)—but see East Ohio Gas Co. *v.* Tax Commission, 283 U.S. 465 (1931); gasoline tax imposed per gallon of gasoline imported by interstate carriers as fuel for use in their vehicles within the State as well as in their interstate travel, Bingaman *v.* Golden Eagle Western Lines, 297 U.S. 626 (1936). *See also*, for reiteration of the basic rule that the commerce clause forbids States to tax the privilege of engaging in interstate commerce, Gwin, White & Prince *v.* Henneford, 305 U.S. 434, 438-439 (1939). In California *v.* Thompson, 313 U.S. 109 (1941), the Court, overruling Di Santo *v.* Pennsylvania, 273 U.S. 34 (1927), sustained, as not a "revenue measure," but "a measure to safeguard the traveling public by motor vehicle," who are "particularly unable" to protect themselves against overreaching by those "engaged in a business notoriously subject to abuses," a California statute requiring that agents for this type of transportation take out a license for both their interstate and their intrastate business.

[639] 216 U.S. 1 (1910). *Cf.* Osborne *v.* Florida, 164 U.S. 650 (1897), involving an express business; in Pullman Company *v.* Adams, 189 U.S. 420 (1903); and in Allen *v.* Pullman's Palace Car Co., 191 U.S. 171 (1903). Here State taxes levied on the local business of companies engaged also in interstate commerce were sustained "on the assumption" that the companies in question were free to abandon their local business.

[640] *See also* Pullman Co. *v.* Kansas ex rel. Coleman, 216 U.S. 56 (1910); Ludwig *v.* Western Union Teleg. Co., 216 U.S. 146 (1910); Atchison, T. & S.F.R. Co. *v.* O'Connor, 223 U.S. 280, 285 (1912).

[641] 245 U.S. 178 (1917). *Cf.* Baltic Mining Co. *v.* Massachusetts, 231 U.S. 68 (1914); Kansas City Ry. *v.* Kansas, 240 U.S. 227 (1916); and Kansas City, M. & B.R. Co. *v.* Stiles, 242 U.S. 111 (1916). In each of these a tax like that involved in Looney *v.* Crane was sustained, in the first two because the statute set a maximum limit to the tax; in the third because the amount collected under the act was held to be "reasonable." The ideology of these decisions is clearly opposed to that of the cases treated in the text. The rule in Looney *v.* Crane Co. was held not applicable in the case of a West Virginia corporation doing business in Illinois and owning practically all of its property there. An Illinois tax on the local business, which was measured by the total capitalization of the company was sustained, it being shown further that the tax was little more than it would have been if levied at the same rate directly on the property of the company that was in Illinois. Hump Hairpin Mfg. Co. *v.* Emmerson, 258 U.S. 290 (1922).

[642] 246 U.S. 135 (1918). *See also* Locomobile Co. of America *v.* Massachusetts, 246 U.S. 146 (1918); Cheney Brothers Co. *v.* Massachusetts, 246 U.S. 147 (1918); Union Pacific R.R. Co. *v.* Pub. Service Comm., 248 U.S. 67 (1918).

[643] 246 U.S. at 141.

[644] 277 U.S. 163 (1928).

[645] Ibid. 171.

[646] 294 U.S. 384 (1935).

[647] 297 U.S. 403 (1936).

[648] Ibid. 415. Headnote 6.

[649] 8 Wall. 168, 181 (1869). *See also* Bank of Augusta *v.* Earle, 13 Pet. 519 (1839); and Security Mut. L. Ins. Co. *v.* Prewitt, 202 U.S. 246 (1906).

[650] *See* Atlantic Lumber Co. *v.* Commissioner, 298 U.S. 553 (1936); Southern Natural Gas Corp. *v.* Alabama, 301 U.S. 148 (1937); Atlantic Refining Co. *v.* Virginia, 302 U.S. 22 (1937); Coverdale *v.* Arkansas-Louisiana Pipe Line Co., 303 U.S. 604 (1938); Ford Motor Co. *v.* Beauchamp, 308 U.S. 331 (1939); Treasury of Indiana *v.* Wood Corp., 313 U.S. 62 (1941); Wheeling Steel Corp. *v.* Glander, 337 U.S. 562, 571 (1949); *Cf.* however, James *v.* Dravo Contracting Co., 302 U.S. 134 (1937); Memphis Natural Gas Co. *v.* Stone, 335 U.S. 80, 85-86 (1948).

[651] Philadelphia & R.R. Co. *v.* Pennsylvania (State Freight Tax Case), 15 Wall. 232 (1873).

[652] Prudential Ins. Co. *v.* Benjamin, 328 U.S. 408, 418 (1946).

[653] 12 Wheat. 419 (1827).

[654] Philadelphia & R.R. Co. *v.* Pennsylvania, 15 Wall. 284 (1873).

[655] Philadelphia & S. Mail S.S. Co. *v.* Pennsylvania, 122 U.S. 326 (1887).

[656] Western Union Tel. Co. *v.* Massachusetts, 125 U.S. 530 (1888).

[657] Ibid. 547.

[658] *See* Railroad Co. *v.* Peniston, 18 Wall. 5, 30-31 (1873).

[659] Pullman's Palace Car Co. *v.* Pennsylvania, 141 U.S. 18 (1891).

[660] Ibid. 26.

[661] 165 U.S. 194; upon rehearing 166 U.S. 185 (1897).

[662] 166 U.S. at 220.

[663] *See* Justice Holmes' language in Galveston, Harrisburg, & S.A. Ry. Co. *v.* Texas, 210 U.S. 217, 225, 227 (1908). *See also* Cudahy Packing Co. *v.* Minnesota 246 U.S. 450 (1918); and Pullman Co. *v.* Richardson, 261 U.S. 330 (1923); and Virginia *v.* Imperial Coal Sales Co., 293 U.S. 15 (1934).

[664] Pullman's Palace Car Co. *v.* Pennsylvania, 141 U.S. 18 (1891).

[665] Pittsburgh, C.C. & St. L.R. Co. *v.* Backus, 154 U.S. 421 (1894); Cleveland, C.C. & St. L.R. Co. *v.* Backus, 154 U.S. 439 (1894).

[666] Western Union Teleg. Co. *v.* Taggart, 163 U.S. 1 (1896). *See also* Western Union Teleg. Co. *v.* Massachusetts, 125 U.S. 530 (1888).

[667] Adams Express Co. *v.* Ohio, 165 U.S. 194 (1897), upon rehearing 166 U.S. 185 (1897).

[668] Great Northern Railway Co. *v.* Minnesota, 278 U.S. 503 (1929).

[669] Nashville, C. & St. L. Railway *v.* Browning, 310 U.S. 362 (1910).

[670] Ibid. 366, citing Union Tank Line Co. *v.* Wright, 249 U.S. 275 (1919); Wallace *v.* Hines, 253 U.S. 66 (1920); Southern R. Co. *v.* Kentucky, 274 U.S. 76 (1927).

[671] Atlantic Lumber Co. *v.* Commissioner, 298 U.S. 553 (1936). *Cf.* Alpha Portland Cement Co. *v.* Massachusetts, 268 U.S. 203 (1925).

[672] 142 U.S. 217 (1891).

[673] Ibid. 227-228.

[674] Citing Pickard *v.* Pullman Southern Car Co., 117 U.S. 34 (1886); Leloup *v.* Port of Mobile, 127 U.S. 640 (1888); Crutcher *v.* Kentucky, 141 U.S. 47 (1891); Philadelphia & S. Mail Steamship Co. *v.* Pennsylvania, 122 U.S. 326 (1887).

[675] Galveston, Harrisburg & S.A.R. Co. *v.* Texas, 210 U.S. 217 (1908).

[676] Ibid. 226.

[677] Postal Telegraph Cable Co. *v.* Adams, 155 U.S. 688, 697 (1895). *See also*

Illinois Central R. Co. *v.* Minnesota, 309 U.S. 157 (1940), in which was sustained a five percent gross earnings tax on all railroads operating in the State, payable in lieu of all other taxes and found to have "a fair relation to the property employed in the State."

[678] New Jersey Bell Telephone Co. *v.* State Bd. of Taxes & Assessments, 280 U.S. 338 (1930).

[679] Bass, Ratcliff & Gretton *v.* State Tax Com., 266 U.S. 271 (1924).

[680] Matson Navigation Co. *v.* State Board, 297 U.S. 441 (1936). *See also* International Shoe Co. *v.* Shartel, 279 U.S. 429 (1929).

[681] Ford Motor Co. *v.* Beauchamp, 308 U.S. 331 (1939).

[682] International Harvester Co. *v.* Evatt, 329 U.S. 416 (1947).

[683] Galveston, Harrisburg & San Antonio R. Co. *v.* Texas, 210 U.S. 217 (1908).

[684] Wallace *v.* Hines, 253 U.S. 66 (1920).

[685] *See* pp. 194, 202. *See also* Interstate Oil Pipe Line Co. *v.* Stone, 337 U.S. 662 (1949) for an extensive review and evaluation of cases.

[686] Illinois Central R. Co. *v.* Minnesota, 309 U.S. 157 (1940). *See also* Wisconsin and Michigan Ry. *v.* Powers, 191 U.S. 379 (1903); United States Express Co. *v.* Minnesota, 223 U.S. 335 (1912). *See* note 13 to Justice Rutledge's opinion in Freeman *v.* Hewit, 329 U.S. at pp. 265-266.

[687] Western Live Stock *v.* Bureau of Revenue, 303 U.S. 250 (1938). *See also* United States Express Co. *v.* Minnesota, 223 U.S. 335 (1912); Dept. of Treasury of Indiana *v.* Wood Corp., 313 U.S. 62 (1941); Dept. of Treasury of Indiana *v.* Mfg. Co., 313 U.S. 252 (1941); Harvester Co. *v.* Dept. of Treasury, 322 U.S. 340 (1944).

[688] Western Live Stock *v.* Bureau of Revenue, 303 U.S. 250 (1938).

[689] Meyer *v.* Wells, Fargo & Co., 223 U.S. 298 (1912); *also* the following note.

[690] Philadelphia & S. Mail S.S. Co. *v.* Pennsylvania, 122 U.S. 326 (1887); Ratterman *v.* Western Union Teleg. Co., 127 U.S. 411 (1888); Western Union Teleg. Co. *v.* Alabama Board of Assessment (Seay), 132 U.S. 472 (1889); Adams Mfg. Co. *v.* Storen, 304 U.S. 307 (1938); Gwin, White & Prince *v.* Henneford, 305 U.S. 434 (1939). *Cf.* Fargo *v.* Michigan (Fargo *v.* Stevens), 121 U.S. 230 (1887), as explained in Western Live Stock *v.* Bureau of Revenue, 303 U.S. 250 (1938).

[691] Lockhart, Gross Receipts Taxes on Interstate Transportation and Communication, 57 Harvard L. Rev. 40, 65, 66 (1943); Galveston, H. & S.A.R. Co. *v.* Texas, 210 U.S. 217 (1908); New Jersey Bell Teleph. Co. *v.* State Bd. of Taxes and Assessments, 280 U.S. 338 (1930). But *Cf.* Nashville, C. and St. L. Ry. *v.* Browning, 310 U.S. 362 (1940). In both the Galveston and New Jersey Telephone Company cases, although the taxable events all occurred within the taxing State, the possibility of multiple taxation was nevertheless present. *See also* Puget Sound Stevedoring Co. *v.* State Tax Commission, 302 U.S. 90 (1937), the decision in which might have been rested upon the clause of the Constitution forbidding the States to tax exports. *See also* Richfield Oil Corp. *v.* State Board of Equalization, 329 U.S. 69 (1946).

[692] Fisher's Blend Station *v.* State Tax Comm., 297 U.S. 650 (1936); Western Live Stock *v.* Bureau of Revenue, 303 U.S. 250 (1938).

[693] *See* p. 193.

[694] *See* pp. 150-160.

[695] *See* p. 189.

[696] 303 U.S. 250 (1938).

[697] Ibid. 254.

[698] Ibid. 255-256.

[699] 305 U.S. 434 (1939).

[700] Ibid. 439-440.

[701] 305 U.S. at 455 (1939).

[702] *See* McCarroll *v.* Dixie Greyhound Lines, Inc., 309 U.S. 176, 188-189 (1940).

[703] Freeman *v.* Hewit, 329 U.S. 249 (1946).

[704] 329 U.S. 249.

[705] The Court relied particularly on Adams Mfg. Co. *v.* Storen, 304 U.S. 307 (1938) in which the multiple taxation test had been used.

[706] Justice Black dissented without opinion. Justice Douglas, speaking also for Justice Murphy, contended that the sale had been local, and that the only interstate agency employed had been the mails, an argument which squares badly with the attitude of the same Justices in United States *v.* South-Eastern Underwriters Assoc., 322 U.S. 533 (1944).

[707] 330 U.S. 422 (1947), reaffirming Puget Sound Stevedoring Co. *v.* Tax Comm., 302 U.S. 90 (1937).

[708] 330 U.S. at 433.

[709] Justices Murphy, Douglas, and Rutledge thought the decision correct as to receipts from foreign commerce. Speaking for them, Justice Douglas made an effort to resurrect Maine *v.* Grand Trunk R. Co., 142 U.S. 217 (1891). Justice Black dissented without opinion.

[710] 334 U.S. 653.

[711] Ibid. 663, citing Western Live Stock *v.* Bureau of Revenue, 303 U.S. 250 (1938); and Ratterman *v.* Western Union Teleg. Co., 127 U.S. 411 (1888).

[712] 335 U.S. 80.

[713] 337 U.S. 662, 666, 677-678, 680.

[714] *See supra*, pp. 196, 204-207.

[715] 247 U.S. 321 (1918).

[716] Ibid. 328-329.

[717] Shaffer *v.* Carter, 252 U.S. 37 (1920).

[718] Underwood Typewriter Co. *v.* Chamberlain, 254 U.S. 113 (1920); Bass, Ratcliff & Gretton *v.* State Tax Commission, 266 U.S. 271 (1924).

[719] Hans Rees' Sons *v.* North Carolina, 283 U.S. 123, 132, 133 (1931). In this case a North Carolina tax was assessed on the income of a New York corporation, which bought leather, manufactured it in North Carolina, and sold its products at wholesale and retail in New York. The Court observed: "The difficulty of making an exact apportionment is apparent and hence, when the State has adopted a method not intrinsically arbitrary, it will be sustained until proof is offered of an unreasonable and arbitrary application in particular cases." The decisions in the Underwood and Bass cases, *supra*, "are not authority for the conclusion that where a corporation manufactures in one State and sells in another, the net profits of the entire transaction, as a unitary enterprise, may be attributed, regardless of evidence, to either State."

[720] Atlantic Coast Line *v.* Daughton, 262 U.S. 413 (1923).

[721] Matson Nav. Co. *v.* State Board, 297 U.S. 441 (1936). *See also* Butler Bros. *v.* McColgan, 315 U.S. 501 (1942), where the tax was sustained under the Fourteenth Amendment.

[722] Memphis Gas Co. *v.* Beeler, 315 U.S. 649 (1942).

[723] Ibid. 656-657

[724] Spector Motor Service *v.* O'Connor, 340 U.S. 602 (1951).

[725] 114 U.S. 196 (1885).

[726] Hays *v.* Pacific Mail S.S. Co., 17 How. 596 (1855).

[727] Packet Co. *v.* Keokuk, 95 U.S. 80 (1877); *see also* Transportation Co. *v.* Parkersburg, 107 U.S. 691 (1883).

[728] Ayer & L. Tie Co. *v.* Kentucky, 202 U.S. 409 (1906). For a résumé of the rules for taxing vessels *see* Northwest Airlines *v.* Minnesota, 322 U.S. 292, 314-315 (1944), note 2.

[729] Old Dominion S.S. Co. *v.* Virginia, 198 U.S. 299 (1905): a vessel enrolled in New York at domicile of owner, but operating wholly in Virginia, was held taxable in Virginia.

[730] 336 U.S. 169 (1949).

[731] Northwest Airlines *v.* Minnesota, 322 U.S. 292 (1944).

[732] He also invoked New York Central and H.R.R. Co. *v.* Miller, 202 U.S. 584 (1906), where although 12 to 64 per cent of the rolling stock of the railroad

was outside of New York throughout the tax year, New York was nevertheless allowed to tax it all because no part was in any other State throughout the year. The case is atypical, a constitutional sport; *cf.* Union Refrigerator Transit Co. *v.* Kentucky, 199 U.S. 194 (1905).

[733] 322 U.S. at 301-302.

[734] "The apportionment theory is a mongrel one, a cross between desire not to interfere with State taxation and desire at the same time not utterly to crush out interstate commerce. It is a practical, but rather illogical, device to prevent duplication of tax burdens on vehicles in transit. It is established in our decisions and has been found more or less workable with more or less arbitrary formulae of apportionment. Nothing either in theory or in practice commends it for transfer to air commerce."—Ibid. 306.

[735] Ibid. 308.

[736] Pullman's Palace Car Co. *v.* Pennsylvania, 141 U.S. 18 (1891).

[737] 322 U.S. 309.

[738] 235 U.S. 610 (1915).

[739] Ibid. 622.

[740] Hendrick *v.* Maryland, 235 U.S. 610 (1915).

[741] Kane *v.* New Jersey, 242 U.S. 160 (1916).

[742] Morf *v.* Bingaman, 298 U.S. 407 (1936).

[743] Ingels *v.* Morf, 300 U.S. 290 (1937).

[744] Clark *v.* Poor, 274 U.S. 554 (1927); Hicklin *v.* Coney, 290 U.S. 109 (1933).

[745] Interstate Busses Corp. *v.* Blodgett, 276 U.S. 245 (1928); Continental Baking Co. *v.* Woodring, 286 U.S. 352 (1932).

[746] Aero Mayflower Transit Co. *v.* Georgia Pub. Serv. Commission, 295 U.S. 285 (1935).

[747] Interstate Transit *v.* Lindsey, 283 U.S. 183 (1931). *Cf.* Sprout *v.* South Bend, 277 U.S. 163 (1928).

[748] *See* Dixie Ohio Express Co. *v.* State Rev. Comm., 306 U.S. 72 (1939); *also* Clark *v.* Paul Gray, Inc., 306 U.S. 583 (1939); Aero Mayflower Transit Co. *v.* Board of R.R. Commrs., 332 U.S. 495, 503-504 (1947). Here was sustained a State statute imposing a flat tax of $10 annually upon each vehicle operated by a motor carrier over the State's highways, and a fee of one half of one per cent of the carrier's gross operating revenue from its operations within the State, with an annual minimum of $15 per vehicle, in consideration of the use of the highways and in addition to all other motor vehicle license fees and taxes. This was held, as applied to a carrier engaged solely in interstate commerce, not to burden such commerce unconstitutionally, although the proceeds went into the State's general fund subject to appropriation for other than highway purposes. (Opinion by Rutledge, J., all concurring.) While a "State may not discriminate against or exclude such interstate traffic generally in the use of its highways, * * * [it is not] required to furnish those facilities to it free of charge or indeed on equal terms with other traffic not inflicting similar destructive effects. * * * Interstate traffic equally with intrastate may be required to pay a fair share of the cost and maintenance reasonably related to the use made of the highways." Ibid., headnote 6.

[749] 339 U.S. 542 (1950).

[750] Ibid. 561.

[751] Justice Roberts for the Court in Great Northern R. Co. *v.* Washington, 300 U.S. 154, 159-161 (1937).

[752] Charlotte, C. & A.R. Co. *v.* Gibbes, 142 U.S. 386 (1892); New York ex rel. New York Electric Lines Co. *v.* Squire, 145 U.S. 175, 191 (1892).

[753] Atlantic & P. Teleg. Co. *v.* Philadelphia, 190 U.S. 160 (1903); Mackay Teleg. & Cable Co. *v.* Little Rock, 250 U.S. 94, 99 (1919).

[754] Western U. Teleg. Co. *v.* New Hope, 187 U.S. 419, 425 (1903); Pure Oil Co. *v.* Minnesota, 248 U.S. 158, 162 (1918).

[755] New Mexico ex rel. McLean *v.* Denver & R.G.R. Co., 203 U.S. 38, 55 (1906). *Cf.* Red "C" Oil Mfg. Co. *v.* Board of Agriculture, 222 U.S. 380, 393 (1912); Western U. Teleg. Co. *v.* New Hope, 187 U.S. 419 (1903).

[756] Brimmer *v.* Rebman, 138 U.S. 78, 83 (1891); Postal Teleg. & Cable Co. *v.* Taylor, 192 U.S. 64 (1904); Pure Oil Co. *v.* Minnesota, 248 U.S. 158, 162 (1918).

[757] Atlantic & P. Teleg. Co. *v.* Philadelphia, 190 U.S. 160, 164 (1903); Postal Teleg. Cable Co. *v.* Taylor, 192 U.S. 64, 69 (1904); Foote & Co. *v.* Stanley, 232 U.S. 494, 503, 504 (1914).

[758] Foote & Co. *v.* Stanley, 232 U.S. 494, 505 (1914); Lugo *v.* Suazo, 59 F. (2d) 386 (1932).

[759] Western U. Teleg. Co. *v.* New Hope, 187 U.S. 419, 425 (1903); Foote & Co. *v.* Stanley, 232 U.S. 494, 507 (1914).

[760] Postal Teleg. Cable Co. *v.* New Hope, 192 U.S. 55 (1904); Foote & Co. *v.* Stanley, 232 U.S. 494, 508 (1914).

[761] 10 Stat. 112. Sustained in Pennsylvania *v.* Wheeling & Belmont Bridge Co., 18 How. 421 (1856).

[762] Pennsylvania *v.* Wheeling & Belmont Bridge Co., 13 How. 518 (1852).

[763] Transportation Co. *v.* Parkersburg, 107 U.S. 691, 701 (1883).

[764] 322 U.S. 533 (1944).

[765] 59 Stat. 33 (1945).

[766] 328 U.S. 408 (1946).

[767] Ibid. 429-430, 434-435.

[768] *See* pp. 163-172.

[769] 9 Wheat. 1 (1824).

[770] Ibid. 203.

[771] 12 Wheat. 419 (1827).

[772] Ibid. 443-444.

[773] *Cf.* 12 Wheat. at 439-440.

[774] 11 Pet. 102 (1837).

[775] Smith *v.* Turner (Passenger Cases), 7 How. 283 (1849).

[776] Henderson *v.* New York, 92 U.S. 259 (1876).

[777] Ibid. 272.

[778] Chy Lung *v.* Freeman, 92 U.S. 275 (1876).

[779] Compagnie Francaise de Navigation *v.* Bd. of Health, 186 U.S. 380, 398, (1902). *See also* Morgan's L. & T.R.S.S. Co. *v.* Bd. of Health, 118 U.S. 455 (1886); Louisiana *v.* Texas, 176 U.S. 1, 21 (1900).

[780] 211 U.S. 31, 36-37 (1908).

[781] As to concessions by the Court to the practical necessities of enforcement, *see also* Bayside Fish Flour Co. *v.* Gentry, 297 U.S. 422 (1936); and Whitfield *v.* Ohio, 297 U.S. 431 (1936).

[782] 325 U.S. 761, 766-767.

[783] Ibid. 767; citing: Minnesota Rate Cases, 230 U.S. 352, 399, 400 (1913); South Carolina Highway Dept. *v.* Barnwell Bros., 303 U.S. 177, 187 (1938), et seq.; California *v.* Thompson, 313 U.S. 109, 113, 114 (1941) and cases cited; Parker *v.* Brown, 317 U.S. 341, 359, 360 (1943).

[784] 325 U.S. at 767; citing: Cooley *v.* Board of Wardens, 12 How. at 319 (1851); South Carolina Highway Dept. *v.* Barnwell Bros., 303 U.S. at 185; California *v.* Thompson, 313 U.S. at 113; Duckworth *v.* Arkansas, 314 U.S. 390, 394 (1941); Parker *v.* Brown, 317 U.S. at 362, 363.

[785] 325 U.S. at 767; citing: South Carolina Highway Dept. *v.* Barnwell Bros., 303 U.S. at 188 and cases cited; Lone Star Gas Co. *v.* Texas, 304 U.S. 224, 238 (1938); Milk Board *v.* Eisenberg Co., 306 U.S. 346, 351 (1939); Maurer *v.* Hamilton, 309 U.S. 598, 603 (1940); California *v.* Thompson, 313 U.S. 113, 114 and cases cited.

[786] 325 U.S. at 767, 768; citing: Cooley *v.* Board of Wardens, 12 How. at 319 (1851); Leisy *v.* Hardin, 135 U.S. 100, 108, 109 (1890); Minnesota Rate Cases, 230 U.S. at 399, 400 (1913); Edwards *v.* California, 314 U.S. 160, 176 (1941).

[787] 325 U.S. at 768; citing: Brown *v.* Maryland, 12 Wheat. 419, 447 (1827); Minnesota Rate Cases, 230 U.S. at 399, 400; Pennsylvania *v.* West Virginia, 262 U.S. 553, 596 (1923); Baldwin *v.* Seelig, 294 U.S. 511, 522 (1935); South Carolina Highway Dept. *v.* Barnwell Bros., 303 U.S. at 185 (1938).

[788] 325 U.S. at 768; citing: Welton *v.* Missouri, 91 U.S. 275, 282 (1876); Hall *v.* DeCuir, 95 U.S. 485, 490 (1878); Brown *v.* Houston, 114 U.S. 622, 631 (1885); Bowman *v.* Chicago & N.W.R. Co., 125 U.S. 465, 481, 482 (1888); Leisy *v.* Hardin, 135 U.S. at 109; In re Rahrer, 140 U.S. 545, 559, 560 (1891); Brennan *v.* Titusville, 153 U.S. 289, 302 (1894); Covington & C. Bridge Co. *v.* Kentucky, 154 U.S. 204, 212 (1894); Graves *v.* New York ex rel. O'Keefe, 306 U.S. 466, 479 (1939); Dowling, Interstate Commerce and State Power, 27 Va. Law Rev. 1 (1940).

[789] 325 U.S. at 769; citing: Parker *v.* Brown. 317 U.S. at 362 (1943); Terminal Railroad Assn. *v.* Brotherhood, 318 U.S. 1, 8 (1943); *see* Di Santo *v.* Pennsylvania, 273 U.S. 34, 44 (1927) (and compare California *v.* Thompson, 313 U.S. 109 (1941)); Illinois Gas Co. *v.* Public Service Co., 314 U.S. 498, 504, 505 (1942).

[790] 325 U.S. at 769; citing: Cooley *v.* Board of Wardens, 12 How. 299 (1851); Kansas City Southern R. Co. *v.* Kaw Valley District, 233 U.S. 75, 79 (1914); South Covington R. Co. *v.* Covington, 235 U.S. 537, 546 (1915); Missouri, K. & T.R. Co. *v.* Texas, 245 U.S. 484, 488 (1918); St. Louis & S.F.R. Co. *v.* Public Service Comm'n., 254 U.S. 535, 537 (1921): Foster-Fountain Packing Co. *v.* Haydel, 278 U.S. 1, 10 (1928); Gwin, White & Prince *v.* Henneford, 305 U.S. 434, 441 (1939); McCarroll *v.* Dixie Lines, 309 U.S. 176 (1940).

[791] 325 U.S. at 769; citing: In re Rahrer, 140 U.S. at 561, 562 (1891); Adams Express Co. *v.* Kentucky, 238 U.S. 190, 198 (1915); Rosenberger *v.* Pacific Express Co., 241 U.S. 48, 50, 51 (1916); Clark Distilling Co. *v.* Western Maryland R. Co., 242 U.S. 311, 325, 326 (1917); Whitfield *v.* Ohio, 297 U.S. 431, 438-440 (1936); Kentucky Whip & Collar Co. *v.* Illinois Central R. Co., 299 U.S. 334, 350, 351 (1937); Hooven & Allison Co. *v.* Evatt, 324 U.S. 652, 679 (1945).

[792] 325 U.S. at 769, 770; citing: Addyston Pipe & Steel Co. *v.* United States, 175 U.S. 211, 230 (1899); Louisville & Nashville R. Co. *v.* Mottley, 219 U.S. 467 (1911); Houston, E. & W.T.R. Co. *v.* United States, 234 U.S. 342 (1914); American Express Co. *v.* Caldwell, 244 U.S. 617, 626 (1917); Illinois Central R. Co. *v.* Public Utilities Comm'n., 245 U.S. 493, 506 (1918); New York *v.* United States, 257 U.S. 591, 601 (1922); Louisiana Public Service Comm'n. *v.* Texas & N.O.R. Co., 284 U.S. 125, 130 (1931); Pennsylvania R. Co. *v.* Illinois Brick Co., 297 U.S. 447, 459, (1936).

[793] 325 U.S. at 770; citing: Gwin, White & Prince *v.* Henneford, 305 U.S. 434, 441 (1939).

[794] 325 U.S. at 770; citing: Terminal Railroad Assn. *v.* Brotherhood, 318 U.S. 1, 8 (1943); Southern R. Co. *v.* King, 217 U.S. 524 (1910).

[795] Peik *v.* Chicago & N.W.R. Co., 94 U.S. 164 (1877).

[796] Wabash, St. L. & P.R. Co. *v.* Illinois, 118 U.S. 557 (1886).

[797] 24 Stat. 379 (1887).

[798] Wisconsin Railroad Com. *v.* Chicago, B. & Q.R.R. Co., 257 U.S. 563 (1922).

[799] Gladson *v.* Minnesota, 166 U.S. 427 (1897); followed in Lake Shore & M.S.R. Co. *v.* Ohio ex rel. Lawrence, 173 U.S. 285 (1899), in which an Ohio statute requiring that "each company shall cause three, each way, of its regular trains carrying passengers, * * * Sundays excepted, to stop at a station, city or village, containing three thousand inhabitants, for a time sufficient to receive and let off passengers; * * *" was sustained.

[800] Illinois Central R.R. Co. *v.* Illinois, 163 U.S. 142, 153 (1896).

[801] Chicago, Burlington & Quincy R.R. Co. *v.* Wisconsin R.R. Com., 237 U.S. 220, 226 (1915); St. Louis & San Francisco R. Co. *v.* Public Service Com., 254 U.S. 535, 536-537 (1921).

[802] St. Louis & San Francisco R. Co. *v.* Public Service Com., 261 U.S. 369, 371 (1923).

[803] Wisconsin, Minnesota & Pacific R.R. *v.* Jacobson, 179 U.S. 287 (1900).

[804] Missouri P.R. Co. *v.* Larabee Flour Mills Co., 211 U.S. 612 (1909).

[805] McNeill *v.* Southern R. Co., 202 U.S. 543 (1906).

[806] St. Louis S.W.R. Co. *v.* Arkansas, 217 U.S. 136 (1910).

[807] *See e.g.* The Court's language in Hannibal & St. L.R. Co. *v.* Husen, 95 U.S. 465, 470 (1878); New York, N.H. & H.R. Co. *v.* New York, 165 U.S. 628, 631 (1897); Lake Shore & M.S.R. Co. *v.* Ohio ex rel. Lawrence, 173 U.S. 285, 292 (1899); Hennington *v.* Georgia, 163 U.S. 299 (1896); Simpson *v.* Shepard (Minnesota Rate Cases), 230 U.S. 352, 402-410 (1913).

[808] Smith *v.* Alabama, 124 U.S. 465 (1888); *see also* Nashville, C. & St. L.R. Co. *v.* Alabama, 128 U.S. 96 (1888); McCall *v.* California, 136 U.S. 104 (1890); Missouri, K. & T.R. Co. *v.* Haber, 109 U.S. 613, 633 (1898).

[809] New York, N.H. & H.R. Co. *v.* New York, 165 U.S. 628 (1807). *See also* Chicago, M. & St. P.R. Co. *v.* Solan, 169 U.S. 133, 137 (1898).

[810] Erb *v.* Morasch, 177 U.S. 584 (1900).

[811] Erie R.R. Co. *v.* Public Utility Commrs., 254 U.S. 394 (1921).

[812] Atchison, T. & S.F.R. Co. *v.* R.R. Comm., 283 U.S. 380 (1931).

[813] Chicago, R.I. & P.R. Co. *v.* Arkansas, 219 U.S. 453 (1911).

[814] Ibid, 453, 466. *See also* St. Louis, I.M. & S. Co. *v.* Arkansas, 240 U.S. 518 (1916); Missouri P.R. Co. *v.* Norwood, 283 U.S. 249 (1931).

[815] Terminal Railroad Assn. *v.* Brotherhood, 318 U.S. 1 (1943).

[816] 163 U.S. 299 (1896). In South Covington R. Co. *v.* Covington, 235 U.S. 537 (1915), the Court sustained a municipal ordinance which prohibits the company from allowing passengers to ride on the rear or front platforms without suitable barriers, and requires that the cars be kept clean and ventilated and fumigated. However, provisions of the ordinance that cars shall never be permitted to fall below a certain temperature and regulating the number of passengers to be carried in the cars were held to be unreasonable and violative of the commerce clause. There was no unconstitutional interference with interstate commerce by a municipal ordinance which directed a railway company to remove its tracks from a busy street intersection. Denver & R.G.R. Co. *v.* Denver, 250 U.S. 241 (1919).

[817] Chicago, M. & St. P.R. Co. *v.* Solan, 169 U.S. 133 (1898); Richmond & A.R. Co. *v.* Patterson Tobacco Co., 169 U.S. 311 (1898).

[818] 325 U.S. 761, 779-780 (1945).

[819] Kansas City Southern R. Co. *v.* Kaw Valley Drainage Dist., 233 U.S. 75, 79 (1914).

[820] 244 U.S. 310 (1917).

[821] *Cf.* Southern R. Co. *v.* King, 217 U.S. 524 (1910), where the crossings were fewer and the burden to interstate commerce was shown not to be unduly heavy.

[822] 302 U.S. 1, 15 (1937).

[823] 325 U.S. 761, 771-776.

[824] 328 U.S. 373, 380, 386 (1946).

[825] Hendrick *v.* Maryland, 235 U.S. 610 (1915); Kane *v.* New Jersey, 242 U.S. 160 (1916).

[826] Sproles *v.* Binford, 286 U.S. 374 (1932). *See also* Morris *v.* Duby, 274 U.S. 135 (1927).

[827] South Carolina State Highway Dept. *v.* Barnwell Bros. Inc., 303 U.S. 177 (1938).

[828] 289 U.S. 92 (1933).

[829] 309 U.S. 598 (1940).

[830] 306 U.S. 79 (1939).

[831] Eichholz *v.* Public Service Com. of Missouri, 306 U.S. 268 (1939), citing Cooley *v.* Board of Wardens, 12 How. 299 (1851).

[832] Railway Express Agency *v.* New York, 336 U.S. 106 (1949).

[833] Ibid. 111. For a more extreme application of this idea by a narrowly divided Court, in a quite special situation, *see* Buck et al. *v.* California, 342 U.S. 99 (1952).

[834] Continental Baking Co. *v.* Woodring, 286 U.S. 352 (1932); Stephenson *v.* Binford, 287 U.S. 251 (1932); Hicklin *v.* Coney, 290 U.S. 169 (1933).

[835] Michigan Pub. Utilities Com. *v.* Duke, 266 U.S. 570 (1925). *See also* Smith *v.* Cahoon, 283 U.S. 553 (1931); and Continental Baking Co. *v.* Woodring, 286 U.S. 352 (1932).

[836] Buck *v.* Kuykendall, 267 U.S. 307 (1925). *See also*, Bush & Sons Co. *v.* Maloy, 267 U.S. 317 (1925); Interstate Busses Corp. *v.* Holyoke Street R. Co., 273 U.S. 45 (1927).

[837] 273 U.S. 34 (1927). *See also* McCall *v.* California, 136 U.S. 104 (1890). In the former case, agents soliciting patronage for steamship lines were involved; in the latter, an agent soliciting patronage for a particular railway line.

[838] California *v.* Thompson, 313 U.S. 109, 115-116 (1941).

[839] 9 Wheat. 1 (1824).

[840] 2 Pet. 245, 252 (1829).

[841] 12 How. 299 (1851).

[842] Foster *v.* Davenport, 22 How. 244 (1859); Sinnot *v.* Davenport, 22 How. 227 (1859). *See also* Lord *v.* Steamship Co., 102 U.S. 541 (1881).

[843] Foster *v.* Master & Wardens of Port of New Orleans, 94 U.S. 246 (1877).

[844] Ibid. 247.

[845] Northern Transp. Co. *v.* Chicago, 99 U.S. 635, 643 (1879); Willamette Iron Bridge Co. *v.* Hatch, 125 U.S. 1 (1888); Illinois *v.* Economy Power Light Co., 234 U.S. 497 (1914).

[846] Economy Light and Power Co. *v.* United States, 256 U.S. 113 (1921).

[847] Harman *v.* Chicago, 147 U.S. 396, 412 (1893).

[848] 302 U.S. 1 (1937).

[849] Ibid. 10.

[850] 333 U.S. 28 (1948).

[851] Hall *v.* De Cuir, 95 U.S. 485 (1878).

[852] 2 Pet. 245 (1829).

[853] Pound *v.* Turck, 95 U.S. 459 (1878); Lindsay & Phelps Co. *v.* Mullen, 176 U.S. 126 (1900).

[854] 3 Wall. 713 (1866).

[855] Ibid. 729. *See also*, Escanaba & L.M. Transp. Co. *v.* Chicago, 107 U.S. 678 (1883); and Cardwell *v.* American River Bridge Co., 113 U.S. 205 (1885).

[856] 119 U.S. 543 (1886).

[857] Ibid. 548-549.

[858] Packet Co. *v.* Keokuk, 95 U.S. 80 (1877); Ouachita Packet Co. *v.* Aiken, 121 U.S. 444 (1887).

[859] Prosser *v.* Northern P.R. Co., 152 U.S. 59 (1894). *See also* Sands *v.* Manistee R. Imp. Co., 123 U.S. 288 (1887); Gring *v.* Ives, 222 U.S. 365 (1912).

[860] Cases cited in note 7 above; Parkersburg & O. Transp. Co. *v.* Parkersburg, 107 U.S. 691 (1883).

[861] Gloucester Ferry Co. *v.* Pennsylvania, 114 U.S. 196, 215 (1885); Conway *v.* Taylor, 1 Black 603 (1862); Wiggins Ferry Co. *v.* East St. Louis, 107 U.S. 365 (1883).

[862] Mayor and Board of Aldermen of Vidalia *v.* McNeely, 274 U.S. 676 (1927). *See also* Helson *v.* Kentucky, 279 U.S. 245, 249 (1929).

[863] Covington & C. Bridge Co. *v.* Kentucky, 154 U.S. 204 (1894).

[864] Port Richmond and Bergen Point Ferry Co. *v.* Bd. of Chosen Freeholders, 234 U.S. 317 (1914).

[865] New York Central & H.R.R. Co. *v.* Bd. of Chosen Freeholders, 227 U.S. 248 (1913).

[866] Wilmington Transp. Co. *v.* R.R. Com., 236 U.S. 151 (1915).

[867] Western U. Teleg. Co. *v.* Pendleton, 122 U.S. 347 (1887).

[868] Western U. Teleg. Co. *v.* Foster, 247 U.S. 105 (1918).

[869] Western U. Teleg. Co. *v.* Crovo, 220 U.S. 364 (1911).

[870] Western U. Teleg. Co. *v.* Commercial Milling Co., 218 U.S. 406 (1910).

[871] Western U. Teleg. Co. *v.* Brown, 234 U.S. 542 (1914).

[872] Essex *v.* New England Teleg. Co., 239 U.S. 313 (1915).

[873] Pensacola Teleg. Co. *v.* Western U. Teleg. Co., 96 U.S. 1 (1878).

[874] Western Union Teleg. Co. *v.* Richmond, 224 U.S. 160 (1912). *See also* Postal Teleg. Cable Co. *v.* Richmond, 249 U.S. 252 (1919).

[875] Northwestern Bell Teleph. Co. *v.* Nebraska State R. Com., 297 U.S. 471 (1936).

[876] Bell Tel. Co. *v.* Pennsylvania Public Util. Com., 309 U.S. 30 (1940).

[877] Missouri ex rel. Barrett *v.* Kansas Natural Gas Co., 265 U.S. 298 (1924).

[878] Public Utilities Com. *v.* Attleboro Steam & Electric Co., 273 U.S. 83 (1927).

[879] Pennsylvania Natural Gas Co. *v.* Public Serv. Com., 252 U.S. 23 (1920); Public Utilities Com. *v.* Landon, 249 U.S. 236 (1919).

[880] Panhandle Eastern Pipe Lines Co. *v.* Public Serv. Com., 332 U.S. 507 (1947).

[881] Panhandle Co. *v.* Michigan Comm'n., 341 U.S. 329 (1951).

[882] Peoples Natural Gas Co. *v.* Public Serv. Com., 270 U.S. 550 (1926).

[883] East Ohio Gas Co. *v.* Tax Com. of Ohio, 283 U.S. 465 (1931).

[884] Western Distributing Co. *v.* Public Serv. Com. of Kansas, 285 U.S. 119 (1932).

[885] Arkansas Louisiana Gas Co. *v.* Dept. of Public Utilities, 304 U.S. 61 (1938).

[886] Lone Star Gas Co. *v.* Texas, 304 U.S. 224 (1938).

[887] Cities Service Co. *v.* Peerless Co., 340 U.S. 179 (1950).

[888] Union Brokerage Co. *v.* Jensen, 322 U.S. 202 (1944). *See also* International Harvester Co. *v.* Kentucky, 234 U.S. 579 (1914); Sioux Remedy Co. *v.* Cope, 235 U.S. 197 (1914); Interstate Amusement Co. *v.* Albert, 239 U.S. 560 (1916).

[889] 322 U.S. at 207-209.

[890] Sioux Remedy Co. *v.* Cope, 235 U.S. 197 (1914).

[891] International Milling Co. *v.* Columbia T. Co., 292 U.S. 511 (1934).

[892] Natural Gas Pipeline Co. *v.* Slattery, 302 U.S. 300 (1937).

[893] Engel *v.* O'Malley, 219 U.S. 128 (1911).

[894] Merrick *v.* Halsey & Co., 242 U.S. 568 (1917). *See also* Hall *v.* Geiger-Jones Co., 242 U.S. 539 (1917); Caldwell *v.* Sioux Falls Stock Yards Co., 242 U.S. 559 (1917).

[895] Hartford Accident & Indemnity Co. *v.* Illinois ex rel. McLaughlin, 298 U.S. 155 (1936), citing Cargill Co. *v.* Minnesota, 180 U.S. 452, 470 (1901); Simpson *v.* Shepard (Minnesota Rate Case), 230 U.S. 352, 410 (1913); Hall *v.* Geiger-Jones Co., 242 U.S. 539, 557 (1917); Federal Compress & Warehouse Co. *v.* McLean, 291 U.S. 17 (1934).

[896] Davis *v.* Cleveland, C.C. & St. L. Co., 217 U.S. 157 (1910).

[897] Martin *v.* West, 222 U.S. 191 (1911).

[898] The "Winnebago," 205 U.S. 354, 362 (1907).

[899] Justice Hughes for the Court in Minnesota Rate Cases (Simpson *v.* Shepard), 230 U.S. 352, 406 (1913).

[900] Ibid. 408.

[901] Railroad Co. *v.* Husen, 95 U.S. 465 (1878).

[902] Kimmish *v.* Ball, 129 U.S. 217 (1889).

[903] Smith *v.* St. Louis & S.W.R. Co., 181 U.S. 248 (1901).

[904] Ibid. 255. Morgan's S.S. Co. *v.* Louisiana Bd. of Health, 118 U.S. 455 (1886) is cited.

[905] Hebe Co. *v.* Shaw, 248 U.S. 297 (1919).

[906] Hygrade Provision Co. *v.* Sherman, 266 U.S. 497 (1925).

[907] Mintz *v.* Baldwin, 289 U.S. 346 (1933).

[908] Pacific States Box & Basket Co. *v.* White, 296 U.S. 176 (1935).

[909] Bayside Fish Flour Co. *v.* Gentry, 297 U.S. 422 (1936).

[910] Highland Farms Dairy, Inc. *v.* Agnew, 300 U.S. 608 (1937).

[911] Bourjois, Inc. *v.* Chapman, 301 U.S. 183 (1937).

[912] Clason *v.* Indiana, 306 U.S. 439 (1939).

[913] Milk Control Bd. *v.* Eisenberg Farm Products, 306 U.S. 346 (1939).

[914] Patapsco Guano Co. *v.* North Carolina, 171 U.S. 345 (1898).

[915] Savage *v.* Jones, 225 U.S. 501 (1912); followed in Corn Products Refining Co. *v.* Eddy, 249 U.S. 427 (1919).

[916] Pure Oil Co. *v.* Minnesota, 248 U.S. 158 (1918).

[917] Mutual Film Corp. *v.* Hodges, 236 U.S. 248 (1915).

[918] Minnesota *v.* Barber, 136 U.S. 313 (1890); *see also* Brimmer *v.* Rebman, 138 U.S. 78 (1891).

[919] 136 U.S. at 322. *See also* pp. 328-329.

[920] Voight *v.* Wright, 141 U.S. 62 (1891).

[921] Hale *v.* Bimco Trading Co., 306 U.S. 375 (1939).

[922] Dean Milk Co. *v.* Madison, 340 U.S. 349 (1951).

[923] 12 Wheat. 419 (1827).

[924] Ibid. 449.

[925] Woodruff *v.* Parham, 8 Wall. 123 (1869). There were later some departures from the rule, apparently due to inattention, in cases involving oil. *See* Standard Oil *v.* Graves, 249 U.S. 389 (1919); Askren *v.* Continental Oil Co., 252 U.S. 444 (1920); Bowman *v.* Continental Oil Co., 256 U.S. 642 (1921) and Texas Co. *v.* Brown, 258 U.S. 466 (1922). These cases were "qualified," and in fact disavowed in Sonneborn Bros. *v.* Cureton, 262 U.S. 506, 520 (1923). *Cf.* the contemporary case of Wagner *v.* Covington, 251 U.S. 95 (1912) where the true rule is followed.

[926] Mugler *v.* Kansas, 123 U.S. 623 (1887).

[927] Kidd *v.* Pearson, 128 U.S. 1 (1888).

[928] 125 U.S. 465 (1888).

[929] Leisy & Co. *v.* Hardin, 135 U.S. 100 (1890).

[930] 26 Stat. 313 (1890); sustained in In re Rahrer, 140 U.S. 545 (1891).

[931] Rhodes *v.* Iowa, 170 U.S. 412 (1898).

[932] 37 Stat. 699 (1913); sustained in Clark Distilling Co. *v.* Western Md. Ry. Co., 242 U.S. 311 (1917).

[933] Austin *v.* Tennessee, 179 U.S. 343 (1900).

[934] 155 U.S. 461 (1894).

[935] 135 U.S. 100 (1890).

[936] 155 U.S. at 474.

[937] Schollenberger *v.* Pennsylvania, 171 U.S. 1 (1898).

[938] Collins *v.* New Hampshire, 171 U.S. 30 (1898).

[939] *See* note 1 above.

[940] State Board *v.* Young's Market Co., 299 U.S. 59 (1936); Finch & Co. *v.* McKittrick, 305 U.S. 395 (1939); Brewing Co. *v.* Liquor Comm'n., 305 U.S. 391 (1939); Ziffrin, Inc. *v.* Reeves, 308 U.S. 132 (1939).

[941] Duckworth *v.* Arkansas, 314 U.S. 390 (1941); followed in Carter *v.* Virginia, 321 U.S. 131 (1944). Justice Jackson would have preferred to rest the decision on the Twenty-first Amendment instead of "what I regard as an unwise extension of State power over interstate commerce," 314 U.S. at 397; and appears to have converted Justice Frankfurter. *See* latter's opinion in 321

U.S. at 139-143.

[942] 297 U.S. 431 (1936).

[943] 45 Stat 1084 (1929).

[944] 297 U.S. at 440. *See also* Justice Cardozo's remarks in Baldwin *v.* Seelig, 294 U.S. 511, 526-527 (1935).

[945] *Cf.* Plumley *v.* Massachusetts, 155 U.S. 461 (1894); Savage *v.* Jones, 225 U.S. 501 (1912); Corn Products Refining Co. *v.* Eddy, 249 U.S. 427 (1919).

[946] Elkison *v.* Deliesseline, 8 Fed. Cas. No. 4366 (1823).

[947] For interesting particulars *see* 2 Charles Warren, The Supreme Court in United States History, 84-87.

[948] 1 Op. Atty. Gen. 659.

[949] 2 Op. Atty. Gen. 426.

[950] 11 Pet. 102 (1837).

[951] Smith *v.* Turner (Passenger Cases), 7 How. 283 (1849).

[952] Crandall *v.* Nevada, 6 Wall. 35 (1868).

[953] 314 U.S. 160 (1941).

[954] Ibid. 172.

[955] Ibid. 173. Justice Cardozo's words, quoted by Justice Byrnes, occur in Baldwin *v.* Seelig, 294 U.S. 511, 523 (1935). Justice Byrnes' answer to another argument of the State, based on historical conceptions of the word "indigent," was, "poverty and immorality are not synonymous."

[956] *See* especially Justice Douglas' forceful opinion. 314 U.S. 177-181.

[957] 161 U.S. 519 (1896).

[958] Hudson County Water Co. *v.* McCarter, 209 U.S. 349 (1908).

[959] 221 U.S. 229 (1911).

[960] Ibid. 255-256.

[961] 262 U.S. 553 (1923).

[962] 237 U.S. 52 (1915).

[963] Ibid. 61.

[964] 258 U.S. 50, 61 (1922).

[965] 258 U.S. 50 (1922); 66 L. Ed. 458, Hd. 2.

[966] *See* pp. 193-195.

[967] 291 U.S. 502 (1934); followed in Hegeman Farms Corp. *v.* Baldwin, 293 U.S. 163 (1934).

[968] 294 U.S. 511 (1935).

[969] Milk Control Bd. *v.* Eisenberg Farm Products, 306 U.S. 346 (1939).

[970] Ibid. 352.

[971] Hood *v.* Du Mond, 336 U.S. 525, 535 (1949).

[972] Foster-Fountain Packing Co. *v.* Haydel, 278 U.S. 1 (1928).

[973] Ibid. 13.

[974] Toomer *v.* Witsell, 334 U.S. 385 (1948). Other features of the South Carolina act were found to violate article IV, section 2. *See* p. 690.

[975] Bayside Fish Flour Co. *v.* Gentry, 297 U.S. 422 (1936).

[976] Ibid. 426, citing Silz *v.* Hesterberg, 211 U.S. 31, 39 (1908).

[977] 34 Stat. 584 (1906).

[978] Chicago, I. & L.R. Co. *v.* United States, 219 U.S. 486 (1911).

[979] Southern R. Co. *v.* Reid, 222 U.S. 424 (1912); Southern R. Co. *v.* Burlington Lumber Co., 225 U.S. 99 (1912).

[980] Chicago, R.I. & P.R. Co. *v.* Hardwick Farmers Elevator Co., 226 U.S. 426 (1913).

[981] St. Louis, I.M. & S.R. Co. *v.* Edwards, 227 U.S. 265 (1913).

[982] Yazoo & M.V.R. Co. *v.* Greenwood Grocery Co., 227 U.S. 1 (1913). In this case the severity of the regulation furnished additional reason for its disallowance.

[983] 226 U.S. 491 (1913). For the Court's reiteration of the formula governing such cases, *see* ibid. 505-506. *See also* Barrett *v.* New York, 232 U.S. 14 (1914); Chicago, R.I. & P.R. Co. *v.* Cramer, 232 U.S. 490 (1914); Atchison, T. & S.F.R. Co. *v.* Harold, 241 U.S. 371 (1916); Missouri P.R. Co. *v.* Porter, 273 U.S. 341 (1927). A year before the enactment of the Carmack Amendment the Court had held that the imposition by a State upon the initial or any connecting carrier of the duty of tracing the freight and informing the shipper in writing when, where, how, and by which carrier the freight was lost, damaged, or destroyed, and of giving the names of the parties and their official position, by whom the truth of the facts set out in the information could be established, was, when applied to interstate commerce, a violation of the commerce clause. Central of Georgia R. Co. *v.* Murphey, 196 U.S. 194, 202 (1905). The Court's opinion definitely invited Congress to deal with the subject, as it does in the Carmack Amendment.

[984] 35 Stat. 65 (1908); 36 Stat. 291 (1910).

[985] 34 Stat. 1415 (1907).

[986] 27 Stat. 531 (1893); 32 Stat. 943 (1903).

[987] Mondou *v.* New York, N.H. & H.R. Co. (Second Employers' Liability Cases), 223 U.S. 1 (1912); Southern R. Co. *v.* Railroad Com., 236 U.S. 439 (1915).

[988] Erie R. Co. *v.* New York, 233 U.S. 671 (1914).

[989] 26 Stat. 414 (1890).

[990] Crossman *v.* Lurman, 192 U.S. 189 (1904).

[991] 34 Stat. 768 (1906); Savage *v.* Jones, 225 U.S. 501 (1912), citing Missouri, Kansas & Texas Ry. Co. *v.* Haber, 169 U.S. 613 (1898); Reid *v.* Colorado, 187 U.S. 137 (1902); Asbell *v.* Kansas, 209 U.S. 251 (1908); Southern Ry. Co. *v.* Reid, 222 U.S. 424, 442 (1912).

[992] McDermott *v.* Wisconsin, 228 U.S. 115 (1913).

[993] Ibid. 137.

[994] Armour & Co. *v.* North Dakota, 240 U.S. 510 (1916).

[995] 37 Stat. 315 (1912); 39 Stat. 1165 (1917).

[996] Oregon-Washington R. & Nav. Co. *v.* Washington, 270 U.S. 87 (1926).

[997] 44 Stat. 250 (1926).

[998] Mintz *v.* Baldwin, 289 U.S. 346 (1933).

[999] 32 Stat. 791 (1903); 33 Stat. 1264 (1905).

[1000] Townsend *v.* Yeomans, 301 U.S. 441 (1937).

[1001] 49 Stat. 731 (1935).

[1002] Allen-Bradley Local *v.* Employment Relations Board, 315 U.S. 740 (1942).

[1003] 49 Stat. 449 (1935).

[1004] Quoting Napier *v.* Atlantic Coast Line R. Co., 272 U.S. 605, 611 (1926).

[1005] Parker *v.* Brown, 317 U.S. 341 (1943).

[1006] 50 Stat. 246 (1937).

[1007] 317 U.S. at 368.

[1008] Ibid. 362.

[1009] Union Brokerage Co. *v.* Jensen, 322 U.S. 202 (1944).

[1010] Ibid. 211.

[1011] Panhandle Eastern Pipe Line Co. *v.* Public Serv. Com. of Indiana, 332 U.S. 507 (1947); Rice *v.* Chicago Board of Trade, 331 U.S. 247 (1947).

[1012] 52 Stat. 821 (1938).

[1013] 49 Stat. 1491 (1936).

[1014] 49 Stat. 543 (1935); 54 Stat. 919-920 (1940).

[1015] California *v.* Zook, 336 U.S. 725 (1949).

[1016] 52 Stat. 821 (1938).

[1017] Illinois Gas Co. *v.* Public Service Co., 314 U.S. 498 (1942).

[1018] 26 U.S.C.A. § 2320-2327.

[1019] Cloverleaf Co. *v.* Patterson, 315 U.S. 148 (1942). Four Justices, speaking by Chief Justice Stone dissented, on the basis of Mintz *v.* Baldwin, 289 U.S. 346 (1933); Kelly *v.* Washington ex rel. Foss Co., 302 U.S. 1 (1937); and Welch Co. *v.* New Hampshire, 306 U.S. 79 (1939).

[1020] 39 Stat. 486 (1916); amended by 46 Stat. 1463 (1931).

[1021] Rice *v.* Santa Fe Elevator Corp., 331 U.S. 218 (1947).

[1022] *See* note 1 above.

[1023] Interstate Natural Gas Co. *v.* Federal Power Com., 331 U.S. 682 (1947).

[1024] 49 U.S.C.A. 5.

[1025] Schwabacher *v.* United States, 334 U.S. 182 (1948).

[1026] Seaboard Air Line R. Co. *v.* Daniel, 333 U.S. 118 (1948).

[1027] Hill *v.* Florida, 325 U.S. 538 (1945).

[1028] 49 Stat. 449 (1935).

[1029] 325 U.S. at 542.

[1030] Auto Workers *v.* Wisconsin Board, 336 U.S. 245 (1949).

[1031] 49 Stat. 449 (1935); 61 Stat. 136 (1947).

[1032] Algoma Plywood & Veneer Co. *v.* Wisconsin Bd., 336 U.S. 301 (1949).

[1033] Automobile Workers *v.* O'Brien, 339 U.S. 454 (1950); Bus Employees *v.* Wisconsin Board, 340 U.S. 383 (1951).

[1034] United States *v.* Kagama, 118 U.S. 375, 384 (1886); *Cf.* United States *v.* Holliday, 3 Wall. 407 (1866).

[1035] 16 Stat. 544, 566; R.S. 2079.

[1036] *See* United States *v.* Sandoval, 231 U.S. 28 (1914).

[1037] *See* Perrin *v.* United States, 232 U.S. 478 (1914); Johnson *v.* Gearlds, 234 U.S. 422 (1914); Dick *v.* United States, 208 U.S. 340 (1908).

[1038] United States *v.* Nice, 241 U.S. 591 (1916), overruling Re Heff, 197 U.S. 488, 509 (1905).

[1039] United States *v.* Sandoval, 231 U.S. 28 (1914).

[1040] United States *v.* Holliday, 3 Wall. 407, 419 (1866).

[1041] Ex parte Webb, 225 U.S. 663 (1912).

[1042] Boyd *v.* Nebraska, 143 U.S. 135, 162 (1892).

[1043] 10 How. 393 (1857).

[1044] Ibid. 417, 419.

[1045] Mackenzie *v.* Hare, 239 U.S. 299, 311 (1915).

[1046] 66 Stat. 163; Public Law 414, 82d Cong., 2d Sess. (1952).

[1047] Ibid. tit. III, § 301. The first category comprises, it should be noted, those who are citizens by the opening clause of Amendment XIV, which embodies Chief Justice Marshall's holding in Gassies *v.* Ballon, that a citizen of the United States, residing in any State of the Union, is a citizen of that State. 6 Pet. 761, 762 (1832).

[1048] 66 Stat. 163; tit. III, §§ 302-307. These categories illustrate collective naturalization. "Instances of collective naturalization by treaty or by statute are numerous." Boyd *v.* Nebraska, 143 U.S. 135, 162 (1892). *See also* Elk *v.* Wilkins, 112 U.S. 94 (1884).

[1049] 57 Stat. 600.

[1050] 66 Stat. 163, tit. III, § 311.

[1051] Ibid. § 313 (a) (4-6).

[1052] Ibid. § 313 (c).

[1053] 66 Stat. 163, § 337 (a). In United States *v.* Schwimmer, 279 U.S. 644 (1929); and United States *v.* Macintosh, 283 U.S. 605 (1931) it was held, by a divided Court, that clauses (3) and (4) of the oath, as previously prescribed, required the candidate for naturalization to be ready and willing to bear arms for the United States, but these holdings were overruled in Girouard *v.* United States, 328 U.S. 61 (1946).

[1054] 66 Stat. 163, § 340 (a); *see also* Johannessen *v.* United States, 225 U.S. 227 (1912).

[1055] Ibid. § 340 (c). For cancellation proceedings under the Nationality Act of 1910 (54 Stat. 1158, § 338); *see* Schneiderman *v.* United States, 320 U.S. 118 (1943); Baumgartner *v.* United States 322 U.S. 665 (1944), where district court decisions ordering cancellation were reversed on the ground that the Government had not discharged the burden of proof resting upon it. Knauer *v.* United States, 328 U.S. 654 (1946) represents a less rigid view.

[1056] Osborn *v.* Bank of the United States, 9 Wheat. 738, 827 (1824).

[1057] 328 U.S. 654 (1946).

[1058] Ibid. 658.

[1059] Johannessen *v.* United States, 225 U.S. 227 (1912) and Knauer *v.* United States, 328 U.S. 654, 673 (1946).

[1060] 66 Stat. 163, tit. III, § 352 (a).

[1061] Perkins *v.* Elg, 307 U.S. 325, 329, 334 (1939). Naturalization has a retroactive effect and removes all liability to forfeiture of land held while an alien (Osterman *v.* Baldwin, 6 Wall. 116, 122 (1867)); the subsequent naturalization of an alien who takes land by grant or by location on public land relates back and obviates every consequence of his alien disability (Manuel *v.* Wulff, 152 U.S. 505, 511 (1894); Doe ex dem. Governeur's Heirs *v.* Robertson, 11 Wheat. 332, 350 (1826)). A certificate of naturalization, while conclusive as a judgment of citizenship, cannot be introduced in a distinct proceeding as evidence of residence, age or good character of the person naturalized (Mutual Ben. L. Ins. Co. *v.* Tisdale, 91 U.S. 238 (1876)).

[1062] Chirac *v.* Chirac, 2 Wheat. 259, 269 (1817).

[1063] Holmgren *v.* United States, 217 U.S. 509 (1910), where it was also held that Congress may provide for the punishment of false swearing in such proceedings in State court. Ibid. 520.

[1064] Spragins *v.* Houghton, 3 Ill. 377 (1840); Stewart *v.* Foster, 2 Binney's (Pa.) 110 (1809).

[1065] Shanks *v.* Dupont, 3 Pet. 242, 240 (1830).

[1066] 15 Stat. 223; 8 U.S.C.A. § 800.

[1067] MacKenzie *v.* Hare, 239 U.S. 299, 309, 311-312 (1915). In this case, a now obsolete statute (34 Stat. 1228), known as the Citizenship Act of 1907, which divested the citizenship of a woman marrying an alien, was upheld as constitutional. Under the Act of June 27, 1952, these conditions comprise the following: (1) Obtaining naturalization in a foreign State; (2) Taking an oath of allegiance to a foreign State; (3) Serving in the armed forces of a foreign State without authorization and with consequent acquisition of foreign nationality; (4) Assuming public office under the government of a foreign State, for which only nationals of that State are eligible; (5) Voting in an election or participating in a plebiscite in a foreign State; (6) Formal renunciation of citizenship before an American foreign service officer abroad; (7) Conviction and discharge from the armed services for desertion in time of war; (8) Conviction of treason or an attempt at forceful overthrow of the United States; (9) Formal renunciation of citizenship within the United States in time of war, subject to approval by the Attorney General; (10) Fleeing or remaining outside the United States in time of war or proclaimed emergency in order to evade military training; (11) Residence by a naturalized citizen, subject to certain exceptions, for two to three years in the country of his birth or in which he formerly was a national or for five years in any other foreign State, and (12) Minor children, of naturalized citizens losing citizenship by such foreign residence, also lose their United States citizenship if they acquire the nationality of a foreign State; but not until they attain the age of 25 without having acquired permanent residence in the United States. 66 Stat. 163; Tit. III §§ 349-357.

[1068] Chinese Exclusion Case, 130 U.S. 581, 603, 604 (1889); *See also* Fong Yue

Ting *v.* United States, 149 U.S. 698, 705 (1893); Japanese Immigrant Case, 189 U.S. 86 (1903); Turner *v.* Williams, 194 U.S. 279 (1904); Bugajewitz *v.* Adams, 228 U.S. 585 (1913); Hines *v.* Davidowitz, 312 U.S. 52 (1941).

[1069] 66 Stat. 163; Tit. II, § 212.

[1070] Ibid. § 212 (a) (28) (F).

[1071] 54 Stat. 670.

[1072] Hines *v.* Davidowitz, 312 U.S. 52, 69-70.

[1073] 66 Stat. 163; Tit. II, §§ 261-266.

[1074] 338 U.S. 537 (1950).

[1075] 59 Stat. 659.

[1076] 338 U.S. at 543.

[1077] Carlson *v.* Landon, 342 U.S. 524 (1952).

[1078] 54 Stat. 670.

[1079] Harisiades *v.* Shaughnessy, 342 U.S. 580, 587 (1952).

[1080] 8 U.S.C, § 156 C was the provision in question.

[1081] United States *v.* Spector, 343 U.S. 169 (1952).

[1082] Keller *v.* United States, 213 U.S. 138 (1909).

[1083] Ibid. 149-150. For the requirements of due process of law in the deportation of alien, *see* p. 852 (Amendment V).

[1084] Adams *v.* Storey, 1 Fed. Cas. No. 66 (1817).

[1085] 2 Stat. 19 (1800).

[1086] Story's Commentaries, II, 1113 (Cooley's ed. 1873).

[1087] 186 U.S. 181 (1902).

[1088] Continental Illinois Nat. Bank & Trust Co. *v.* Chicago, R.I. & P.R. Co., 294 U.S. 648, 670 (1935).

[1089] United States *v.* Bekins, 304 U.S. 27 (1938), distinguishing Ashton *v.* Cameron County Water Improv. Dist., 298 U.S. 513 (1936).

[1090] In re Reiman, Fed. Cas. No. 11,673 (1874), cited with approval in Continental Illinois Nat. Bank & Trust Co. *v.* Chicago, R.I. & P.R. Co., 294 U.S. 648, 672 (1935).

[1091] Continental Illinois Nat. Bank & Trust Co. *v.* Chicago, R.I. & P.R. Co., 294 U.S. 648 (1935).

[1092] Wright *v.* Mountain Trust Bank, 300 U.S. 440 (1937); Adair *v.* Bank of America Assn., 303 U.S. 350 (1938).

[1093] Wright *v.* Union Central Insurance Co., 304 U.S. 502 (1938).

[1094] 294 U.S. 648 (1935).

[1095] Ibid. 671.

[1096] Louisville Joint Stock Land Bank *v.* Radford, 295 U.S. 555, 589, 602 (1935).

[1097] Ashton *v.* Cameron County Water Improvement District, 298 U.S. 513 (1936). *But see* United States *v.* Bekins, 304 U.S. 27 (1938).

[1098] Chicago Title & Trust Co. *v.* 4136 Wilcox Bldg. Corp., 302 U.S. 120 (1937).

[1099] Re Klein, 1 How. 277 (1843); Hanover Nat. Bank *v.* Moyses, 186 U.S. 181 (1902).

[1100] United States *v.* Bekins, 304 U.S. 27 (1938).

[1101] Stellwagen *v.* Clum, 245 U.S. 605 (1918); Hanover Nat. Bank *v.* Moyses, 186 U.S. 181, 190 (1902).

[1102] Hanover Nat. Bank *v.* Moyses, 186 U.S. 181, 184 (1902).

[1103] Sturges *v.* Crowninshield, 4 Wheat. 122, 199 (1819); Ogden *v.* Saunders, 12 Wheat. 212, 368 (1827).

[1104] Tua *v.* Carriere, 117 U.S. 201 (1886); Butler *v.* Goreley, 146 U.S. 303, 314 (1892).

[1105] Sturges *v.* Crowninshield, 4 Wheat. 122 (1819).

[1106] Ogden *v.* Saunders, 12 Wheat. 212, 358 (1827); Denny *v.* Bennett, 128 U.S. 489, 498 (1888); Brown *v.* Smart, 145 U.S. 454 (1892).

[1107] Re Watts, 190 U.S. 1, 27 (1903); International Shoe Co. *v.* Pinkus, 278 U.S. 261, 264 (1929).

[1108] International Shoe Co. *v.* Pinkus, 278 U.S. 261, 265 (1929).

[1109] Kalb *v.* Feuerstein, 308 U.S. 433 (1940).

[1110] Stellwagen *v.* Clum, 245 U.S. 605, 615 (1918).

[1111] Reitz *v.* Mealey, 314 U.S. 33 (1941).

[1112] New York *v.* Irving Trust Co., 288 U.S. 329 (1933).

[1113] McCulloch *v.* Maryland, 4 Wheat. 316 (1819).

[1114] Veazie Bank *v.* Fenno, 8 Wall. 533 (1869).

[1115] Ibid. 548.

[1116] Merchants Nat. Bank *v.* United States, 101 U.S. 1 (1880).

[1117] Nortz *v.* United States, 294 U.S. 317 (1935).

[1118] Legal Tender Cases, 12 Wall. 457, 549 (1871); Juilliard *v.* Greenman, 110 U.S. 421, 449 (1884).

[1119] Legal Tender Cases, 12 Wall. 457 (1871).

[1120] Norman *v.* Baltimore & O.R. Co., 294 U.S. 240 (1935).

[1121] Ling Su Fan *v.* United States, 218 U.S. 302 (1910).

[1122] United States *v.* Marigold, 9 How. 560, 568 (1850).

[1123] Fox *v.* Ohio, 5 How. 410 (1847).

[1124] United States *v.* Marigold, 9 How. 560, 568 (1850).

[1125] Ibid.

[1126] Baender *v.* Barnett, 255 U.S. 224 (1921).

[1127] Knox *v.* Lee (Legal Tender Cases), 12 Wall. 457, 536 (1871).

[1128] McCulloch *v.* Maryland, 4 Wheat. 316, 407 (1819); Osborn *v.* Bank of United States, 9 Wheat. 738, 861 (1824); Farmers' & Mechanics' Nat. Bank *v.* Dearing, 91 U.S.C. 29, 33 (1875); Smith *v.* Kansas City Title & Trust Co., 255 U.S. 180, 208 (1921).

[1129] Legal Tender Cases, 12 Wall. 457, 540-547 (1871).

[1130] Perry *v.* United States, 294 U.S. 330, 353 (1935).

[1131] Ibid. 361.

[1132] United States *v.* Railroad Bridge Co., Fed. Cas. No. 16,114 (1855).

[1133] Searight *v.* Stokes, 3 How. 151, 166 (1845).

[1134] 91 U.S. 367 (1876).

[1135] Ex parte Jackson, 96 U.S. 727, 732 (1878).

[1136] Searight *v.* Stokes, 3 How. 151, 169 (1845).

[1137] Re Debs, 158 U.S. 564, 599 (1895).

[1138] 2 Cong. Globe 4, 10 (1835).

[1139] Ibid. 298. On this point his reasoning would appear to be vindicated by such decisions, as Bowman *v.* Chicago & N.W.R. Co., 125 U.S. 465 (1888) and Leisy *v.* Hardin, 135 U.S. 100 (1890) denying the right of the States to prevent the importation of alcoholic beverages from other States.

[1140] 96 U.S. 727 (1878).

[1141] Ibid. 732.

[1142] Public Clearing House *v.* Coyne, 194 U.S. 497 (1904), followed in Donaldson *v.* Read Magazine, 333 U.S. 178 (1948).

[1143] 194 U.S. at 506.

[1144] Lewis Publishing Co. *v.* Morgan, 229 U.S. 288, 316 (1913).

[1145] 255 U.S. 407 (1921).

[1146] Hannegan *v.* Esquire, Inc., 327 U.S. 146, 155 (1946).

[1147] 49 Stat. 803, 812, 813 (1935), 15 U.S.C. 79d, 79e (1946).

[1148] Electric Bond & Share Co. *v.* Securities and Exchange Comm'n., 303 U.S. 419 (1938).

[1149] Ibid. 442.

[1150] Pensacola Teleg. Co. *v.* Western U. Teleg. Co., 90 U.S. 1 (1878).

[1151] Illinois C.R. Co. *v.* Illinois ex rel. Butler, 163 U.S. 142 (1896).

[1152] Gladson *v.* Minnesota, 166 U.S. 427 (1897).

[1153] Price *v.* Pennsylvania R. Co., 113 U.S. 218 (1885); Martin *v.* Pittsburgh & L.E.R. Co., 203 U.S. 284 (1906).

[1154] Railway Mail Assn. *v.* Corsi, 326 U.S. 88 (1945).

[1155] United States *v.* Kirby, 7 Wall. 482 (1869).

[1156] Johnson *v.* Maryland, 254 U.S. 51 (1920).

[1157] Pennock *v.* Dialogue, 2 Pet. 1, 17, 18 (1829).

[1158] Wheaton *v.* Peters, 8 Pet. 591, 656, 658 (1834).

[1159] Kendall *v.* Winsor, 21 How. 322, 328 (1859); Great Atlantic & Pacific Tea Co. *v.* Supermarket Equipment Corp., 340 U.S. 147 (1950).

[1160] Evans *v.* Jordan, 9 Cr. 199 (1815); Bloomer *v.* McQuewan, 14 How. 539, 548 (1852); Bloomer *v.* Millinger, 1 Wall. 340, 350 (1864); Eunson *v.* Dodge, 18 Wall. 414, 416 (1873).

[1161] Brown *v.* Duchesne, 19 How. 183, 195 (1857).

[1162] Seymour *v.* Osborne, 11 Wall. 516, 549 (1871). *Cf.* Union Paper Collar Co. *v.* Van Dusen, 23 Wall. 530, 563 (1875); Reckendorfer *v.* Faber, 92 U.S. 347, 356 (1876).

[1163] Smith *v.* Nichols, 21 Wall. 112, 118 (1875).

[1164] Rubber-Tip Pencil Co. *v.* Howard, 20 Wall. 498, 507 (1874); Clark Thread Co. *v.* Willimantic Linen Co., 140 U.S. 481, 489 (1891).

[1165] Funk Bros. Seed Co. *v.* Kalo Co., 333 U.S. 127, 130 (1948). *Cf.* Dow Chemical Co. *v.* Halliburton Co., 324 U.S. 320 (1945); Cuno Corp. *v.* Automatic Devices Corp., 314 U.S. 84, 89 (1941).

[1166] Sinclair & Carroll Co. *v.* Interchemical Corp., 325 U.S. 327 (1945); Marconi Wireless Teleg. Co. *v.* United States, 320 U.S. 1 (1943).

[1167] Keystone Mfg. Co. *v.* Adams, 151 U.S. 139 (1894); Diamond Rubber Co. *v.* Consolidated Tire Co., 220 U.S. 428 (1911).

[1168] Great Atlantic & Pacific Tea Co. *v.* Supermarket Equipment Corp., 340 U.S. 147 (1950). An interesting concurring opinion was filed by Justice Douglas for himself and Justice Black: "It is not enough," says Justice Douglas, "that an article is new and useful. The Constitution never sanctioned the patenting of gadgets. Patents serve a higher end—the advancement of science. An invention need not be as startling as an atomic bomb to be patentable. But it has to be of such quality and distinction that masters of the scientific field in which it falls will recognize it as an advance." Ibid. 154-155. He then quotes the following from an opinion of Justice Bradley's given 70 years ago:

"It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith. (Atlantic Works *v.* Brady, 107 U.S. 192, 200 (1882))." Ibid. 155.

The opinion concludes: "The attempts through the years to get a broader, looser conception of patents than the Constitution contemplates have been

persistent. The Patent Office, like most administrative agencies, has looked with favor on the opportunity which the exercise of discretion affords to expand its own jurisdiction. And so it has placed a host of gadgets under the armour of patents—gadgets that obviously have had no place in the constitutional scheme of advancing scientific knowledge. A few that have reached this Court show the pressure to extend monopoly to the simplest of devices:

"Hotchkiss *v.* Greenwood, 11 How. 248 (1850): Doorknob made of clay rather than metal or wood, where different shaped doorknobs had previously been made of clay.

"Rubber-Tip Pencil Co. *v.* Howard, 20 Wall. 498 (1874): Rubber caps put on wood pencils to serve as erasers.

"Union Paper Collar Co. *v.* Van Dusen, 23 Wall. 530 (1875): Making collars of parchment paper where linen paper and linen had previously been used.

"Brown *v.* Piper, 91 U.S. 37 (1875): A method for preserving fish by freezing them in a container operating in the same manner as an ice cream freezer.

"Reckendorfer *v.* Faber, 92 U.S. 347 (1876): Inserting a piece of rubber in a slot in the end of a wood pencil to serve as an eraser.

"Dalton *v.* Jennings, 93 U.S. 271 (1876): Fine thread placed across open squares in a regular hairnet to keep hair in place more effectively.

"Double-Pointed Tack Co. *v.* Two Rivers Mfg. Co., 109 U.S. 117 (1883): Putting a metal washer on a wire staple.

"Miller *v.* Foree, 116 U.S. 22 (1885): A stamp for impressing initials in the side of a plug of tobacco.

"Preston *v.* Manard, 116 U.S. 661 (1886): A hose reel of large diameter so that water may flow through hose while it is wound on the reel.

"Hendy *v.* Miners' Iron Works, 127 U.S. 370 (1888): Putting rollers on a machine to make it moveable.

"St. Germain *v.* Brunswick, 135 U.S. 227 (1890): Revolving cue rack.

"Shenfield *v.* Nashawannuck Mfg. Co., 137 U.S. 56 (1890): Using flat cord instead of round cord for the loop at the end of suspenders.

"Florsheim *v.* Schilling, 137 U.S. 64 (1890): Putting elastic gussets in corsets.

"Cluett *v.* Claflin, 140 U.S. 180 (1891): A shirt bosom or dickie sewn onto the front of a shirt.

"Adams *v.* Bellaire Stamping Co., 141 U.S. 539 (1891): A lantern lid fastened to the lantern by a hinge on one side and a catch on the other.

"Patent Clothing Co. *v.* Glover, 141 U.S. 560 (1891): Bridging a strip of cloth across the fly of pantaloons to reinforce them against tearing.

"Pope Mfg. Co. *v.* Gormully Mfg. Co., 144 U.S. 238 (1892): Placing rubber hand grips on bicycle handlebars.

"Knapp *v.* Morss, 150 U.S. 221 (1893): Applying the principle of the umbrella to a skirt form.

"Morgan Envelope Co. *v.* Albany Perforated Wrapping Paper Co., 152 U.S. 425 (1894): An oval rather than cylindrical toilet paper roll, to facilitate tearing off strips.

"Dunham *v.* Dennison Mfg. Co., 154 U.S. 103 (1894): An envelope flap which could be fastened to the envelope in such a fashion that the envelope could be opened without tearing.

"The patent involved in the present case belongs to this list of incredible patents which the Patent Office has spawned. The fact that a patent as flimsy and as spurious as this one has to be brought all the way to this Court to be declared invalid dramatically illustrates how far our patent system frequently departs from the constitutional standards which are supposed to govern." Ibid. 156-158.

[1169] "Inventive genius"—Justice Hunt in Reckendorfer *v.* Faber, 92 U.S. 347, 357 (1875); "Genius or invention"—Chief Justice Fuller in Smith *v.* Whitman Saddle Co., 148 U.S. 674, 681 (1893); "Intuitive genius"—Justice Brown in Potts *v.* Creager, 155 U.S. 597, 607 (1895); "Inventive genius"—Justice Stone in Concrete Appliances Co. *v.* Gomery, 269 U.S. 177, 185 (1925); "Inventive genius"—Justice Roberts in Mantle Lamp Co. *v.* Aluminum Co., 301 U.S. 544, 546 (1937); Justice Douglas in Cuno Corp. *v.* Automatic Devices Corp., 314

U.S. 84, 91 (1941); "the flash of creative genius, not merely the skill of the calling." *See also* Note 2 above.

[1170] *See* Note 7 above.

[1171] Great Atlantic & Pacific Tea Co. *v.* Supermarket Equipment Corp., 340 U.S. 147 (1950); Mahn *v.* Harwood, 112 U.S. 354, 358 (1884).

[1172] Evans *v.* Eaton, 3 Wheat. 454, 512 (1818).

[1173] United States *v.* Duell, 172 U.S. 576, 586-589 (1899). *See also* Butterworth *v.* Hoe, 112 U.S. 50 (1884).

[1174] Wheaton *v.* Peters, 8 Pet. 591, 660 (1834); Holmes *v.* Hurst, 174 U.S. 82 (1899). *Cf.* E. Burke Inlow, The Patent Clause (1950) Chaps. III and IV, for evidence of a judicial recognition of an inventor's inchoate right to have his invention patented.

[1175] Wheaton *v.* Peters, 8 Pet. 591, 662 (1834); Evans *v.* Jordan, 9 Cr. 199 (1815).

[1176] Kalem Co. *v.* Harper Bros. 222 U.S. 55 (1911).

[1177] Baker *v.* Selden, 101 U.S. 99, 105 (1880).

[1178] Stevens *v.* Gladding, 17 How. 447 (1855).

[1179] Ager *v.* Murray, 105 U.S. 126 (1882).

[1180] James *v.* Campbell, 104 U.S. 356, 358 (1882). *See also* United States *v.* Burns, 12 Wall. 246, 252 (1871); Cammeyer *v.* Newton, 94 U.S. 225, 234 (1877); Hollister *v.* Benedict Manufacturing Co., 113 U.S. 59, 67 (1885); United States *v.* Palmer, 128 U.S. 262, 271 (1888); Belknap *v.* Schild, 161 U.S. 10, 16 (1896).

[1181] McClurg *v.* Kingsland, 1 How. 202, 206 (1843).

[1182] Bloomer *v.* McQuewan, 14 How. 539, 553 (1852).

[1183] *See* Motion Picture Co. *v.* Universal Film Co., 243 U.S. 502 (1917); Morton Salt Co. *v.* Suppiger Co., 314 U.S. 488 (1942); United States *v.* Masonite Corp., 316 U.S. 265 (1942); and United States *v.* New Wrinkle, Inc., 342 U.S. 371 (1952), where the Justices divide 6 to 3 as to the significance for the case of certain leading precedents. *See also* Inlow, The Patent Clause, Chap. V.

[1184] Patterson *v.* Kentucky, 97 U.S. 501 (1879).

[1185] Allen *v.* Riley, 203 U.S. 347 (1906): Woods & Sons *v.* Carl, 203 U.S. 358 (1906); Ozan Lumber Co. *v.* Union County Bank, 207 U.S. 251 (1907).

[1186] Fox Film Corp. *v.* Doyal, 280 U.S. 123 (1932)—overruling Long *v.* Rockwood, 277 U.S. 142 (1928).

[1187] 100 U.S. 82 (1879).

[1188] Ibid. 94.

[1189] Burrow-Giles Lithographic Co. *v.* Sarony, 111 U.S. 53 (1884).

[1190] Bleistein *v.* Donaldson Lithographing Co., 188 U.S. 239, 252 (1903).

[1191] Kent, Commentaries, 1-2, (12th ed. 1873).

[1192] XIX Journals of the Continental Congress 315, 361 (1912). XX Id. 762, XXI id. 1136-1137, 1158.

[1193] Article IX.

[1194] Madison, Journal of the Constitutional Convention, II, 82 (Hunt's ed. 1908).

[1195] Ibid. 185-186, 372.

[1196] United States *v.* Smith, 5 Wheat. 153, 160, 162 (1820). *See also* The Marianna Flora, 11 Wheat. 1, 40-41 (1826); United States *v.* Brig Malek Abhel, 2 How. 210, 232 (1844).

[1197] 317 U.S. 1, 27 (1942).

[1198] Ibid. 28.

[1199] United States *v.* Arjona, 120 U.S. 479, 487, 488 (1887).

[1200] United States *v.* Flores, 3 F. Supp. 134 (1932).

[1201] 289 U.S. 137, 149-150 (1933).

[1202] United States *v.* Furlong, 5 Wheat. 184, 200 (1920).

[1203] The Federalist No. 23.

[1204] Penhallow *v.* Doane, 3 Dall. 54 (1795).

[1205] 4 Wheat. 316 (1819).

[1206] Ibid. 407. Emphasis supplied.

[1207] Ex parte Milligan, 4 Wall. 2, 139 (1866) (dissenting opinion); *see also* Miller *v.* United States, 11 Wall. 268, 305 (1871); and United States *v.* Macintosh, 283 U.S. 605, 622 (1931).

[1208] 58 Cong. Globe, 37th Cong., 1st sess., App. 1 (1861).

[1209] Hamilton *v.* Dillin, 21 Wall. 73, 86 (1875).

[1210] Northern P.R. Co. *v.* North Dakota, 250 U.S. 135, 149 (1919).

[1211] Home Bldg. & Loan Assoc. *v.* Blaisdell, 290 U.S. 398 (1934).

[1212] Northern P.R. Co. *v.* North Dakota, 250 U.S. 135, 149 (1919).

[1213] 299 U.S. 304 (1936).

[1214] Ibid. 316, 318.

[1215] 334 U.S. 742 (1948).

[1216] Ibid. 757-758.

[1217] Ibid. 755.

[1218] II Madison Journal of the Constitutional Convention 82 (Hunt's ed. 1908).

[1219] Ibid. 188.

[1220] 11 Annals of Congress 11 (1801).

[1221] Works of Alexander Hamilton, VII, 746 (Hamilton's ed. 1851). *Cf.* Bas *v.* Tingy, 4 Dall. 37 (1800).

[1222] 2 Stat. 129, 130 (1802). Emphasis supplied.

[1223] The Prize Cases, 2 Bl. 635, 668 (1863).

[1224] Ibid. 683, 688.

[1225] 12 Wall. 700 (1872).

[1226] Ibid. 702.

[1227] I Blackstone, Commentaries 263, (Wendell's ed. 1857).

[1228] II Story, Commentaries, § 1187 (4th ed. 1873).

[1229] 25 Op. Atty. Gen. 105, 108 (1904).

[1230] 40 Op. Atty. Gen. 555 (1948).

[1231] 61 Stat. 405 (1947).

[1232] H.J. Res. 298, 80th Cong., 2d sess. (1948).

[1233] Selective Draft Law Cases, 245 U.S. 366, 380 (1918); Cox *v.* Wood, 247 U.S. 3 (1918).

[1234] 245 U.S. at 385.

[1235] Ibid. 386-388. The measure was upheld by a State court, Kneedler *v.* Lane, 45 Pa. 238 (1863).

[1236] Selective Draft Law Cases, 245 U.S. 366, 381, 382 (1918)

[1237] Butler *v.* Perry, 240 U.S. 328, 333 (1916).

[1238] 245 U.S. 366 (1918).

[1239] Ibid. 390.

[1240] United States *v.* Williams, 302 U.S. 46 (1937). *See also* In re Grimley, 137 U.S. 147, 153 (1890); In re Morrissey, 137 U.S. 157 (1890).

[1241] Wissner *v.* Wissner, 338 U.S. 655, 660 (1950).

[1242] McKinley *v.* United States, 249 U.S. 397 (1919).

[1243] Dynes *v.* Hoover, 20 How. 65, 79 (1858).

[1244] Ex parte Milligan, 4 Wall. 2, 123, 138-139 (1866). Ex parte Quirin, 317 U.S. 1, 40 (1942).

[1245] Wade *v.* Hunter, 336 U.S. 684, 687 (1949).

[1246] Dynes *v.* Hoover, 20 How. 65, 82 (1858).

[1247] Swaim *v.* United States, 165 U.S. 553 (1897); Carter *v.* Roberts, 177 U.S. 496 (1900); Hiatt *v.* Brown, 339 U.S. 103 (1950).

[1248] Mullan *v.* United States, 212 U.S. 516 (1909); Smith *v.* Whitney, 116 U.S. 167, 177 (1886); Hiatt *v.* Brown, 339 U.S. 103 (1950).

[1249] Clark, Emergency Legislation Passed Prior to December 1917, 211 (1918).

[1250] Ibid. 214

[1251] Ibid. 250, 332, 380, 438, 497.

[1252] Ibid. 420, 466, 535, 595, 636, 823. Many of these were soon suspended or repealed. Ibid. 458, 553, 601, 733.

[1253] Ibid. 482, 543, 963, 969.

[1254] Ibid. 916.

[1255] Ibid. 280.

[1256] Hepburn *v.* Griswold, 8 Wall. 603, 617 (1870).

[1257] Ibid. 626.

[1258] Knox *v.* Lee (Legal Tender Cases), 12 Wall. 457, 540 (1871).

[1259] 40 Stat. 276 (1917).

[1260] Ibid. 272.

[1261] Ibid. 411.

[1262] Ibid. 451 (1918).

[1263] Ibid. 904.

[1264] 55 Stat. 236 (1941).

[1265] 56 Stat. 176 (1942).

[1266] Ibid. 23.

[1267] 57 Stat. 163 (1943).

[1268] Lichter *v.* United States, 334 U.S. 742, 754-756, 765, 766 (1948). *See also* United States *v.* Bethlehem Steel Corp., 315 U.S. 289, 305 (1942); Clallam County *v.* United States, 263 U.S. 341 (1923); Sloan Shipyards *v.* United States Fleet Corp., 258 U.S. 549 (1922).

[1269] Lichter *v.* United States, 334 U.S. 742, 779 (1948).

[1270] 245 U.S. 366, 389 (1918).

[1271] Yakus *v.* United States, 321 U.S. 414, 424 (1944).

[1272] 21 Wall. 73 (1875).

[1273] Ibid. 96-97. *Cf.* United States *v.* Chemical Foundation, 272 U.S. 1 (1926).

[1274] 320 U.S. 81 (1943).

[1275] Ibid. 91-92, 104.

[1276] Ibid. 104.

[1277] 334 U.S. 742 (1948).

[1278] Ibid. 778-779.

[1279] Ibid. 782-783.

[1280] Story Commentaries on the Constitution, II, § 1185 (4th ed., 1873).

[1281] 297 U.S. 288 (1936).

[1282] 39 Stat. 166 (1916).

[1283] 297 U.S. 288, 327-328 (1936).

[1284] 60 Stat. 755 (1946).

[1285] Stewart *v.* Kahn, 11 Wall. 493, 507 (1871). *See also* Mayfield *v.* Richards, 115 U.S. 137 (1885).

[1286] 251 U.S. 146, 163 (1919). *See also* Ruppert *v.* Caffey, 251 U.S. 264 (1920).

[1287] Block *v.* Hirsh, 256 U.S. 135 (1921).

[1288] Chastleton Corp. *v.* Sinclair, 264 U.S. 543 (1924).

[1289] 333 U.S. 138 (1948). *See also* Fleming *v.* Mohawk Wrecking & Lumber Co., 331 U.S. 111 (1947).

[1290] 333 U.S. 138, 143-144 (1948).

[1291] Ludecke *v.* Watkins, 335 U.S. 160, 170 (1948).

[1292] 100 U.S. 158 (1880).

[1293] Ibid. 170.

[1294] 4 Wall. 2 (1866).

[1295] Ibid. 127.

[1296] Ibid. 132, 138.

[1297] 327 U.S. 304 (1946).

[1298] 8 Cr. 110 (1814). *See also* Conrad *v.* Waples, 96 U.S. 279, 284 (1878).

[1299] Miller *v.* United States, 11 Wall. 268 (1871).

[1300] Stoehr *v.* Wallace, 255 U.S. 239 (1921); Central Union Trust Co. *v.* Garvan, 254 U.S. 554 (1921); United States *v.* Chemical Foundation, 272 U.S. 1 (1926); Silesian-American Corp. *v.* Clark, 332 U.S. 469 (1947); Cities Service Co. *v.* McGrath, 342 U.S. 330 (1952).

[1301] The "Siren," 13 Wall. 389 (1871).

[1302] The "Hampton," 5 Wall. 372, 376 (1867).

[1303] The "Paquete Habana," 175 U.S. 677, 700, 711 (1900).

[1304] Block *v.* Hirsh, 256 U.S. 135, 156, 157 (1921).

[1305] Bowles *v.* Willingham, 321 U.S. 503, 519 (1944).

[1306] Ibid. 521.

[1307] 255 U.S. 81 (1921).

[1308] Ibid. 89.

[1309] Schenck *v.* United States, 249 U.S. 47 (1919); Debs *v.* United States, 249 U.S. 211 (1919); Sugarman *v.* United States, 249 U.S. 182 (1919); Frohwerk *v.* United States, 249 U.S. 204 (1919); Abrams *v.* United States, 250 U.S. 616 (1919).

[1310] 40 Stat. 217 (1917); amended by 40 Stat. 553 (1918).

[1311] 249 U.S. 47 (1919).

[1312] Ibid. 52.

[1313] Gilbert *v.* Minnesota, 254 U.S. 325 (1920).

[1314] Hirabayashi *v.* United States, 320 U.S. 81 (1943).

[1315] Korematsu *v.* United States, 323 U.S. 214 (1944).

[1316] Ex parte Endo, 323 U.S. 283 (1944).

[1317] 1 Stat. 577 (1798).

[1318] Writings of James Madison, VI, 360-361 (Hunt's ed., 1906).

[1319] 40 Stat. 531 (1918).

[1320] 335 U.S. 160 (1948).

[1321] Mitchell *v.* Harmony, 13 How. 115, 134 (1852).

[1322] 13 Wall. 623, 627 (1871).

[1323] 120 U.S. 227 (1887).

[1324] Ibid. 239.

[1325] H.R. Rep. No. 262, 43d Cong., 1st sess., 39-40 (1874).

[1326] United States *v.* Commodities Trading Corp., 339 U.S. 121 (1950); United States *v.* Toronto Nav. Co., 338 U.S. 396 (1949); Kimball Laundry Co. *v.* United States, 338 U.S. 1 (1949); United States *v.* Cors, 337 U.S. 325 (1949); United States *v.* John J. Felin & Co., 334 U.S. 624 (1948); United States *v.*

Petty Motor Co., 327 U.S. 372 (1946); United States *v.* General Motors Corp., 323 U.S. 373 (1945).

[1327] Moore *v.* Houston, 3 S. & R. (Pa.) 169 (1817), affirmed in Houston *v.* Moore, 5 Wheat. 1 (1820).

[1328] Texas *v.* White, 7 Wall. 700 (1869); Tyler *v.* Defrees, 11 Wall. 331 (1871).

[1329] 1 Stat. 424 (1795).

[1330] Martin *v.* Mott, 12 Wheat. 19, 32 (1827).

[1331] Houston *v.* Moore, 5 Wheat. 1 (1820); Martin *v.* Mott, 12 Wheat. 19 (1827).

[1332] Houston *v.* Moore, 5 Wheat. 1, 16 (1820).

[1333] 39 Stat. 166, 197 (1916).—By the act of June 28, 1947 (61 Stat. 191, 192) the age of enlistment in the National Guard was lowered to 17 years.

[1334] United States *v.* Hammond, 1 Cr. C.C. 15 (1801).

[1335] 2 Stat. 103 (1801).

[1336] 2 Stat. 195 (1802).

[1337] 20 Stat. 102 (1878).

[1338] Metropolitan R. Co. *v.* District of Columbia, 132 U.S. 1, 9 (1889).

[1339] District of Columbia *v.* Bailey, 171 U.S. 161 (1898).

[1340] Shoemaker *v.* United States, 147 U.S. 282, 299 (1893).

[1341] Morris *v.* United States, 174 U.S. 196 (1899).

[1342] United States ex rel. Greathouse *v.* Dern, 289 U.S. 352, 354 (1933); Smoot Sand & Gravel Corp. *v.* Washington Airport, 283 U.S. 348 (1931); Maryland *v.* West Virginia, 217 U.S. 577 (1910); Marine R. & Coal Co. *v.* United States, 257 U.S. 47 (1921); Morris *v.* United States, 174 U.S. 196 (1899).

[1343] Phillips *v.* Payne, 92 U.S. 130 (1876).

[1344] 1 Stat. 139 (1790).

[1345] United States *v.* Simms, 1 Cr. 252, 256 (1803).

[1346] 2 Stat. 103, 104 (1801). *See* Tayloe *v.* Thomson, 5 Pet. 358, 368 (1831); Ex parte Watkins, 7 Pet. 568 (1833); Stelle *v.* Carroll, 12 Pet. 201, 205 (1838); Van Ness *v.* Bank of United States, 13 Pet. 17 (1839); United States *v.* Eliason, 16 Pet. 291, 301 (1842).

[1347] Reily *v.* Lamar, 2 Cr. 344, 356 (1805).

[1348] Korn *v.* Mutual Assur. Soc., 6 Cr. 192, 199 (1810).

[1349] Mutual Assur. Soc. *v.* Watts, 1 Wheat. 279 (1816).

[1350] Hepburn *v.* Ellzey, 2 Cr. 445, 452 (1805); *see also* Serè *v.* Pitot, 6 Cr. 332, 336 (1810); New Orleans *v.* Winter, 1 Wheat. 91, 94 (1816). The District has been held to be a "State" within the terms of a treaty regulating the inheritance of property within the "States of the Union." De Geofroy *v.* Riggs, 133 U.S. 258 (1890).

[1351] Barney *v.* Baltimore, 6 Wall. 280 (1868); Hooe *v.* Jamieson, 166 U.S. 395 (1897); Hooe *v.* Werner, 166 U.S. 399 (1897).

[1352] National Mut. Ins. Co. *v.* Tidewater Transfer Co., Inc., 337 U.S. 582 (1949).

[1353] Ibid. 588-600 (opinion of Justice Jackson, with whom Justices Black and Burton concurred).

[1354] Ibid. 604 (opinion of Justice Rutledge, with whom Justice Murphy concurred).

[1355] Callan *v.* Wilson, 127 U.S. 540 (1888); Capital Traction Co. *v.* Hof, 174 U.S. 1 (1899).

[1356] United States *v.* Moreland, 258 U.S. 433 (1922).

[1357] Wight *v.* Davidson, 181 U.S. 371, 384 (1901); *Cf.* Adkins *v.* Children's Hospital, 261 U.S. 525 (1923) overruled by West Coast Hotel Co. *v.* Parrish, 300 U.S. 379 (1937).

[1358] Kendall *v.* United States ex rel. Stokes, 12 Pet. 524, 619 (1838); Shoemaker *v.* United States, 147 U.S. 282, 300 (1893); Atlantic Cleaners & Dyers *v.* United States, 286 U.S. 427, 435 (1932); O'Donoghue *v.* United States 289 U.S. 516, 518 (1933).

[1359] 6 Wheat. 264 (1821).

[1360] Ibid. 428.

[1361] Loughborough *v.* Blake, 5 Wheat. 317 (1820).

[1362] Gibbons *v.* District of Columbia, 116 U.S. 404, 408 (1886); Welch *v.* Cook, 97 U.S. 541 (1879).

[1363] Loughborough *v.* Blake, 5 Wheat. 317, 320 (1820); Heald *v.* District of Columbia, 259 U.S. 114 (1922).

[1364] Thompson *v.* Roe ex dem. Carroll, 22 How. 422, 435 (1860); Stoutenburgh *v.* Hennick, 129 U.S. 141, 147 (1889).

[1365] Willard *v.* Presbury, 14 Wall. 676, 680 (1870); Briscoe *v.* Rudolph, 221 U.S. 547 (1911).

[1366] Washington Market Co. *v.* District of Columbia, 172 U.S. 361, 367 (1899).

[1367] Mattingly *v.* District of Columbia, 97 U.S. 687, 690 (1878).

[1368] 129 U.S. 141, 148 (1889).

[1369] Keller *v.* Potomac Electric Power Co., 261 U.S. 428 (1923).

[1370] O'Donoghue *v.* United States, 289 U.S. 516 (1933).

[1371] Embry *v.* Palmer, 107 U.S. 3 (1883).

[1372] James *v.* Dravo Contracting Co., 302 U.S. 134, 143 (1937).

[1373] Battle *v.* United States, 209 U.S. 36 (1908).

[1374] Arlington Hotel Co. *v.* Fant, 278 U.S. 439 (1929).

[1375] James *v.* Dravo Contracting Co, 302 U.S. 134, 143 (1937).

[1376] Collins *v.* Yosemite Park Co., 304 U.S. 518, 530 (1938).

[1377] Ibid. 528.

[1378] Battle *v.* United States, 209 U.S. 36 (1908); Johnson *v.* Yellow Cab Co., 321 U.S. 383 (1944); Bowen *v.* Johnston, 306 U.S. 19 (1939).

[1379] Surplus Trading Co. *v.* Cook, 281 U.S. 647 (1930).

[1380] Western Union Teleg. Co. *v.* Chiles, 214 U.S. 274 (1909); Arlington Hotel Co. *v.* Fant, 278 U.S. 439 (1929); Pacific Coast Dairy *v.* Dept. of Agri., 318 U.S. 285 (1943).

[1381] Chicago, R.I. & P.R. Co. *v.* McGlinn, 114 U.S. 542, 545 (1885); James Stewart & Co. *v.* Sadrakula, 309 U.S. 94 (1940).

[1382] Palmer *v.* Barrett, 162 U.S. 399 (1896).

[1383] United States *v.* Unzeuta, 281 U.S. 138 (1930).

[1384] Benson *v.* United States, 146 U.S. 325, 331 (1892).

[1385] Palmer *v.* Barrett, 162 U.S. 399 (1896).

[1386] S.R.A., Inc. *v.* Minnesota, 327 U.S. 558, 564 (1946).

[1387] Ibid. 570, 571.

[1388] Fort Leavenworth R. Co. *v.* Lowe, 114 U.S. 525, 532 (1885); United States *v.* Unzeuta, 281 U.S. 138, 142 (1930); Surplus Trading Co. *v.* Cook, 281 U.S. 647, 652 (1930).

[1389] United States *v.* Cornell, 25 Fed. Cas. No. 14,867 (1819).

[1390] James *v.* Dravo Contracting Co., 302 U.S. 134, 145 (1937).

[1391] Silas Mason Co. *v.* Tax Commission of Washington, 302 U.S. 186 (1937). *See also* Atkinson *v.* State Tax Commission, 303 U.S. 20 (1938).

[1392] 4 Wheat. 316 (1819).

[1393] Ibid. 420. This decision had been clearly foreshadowed fourteen years earlier by Marshall's opinion in United States *v.* Fisher, 2 Cr. 358, 396 (1805). Upholding an act which gave priority to claims of the United States against the estate of a bankrupt he wrote: "The government is to pay the debt of the Union, and must be authorized to use the means which appear to itself most eligible to effect that object. It has, consequently, a right to make remittances, by bills or otherwise, and to take those precautions which will render the transaction safe."

[1394] *See* pp. 74-82, *supra*.

[1395] Neely *v.* Henkel, 180 U.S. 109, 121 (1901). *See also* Missouri *v.* Holland, 252 U.S. 416 (1920).

[1396] *See* p. 426, *supra*.

[1397] Den ex dem. Murray *v.* Hoboken Land & Improvement Co., 18 How. 272, 281 (1856).

[1398] Kohl *v.* United States, 91 U.S. 367, 373 (1876); United Slates *v.* Fox, 94 U.S. 315, 320 (1877).

[1399] *See* pp. 110-117, 266-267.

[1400] United States *v.* Fox, 95 U.S. 670, 672 (1878); United States *v.* Hall, 98 U.S. 343, 357 (1879); United States *v.* Worrall, 2 Dall. 384, 394 (1790); McCulloch *v.* Maryland, 4 Wheat. 316 (1819). That this power has been freely exercised is attested by the 180 pages of the United States Code (1950 ed.) devoted to Title 18, entitled "Criminal Code and Criminal Procedure." In addition numerous regulatory measures prescribe criminal penalties for infractions thereof.

[1401] Ex parte Carll, 106 U.S. 521 (1883).

[1402] United States *v.* Marigold, 9 How. 560, 567 (1850).

[1403] Logan *v.* United States, 144 U.S. 263 (1892).

[1404] United States *v.* Barnow, 239 U.S. 74 (1915).

[1405] Ex parte Yarbrough, 110 U.S. 651 (1884); United States *v.* Waddell, 112 U.S. 76 (1884); In re Quarles, 158 U.S. 532, 537 (1895); Motes *v.* United States, 178 U.S. 458 (1900); United States *v.* Mosley, 238 U.S. 383 (1915). *See also* Rakes *v.* United States, 212 U.S. 55 (1909).

[1406] Ex parte Curtis, 106 U.S. 371 (1882).

[1407] The Alien Registration Act of 1940, 54 Stat. 670, 18 U.S.C.A. § 2385.

[1408] McCulloch *v.* Maryland, 4 Wheat. 316, 407 (1819).

[1409] Osborn *v.* Bank of the United States, 9 Wheat. 738, 862 (1824). *See also* Pittman *v.* Home Owners' Loan Corp., 308 U.S. 21 (1939).

[1410] First Nat. Bank *v.* Fellows ex rel. Union Trust Co., 244 U.S. 416 (1917); Burnes Nat. Bank *v.* Duncan, 265 U.S. 17 (1924).

[1411] Smith *v.* Kansas City Title and Trust Co., 255 U.S. 180 (1921).

[1412] Juilliard *v.* Greenman, 110 U.S. 421, 449 (1884).

[1413] Veazie Bank *v.* Fenno, 8 Wall. 533 (1869).

[1414] Juilliard *v.* Greenman, 110 U.S. 421 (1884). *See also* Legal Tender Cases, 12 Wall. 457 (1871).

[1415] Norman *v.* Baltimore & O.R. Co., 294 U.S. 240, 303 (1935).

[1416] Pacific Railroad Removal Cases (Union P.R. Co. *v.* Myers), 115 U.S. 1, 18 (1885); California *v.* Central P.R. Co., 127 U.S. 1, 39 (1888).

[1417] Luxton *v.* North River Bridge Co., 153 U.S. 525 (1894).

[1418] Clallam County *v.* United States, 263 U.S. 341 (1923).

[1419] Sloan Shipyards *v.* United States Fleet Corp., 258 U.S. 549 (1922). In 1944, the Congressional Joint Committee on Nonessential Federal Expenditures reported that there were then in existence one hundred government corporations, including subsidiaries and quasi-private corporations in which the Government had some special contractual or proprietary interest. S. Doc. No. 227, 78th Cong., 2d sess. 2 (1944).

[1420] Rhode Island *v.* Massachusetts, 12 Pet. 657, 721 (1838).

[1421] Tennessee *v.* Davis, 100 U.S. 257, 263 (1880).

[1422] Chicago & Northwestern R. Co. *v.* Whitton, 13 Wall. 270, 287 (1872).

[1423] Embry *v.* Palmer, 107 U.S. 3 (1883).

[1424] Bank of United States *v.* Halstead, 10 Wheat. 51, 53 (1825).

[1425] United States Exp. Co. *v.* Kountze Bros., 8 Wall. 342, 350 (1860).

[1426] Ex parte Bakelite Corp., 279 U.S. 438, 449 (1929).

[1427] 43 Stat. 5 (1924). *See* Sinclair *v.* United States, 279 U.S. 263 (1929).

[1428] Paramino Lumber Co. *v.* Marshall, 309 U.S. 370 (1940).

[1429] Pope *v.* United States, 323 U.S. 1 (1944).

[1430] Detroit Trust Company *v.* The "Thomas Barium," 293 U.S. 21 (1934).

[1431] Knickerbocker Ice Co. *v.* Stewart, 253 U.S. 149 (1920); Washington *v.* Dawson & Co., 264 U.S. 219 (1924).

[1432] Barron *v.* Baltimore, 7 Pet. 243 (1833); Morgan's L. & T.R. & S.S. Co. *v.* Louisiana Board of Health, 118 U.S. 455, 467 (1886).

[1433] Munn *v.* Illinois, 94 U.S. 113, 135 (1877); Johnson *v.* Chicago & P. Elevator Co., 119 U.S. 388, 400 (1886).

[1434] 19 How. 393, 411 (1857).

[1435] Gasquet *v.* Lapeyre, 242 U.S. 367 (1917).

[1436] 1 Stat. 73, 81 (1789).

[1437] Ex parte Watkins, 3 Pet. 193, 202 (1830).

[1438] Ex parte Bollman, 4 Cr. 75, 101 (1807).

[1439] Price *v.* Johnston, 334 U.S. 266, 282 (1948).

[1440] United States *v.* Smith, 331 U.S. 469, 475 (1947).

[1441] Gusik *v.* Schilder, 339 U.S. 977 (1950).

[1442] Frank *v.* Mangum, 237 U.S. 309, 330 (1915).

[1443] 1 Stat. 73, 81 (1789).

[1444] Ex parte Watkins, 3 Pet. 193, 202 (1830); Ex parte Kearney, 7 Wheat. 38 (1822).

[1445] 14 Stat. 385 (1867).

[1446] Frank *v.* Mangum, 237 U.S. 309, 331 (1915).

[1447] Ex parte Bollman, 4 Cr. 75 (1807).

[1448] Adams *v.* United States ex rel. McCann, 317 U.S. 269, 274 (1942); Glasgow *v.* Moyer, 225 U.S. 420, 428 (1912); Matter of Gregory, 219 U.S. 210, 213 (1911).

[1449] Adams *v.* United States ex rel. McCann, 317 U.S. 269, 274 (1942).

[1450] Walker *v.* Johnston, 312 U.S. 275 (1941); Waley *v.* Johnston, 316 U.S. 101 (1942).

[1451] Ex parte Milligan, 4 Wall. 2, 110 (1866).

[1452] McNally *v.* Hill, 293 U.S. 131 (1934).

[1453] Goto *v.* Lane, 265 U.S. 393 (1924).

[1454] Salinger *v.* Loisel, 265 U.S. 224 (1924).

[1455] Wong Doo *v.* United States, 265 U.S. 239 (1924).

[1456] Price *v.* Johnston, 334 U.S. 266, 294 (1948).

[1457] Corwin, The President, Office and Powers, 178 (3d ed., 1948).

[1458] Ex parte Bollman, 4 Cr. 75, 101 (1807).

[1459] Messages and Papers of the Presidents, VII, 3219 (1897).

[1460] Fed. Cas. No. 9, 487 (1861).

[1461] 10 Op. Atty. Gen. 74, 89 (1861-1863).

[1462] 12 Stat. 755 (1863).

[1463] 4 Wall. 2 (1866).

[1464] Ibid. 114.

[1465] Story, Commentaries on the Constitution, II, § 1344 (4th ed., 1873).

[1466] Cummings *v.* Missouri, 4 Wall. 277, 323 (1867).

[1467] United States *v.* Lovett, 328 U.S. 303, 315 (1946).

[1468] Ex parte Garland, 4 Wall. 333, 377 (1867).

[1469] United States *v.* Lovett, 328 U.S. 303 (1946).

[1470] Story, Commentaries on the Constitution, II, § 1345.

[1471] 3 Dall. 386, 393 (1798).

[1472] Bankers Trust Co. *v.* Blodgett, 260 U.S. 647, 652 (1923).

[1473] Burgess *v.* Salmon, 97 U.S. 381 (1878).

[1474] Calder *v.* Bull, 3 Dall. 386, 390 (1798); Ex parte Garland, 4 Wall. 333, 377 (1867); Burgess *v.* Salmon, 97 U.S. 381, 384 (1878).

[1475] United States *v.* Powers, 307 U.S. 214 (1939).

[1476] Neely *v.* Henkel, 180 U.S. 109, 123 (1901). *Cf.* In re Yamashita, 327 U.S. 1, 26 (1946) (dissenting opinion of Justice Murphy); Hirota *v.* MacArthur, 338 U.S. 197, 199 (1948) (concurring opinion of Justice Douglas).

[1477] Ex parte Garland, 4 Wall. 333 (1867).

[1478] Murphy *v.* Ramsey, 114 U.S. 15 (1885).

[1479] Mahler *v.* Eby, 264 U.S. 32 (1924); Bugajewitz *v.* Adams, 228 U.S. 585 (1913).

[1480] Johannessen *v.* United States, 225 U.S. 227 (1912).

[1481] Cook *v.* United States, 138 U.S. 157, 183 (1891).

[1482] Calder *v.* Bull, 3 Dall. 386, 390 (1798).

[1483] Hopt *v.* Utah, 110 U.S. 574, 589 (1884).

[1484] 157 U.S. 429, 573 (1895).

[1485] 2 Madison, The Constitutional Convention, 208 (Hunt's ed., 1908).

[1486] 3 Dall. 171 (1796).

[1487] 7 Hamilton's Works, 845, 848 (Hamilton's ed., 1851). "If the meaning of the word *excise* is to be sought in the British statutes, it will be found to include the duty on carriages, which is there considered as an *excise*, and then must necessarily be uniform and liable to apportionment; consequently, not a direct tax." Ibid.

[1488] 4 Annals of Congress, 730 (1794); 2 Madison's Writings, 14, (Library of Congress ed., 1865) (Letter to Thomas Jefferson, May 11, 1794).

[1489] 3 Dall. 171, 177 (1796).

[1490] Pacific Ins. Co. *v.* Soule, 7 Wall. 433 (1869).

[1491] Veazie Bank *v.* Fenno, 8 Wall. 533 (1869).

[1492] Scholey *v.* Rew, 23 Wall. 331 (1875).

[1493] Springer *v.* United States, 102 U.S. 586 (1881).

[1494] Ibid. 602.

[1495] 157 U.S. 429 (1895); 158 U.S. 601 (1895).

[1496] 28 Stat. 509 (1894).

[1497] Stanton *v.* Baltic Mining Co., 240 U.S. 103 (1916); Knowlton *v.* Moore, 178 U.S. 41, 80 (1900).

[1498] Nicol *v.* Ames, 173 U.S. 509 (1899).

[1499] Knowlton *v.* Moore, 178 U.S. 41 (1900).

[1500] Patton *v.* Brady, 184 U.S. 608 (1902).

[1501] 192 U.S. 363 (1904).

[1502] Ibid. 370.

[1503] 192 U.S. 397 (1904).

[1504] 220 U.S. 107 (1911).

[1505] 240 U.S. 103 (1916).

[1506] Ibid. 114.

[1507] 232 U.S. 261 (1914).

[1508] New York Trust Co. *v.* Eisner, 256 U.S. 345, 349 (1921).

[1509] Phillips *v.* Dime Trust & Safe Deposit Co., 284 U.S. 160 (1931).

[1510] Tyler *v.* United States, 281 U.S. 497 (1930).

[1511] Fernandez *v.* Wiener, 326 U.S. 340 (1945).

[1512] Chase National Bank *v.* United States, 278 U.S. 327 (1929).

[1513] Bromley *v.* McCaughn, 280 U.S. 124, 136 (1929). *See also* Helvering *v.* Bullard, 303 U.S. 297 (1938).

[1514] Bromley *v.* McCaughn, 280 U.S. 124, 140 (1929).

[1515] Loughborough *v.* Blake, 5 Wheat. 317 (1820).

[1516] De Treville *v.* Smalls, 98 U.S. 517, 527 (1879).

[1517] Turpin & Bro. *v.* Burgess, 117 U.S. 504, 507 (1886). *Cf.* Almy *v.* California, 24 How. 169, 174 (1861).

[1518] Dooley *v.* United States, 183 U.S. 151, 154 (1901).

[1519] Cornell *v.* Coyne, 192 U.S. 418, 428 (1904); Turpin & Bro. *v.* Burgess, 117 U.S. 504, 507 (1886).

[1520] Spalding & Bros. *v.* Edwards, 262 U.S. 66 (1923).

[1521] Thompson *v.* United States, 142 U.S. 471 (1892).

[1522] Peck & Co. *v.* Lowe, 247 U.S. 165 (1918); National Paper & Type Co. *v.* Bowers, 266 U.S. 373 (1924).

[1523] Fairbank *v.* United States, 181 U.S. 283 (1901).

[1524] United States *v.* Hvoslef, 237 U.S. 1 (1915).

[1525] Thames & Mersey Ins. Co. *v.* United States, 237 U.S. 19 (1915).

[1526] Pace *v.* Burgess, 92 U.S. 372 (1876); Turpin & Bro. *v.* Burgess, 117 U.S. 504, 505 (1886).

[1527] Louisiana Public Service Comm'n. *v.* Texas & N.O.R. Co., 284 U.S. 125, 131 (1931); Pennsylvania *v.* Wheeling & Belmont Bridge Co., 18 How. 421, 433 (1856); South Carolina *v.* Georgia, 93 U.S. 4 (1876). In Williams *v.* United States, 255 U.S. 336 (1921) the argument that an act of Congress which prohibited interstate transportation of liquor into States whose laws prohibited manufacture or sale of liquor for beverage purposes was repugnant to this clause was rejected as plainly wanting in merit.

[1528] Louisiana Public Service Comm'n. *v.* Texas & N.O.R. Co., 284 U.S. 125, 132 (1931).

[1529] Smith *v.* Turner (Passenger Cases), 7 How. 283, 414 (1849) (opinion of Justice Wayne); *cf.* Cooley *v.* Board of Port Wardens, 12 How. 299, 314 (1851).

[1530] Morgan's L. & T.R. & S.S. Co. *v.* Louisiana Bd. of Health, 118 U.S. 455, 467 (1886). *See also* Munn *v.* Illinois, 94 U.S. 113, 135 (1877); Johnson *v.* Chicago & P. Elevator Co., 119 U.S. 388, 400 (1886).

[1531] 1 Stat. 53, 54 (1789).

[1532] Thompson *v.* Darden, 198 U.S. 310 (1905).

[1533] Alaska *v.* Troy, 258 U.S. 101 (1922).

[1534] Cincinnati Soap Co. *v.* United States, 301 U.S. 308, 321 (1937); Knote *v.* United States, 95 U.S. 149, 154 (1877).

[1535] United States *v.* Price, 116 U.S. 43 (1885); United States *v.* Realty Co., 163 U.S. 427, 439 (1896); Allen *v.* Smith, 173 U.S. 389, 393 (1899).

[1536] Hart *v.* United States, 118 U.S. 62, 67 (1886).

[1537] 32 Stat. 388 (1902).

[1538] Cincinnati Soap Co. *v.* United States, 301 U.S. 308, 322 (1937).

[1539] Reeside *v.* Walker, 11 How. 272 (1851).

[1540] United States *v.* Klein, 13 Wall. 128 (1872).

[1541] Knote *v.* United States, 95 U.S. 149, 154 (1877); Austin *v.* United States, 155 U.S. 417, 427 (1894).

[1542] Hart *v.* United States, 118 U.S. 62, 67 (1886).

[1543] 13 Op. Atty. Gen. 538 (1871).

[1544] Williams *v.* Bruffy, 96 U.S. 176, 183 (1878).

[1545] 14 Pet. 540 (1840).

[1546] United States *v.* California, 332 U.S. 19 (1947).

[1547] 313 U.S. 69 (1941).

[1548] Ibid. 78-79.

[1549] Craig *v.* Missouri, 4 Pet. 410, 425 (1830); Byrne *v.* Missouri, 8 Pet. 40 (1834).

[1550] Poindexter *v.* Greenhow, 114 U.S. 270 (1885); Chaffin *v.* Taylor, 116 U.S. 567 (1886).

[1551] Houston & T.C.R. Co. *v.* Texas, 177 U.S. 66 (1900).

[1552] Briscoe *v.* Bank of Kentucky, 11 Pet. 257 (1837).

[1553] Darrington *v.* Bank of Alabama, 13 How. 12, 15 (1851); Curran *v.* Arkansas, 15 How. 304, 317 (1853).

[1554] Briscoe *v.* Bank of Kentucky, 11 Pet. 257 (1837).

[1555] Woodruff *v.* Trapnall, 10 How. 190, 205 (1851).

[1556] Legal Tender Cases, 110 U.S. 421, 446 (1884).

[1557] Gwin *v.* Breedlove, 2 How. 29, 38 (1844). *See also* Griffin *v.* Thompson, 2 How. 244 (1844).

[1558] Farmers & Merchants Bank *v.* Federal Reserve Bank, 262 U.S. 649, 659 (1923).

[1559] Cummings *v.* Missouri, 4 Wall. 277, 323 (1867); Klinger *v.* Missouri, 13 Wall. 257 (1872); Pierce *v.* Carskadon, 16 Wall. 234, 239 (1873). *See* p. 317, *supra*, and p. 327, *post*.

[1560] Calder *v.* Bull, 3 Dall. 386, 390 (1798); Watson *v.* Mercer, 8 Pet. 88, 110 (1834); Baltimore & S.R. Co. *v.* Nesbit, 10 How. 395, 401 (1850); Carpenter *v.* Pennsylvania, 17 How. 456, 463 (1855); Loche *v.* New Orleans, 4 Wall. 172 (1867); Orr *v.* Gilman, 183 U.S. 278, 285 (1902); Kentucky Union Co. *v.* Kentucky, 219 U.S. 140 (1911).

[1561] Frank *v.* Mangum, 237 U.S. 300, 344 (1915); Ross *v.* Oregon, 227 U.S. 150, 161 (1913).

[1562] Jaehne *v.* New York, 128 U.S. 189, 190 (1888).

[1563] Rooney *v.* North Dakota, 196 U.S. 319, 325 (1905).

[1564] Chicago & A.R. Co. *v.* Tranbarger, 238 U.S. 67 (1915).

[1565] Samuels *v.* McCurdy, 267 U.S. 188 (1925).

[1566] Hawker *v.* New York, 170 U.S. 189, 190 (1898). *See also* Reetz *v.* Michigan, 188 U.S. 505, 509 (1903); Lehmann *v.* State Board of Public Accountancy, 263 U.S. 394 (1923).

[1567] Cummings *v.* Missouri, 4 Wall. 277, 316 (1867).

[1568] Pierce *v.* Carskadon, 16 Wall. 234 (1873).

[1569] Lindsey *v.* Washington, 301 U.S. 397 (1937).

[1570] Kring *v.* Missouri, 107 U.S. 221 (1883).

[1571] Holden *v.* Minnesota, 137 U.S. 483, 491 (1890).

[1572] Ex parte Medley, 134 U.S. 160, 171 (1890).

[1573] Gryger *v.* Burke, 334 U.S. 728 (1948); McDonald *v.* Massachusetts, 180 U.S. 311 (1901); Graham *v.* West Virginia, 224 U.S. 616 (1912).

[1574] Malloy *v.* South Carolina, 237 U.S. 180 (1915).

[1575] Rooney *v.* North Dakota, 196 U.S. 319, 324 (1905).

[1576] Gibson *v.* Mississippi, 162 U.S. 565, 590 (1896).

[1577] Duncan *v.* Missouri, 152 U.S. 377, 382 (1894).

[1578] Gut *v.* Minnesota, 9 Wall. 35, 37 (1870).

[1579] Duncan *v.* Missouri, 152 U.S. 377 (1894).

[1580] Mallett *v.* North Carolina, 181 U.S. 589, 593 (1901).

[1581] Gibson *v.* Mississippi, 162 U.S. 565, 588 (1896).

[1582] Beazell *v.* Ohio, 269 U.S. 167 (1925).

[1583] Thompson *v.* Missouri, 171 U.S. 380, 381 (1898).

[1584] Thompson *v.* Utah, 170 U.S. 343 (1898).

[1585] Dodge *v.* Woolsey, 18 How. 331 (1856); Railroad Co. *v.* McClure, 10 Wall. 511 (1871); New Orleans Gaslight Co. *v.* Louisiana Light & Heat Producing & Mfg. Co., 115 U.S. 650 (1885); Bier *v.* McGehee, 148 U.S. 137, 140 (1893).

[1586] New Orleans Waterworks Co. *v.* Rivers, 115 U.S. 674 (1885); Walla Walla *v.* Walla Walla Water Co., 172 U.S. 1 (1898); Vicksburg *v.* Vicksburg Waterworks Co., 202 U.S. 453 (1906); Atlantic Coast Line R. Co. *v.* Goldsboro, 232 U.S. 548 (1914); Cuyahoga River Power Co. *v.* Akron, 240 U.S. 462 (1916).

[1587] The above; *also* Grand Trunk Western R. Co. *v.* Railroad Commission, 221 U.S. 400 (1911); Louisville & N.R. Co. *v.* Garrett, 231 U.S. 298 (1913); Appleby *v.* Delaney, 271 U.S. 403 (1926).

[1588] Central Land Co. *v.* Laidley, 159 U.S. 103 (1895). *See also* New Orleans Waterworks Co. *v.* Louisiana Sugar Ref. Co., 125 U.S. 18 (1888); Hanford *v.* Davies, 163 U.S. 273 (1896); Ross *v.* Oregon, 227 U.S. 150 (1913); Detroit United R. Co. *v.* Michigan, 242 U.S. 238 (1916); Long Sault Development Co. *v.* Call, 242 U.S. 272 (1916); McCoy *v.* Union Elev. Co., 247 U.S. 354 (1918); Columbia R. Gas & E. Co. *v.* South Carolina, 261 U.S. 236 (1923); Tidal Oil Co. *v.* Flanagan, 263 U.S. 444 (1924).

[1589] Jefferson Branch Bank *v.* Skelly, 1 Bl. 436, 443 (1862); Bridge Proprietors *v.* Hoboken Co., 1 Wall. 116, 145 (1863); Wright *v.* Nagle, 101 U.S. 791, 793 (1880); and McGahey *v.* Virginia, 135 U.S. 662, 667 (1890); Scott *v.* McNeal, 154 U.S. 34, 45 (1894); Stearns *v.* Minnesota, 179 U.S. 223, 232-233 (1900); Coombes *v.* Getz, 285 U.S. 434, 441 (1932); Atlantic C.L.R. Co. *v.* Phillips, 332 U.S. 168, 170 (1947).

[1590] McCullough *v.* Virginia, 172 U.S. 102 (1898); Houston & Texas Central R.R. Co. *v.* Texas, 177 U.S. 66, 76, 77 (1900); Hubert *v.* New Orleans, 215 U.S. 170, 175 (1909); Carondelet Canal Co. *v.* Louisiana, 233 U.S. 362, 376 (1914); Louisiana Ry. & Nav. Co. *v.* New Orleans, 235 U.S. 164, 171 (1914).

[1591] State Bank of Ohio *v.* Knoop, 16 How. 369 (1854), and Ohio Life Insurance & Trust Co. *v.* Debolt, 16 How. 416 (1854) are the leading cases. *See also* Jefferson Branch Bank *v.* Skelly, 1 Bl. 436 (1862); Louisiana *v.* Pilsbury, 105 U.S. 278 (1882); McGahey *v.* Virginia, 135 U.S. 662 (1890); Mobile & Ohio R.R. Co. *v.* Tennessee, 153 U.S. 486 (1894); Bacon *v.* Texas, 163 U.S. 207 (1896); McCullough *v.* Virginia, 172 U.S. 102 (1898).

[1592] Gelpcke *v.* Dubuque, 1 Wall. 175, 206 (1864); Havemeyer *v.* Iowa County, 3 Wall. 294 (1866); Thompson *v.* Lee County, 3 Wall. 327 (1866); Kenosha *v.* Lamson, 9 Wall. 477 (1870); Olcott *v.* Fond du Lac County, 16 Wall. 678 (1873); Taylor *v.* Ypsilanti, 105 U.S. 60 (1882); Anderson *v.* Santa Anna, 116 U.S. 356 (1886); Wilkes County *v.* Coler, 180 U.S. 506 (1901).

[1593] Great Southern Fire Proof Hotel Co. *v.* Jones, 193 U.S. 532, 548 (1904).

[1594] Sauer *v.* New York, 206 U.S. 536 (1907); Muhlker *v.* New York & H.R. Co., 197 U.S. 544, 570 (1905).

[1595] Tidal Oil Company *v.* Flanagan, 263 U.S. 444, 450, 451-452 (1924).

[1596] Walker *v.* Whitehead, 16 Wall. 314 (1873); Wood *v.* Lovett, 313 U.S. 362, 370 (1941).

[1597] 4 Wheat. 122, 197 (1819); *see also* Curran *v.* Arkansas, 15 How. 304 (1853).

[1598] 4 Wheat. 518 (1819).

[1599] Ibid. 627.

[1600] 290 U.S. 398 (1934).

[1601] Ibid. 431.

[1602] Ibid. 435.

[1603] "The *Blaisdell* decision represented a realistic appreciation of the fact that ours is an evolving society and that the general words of the contract clause were not intended to reduce the legislative branch of government to helpless impotency." Justice Black, in Wood *v.* Lovett, 313 U.S. 362, 383 (1941).

[1604] Wright, The Contract Clause of the Constitution, 95 (Cambridge, 1938).

[1605] Farrand, Records, III, 548.

[1606] The Federalist, No. 44.

[1607] Works of James Wilson, I, 567, (Andrews, ed., 1896).

[1608] 2 Dall. 410 (1793).

[1609] Ogden *v.* Saunders, 12 Wheat. 213, 338 (1827).

[1610] 6 Cr. 87 (1810).

[1611] In Ware *v.* Hylton, 3 Dall. 199 (1797) the Court had earlier set aside an act of Virginia as being in conflict with the Treaty of Peace, of 1783, with Great Britain.

[1612] As given by Professor Wright in his treatise, The Contract Clause of the Constitution, 22. Professor Wright dates Hamilton's pamphlet, 1796.

[1613] 6 Cr. 87, 139 (1810). Justice Johnson, in his concurring opinion, relied exclusively on general principles. "I do not hesitate to declare, that a State does not possess the power of revoking its own grants. But I do it, on a general principle, on the reason and nature of things; a principle which will impose laws even on the Deity." Ibid. 143. *See also* his words in Satterlee *v.* Matthewson, 2 Pet. 380, 686 (1829); and those of the North Carolina Supreme Court in Barnes *v.* Barnes, 8 Jones L. 53 (N.C.) 366 (1861), quoted in Thomas Henry Calvert. The Constitution and the Courts, I, 948 (Northport, L.I., 1924). In both these opinions it is asseverated that the contracts clause has been made to do the work of "fundamental principles."

[1614] 7 Cr. 164 (1812). The exemption from taxation which was involved in this case was held in 1886 to have lapsed through the acquiescence for sixty years of the owners of the lands in the imposition of taxes upon these. Given *v.* Wright, 117 U.S. 648 (1886).

[1615] Dartmouth College *v.* Woodward, 4 Wheat. 518 (1819).

[1616] It was not until well along in the eighteenth century that the first American business corporation was created: "This was the New London Society United for Trade and Commerce, which was chartered in Connecticut in 1732. It had, however, an early demise. Following this was a second Connecticut charter, namely, for building 'Union Wharf,' on 'Long Wharf,' at New Haven. A similar company, 'The Proprietors of Boston Pier,' or 'The Long Wharf in the Town of Boston in New England,' was chartered by the Massachusetts General Court in 1772. In 1768 the Pennsylvania Assembly incorporated 'The Philadelphia Contributionship for the Insuring of Houses from Loss by Fire.' Alone of the colonial business corporations it has had a continuous existence to the present day.

"Apparently the only other business corporations of the colonies were companies for supplying water. One was incorporated in Massachusetts in 1652, and three in Rhode Island in 1772 and 1773. Alongside of these corporations, and, indeed, preceding them, were a large number of unincorporated associations, partnerships, societies, groups of 'undertakers,' 'companies,' formed for a great variety of business purposes. In the eye of the law all of them were probably mere partnerships or tenancies in common. Whaling and fishing companies, so-called, were numerous. There were a number of mining companies, chiefly for producing iron or copper. There were some manufacturing companies, but they were not numerous. Banking institutions were represented notably by the 'Bank of Credit Lumbard,' promoted in Boston by John Blackwell and authorized by the General Court in 1686, and by the 'Land Bank or Manufacturing Scheme' in the same colony in 1739-41.

"In addition to these there were a few insurance companies, a number of companies formed for the Indian trade, numerous land companies, large and small, a number of associations for erecting bridges, building or repairing roads, and improving navigation of small streams or rivers. Besides these there were a few colonial corporations not easily classed, such as libraries, chambers of commerce, etc.

"During the Revolution few corporations of any sort were chartered. After the conclusion of peace the situation was materially altered. Capital had accumulated during the war. The disbanding of the army set free a labor supply, which was rapidly increased by throngs of immigrants. The day was one of bold experimentation, enthusiastic exploitation of new methods, eager exploration of new paths, confident undertaking of new enterprises. Everything conspired to bring about a considerable extension of corporate enterprise in the field of business before the end of the eighteenth century, notably after the critical period of disunion and Constitution-making has

passed. Prior to 1801 over three hundred charters were granted for business corporations; 90 per cent. of them after 1789. Judged by twentieth-century standards these seem few, indeed, but neither in the colonies nor in the mother country was there precedent for such a development." 105 The Nation 512 (New York, Nov. 8, 1917), reviewing Joseph Stancliffe Davis, Essays in the Earlier History of American Corporations (2 vols., Harvard University Press, 1917).

[1617] In 1806 Chief Justice Parsons of the Supreme Judicial Court of Massachusetts, without mentioning the contracts clause, declared that rights legally vested in a corporation cannot be "controuled or destroyed by a subsequent statute, unless a power be reserved to the legislature in the act of incorporation," Wales *v.* Stetson, 2 Mass. 143 (1806). *See also* Stoughton *v.* Baker et al., 4 Mass. 522 (1808) to like effect; *cf.* Locke *v.* Dane, 9 Mass. 360 (1812) in which it is said that the purpose of the contracts clause was to "provide against paper money and insolvent laws." Together these holdings add up to the conclusion that the reliance of the Massachusetts court was on "fundamental principles," rather than the contracts clause.

[1618] 4 Wheat., especially at 577-595 (Webster's argument); ibid. 666 (Story's opinion). *See also* Story's opinion for the Court in Terrett *v.* Taylor, 9 Cr. 43 (1815).

[1619] 4 Wheat. 518 (1819).

[1620] Ibid. 627.

[1621] 4 Wheat. at 637; *see also* Home of the Friendless *v.* Rouse, 8 Wall. 430, 437 (1869).

[1622] 4 Pet. 514 (1830).

[1623] 11 Pet. 420 (1837).

[1624] Note the various cases to which municipalities are parties.

[1625] 4 Wheat. at 629.

[1626] In Munn *v.* Illinois, 94 U.S. 113 (1877) a category of "business affected with a public interest" and whose property is "impressed with a public use" was recognized. A corporation engaged in such a business becomes a "quasi-public" corporation, the power of the State to regulate which is larger than in the case of a purely private corporation. Inasmuch as most corporations receiving public franchises are of this character, the final result of Munn *v.* Illinois was to enlarge the police power of the State in the case of the most important beneficiaries of the Dartmouth College decision.

[1627] Meriwether *v.* Garrett, 102 U.S. 472 (1880); Covington *v.* Kentucky, 173 U.S. 231 (1899); Hunter *v.* Pittsburgh, 207 U.S. 161 (1907).

[1628] East Hartford *v.* Hartford Bridge Co., 10 How. 511 (1851); Hunter *v.* Pittsburgh, 207 U.S. 161 (1907).

[1629] Trenton *v.* New Jersey, 262 U.S. 182, 191 (1923).

[1630] Newton *v.* Mahoning County, 100 U.S. 548 (1880).

[1631] Attorney General ex rel. Kies *v.* Lowrey, 199 U.S. 233 (1905).

[1632] Faitoute Iron & Steel Co. *v.* Asbury Park, 316 U.S. 502 (1942). In this case the contracts involved were municipal bonds, and hence "private" contracts; but the overruling power of the State in relation to its municipalities was one of the grounds invoked by the Court in sustaining the legislation. *See* Ibid. 509. "'A municipal corporation * * * is a representative not only of the State, but is a portion of its governmental power. * * * The State may withdraw these local powers of government at pleasure, and may, through its legislature or other appointed channels, govern the local territory as it governs the State at large. It may enlarge or contract its powers or destroy its existence.'" United States *v.* Baltimore & O.R. Co., 17 Wall. 322, 329 (1873); and *see* Hunter *v.* Pittsburgh, 207 U.S. 161 (1907).

[1633] Butler *v.* Pennsylvania, 10 How. 402 (1850); Fisk *v.* Police Jury, 116 U.S. 131 (1885); Dodge *v.* Board of Education, 302 U.S. 74 (1937); Mississippi Use of Robertson *v.* Miller, 276 U.S. 174 (1928).

[1634] Butler *v.* Pennsylvania, 10 How. 420 (1850). *Cf.* Marbury *v.* Madison, 1 Cr. 137 (1803); Hoke *v.* Henderson, 15 N.C., (4 Dev.) 1 (1833). *See also* United States *v.* Fisher, 109 U.S. 143 (1883); United States *v.* Mitchell, 109 U.S. 146 (1883); Crenshaw *v.* United States, 134 U.S. 99 (1890).

[1635] Fisk *v.* Police Jury, 116 U.S. 131 (1885); Mississippi Use of Robertson *v.* Miller, 276 U.S. 174 (1928).

[1636] Hall *v.* Wisconsin, 103 U.S. 5 (1880). *Cf.* Higginbotham *v.* Baton Rouge, 306 U.S. 535 (1939).

[1637] Phelps *v.* Board of Education, 300 U.S. 319 (1937).

[1638] Dodge *v.* Board of Education, 302 U.S. 74 (1937).

[1639] Indiana ex rel. Anderson *v.* Brand 303 U.S. 95 (1938).

[1640] 7 Cr. 164 (1812).

[1641] Delaware Railroad Tax, 18 Wall. 206, 225 (1874); Pacific R. Co. *v.* Maguire, 20 Wall. 36, 43 (1874); Humphrey *v.* Pegues, 16 Wall. 244, 249 (1873); Home of Friendless *v.* Rouse, 8 Wall. 430, 438 (1869).

[1642] 16 How. 369 (1854).

[1643] Ibid. 382-383.

[1644] Salt Co. *v.* East Saginaw, 13 Wall. 373, 379 (1872). *See also* Welch *v.* Cook, 97 U.S. 541 (1879); Grand Lodge, F. & A.M. *v.* New Orleans, 166 U.S. 143 (1897); Wisconsin & M.R. Co. *v.* Powers, 191 U.S. 379 (1903). *Cf.* Ettor *v.* Tacoma, 228 U.S. 148 (1913), in which it was held that the repeal of a statute providing for consequential damages caused by changes of grades of streets could not constitutionally affect an already accrued right to compensation.

[1645] *See* Christ Church *v.* Philadelphia County, 24 How. 300, 302 (1861); Seton Hall College *v.* South Orange, 242 U.S. 100 (1916).

[1646] Compare the above case with Home of Friendless *v.* Rouse, 8 Wall. 430, 437 (1869); *also* Illinois Central R. Co. *v.* Decatur, 147 U.S. 190 (1893) with Wisconsin & M.R. Co. *v.* Powers, 191 U.S. 379 (1903).

[1647] Crane *v.* Hahlo, 258 U.S. 142, 145-146 (1922); Louisiana ex rel. Folsom *v.* New Orleans, 109 U.S. 285, 288 (1883); Morley *v.* Lakeshore & M.S.R. Co., 146 U.S. 162, 169 (1892). That the obligation of contracts clause did not protect vested rights merely as such was stated by the Court as early as Satterlee *v.* Matthewson, 2 Pet. 380, 413 (1829); and again in the Charles River Bridge Co. *v.* Warren Bridge Co., 11 Pet. 420, 539-540 (1837).

[1648] *See* Story's opinion. 4 Wheat. at 712.

[1649] Home of Friendless *v.* Rouse, 8 Wall. 430, 438 (1869); Pennsylvania College Cases, 13 Wall. 190, 213 (1872); Miller *v.* New York, 15 Wall. 478 (1873); Murray *v.* Charleston, 96 U.S. 432 (1878); Greenwood *v.* Union Freight R. Co., 105 U.S. 13 (1882); Chesapeake & O.R. Co. *v.* Miller, 114 U.S. 176 (1885); Louisville Water Co. *v.* Clark, 143 U.S. 1 (1892).

[1650] New Jersey *v.* Yard, 95 U.S. 104, 111 (1877).

[1651] *See* Holyoke Water Power Co. *v.* Lyman, 15 Wall. 500, 520 (1873), following Fisheries *v.* Holyoke Water Power Co., 104 Mass. 446, 451 (1870); *also* Shields *v.* Ohio, 95 U.S. 319 (1877); Fair Haven & W.R. Co. *v.* New Haven, 203 U.S. 379 (1906); Berea College *v.* Kentucky, 211 U.S. 45 (1908). *See also* Lothrop *v.* Stedman, 15 Fed. Cas. No. 8,519 (1875), where the principles of natural justice are thought to set a limit to the power. Earlier is Zabriskie *v.* Hackensack & N.Y.R. Co., 18 N.J. Eq. 178 (1867) where it is said that a new charter may not be substituted; *also* Allen *v.* McKean, 1 Fed. Cas. No. 229 (1833) in which a federal court set aside a Maine statute somewhat like the one involved in the Dartmouth College case, on the ground that it went beyond the power of mere alteration. In this case, however, only the right to alter had been reserved, in the charter itself, and not the right to repeal.

[1652] *See* in this connection the cases cited by Justice Sutherland in his opinion for the Court in Phillips Petroleum Co. *v.* Jenkins, 297 U.S. 629 (1936).

[1653] Curran *v.* Arkansas, 15 How. 304 (1853); Shields *v.* Ohio, 95 U.S. 319 (1877); Greenwood *v.* Union Freight R. Co., 105 U.S. 13 (1882); Adirondack R. Co. *v.* New York, 176 U.S. 335 (1900); Stearns *v.* Minnesota, 179 U.S. 223 (1900); Chicago, M. & St. P.R. Co. *v.* Wisconsin, 238 U.S. 491 (1915); Coombes *v.* Getz, 285 U.S. 434 (1932).

[1654] Pennsylvania College Cases, 13 Wall. 190, 218 (1872). *See also* Calder *v.* Michigan, 218 U.S. 591 (1910).

[1655] Lakeshore & M.S.R. Co. *v.* Smith, 173 U.S. 684, 690 (1899); Coombes *v.* Getz, 285 U.S. 434 (1932). Both these decisions cite Greenwood *v.* Union Freight R. Co., 105 U.S. 13, 17 (1882), but without apparent justification.

[1656] 4 Pet. 514 (1830).

[1657] Thorpe *v.* Rutland & Burlington Railroad Co., 27 Vt. 140 (1854).

[1658] Thus a railroad may be required, at its own expense and irrespective of benefits to itself, to eliminate grade crossings in the interest of public safety, (New York & N.E.R. Co. *v.* Bristol, 151 U.S. 556 (1894)); to make highway crossings reasonably safe and convenient for public use, (Great Northern R. Co. *v.* Minnesota, 246 U.S. 434 (1918)); to repair viaducts, (Northern Pac. R. Co. *v.* Minnesota, 208 U.S. 583 (1908)); and to fence its right of way, (Minneapolis & St. L.R. Co. *v.* Emmons, 149 U.S. 364 (1893)). Though a railroad company owns the right of way along a street, the city may require it to lay tracks to conform to the established grade; to fill in tracks at street intersections; and to remove tracks from a busy street intersection, when the attendant disadvantages and expense are small and the safety of the public appreciably enhanced, (Denver & R.G.R. Co. *v.* Denver, 250 U.S. 241 (1919)).

Likewise the State, in the public interest, may require a railroad to reestablish an abandoned station, even though the railroad commission had previously authorized its abandonment on condition that another station be established elsewhere, a condition which had been complied with, (New Haven & N. Co. *v.* Hamersley, 104 U.S. 1 (1881)). It may impose upon a railroad liability for fire communicated by its locomotives, even though the State had previously authorized the company to use said type of locomotive power, (St. Louis & S.F.R. Co. *v.* Mathews, 165 U.S. 1, 5 (1897)); and it may penalize the failure to cut drains through embankments so as to prevent flooding of adjacent lands, (Chicago & A.R. Co. *v.* Tranbarger, 238 U.S. 67 (1915)).

[1659] Boston Beer Co. *v.* Massachusetts, 97 U.S. 25 (1878). *See also* Fertilizing Co. *v.* Hyde Park, 97 U.S. 659 (1878); and Hammond Packing *v.* Arkansas, 212 U.S. 322, 345 (1909).

[1660] 11 Pet. 420 (1837).

[1661] 11 Pet. at 548-553.

[1662] 201 U.S. 400 (1906).

[1663] Ibid. 471-472, citing The Binghamton Bridge, 3 Wall. 51, 75 (1865).

[1664] Memphis & L.R.R. Co. *v.* Berry, 112 U.S. 609, 617 (1884). *See also* Picard *v.* East Tennessee, Virginia & Georgia R. Co., 130 U.S. 637, 641 (1889); Louisville & N.R. Co. *v.* Palmes, 109 U.S. 244, 251 (1883); Morgan *v.* Louisiana, 93 U.S. 217 (1876); Wilson *v.* Gaines, 103 U.S. 417 (1881); Norfolk & W.R. Co. *v.* Pendleton, 156 U.S. 667, 673 (1895).

[1665] Railroad Co. *v.* Georgia, 98 U.S. 359, 365 (1879).

[1666] Phoenix F. & M. Insurance Co. *v.* Tennessee, 161 U.S. 174 (1896).

[1667] Rochester R. Co. *v.* Rochester, 205 U.S. 236 (1907); followed in Wright *v.* Georgia R. & Bkg. Co., 216 U.S. 420 (1910); and New York Rapid Transit Co. *v.* City of New York, 303 U.S. 573 (1938). *Cf.* Tennessee *v.* Whitworth, 117 U.S. 139 (1886) the authority of which is respected in the preceding case.

[1668] Chicago, B. & K.C.R. Co. *v.* Missouri ex rel. Guffey, 120 U.S. 569 (1887).

[1669] Ford *v.* Delta & Pine Land Co., 164 U.S. 662 (1897).

[1670] Vicksburg, S. & P.R. Co. *v.* Dennis, 116 U.S. 665 (1886).

[1671] Millsaps College *v.* Jackson, 275 U.S. 129 (1927).

[1672] Hale *v.* Iowa State Board of Assessment, 302 U.S. 95 (1937).

[1673] Stone *v.* Farmers' Loan & Trust Co. (Railroad Commission Cases), 116 U.S. 307, 330 (1886) extended in Southern Pacific Co. *v.* Campbell, 230 U.S. 537 (1913) to cases in which the word "reasonable" does not appear to qualify the company's right to prescribe tolls. *See also* American Toll Bridge Co. *v.* Railroad Com. of California et al., 307 U.S. 486 (1939).

[1674] Georgia R. & Power Co. *v.* Decatur, 262 U.S. 432 (1923). *See also* Southern Iowa Electric Co. *v.* Chariton, 255 U.S. 539 (1921).

[1675] Walla Walla *v.* Walla Walla Water Co., 172 U.S. 1, 15 (1898).

[1676] Skaneateles Water Works Co. *v.* Skaneateles, 184 U.S. 354 (1902); Knoxville Water Co. *v.* Knoxville, 200 U.S. 22 (1906); Madera Water Works *v.* Madera, 228 U.S. 454 (1913).

[1677] Rogers Park Water Co. *v.* Fergus, 180 U.S. 624 (1901).

[1678] Home Telephone Co. *v.* Los Angeles, 211 U.S. 265 (1908); Wyandotte Gas Co. *v.* Kansas, 231 U.S. 622 (1914).

[1679] *See also* Puget Sound Traction, Light & P. Co. *v.* Reynolds, 244 U.S. 574

(1917). "Before we can find impairment of a contract we must find an obligation of the contract which has been impaired. Since the contract here relied upon is one between a political subdivision of a state and private individuals, settled principles of construction require that the obligation alleged to have been impaired be clearly and unequivocally expressed." Justice Black for the Court in Keefe *v.* Clark, 322 U.S. 393, 396-397 (1944).

[1680] Corporation of Brick Church *v.* Mayor et al., 5 Cowen (N.Y.) 538, 540 (1826).

[1681] West River Bridge Co. *v.* Dix, 6 How. 507 (1848). *See also* Backus *v.* Lebanon, 11 N.H. 19 (1840); White River Turnpike Co. *v.* Vermont Cent. R. Co., 21 Vt. 590 (1849); and Bonaparte *v.* Camden & A.R. Co., 3 Fed. Cas. No. 1,617 (1830); cited in Calvert I, 960-961.

[1682] Pennsylvania Hospital *v.* Philadelphia, 245 U.S. 20 (1917).

[1683] Illinois Central Railroad *v.* Illinois, 146 U.S. 387, 453, 455 (1892).

[1684] *See* pp. 335-336.

[1685] *See* especially Home of the Friendless *v.* Rouse, 8 Wall. 430 (1869), and Washington University *v.* Rouse, 8 Wall. 439 (1869).

[1686] Georgia Railway Co. *v.* Redwine, 342 U.S. 299, 305-06 (1952). The Court distinguishes In re Ayers, 123 U.S. 443 (1887) on the ground that the action there was barred "as one in substance directed against the State to obtain specific performance of a contract with the State". 342 U.S. 305.

[1687] Stone *v.* Mississippi, 101 U.S. 814, 820 (1880).

[1688] Butcher's Union Co. *v.* Crescent City Co., 111 U.S. 746 (1884).

[1689] New Orleans Gas Co. *v.* Louisiana Light Co., 115 U.S. 630 (1885).

[1690] Atlantic Coast Line R. Co. *v.* Goldsboro, 232 U.S. 548, 558 (1914). *See also* Chicago & A.R. Co. *v.* Tranbarger, 238 U.S. 67 (1915); *also* Pennsylvania Hospital *v.* Philadelphia, 245 U.S. 20 (1917), where the police power and eminent domain are treated on the same basis in respect of inalienability; also Wabash R. Co. *v.* Defiance, 167 U.S. 88, 97 (1897); Home Telephone Co. *v.* Los Angeles, 211 U.S. 265 (1908); and Calvert I, 962.

[1691] Morley *v.* Lake Shore & M.S.R. Co., 146 U.S. 162 (1892); New Orleans *v.* New Orleans Waterworks Co., 142 U.S. 79 (1891); Missouri & A. Lumber & Min. Co. *v.* Greenwood Dist, 249 U.S. 170 (1919). But *cf.* Livingston *v.* Moore, 7 Pet. 469, 549 (1833); and Garrison *v.* New York, 21 Wall. 196, 203 (1875), suggesting that a different view was earlier entertained in the case of judgments in actions of debt.

[1692] Maynard *v.* Hill, 125 U.S. 190 (1888); Dartmouth College *v.* Woodward, 4 Wheat. 518, 629 (1819). *Cf.* Andrews *v.* Andrews, 188 U.S. 14 (1903). The question whether a wife's rights in the community property under the laws of California were of a contractual nature was raised but not determined in Moffitt *v.* Kelly, 218 U.S. 400 (1910).

[1693] New Orleans *v.* New Orleans Waterworks Co., 142 U.S. 79 (1891); Zane *v.* Hamilton County, 189 U.S. 370, 381 (1903).

[1694] 4 Wheat. 122 (1819). For the first such case in a Federal Circuit Court, *see* Charles Warren, The Supreme Court in United States History, I, 67 (Boston, 1922).

[1695] 12 Wheat. 213 (1827).

[1696] Ibid. 353-354.

[1697] Von Hoffman *v.* Quincy, 4 Wall. 535, 552 (1867).

[1698] 1 How. 311 (1843).

[1699] 2 How. 608 (1844).

[1700] Oshkosh Waterworks Co. *v.* Oshkosh, 187 U.S. 437, 439 (1903); New Orleans & L.R. Co. *v.* Louisiana, 157 U.S. 219 (1895).

[1701] Antoni *v.* Greenhow, 107 U.S. 769 (1883).

[1702] The right was unheld in Mason *v.* Haile, 12 Wheat. 370 (1827); and again in Vial *v.* Penniman (Penniman's Case), 103 U.S. 714 (1881). On early English and Colonial law touching the subject, *see* argument of counsel in Sturges *v.* Crowninshield, 4 Wheat. 122, 140-145 (1819).

[1703] McGahey *v.* Virginia, 135 U.S. 662 (1890).

[1704] Louisiana ex rel. Ranger *v.* New Orleans, 102 U.S. 203 (1880).

[1705] Von Hoffman *v.* Quincy, 4 Wall. 535, 554 (1867).

[1706] Antoni *v.* Greenhow, 107 U.S. 769, 775.—Illustrations of changes in remedies, which have been sustained, may be seen in the following cases: Jackson ex dem. Hart *v.* Lamphire, 3 Pet. 280 (1830); Hawkins *v.* Barney, 5 Pet. 457 (1831); Crawford *v.* Branch Bank of Alabama, 7 How. 279 (1849); Curtis *v.* Whitney, 13 Wall. 68 (1872); Cairo & F.R. Co. *v.* Hecht, 95 U.S. 168 (1877); Terry *v.* Anderson, 95 U.S. 628 (1877); Tennessee *v.* Sneed, 96 U.S. 69 (1877); South Carolina *v.* Gaillard, 101 U.S. 433 (1880); Louisiana *v.* New Orleans, 102 U.S. 203 (1880); Connecticut Mut. L. Ins. Co. *v.* Cushman, 108 U.S. 51 (1883); Vance *v.* Vance, 108 U.S. 514 (1883); Gilfillan *v.* Union Canal Co., 109 U.S. 401 (1883); Hill *v.* Merchants' Mut. Ins. Co., 134 U.S. 515 (1890); New Orleans City & Lake R. Co. *v.* Louisiana, 157 U.S. 219 (1895); Red River Valley Nat. Bank *v.* Craig, 181 U.S. 548 (1901); Wilson *v.* Standefer, 184 U.S. 399 (1902); Oshkosh Waterworks Co. *v.* Oshkosh, 187 U.S. 437 (1903); Waggoner *v.* Flack, 188 U.S. 595 (1903); Bernheimer *v.* Converse, 206 U.S. 516 (1907); Henley *v.* Myers, 215 U.S. 373 (1910); Selig *v.* Hamilton, 234 U.S. 652 (1914); Security Sav. Bank *v.* California, 263 U.S. 282 (1923); United States Mortgage Co. *v.* Matthews, 293 U.S. 232 (1934).

Compare the following cases, where changes in remedies were deemed to be of such a character as to interfere with substantial rights: Wilmington & W.R. Co. *v.* King, 91 U.S. 3 (1875); Memphis *v.* United States, 97 U.S. 293 (1878); Poindexter *v.* Greenhow, 114 U.S. 269, 270, 298, 299 (1885); Effinger *v.* Kenney, 115 U.S. 566 (1885); Fisk *v.* Jefferson Police Jury, 116 U.S. 131 (1885); Bradley *v.* Lightcap, 195 U.S. 1 (1904); Bank of Minden *v.* Clement, 256 U.S. 126 (1921).

[1707] Von Hoffman *v.* Quincy, 4 Wall. 535, 554-555 (1867).

[1708] *See also* Louisiana ex rel. Nelson *v.* St. Martin's Parish, 111 U.S. 716 (1884).

[1709] Mobile *v.* Watson, 116 U.S. 289 (1886); Graham *v.* Folsom, 200 U.S. 248 (1906).

[1710] Heine *v.* Levee Commissioners, 19 Wall. 655 (1874). *Cf.* Virginia *v.* West Virginia, 246 U.S. 565 (1918).

[1711] Faitoute Iron & Steel Co. *v.* Asbury Park, 316 U.S. 502, 510 (1942). Alluding to the ineffectiveness of purely judicial remedies against defaulting municipalities, Justice Frankfurter says: "For there is no remedy when resort is had to 'devices and contrivances' to nullify the taxing power which can be carried out only through authorized officials. *See* Rees *v.* City of Watertown, 19 Wall. 107, 124 (1874). And so we have had the spectacle of taxing officials resigning from office in order to frustrate tax levies through mandamus, and officials running on a platform of willingness to go to jail rather than to enforce a tax levy (*see* Raymond, State and Municipal Bonds, 342-343), and evasion of service by tax collectors, thus making impotent a court's mandate. Yost *v.* Dallas County, 236 U.S. 50, 57 (1915)." 316 U.S. at 511.

[1712] Myers *v.* Irwin, 2 Sergeant and Rawle's (Pa.), 367, 371 (1816); *also*, to same effect, Lindenmuller *v.* The People, 33 Barbour (N.Y.), 548 (1861). *See also* Brown *v.* Penobscot Bank, 8 Mass. 445 (1812).

[1713] Manigault *v.* Springs, 199 U.S. 473, 480 (1905).

[1714] Jackson *v.* Lamphire, 3 Pet. 280 (1830). *See also* Phalen *v.* Virginia, 8 How. 163 (1850).

[1715] Stone *v.* Mississippi, 101 U.S. 814 (1880).

[1716] Boston Beer Co. *v.* Massachusetts, 97 U.S. 25 (1878).

[1717] New York C.R. Co. *v.* White, 243 U.S. 188 (1917). In this and the preceding two cases the legislative act involved did not except from its operation existing contracts.

[1718] Manigault *v.* Springs, 199 U.S. 473 (1905).

[1719] Portland Railway, Light & Power Co. *v.* Railroad Comm. of Oregon, 229 U.S. 397 (1913).

[1720] Midland Realty Co. *v.* Kansas City Power & Light Co., 300 U.S. 109 (1937).

[1721] Hudson County Water Co. *v.* McCarter, 209 U.S. 349 (1908).

[1722] Brown (Marcus) Holding Co. *v.* Feldman, 256 U.S. 170, 198 (1921); followed in Levy Leasing Co. *v.* Siegel, 258 U.S. 242 (1922).

[1723] Chastleton Corp. *v.* Sinclair, 264 U.S. 543, 547-548 (1924).

[1724] 290 U.S. 398 (1934).

[1725] Ibid. 442, 444. *See also* Veix *v.* Sixth Ward Building and Loan Assn. of Newark, 310 U.S. 32 (1940) in which was sustained a New Jersey statute, amending, in view of the Depression, the law governing building and loan associations. The authority of the State to safeguard the vital interests of the people, said Justice Reed, "is not limited to health, morals and safety. It extends to economic needs as well." Ibid. 38-39.

[1726] *See* especially Edwards *v.* Kearzey, 96 U.S. 595 (1878); and Barnitz *v.* Beverly, 163 U.S. 118 (1896).

[1727] 290 U.S. 398 (1934). As to conditions surrounding the enactment of moratorium statutes in 1933, *see* New York Times of January 22, 1933, sec. II, pp. 1-2.

[1728] Worthen Co. *v.* Thomas, 292 U.S. 426 (1934); Worthen Co. *v.* Kavanaugh, 295 U.S. 56 (1935).

[1729] 295 U.S. at 62.

[1730] East New York Savings Bank *v.* Hahn, 326 U.S. 230, 235 (1945).

[1731] Honeyman *v.* Jacobs, 306 U.S. 539 (1939). *See also* Gelfert *v.* National City Bank, 313 U.S. 221 (1941).

[1732] 313 U.S. at 233-234.

[1733] One reason for this is indicated in the following passage from Justice Field's opinion for the Court in Paul *v.* Virginia, decided in 1869: "At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them." 8 Wall. 168, 181-182.

[1734] Wright, The Contract Clause, 91-100.

[1735] Perry *v.* United States, 294 U.S. 330 (1935); Louisville Joint Stock Bank *v.* Radford, 295 U.S. 555 (1935). The Court has pointed out, what of course, is evident on a reading of the Constitution, that the contract clause is a limitation on the powers of the States and not of the United States. Central P.R. Co. *v.* Gallatin (Sinking Fund Cases), 99 U.S. 700, 718 (1879). *See also* Mitchell *v.* Clark, 110 U.S. 633, 643 (1884); Legal Tender Cases, 12 Wall. 457, 529 (1871); Continental Ill. Nat. Bank & Trust Co. *v.* Chicago, R.I. & P.R. Co., 294 U.S. 648 (1935); St. Anthony Falls Water Power Co. *v.* Board of Water Commissioners, 168 U.S. 349, 372 (1897); Dubuque, S.C.R. Co. *v.* Richmond, 19 Wall. 584 (1874); New York *v.* United States, 257 U.S. 591 (1922). *Cf.* however, Hepburn *v.* Griswold, 8 Wall. 603, 623 (1870); and Central Pacific R.R. Co. *v.* Gallatin (Sinking Fund Cases), 99 U.S. 700, 737 (1879).

[1736] *See*, e.g., Neblett et al. *v.* Carpenter, et al., 305 U.S. 297 (1938); Asbury Hospital *v.* Cass County, 326 U.S. 207 (1945); Connecticut Mutual L. Ins. Co. *v.* Moore, 333 U.S. 541 (1948). For a notable case in which the obligations clause was mustered into service, by rather heroic logic, to do work that was afterwards put upon the due process clause, *see* State Tax On Foreign-Held Bonds, 15 Wall. 300 (1873).

[1737] Hooven & Allison Co. *v.* Evatt, 324 U.S. 652, 673 (1945).

[1738] Woodruff *v.* Parham, 8 Wall. 123 (1869).

[1739] 12 Wheat. 419 (1827).

[1740] Ibid. 441.

[1741] May & Co. *v.* New Orleans, 178 U.S. 496, 502 (1900).

[1742] Ibid. 501; Gulf Fisheries Co. *v.* MacInerney, 276 U.S. 124 (1928); McGoldrick *v.* Gulf Oil Corp., 309 U.S. 414 (1940).

[1743] Low *v.* Austin, 13 Wall. 29 (1872); May & Co. *v.* New Orleans, 178 U.S. 496 (1900).

[1744] Hooven & Allison Co. *v.* Evatt, 324 U.S. 652, 667 (1945).

[1745] Ibid. 664.

[1746] Canton R. Co. *v.* Rogan, 340 U.S. 511 (1951).

[1747] Brown *v.* Maryland, 12 Wheat. 419, 447 (1827).

[1748] Anglo-Chilean Nitrate Sales Corp. *v.* Alabama, 288 U.S. 218 (1933).

[1749] Low *v.* Austin, 13 Wall. 29, 33 (1872).

[1750] Cook *v.* Pennsylvania, 97 U.S. 566, 573, (1878).

[1751] Crew Levick Co. *v.* Pennsylvania, 245 U.S. 292 (1917).

[1752] Cooley *v.* Board of Port Wardens, 12 How. 299, 313 (1851).

[1753] Waring *v.* Mobile, 8 Wall. 110, 122 (1869). *See also* Pervear *v.* Massachusetts, 5 Wall. 475, 478 (1867); Schollenberger *v.* Pennsylvania, 171 U.S. 1, 24 (1898).

[1754] Gulf Fisheries Co. *v.* MacInerney, 276 U.S. 124 (1928).

[1755] Nathan *v.* Louisiana, 8 How. 73, 81 (1850).

[1756] Mager *v.* Grima, 8 How. 490 (1850).

[1757] Brown *v.* Maryland, 12 Wheat. 419, 441 (1827); Hooven & Allison Co. *v.* Evatt, 324 U.S. 652 (1945).

[1758] New York ex rel. Burke *v.* Wells, 208 U.S. 14 (1908).

[1759] Selliger *v.* Kentucky, 213 U.S. 200 (1909); *cf.* Almy *v.* California, 24 How. 169, 174 (1861).

[1760] Bowman *v.* Chicago & N.W.R. Co., 125 U.S. 465, 488 (1888).

[1761] 107 U.S. 38 (1883).

[1762] Ibid. 55.

[1763] Patapsco Guano Co. *v.* North Carolina Bd. of Agriculture, 171 U.S. 345, 301 (1898). For a discussion of the limitations on State power to pass inspection laws resulting from the commerce clause, *see* pp. 183, 237.

[1764] Bowman *v.* Chicago & N.W.R. Co., 125 U.S. 465, 488-489 (1888).

[1765] Clyde Mallory Lines *v.* Alabama ex rel. State Docks Commission, 296 U.S. 261, 265 (1935); Cannon *v.* New Orleans, 20 Wall. 577, 581 (1874); Wheeling, P. & C. Transportation Co. *v.* Wheeling, 99 U.S. 273, 283 (1879).

[1766] Keokuk Northern Line Packet Co. *v.* Keokuk, 95 U.S. 80 (1877); Parkersburg & Ohio River Transportation Co. *v.* Parkersburg, 107 U.S. 691 (1883); Ouachita Packet Co. *v.* Aiken, 121 U.S. 444 (1887).

[1767] Cooley *v.* Board of Port Wardens, 12 How. 299, 314 (1851); Ex parte McNiel, 13 Wall. 236 (1872); Inman Steamship Co. *v.* Tinker, 94 U.S. 238, 243 (1877); Northwestern Union Packet Co. *v.* St. Louis, 100 U.S. 423 (1880); Vicksburg *v.* Tobin, 100 U.S. 430 (1880); Cincinnati, P.B.S. & P. Packet Co. *v.* Catlettsburg, 105 U.S. 559 (1882).

[1768] Huse *v.* Glover, 119 U.S. 543, 549 (1886).

[1769] Southern S.S. Co. *v.* Portwardens, 6 Wall. 31 (1867).

[1770] Peete *v.* Morgan, 19 Wall. 581 (1874).

[1771] Morgan's L. & T.R. & S.S. Co. *v.* Board of Health, 118 U.S. 455, 462 (1886).

[1772] Wiggins Ferry Co. *v.* East St. Louis, 107 U.S. 365 (1883). *See also* Gloucester Ferry Co. *v.* Pennsylvania, 114 U.S. 196, 212 (1885); Philadelphia & S. Mail Steamship Co. *v.* Pennsylvania, 122 U.S. 326, 338 (1887); Osborne *v.* Mobile, 16 Wall. 479, 481 (1873).

[1773] Cox *v.* Lott (State Tonnage Tax Cases), 12 Wall. 204, 217 (1871).

[1774] Luther *v.* Borden, 7 How. 1, 45 (1849).

[1775] Presser *v.* Illinois, 116 U.S. 252 (1886).

[1776] Poole *v.* Fleeger, 11 Pet 185, 209 (1837).

[1777] Hinderlider *v.* La Plata Co., 304 U.S. 92, 104 (1938).

[1778] Frankfurter and Landis, The Compact Clause of the Constitution—A Study in Interstate Adjustments, 34 Yale Law Journal, 685, 691 (1925).

[1779] Article IX.

[1780] Article VI.

[1781] 14 Pet. 540 (1840).

[1782] Ibid. 570, 571, 572.

[1783] 148 U.S. 503, 518 (1893). *See also* Stearns *v.* Minnesota, 179 U.S. 223, 244

(1900); *also* reference in next note, at pp. 761-762.

[1784] *See* Leslie W. Dunbar, Interstate Compacts and Congressional Consent, 36 Virginia Law Review, 753 (October, 1950).

[1785] Frankfurter and Landis, The Compact Clause of the Constitution—A Study in Interstate Adjustments, 34 Yale Law Journal, 685, 735 (1925); Frederick L. Zimmerman and Mitchell Wendell, Interstate Compacts Since 1925 (1951), 8 Book of States, 26 (1950-1951).

[1786] 48 Stat. 909 (1934).

[1787] 8 Book of the States, 45 (1950-1951).

[1788] 7 U.S.C. § 515; 15 U.S.C. § 717j; 16 U.S.C. §§ 552, 667a; 33 U.S.C. §§ 11, 567-567b.

[1789] Green *v.* Biddle, 8 Wheat. 1, 85 (1823).

[1790] Virginia *v.* Tennessee, 148 U.S. 503 (1893).

[1791] Virginia *v.* West Virginia, 11 Wall. 39 (1871).

[1792] Wharton *v.* Wise, 153 U.S. 155, 173 (1894).

[1793] James *v.* Dravo Contracting Co., 302 U.S. 134 (1937). *See also* Arizona *v.* California, 292 U.S. 341, 315 (1934).

[1794] 332 U.S. 631 (1948).

[1795] On the activities of the Board, in which representatives of both races participate and from which both races have benefited, *see* Remarks of Hon. Spessard L. Holland of Florida. Cong. Rec., 81st Cong., 2d sess., v. 96, p. 465-470.

[1796] Pennsylvania *v.* Wheeling & Belmont Bridge Co., 18 How. 421, 433 (1856).

[1797] St. Louis & S.F.R. Co. *v.* James, 161 U.S. 545, 562 (1896).

[1798] Poole *v.* Fleeger, 11 Pet. 185, 209 (1837); Rhode Island *v.* Massachusetts, 12 Pet. 657, 725 (1838).

[1799] Hinderlider *v.* La Plata Co., 304 U.S. 92, 104, 106 (1938).

[1800] Green *v.* Biddle, 8 Wheat. 1, 13 (1823); Virginia *v.* West Virginia, 246 U.S. 565 (1918). *See also* Pennsylvania *v.* Wheeling & Belmont Bridge Co., 13 How. 518, 566 (1852); Olin *v.* Kitzmiller, 259 U.S. 260 (1922).

[1801] Virginia *v.* West Virginia, 246 U.S. 565, 601 (1918).

[1802] Dyer *v.* Sims, 341 U.S. 22 (1951). The case stemmed from mandamus proceedings brought to compel the auditor of West Virginia to pay out money to a commission which had been created by a compact between West Virginia and other States to control pollution of the Ohio River. The decision of the Supreme Court of Appeals of West Virginia denying mandamus was reversed by the Supreme Court, and the case remanded. The opinion of the Court, by Justice Frankfurter, reviews and revises the West Virginia Court's interpretation of the State constitution, thereby opening up, temporarily at least, a new field of power for judicial review. Justice Reed, challenging this extension of judicial review, thought the issue determined by the Supremacy Clause. Justice Jackson urged that the compact power was "inherent in sovereignty" and hence was limited only by the requirement of congressional consent. Justice Black concurred in the result without opinion.

ARTICLE II

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EXECUTIVE DEPARTMENT

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EXECUTIVE DEPARTMENT

[Pg 377]

ARTICLE II

SECTION 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:

The Nature and Scope of Presidential Power

CONTEMPORARY SOURCE OF THE PRESIDENCY

The immediate source of article II was the New York constitution of 1777,[1] of which the relevant provisions are the following: "Art. XVIII. * * * The governor * * * shall by virtue of his office, be general and commander in chief of all the militia, and admiral of the navy of this state; * * * he shall have power to convene the assembly and senate on extraordinary occasions; to prorogue them from time to time, provided such prorogations shall not exceed sixty days in the space of any one year; and, at his discretion, to grant reprieves and pardons to persons convicted of crimes, other than treason and murder, in which he may suspend the execution of the sentence, until it shall be reported to the legislature at their subsequent meeting; and they shall either pardon or direct the execution of the criminal, or grant a further reprieve.

"Art. XIX. * * * It shall be the duty of the governor to inform the legislature at every session of the condition of the State so far as may concern his department; to recommend such matters to their consideration as shall appear to him to concern its good government, welfare, and prosperity; to correspond with the Continental Congress and other States; to transact all necessary business with the officers of government, civil and military; to take care that the laws are executed to the best of his ability; and to expedite all such measures as may be resolved upon by the legislature.

"To these, of course, are to be added the important powers of qualified appointment and qualified veto. It is to be observed also that there is no question of the interposition of the law of the land to regulate these powers. They are the governor's, by direct grant of the people, and his alone. Another distinguishing characteristic, equally important, is the fact that the governor was to be chosen by a constitutionally defined electorate, not by the legislature. He was also to have a [Pg 378] three-year term, and there were to be no limitations on his re-eligibility to office. In short, all the isolated principles of executive strength in other constitutions were here brought into a new whole. Alone they were of slight importance; gathered together they gain new meaning. And, in addition, we have new elements of strength utilized for the first time on the American continent." [2] The appellation "President" appears to have been suggested to the Federal Convention by Charles Pinckney,[3] to whom it may have been suggested by the title at that date of the chief magistrate of Delaware.

THE PRESIDENCY IN THE FEDERAL CONVENTION

The relevant clause in the Report from the Committee of Detail of August 6, 1787 to the Federal Convention read as follows: "The Executive Power of the United States shall be vested in a single person. His stile shall be 'The President of the United States of America'; and his title shall be 'His Excellency.'"[4] This language recorded the decision of the Convention, sitting in committee of the whole, that the national executive power should be vested in a single person, not a body. For the rest, it is a simple designation of office. The final form of the clause came from the Committee of Style,[5] and was never separately acted on by the Convention.

"EXECUTIVE POWER"; HAMILTON'S CONTRIBUTION

Is this term a summary description merely of the powers which are granted in more specific terms in succeeding provisions of article II, or is it also a grant of powers; and if the latter, what powers specifically does it comprise? In the debate on the location of the removal power in the House of Representatives in 1789[6] Madison and others urged that this was "in its nature" an "executive power";[7] and their view prevailed so far as executive officers appointed without stated term by the President, with the advice and consent of the Senate, were concerned. Four years later Hamilton, in defending President Washington's course in issuing a Proclamation of Impartiality upon the outbreak of war between France and Great Britain, developed the following argument: "The second article of the Constitution of the United States, section first, establishes this general proposition, that 'the Executive Power shall be vested in a President of the United States of America.' The same article, in a succeeding section, proceeds to delineate particular cases of executive power. It declares, among other things, that the president shall be commander [Pg 379] 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; that he shall have power, by and with the advice and consent of the senate, to make treaties; that it shall be his duty to receive ambassadors and other public ministers, *and to take care that the laws be faithfully executed.* It would not consist with the rules of sound construction, to consider this enumeration of particular authorities as derogating from the more comprehensive grant in the general clause, further than

as it may be coupled with express restrictions or limitations; as in regard to the co-operation of the senate in the appointment of officers, and the making of treaties; which are plainly qualifications of the general executive powers of appointing officers and making treaties. The difficulty of a complete enumeration of all the cases of executive authority, would naturally dictate the use of general terms, and would render it improbable that a specification of certain particulars was designed as a substitute for those terms, when antecedently used. The different mode of expression employed in the constitution, in regard to the two powers, the legislative and the executive, serves to confirm this inference. In the article which gives the legislative powers of the government, the expressions are, 'All legislative powers herein granted shall be vested in a congress of the United States.' In that which grants the executive power, the expressions are, 'The *executive power* shall be vested in a President of the United States.' The enumeration ought therefore to be considered, as intended merely to specify the principal articles implied in the definition of executive power; leaving the rest to flow from the general grant of that power, interpreted in conformity with other parts of the Constitution, and with the principles of free government. The general doctrine of our Constitution then is, that the *executive power* of the nation is vested in the President; subject only to the *exceptions* and *qualifications*, which are expressed in the instrument."[8]

THE MYERS CASE

These enlarged conceptions of the executive power clause have been ratified by the Supreme Court within recent times. In the Myers case,[9] decided in 1926, not only was Madison's contention as to the location of the removal power adopted, and indeed extended, but Hamilton's [Pg 380] general theory as to the proper mode of construing the clause was unqualifiedly endorsed. Said Chief Justice Taft, speaking for the Court: "The executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed, * * *"[10]

THE CURTISS-WRIGHT CASE

Ten years later Justice Sutherland, speaking for the Court in United States *v.* Curtiss-Wright Corporation,[11] joined Hamilton's conception of the President's role in the foreign relations field to the conception that in this field the National Government is not one of enumerated but of inherent powers;[12] and the practical conclusion he drew was that the constitutional objection to delegation of legislative power does not apply to a delegation by Congress to the President of its "cognate" powers in this field; that, in short, the merged powers of the two departments may be put at the President's disposal whenever Congress so desires.[13]

Nor is it alone in the field of foreign relations that the opening clause of article II has promoted latitudinarian conceptions of Presidential power. Especially has his role as "Commander in Chief in wartime" drawn nourishment from the same source, in recent years. The matter is treated in later pages.[14]

THEORY OF THE PRESIDENTIAL OFFICE

The looseness of the grants of power to the President has been more than once the subject of animadversion.[15] This and the unity of the office furnished a text for opponents of the Constitution while its ratification was pending. "Here," according to Hamilton, writing in The Federalist, "the writers against the Constitution, seem to have taken pains to signalize their talent of misrepresentation."[16] Once the Constitution was adopted, however, the tables were turned, and some members of the first Congress, including certain former members of the Federal Convention, sought to elaborate the monarchical aspects of the office. They would fain give him a title, *His Excellency* (already applied in several States to the governors thereof), [Pg 381] *Highness*, *Elective Majesty*, being suggestions. Ellsworth of Connecticut wished to see his *name or place* inserted in the enacting clause of statutes. They contrived to make a ceremony of the President's appearances before Congress, his annual address to which, given in person, was answered by a reply equally formal.[17] They sought to enact that "all writs and processes, issuing out of the Supreme or circuit courts shall be in the name of the President of the United States." Although the attempt failed, owing to opposition in the House, the idea was adopted by the Supreme Court itself in its first term, that of February 1790, when it "*ordered*, That (unless, and until, it shall be otherwise provided by law) all process of this court shall be in the name of 'the President of the United States,'"[18] and it has never been otherwise provided by law. Meantime, on October 3, 1789, President Washington had, at the request of a joint committee of "both Houses of Congress," issued the first Thanksgiving Proclamation.[19]

The "revolution of 1800" was, in the opinion of its principal author, a revolution against monarchical tendencies, and making a virtue of the fact that he was a bad public speaker, Jefferson, in a symbolic gesture, substituted the written message for the presidential address. But the claims of the presidential office to power Jefferson in no wise abated,[20] although Marshall had predicted that he would;[21] to the contrary he in some respects enlarged upon them. After his day, however, the office passed into temporary eclipse behind its own creature, the Cabinet, [22] an ignominy from which Andrew Jackson rescued it. As "the People's Choice," as all by

himself "one of the three *equal* departments of government,"[23] as the leader of his party, as the embodiment of the unity of the country,[24] Jackson stamped upon the Presidency the outstanding features of its final character, thereby reviving, in the opinion of Henry Jones Ford, "the oldest political institution of the race, the elective Kingship."[25] The modern theory of Presidential power was the contribution primarily of Alexander Hamilton; the modern conception of the Presidential office was the contribution primarily of Andrew Jackson and his times.

"THE TERM OF FOUR YEARS"

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Formerly the term of four years during which the President "shall hold office" was reckoned from March 4 of the alternate odd years beginning with 1789. This came about from the circumstance that under the act of September 13, 1788, of "the Old Congress," the first Wednesday in March, which was March 4, 1789, was fixed as the time for commencing proceedings under the said Constitution. Although as a matter of fact Washington was not inaugurated until April 30 of that year, by an act approved March 1, 1792, it was provided that the presidential term should be reckoned from the fourth day of March next succeeding the date of election. And so things stood until the adoption of the Twentieth Amendment by which the terms of the President and Vice President end at noon on the 20th of January.[26]

THE ANTI-THIRD TERM TRADITION

The prevailing sentiment of the Philadelphia Convention favored the indefinite eligibility of the President. It was Jefferson who raised the objection that indefinite eligibility would in fact be for life and degenerate into an inheritance. Prior to 1940 the idea that no President should hold for more than two terms was generally thought to be a fixed tradition, although some quibbles had been raised as to the meaning of the word "term". President Franklin D. Roosevelt's violation of the tradition led to the proposal by Congress on March 24, 1947, of an amendment to the Constitution to rescue the tradition by embodying it in the Constitutional Document. The proposal became a part of the Constitution on February 27, 1951, in consequence of its adoption by the necessary thirty-sixth State, which was Minnesota. *See* pp. 54, 1236.[Transcriber's Note: Page 1236 is blank.][27]

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Clause 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.

Clause 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 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.

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Clause 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.

Clause 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.

Clause 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.

Clause 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.

Clause 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."

Maintenance of the Office of President

"THE ELECTORAL COLLEGE"

The word "appoint" is used in clause 2 "as conveying the broadest power of determination."[28] This power has been used. "Therefore, on reference to contemporaneous and subsequent action under the clause, we should expect to find, as we do, that various modes of choosing the electors [Pg 385] were pursued, as, by the legislature itself on joint ballot; by the legislature through a concurrent vote of the two houses; by vote of the people for a general ticket; by vote of the people in districts; by choice partly by the people voting in districts and partly by legislature; by choice by the legislature from candidates voted for by the people in districts; and in other ways, as, notably, by North Carolina in 1792, and Tennessee in 1796 and 1800. No question was raised as to the power of the State to appoint, in any mode its legislature saw fit to adopt, and none that a single method, applicable without exception, must be pursued in the absence of an amendment to the Constitution. The district system was largely considered the most equitable, and Madison wrote that it was that system which was contemplated by the framers of the Constitution, although it was soon seen that its adoption by some States might place them at a disadvantage by a division of their strength, and that a uniform rule was preferable."[29] In the Federal Convention James Wilson had proposed that the Electors be "taken by lot from the national Legislature," but the suggestion failed to come to a vote.[30]

CONSTITUTIONAL STATUS OF ELECTORS

Dealing with the question of the constitutional status of the Electors, the Court said in 1890: "The sole function of the presidential electors is to cast, certify and transmit the vote of the State for President and Vice President of the nation. Although the electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are the members of the State legislatures when acting as electors of federal senators, or the people of the States when acting as electors of representatives in Congress. * * * In accord with the provisions of the Constitution, Congress has determined the time as of which the number of electors shall be ascertained, and the days on which they shall be appointed and shall meet and vote in the States, and on which their votes shall be counted in Congress; has provided for the filling by each State, in such manner as its legislature may prescribe, of vacancies in its college of electors; and has regulated the manner of certifying and transmitting their votes to the seat of the national government, and the course of proceeding in their opening and counting them."[31] The truth of the matter is that the Electors are not "officers" at all, by the usual tests of office.[32] They have neither tenure nor salary, and having performed their single function they cease to exist as Electors. This function is, moreover, "a federal function,"[33] their capacity to perform which results from no power which was originally resident in the States, but springs directly from the Constitution of the United States.[34] In the face, therefore, of the [Pg 386] proposition that Electors are State officers, the Court has upheld the power of Congress to protect the right of all citizens who are entitled to vote to lend aid and support in any legal manner to the election of any legally qualified person as a Presidential Elector;[35] and more recently its power to protect the choice of Electors from fraud or corruption.[36] "'If this government,' said the Court, 'is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption. If it has not this power it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption.'"[37] The conception of Electors as State officers is still, nevertheless, of some importance, as was shown in the recent case of Ray *v.* Blair, [38] which is dealt with in connection with Amendment XII.[39]

"NATURAL-BORN" CITIZEN

Clause 3 of this section, while requiring that the Electors each vote for two persons, did not require them to distinguish their choices for President and Vice President, the assumption being that the Vice President would be the runner-up of the successful candidate for President. As a result of this arrangement the election of 1800 produced a dangerous tie between Jefferson and Burr, the candidates of the Republican-Democrat Party for President and Vice President respectively. Amendment XII, which was adopted in 1803 and replaces clause 3, makes a recurrence of the 1800 contretemps impossible. *See* pp. 941-942. Clause 4 testifies still further to the national character of Presidential Electors. Clause 5 is today chiefly of historical interest, all [Pg 387] Presidents since, and including Martin Van Buren, except his immediate successor, William Henry Harrison, having been born in the United States subsequently to the Declaration of Independence. The question, however, has been frequently mooted, whether a child born abroad of American parents is "a natural-born citizen" in the sense of this clause. The answer depends upon whether the definition of "citizens of the United States" in section I of Amendment XIV is to be given an exclusive or inclusive interpretation. *See* pp. 963-964.

PRESIDENTIAL SUCCESSION

Was it the thought of the Constitution that a Vice President, in succeeding to "the powers and duties" of the office of President, should succeed also to the title? In answering this question in the affirmative in 1841, John Tyler established a precedent which has been followed ever since; but inasmuch as all successions have taken place in consequence of the death in office of a President, the precedent would not necessarily hold in the case of a succession on account of the temporary inability of the incumbent President. Nor has any procedure been established for determining the question of inability, with the result that in the two instances of disability which have occurred, those of Presidents Garfield and Wilson, the former continued in office until his death and the other, after his partial recovery, till the end of his term.

The Act of 1792

In pursuance of its power to provide for the disappearance, whether permanently or temporarily, from the scene of both President and Vice President, Congress has passed three Presidential Succession Acts. A law enacted March 1, 1792[40] provided for the succession first of the President *pro tempore* of the Senate and then of the Speaker; but in the event that both of these offices were vacant, then the Secretary of State was to inform the executive of each State of the fact and at the same time give public notice that Electors will be appointed in each State to elect a President and Vice President, unless the regular time of such election was so near at hand as to render the step unnecessary. It is unlikely that Congress ever passed a more ill-considered law. As Madison pointed out at the time, it violated the principle of the Separation of Powers and flouted the probability that neither the President *pro tempore* nor the Speaker is an "officer" in the sense of this paragraph of the Constitution. It thus contemplated the possibility of there being nobody to exercise the powers of the President for an indefinite period, and at the same time set at naught, by the provision made for an interim presidential election, the synchrony evidently contemplated by the Constitution in the choice of a President with a new House of Representatives and a new one-third of the Senate. Yet this inadequate enactment remained on the statute book for nearly one hundred years, becoming all the time more and more unworkable [Pg 388] from obsolescence. One provision of it, moreover, still survives, that which ordains that the only evidence of refusal to accept, or of resignation from the office of President or Vice President, shall be an instrument in writing declaring the same and subscribed by the person refusing to accept, or resigning, as the case may be, and delivered into the office of the Secretary of State. [41]

The Acts of 1886 and 1947

By the Presidential Succession Act of January 19, 1886,[42] recently repealed, Congress provided that, in case of the disqualification of both President and Vice President, the Secretary of State should act as President provided he possessed the qualifications laid down in clause 5, above; if not, then the Secretary of the Treasury, etc. The act apparently assumed that while a member of the Cabinet acted as President he would retain his Cabinet post. The Succession Act now in force was urged by President Truman, who argued that it was "undemocratic" for a Vice President who had succeeded to the Presidency to be able to appoint his own successor. By the act of July 18, 1947[43] the Speaker of the House and the President *pro tempore* of the Senate are put ahead of the members of the Cabinet in the order of succession, but when either succeeds he must resign both his post and his seat in Congress; and a member of the Cabinet must in the like situation resign his Cabinet post. The new act also implements Amendment XX by providing for vacancies due to failure to qualify of both a newly elected President and Vice President.

COMPENSATION AND EMOLUMENTS

Clause 7 may be advantageously considered in the light of what has been determined as to the application of the parallel provision regarding judicial salaries. *See* pp. 530-531.[44]

OATH OF OFFICE

What is the time relationship between a President's assumption of office and his taking the oath?

Apparently the former comes first. This answer seems to be required by the language of the clause itself, and is further supported by the fact that, while the act of March 1, 1792 assumes that Washington became President March 4, 1789, he did not take the oath till April 30th. Also, in the parallel case of the coronation oath of the British Monarch, its taking has been at times postponed for years after the heir's succession. [Pg 389]

Effect of the Oath

Does the oath add anything to the President's powers? Again to judge from its English-British antecedent, its informing purpose is to restrain rather than to aggrandize power. Jackson, it is true, appealed to the oath in his Bank Veto Message of July 10, 1832; and Lincoln did so in his Message of July 4, 1861; as did Johnson's counsel in his impeachment trial; but in each of these instances the Presidential exercise of power involved rested primarily on other grounds.

> SECTION 2. Clause 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 relating 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.

The Commander in Chiefship

HISTORICAL

The purely military aspects of the Commander in Chiefship were those which were originally stressed. Hamilton said the office "would amount to nothing more than the supreme command and direction of the Military and naval forces, as first general and admiral of the confederacy." [45] Story wrote in his Commentaries: "The propriety of admitting the president to be commander in chief, so far as to give orders, and have a general superintendency, was admitted. But it was urged, that it would be dangerous to let him command in person, without any restraint, as he might make a bad use of it. The consent of both houses of Congress ought, therefore, to be required, before he should take the actual command. The answer then given was, that though the president might, there was no necessity that he should, take the command in person; and there was no probability that he would do so, except in extraordinary emergencies, and when he was possessed of superior military talents."[46] In 1850 Chief Justice Taney, for the Court, said: "His [the President's] duty and his power are purely military. As commander in chief, he is authorized [Pg 390] to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power. * * * But in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belong to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers of the executive arm of the government are brought into question."[47] Even after the Civil War a powerful minority of the Court described the role of President as Commander in Chief simply as "the command of the forces and the conduct of campaigns."[48]

THE PRIZE CASES

The basis for a broader conception was laid in certain early acts of Congress authorizing the President to employ military force in the execution of the laws.[49] In his famous message to Congress of July 4, 1861,[50] Lincoln advanced the claim that the "war power" was his for the purpose of suppressing rebellion; and in the Prize Cases[51] of 1863, a sharply divided Court sustained this theory. The immediate issue of the case was the validity of the blockade which the President, following the attack on Fort Sumter, had proclaimed of the Southern ports.[52] The argument was advanced that a blockade to be valid must be an incident of a "public war" validly declared, and that only Congress could, by virtue of its power "to declare war," constitutionally impart to a military situation this character and scope. Speaking for the majority of the Court, Justice Grier answered: "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*.' Lord Stowell (1 Dodson, 247) observes, 'It is not the less a war on *that account*, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only is not a mere challenge to [Pg 391] be accepted or refused at pleasure by the other.' The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the act of Congress of May 13, 1846, which recognized '*a*

state of war as existing by the act of the Republic of Mexico.' This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the Act of the President in accepting the challenge without a previous formal declaration of war by Congress. This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of *war*. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact. * * * 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 entrusted. '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."[53]

IMPACT OF THE PRIZE CASES ON WORLD WARS I AND II

In brief, the powers claimable for the President under the Commander in Chief clause at a time of wide-spread insurrection were equated with his powers under the clause at a time when the United States is engaged in a formally declared foreign war; and—impliedly—vice versa. And since Lincoln performed various acts especially in the early months of the Civil War which, like increasing the Army and Navy, admittedly fell within the constitutional province of Congress, it seems to have been assumed during World War I and World War II that the Commander in Chiefship carries with it the power to exercise like powers practically at discretion; and not merely in wartime but even at a time when war becomes a strong possibility. Nor was any attention given the fact that Lincoln had asked Congress to ratify and confirm his acts, which Congress promptly did,[54] with the exception of his suspension of the *habeas corpus* privilege [Pg 392] which was regarded by many as attributable to the President in the situation then existing, by virtue of his duty to take care that the laws be faithfully executed.[55] Nor is this the only respect in which war or the approach of war operates to enlarge the scope of power which is claimable by the President as Commander in Chief in wartime.[56] For at such time the maxim that Congress may not delegate its powers is, by the doctrine of the Curtiss-Wright case,[57] in a state of suspended animation.[58]

PRESIDENTIAL THEORY OF THE COMMANDER IN CHIEFSHIP IN WORLD WAR II

In his message of September 7, 1942 to Congress, in which he demanded that Congress forthwith repeal certain provisions of the Emergency Price Control Act of the previous January 30th,[59] the late President Roosevelt formulated his conception of his powers as "Commander in Chief in wartime" as follows:

"I ask the Congress to take this action by the first of October. Inaction on your part by that date will leave me with an inescapable responsibility to the people of this country to see to it that the war effort is no longer imperiled by threat of economic chaos.

"In the event that the Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act.

"At the same time that farm prices are stabilized, wages can and will be stabilized also. This I will do.

"The President has the powers, under the Constitution and under Congressional acts, to take measures necessary to avert a disaster which would interfere with the winning of the war.

"I have given the most thoughtful consideration to meeting this issue without further reference to the Congress. I have determined, however, on this vital matter to consult with the Congress. * * *

"The American people can be sure that I will use my powers with a full sense of my responsibility to the Constitution and to my country. The American people can also be sure that I shall not hesitate to use every power vested in me to accomplish the defeat of our enemies in any part of the world where our own safety demands such defeat.

"When the war is won, the powers under which I act automatically revert to the people—to whom [Pg 393] they belong."[60]

PRESIDENTIAL WAR AGENCIES

While congressional compliance with the President's demand rendered unnecessary an effort on his part to amend the Price Control Act, there were other matters as to which he repeatedly took action within the normal field of congressional powers, not only during the war, but in some instances prior to it. Thus in exercising both the powers which he claimed as Commander in Chief and those which Congress conferred upon him to meet the emergency, Mr. Roosevelt employed new emergency agencies, created by himself and responsible directly to him, rather than the established departments or existing independent regulatory agencies. Oldest of all these

Presidential agencies was the Office for Emergency Management (OEM), which was created by an executive order dated May 25, 1940. Others were the Board of Economic Warfare (BEW), the National Housing Agency (NHA), the National War Labor Board (NWLB), or more shortly (WLB), the Office of Censorship (OC), the Office of Civilian Defense (OCD), the Office of Defense Transportation (ODT), the Office of Facts and Figures (OFF), presently absorbed into the Office of War Information (OWI), the War Production Board (WPB), which superseded the earlier Office of Production Management (OPM), the War Manpower Commission (WMC), etc. Earlier there had been the Office of Price Administration and Civilian Supply (OPACS), but was replaced under the Emergency Price Control Act of January 30, 1942, by OPA. Later OWI was created by executive order, as was also the Office of Economic Stabilization (OES). The Office of War Mobilization and Reconversion (OWMR), one of the last of the war agencies to appear, was established by the War Mobilization and Reconversion Act of October 3, 1944.[61]

CONSTITUTIONAL STATUS OF PRESIDENTIAL AGENCIES

[Pg 394]

The question of the legal status of the presidential agencies was dealt with judicially but once. This was in the decision, in June 1944, of the United States Court of Appeals of the District of Columbia in a case styled Employers Group of Motor Freight Carriers *v.* National War Labor Board,[62] which was a suit to annul and enjoin a "directive order" of the War Labor Board. The Court refused the injunction on the ground that at the time when the directive was issued any action of the Board was "informatory," "at most advisory." In support of this view the Court quoted approvingly a statement by the chairman of the Board itself: "These orders are in reality mere declarations of the equities of each industrial dispute, as determined by a tripartite body in which industry, labor, and the public share equal responsibility; and the appeal of the Board is to the moral obligation of employers and workers to abide by the nonstrike, no-lock-out agreement and * * * to carry out the directives of the tribunal created under that agreement by the Commander in Chief." Nor, the Court continued, had the later War Labor Disputes Act vested War Labor Board's orders with any greater authority, with the result that they were still judicially unenforceable and unreviewable. Following this theory, War Labor Board was not an office wielding power, but a purely advisory body, such as Presidents have frequently created in the past without the aid or consent of Congress. Congress itself, nevertheless, both in its appropriation acts and in other legislation, treated the Presidential agencies as in all respects offices.[63]

THE WEST COAST JAPANESE

On February 19, 1942 the President issued an executive order the essential paragraphs of which read as follows:

"Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities * * *

"Now, THEREFORE, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is [Pg 395] hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. * * *

"I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities and services."[64] In pursuance of this order more than 112,000 Japanese residents of Western States, of whom nearly two out of every three were natural-born citizens of the United States, were eventually removed from their farms and homes and herded, first in temporary camps, later in ten so-called "relocation centers," situated in the desert country of California, Arizona, Idaho, Utah, Colorado, and Wyoming and in the delta areas of Arkansas.

The Act of March 21, 1942

It was apparently the original intention of the Administration to rest its measures concerning this matter on the general principle of military necessity and the power of the Commander in Chief in wartime. But before any action of importance was taken under Executive Order 9066, Congress ratified and adopted it by the act of March 21, 1942,[65] by which it was made a misdemeanor to knowingly enter, remain in, or leave prescribed military areas contrary to the orders of the Secretary of War or of the commanding officer of the area. The cases which subsequently arose in consequence of the order were decided under the order plus the act. The question at issue,

said Chief Justice Stone for the Court, "is not one of Congressional power to delegate to the President the promulgation of the Executive Order, but whether, acting in cooperation, Congress and the Executive have constitutional * * * [power] to impose the curfew restriction here complained of."[66] This question was answered in the affirmative, as was the similar question later raised by an exclusion order.[67]

PRESIDENTIAL GOVERNMENT OF LABOR RELATIONS

The most important segment of the home front regulated by what were in effect Presidential edicts was the field of labor relations. Exactly six months before Pearl Harbor, on June 7, 1941, Mr. Roosevelt, citing his proclamation thirteen days earlier of an unlimited national emergency, [Pg 396] issued an Executive Order seizing the North American Aviation Plant at Inglewood, California, where, on account of a strike, production was at a standstill. Attorney General Jackson justified the seizure as growing out of the "'duty constitutionally and inherently rested upon the President to exert his civil and military as well as his moral authority to keep the defense efforts of the United States a going concern,'" as well as "to obtain supplies for which Congress has appropriated the money, and which it has directed the President to obtain."[68] Other seizures followed, and on January 12, 1942, Mr. Roosevelt, by Executive Order 9017, created the National War Labor Board. "Whereas," the order read in part, "by reason of the state of war declared to exist by joint resolutions of Congress, * * *, the national interest demands that there shall be no interruption of any work which contributes to the effective prosecution of the war; and Whereas as a result of a conference of representatives of labor and industry which met at the call of the President on December 17, 1941, it has been agreed that for the duration of the war there shall be no strikes or lockouts, and that all labor disputes shall be settled by peaceful means, and that a National War Labor Board be established for a peaceful adjustment of such disputes. Now, therefore, by virtue of the authority vested in me by the Constitution and the statutes of the United States, it is hereby ordered: 1. There is hereby created in the Office for Emergency Management a National War Labor Board, * * *"[69] In this field, too, Congress intervened by means of the War Labor Disputes Act of June 25, 1943,[70] which however still left ample basis for Presidential activity of a legislative character.[71]

"SANCTIONS" [Pg 397]

To implement his directives as Commander in Chief in wartime, and especially those which he issued in governing labor relations, Mr. Roosevelt often resorted to "sanctions," which may be described as penalties lacking statutory authorization. Ultimately, the President sought, by Executive Order 9370 of August 16, 1943, to put sanctions in this field on a systematic basis. This order read:

"(a) To other departments or agencies of the Government directing the taking of appropriate action relating to withholding or withdrawing from a noncomplying employer any priorities, benefits or privileges extended, or contracts entered into, by executive action of the Government, until the National War Labor Board has reported that compliance has been effectuated;

"(b) To any Government agency operating a plant, mine or facility, possession of which has been taken by the President under section 3 of the War Labor Disputes Act, directing such agency to apply to the National War Labor Board, under section 5 of said act, for an order withholding or withdrawing from a noncomplying labor union any benefits, privileges or rights accruing to it under the terms of conditions of employment in effect (whether by agreement between the parties or by order of the National War Labor Board, or both) when possession was taken, until such time as the noncomplying labor union has demonstrated to the satisfaction of the National War Labor Board its willingness and capacity to comply; but, when the check-off is denied, dues received from the check-off shall be held in escrow for the benefit of the union to be delivered to it upon compliance by it.

"(c) To the War Manpower Commission, in the case of noncomplying individuals, directing the entry of appropriate orders relating to the modification or cancellation of draft deferments or employment privileges, or both.

"Franklin D. Roosevelt.

"The White House, *Aug. 16, 1943.*"[72]

CONSTITUTIONAL BASIS OF SANCTIONS

Sanctions were also occasionally employed by statutory agencies, as by OPA, to supplement the penal provisions of the Emergency Price Control Act of January 30, 1942;[73] and in the case of Steuart and Bro., Inc. *v.* Bowles,[74] the Supreme Court had the opportunity to attempt to regularize this type of executive emergency legislation. Here a retail dealer in fuel oil in the District of Columbia was charged with having violated a rationing order of OPA by obtaining large quantities of oil from its supplier without surrendering ration coupons, by delivering many [Pg 398] thousands of gallons of fuel oil without requiring ration coupons, and so on, and was prohibited by the agency from receiving oil for resale or transfer for the ensuing year. The offender conceded the validity of the rationing order in support of which the suspension order was issued, but challenged the validity of the latter as imposing a penalty that Congress has not enacted, and

asked the district court to enjoin it. The Court refused to do so and was sustained by the Supreme Court in its position. Said Justice Douglas, speaking for the Court: "Without rationing, the fuel tanks of a few would be full; the fuel tanks of many would be empty. Some localities would have plenty; communities less favorably situated would suffer. Allocation or rationing is designed to eliminate such inequalities and to treat all alike who are similarly situated. * * * But middlemen—wholesalers and retailers—bent on defying the rationing system could raise havoc with it. * * * These middlemen are the chief if not the only conduits between the source of limited supplies and the consumers. From the viewpoint of a rationing system a middleman who distributes the product in violation and disregard of the prescribed quotas is an inefficient and wasteful conduct. * * * Certainly we could not say that the President would lack the power under this Act to take away from a wasteful factory and route to an efficient one a previous supply of material needed for the manufacture of articles of war. * * * From the point of view of the factory owner from whom the materials were diverted the action would be harsh. * * * But in times of war the national interest cannot wait on individual claims to preference. * * * Yet if the President has the power to channel raw materials into the most efficient industrial units and thus save scarce materials from wastage it is difficult to see why the same principle is not applicable to the distribution of fuel oil."[75] Sanctions were, therefore, constitutional when the deprivations they wrought were a reasonably implied amplification of the substantive power which they supported and were directly conservative of the interests which this power was created to protect and advance. It is certain, however, that sanctions not uncommonly exceeded this pattern.[76]

MARTIAL LAW AND CONSTITUTIONAL LIMITATIONS

Two theories of martial law are reflected in decisions of the Supreme Court. By one, which stems from the Petition of Right, 1628, the common law knows no such thing as martial law;[77] at any rate martial law is not established by official authority of any sort, but arises from the nature of things, being the law of paramount necessity, of which necessity the civil courts are the final judges.[78] By the other theory, martial law can be validly and constitutionally established by supreme political authority in wartime. The latter theory is recognized by the Court in Luther *v.* Borden,[79] where it was held that the Rhode Island legislature had been within its rights in 1842 in resorting to the rights and usages of war in combating insurrection in that State. The decision in the Prize Cases,[80] while not dealing directly with the subject of martial law, gave national scope to the same general principle in 1863. The Civil War being safely over, however, a sharply divided Court, in the elaborately argued Milligan case,[81] reverting to the older doctrine, pronounced void President Lincoln's action, following his suspension of the writ of *habeas corpus* in September, 1863, in ordering the trial by military commission of persons held in custody as "spies" and "abettors of the enemy." The salient passage of the Court's opinion bearing on this point is the following: "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 theatre 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 proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war."[82] Four Justices, speaking by Chief Justice Chase, while holding Milligan's trial to have been void because violative of the act of March 3, 1863 governing the custody and trial of persons who had been deprived of the *habeas corpus* privilege, declared their belief that Congress could have authorized Milligan's trial. Said the Chief Justice: "Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as Commander in Chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions. * * * We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists. 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 offences against the discipline or security of the army or against the public safety."[83] In short, only Congress can authorize the substitution of military tribunals for civil tribunals for the trial of offenses; and Congress can do so only in wartime.

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MARTIAL LAW IN HAWAII

The question of the constitutional status of martial law was raised in World War II by the proclamation of Governor Poindexter of Hawaii, on December 7, 1941, suspending the writ of *habeas corpus* and conferring on the local commanding General of the Army all his own powers as governor and also "all of the powers normally exercised by the judicial officers * * * of this territory * * * during the present emergency and until the danger of invasion is removed." Two days later the Governor's action was approved by President Roosevelt. The regime which the

proclamation set up continued with certain abatements until October 24, 1944.

By section 67 of the Organic Act of April 30, 1900,[84] the Territorial Governor is authorized "in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, [to] suspend the privilege of the writ of *habeas corpus*, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known." By section 5 of the Organic Act, "the Constitution, * * *, shall have the same force and effect within the said Territory as elsewhere in the United States." In a brace of cases which reached it in February 1945 but which it contrived to postpone deciding till February 1946,[85] the Court, speaking by Justice Black, held that the term "martial law" as employed in the Organic Act, "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."[86] The [Pg 401] Court relied on the majority opinion in Ex parte Milligan. Chief Justice Stone concurred in the result. "I assume also," said he, "that there could be circumstances in which the public safety requires, and the Constitution permits, substitution of trials by military tribunals for trials in the civil courts";[87] but added that the military authorities themselves had failed to show justifying facts in this instance. Justice Burton, speaking for himself and Justice Frankfurter, dissented. He stressed the importance of Hawaii as a military outpost and its constant exposure to the danger of fresh invasion. He warned that "courts must guard themselves with special care against judging past military action too closely by the inapplicable standards of judicial, or even military, hindsight."[88]

THE CASE OF THE NAZI SABOTEURS[89]

The saboteurs were eight youths, seven Germans and one an American, who, following a course of training in sabotage in Berlin, were brought to this country in June 1942 aboard two German submarines and put ashore, one group on the Florida coast, the other on Long Island, with the idea that they would proceed forthwith to practice their art on American factories, military equipment, and installations. Making their way inland, the saboteurs were soon picked up by the FBI, some in New York, others in Chicago, and turned over to the Provost Marshal of the District of Columbia. On July 2, the President appointed a military commission to try them for violation of the laws of war, to wit: for not wearing fixed emblems to indicate their combatant status. In the midst of the trial, the accused petitioned the Supreme Court and the United States District Court for the District of Columbia for leave to bring *habeas corpus* proceedings. Their argument embraced the contentions: (1) that the offense charged against them was not known to the laws of the United States; (2) that it was not one arising in the land and naval forces; and (3) that the tribunal trying them had not been constituted in accordance with the requirements of the Articles of War.

The first argument the Court met as follows: The act of Congress in providing for the trial before military tribunals of offenses against the law of war is sufficiently definite, although Congress has not undertaken to codify or mark the precise boundaries of the law of war, or to enumerate or define by statute all the acts which that law condemns. "* * * those who during time of war pass surreptitiously from enemy territory into * * * [that of the United States], discarding their [Pg 402] uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission."[90] The second argument it disposed of by showing that petitioners' case was of a kind that was never deemed to be within the terms of Amendments V and VI, citing in confirmation of this position the trial of Major Andre.[91] The third contention the Court overruled by declining to draw the line between the powers of Congress and the President in the premises,[92] thereby, in effect, attributing to the latter the right to amend the Articles of War in a case of the kind before the Court *ad libitum*.

The decision might well have rested on the ground that the Constitution is without restrictive force in wartime in a situation of this sort. The saboteurs were invaders; their penetration of the boundary of the country, projected from units of a hostile fleet, was essentially a military operation, their capture was a continuation of that operation. Punishment of the saboteurs was therefore within the President's purely martial powers as Commander in Chief. Moreover, seven of the petitioners were enemy aliens, and so, strictly speaking, without constitutional status. Even had they been civilians properly domiciled in the United States at the outbreak of the war they would have been subject under the statutes to restraint and other disciplinary action by the President without appeal to the courts.[93]

THE WAR CRIMES CASES

As a matter of fact, in General Yamashita's case,[94] which was brought after the termination of hostilities for alleged "war crimes," the Court abandoned its restrictive conception altogether. In the words of Justice Rutledge's dissenting opinion in this case: "The difference between the Court's view of this proceeding and my own comes down in the end to the view, on the one hand, that there is no law restrictive upon these proceedings other than whatever rules and regulations may be prescribed for their government by the executive authority or the military and, on the other hand, that the provisions of the Articles of War, of the Geneva Convention and the Fifth

Amendment apply."[95] And the adherence of the United States to the Charter of London in August 1945, under which the Nazi leaders were brought to trial, is explicable by the same theory. These individuals were charged with the crime of instigating aggressive war, which at the time of its commission was not a crime either under International Law or under the laws of the prosecuting governments. It must be presumed that the President is not in his capacity as [Pg 403] Supreme Commander bound by the prohibition in the Constitution of *ex post facto* laws; nor does International Law forbid *ex post facto* laws.[96]

THE PRESIDENT AS COMMANDER OF THE FORCES

While the President customarily delegates supreme command of the forces in active service, there is no constitutional reason why he should do so; and he has been known to resolve personally important questions of military policy. Lincoln early in 1862 issued orders for a general advance in the hope of stimulating McClellan to action; Wilson in 1918 settled the question of an independent American command on the Western Front; Truman in 1945 ordered that the bomb be dropped on Hiroshima and Nagasaki. As against an enemy in the field the President possesses all the powers which are accorded by International Law to any supreme commander. "He may invade the hostile country, and subject it to the sovereignty and authority of the United States."[97] In the absence of attempts by Congress to limit his power, he may establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States, and his authority to do this sometimes survives cessation of hostilities.[98] He may employ secret agents to enter the enemy's lines and obtain information as to its strength, resources, and movements.[99] He may, at least with the assent of Congress, authorize intercourse with the enemy.[100] He may also requisition property and compel services from American citizens and friendly aliens who are situated within the theatre of military operations when necessity requires, thereby incurring for the United States the obligation to render "just compensation."[101] By the same warrant he may bring hostilities to a conclusion by arranging an armistice, stipulating conditions which may determine to a great extent the ensuing peace.[102] He may not, however, effect a permanent acquisition of territory;[103] though he may govern recently acquired territory until Congress sets up a more permanent regime.[104] He is the ultimate tribunal for the enforcement of the rules and regulations which Congress adopts for the government of the forces, and which are enforced through courts-martial.[105] Indeed, until 1830, courts-martial were convened solely on his authority as Commander in Chief.[106] Such rules and regulations are, moreover, it would seem, subject in wartime to his amendment at discretion.[107] Similarly, the power of Congress to "make rules for the government and regulation of the law and naval forces" (Art. I, § 8, cl. 14) did not prevent President Lincoln from promulgating in April, 1863 a code of rules to govern the conduct in the field of the armies of the United States which was prepared at his instance by a commission headed by Francis Lieber and which later became the [Pg 404] basis of all similar codifications both here and abroad.[108] One important power he lacks, that of choosing his subordinates, whose grades and qualifications are determined by Congress and whose appointment is ordinarily made by and with the advice and consent of the Senate, though undoubtedly Congress could if it wished vest their appointment in "the President alone."[109] Also, the President's power to dismiss an officer from the service, once unlimited, is today confined by statute in time of peace to dismissal "in pursuance of the sentence of a general court-martial or in mitigation thereof."[110] But the provision is not regarded by the Court as preventing the President from displacing an officer of the Army or Navy by appointing with the advice and consent of the Senate another person in his place.[111] The President's power of dismissal in time of war Congress has never attempted to limit.

THE COMMANDER IN CHIEF A CIVILIAN OFFICER

Is the Commander in Chiefship a military or civilian office in the contemplation of the Constitution? Unquestionably the latter. A recent opinion by a New York surrogate deals adequately, though not authoritatively, with the subject: "The President receives his compensation for his services, rendered as Chief Executive of the Nation, not for the individual parts of his duties. No part of his compensation is paid from sums appropriated for the military or naval forces; and it is equally clear under the Constitution that the President's duties as [Pg 405] Commander in Chief represents only a part of duties *ex officio* as Chief Executive [Article II, sections 2 and 3 of the Constitution] and that the latter's office is a civil office. [Article II, section 1 of the Constitution; vol. 91, Cong. Rec. 4910-4916; Beard, The Republic (1943) pp. 100-103.] The President does not enlist in, and he is not inducted or drafted into the armed forces. Nor, is he subject to court-martial or other military discipline. On the contrary, article II, section 4 of the Constitution provides that '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.' * * * The last two War Presidents, President Wilson and President Roosevelt, both clearly recognized the civilian nature of the President's position as Commander in Chief. President Roosevelt, in his Navy Day Campaign speech at Shibe Park, Philadelphia, on October 27, 1944, pronounced this principle as follows:—'It was due to no accident and no oversight that the framers of our Constitution put the command of our armed forces under civilian authority. It is the duty of the Commander in Chief to appoint the

Secretaries of War and Navy and the Chiefs of Staff.' It is also to be noted that the Secretary of War, who is the regularly constituted organ of the President for the administration of the military establishment of the Nation, has been held by the Supreme Court of the United States to be merely a civilian officer, not in military service. (United States *v.* Burns, 79 U.S. 246 (1871)). On the general principle of civilian supremacy over the military, by virtue of the Constitution, it has recently been said: 'The supremacy of the civil over the military is one of our great heritages.' Duncan *v.* Kahanamoku, 324 U.S. 833 (1945), 14 L.W. 4205 at page 4210."[112]

Presidential Advisers

THE CABINET

The above provisions are the meager residue from a persistent effort in the Federal Convention to impose a council on the President.[113] The idea ultimately failed, partly because of the diversity of ideas concerning the Council's make-up. One member wished it to consist of "members of the two houses," another wished it to comprise two representatives from each of three sections, "with a rotation and duration of office similar to those of the Senate." The proposal which had the strongest backing was that it should consist of the heads of departments and the Chief Justice of the Supreme Court, who should preside when the President was absent. [Pg 406] Of this proposal the only part to survive was the above cited provision. The consultative relation here contemplated is an entirely one-sided affair, is to be conducted with each principal officer separately and in writing, and to relate only to the duties of their respective offices.[114] The *Cabinet*, as we know it today, that is to say, the Cabinet *meeting*, was brought about solely on the initiative of the first President, and may be dispensed with on Presidential initiative at any time, being totally unknown to the Constitution. Several Presidents have in fact reduced the Cabinet meeting to little more than a ceremony with social trimmings.[115]

Pardons and Reprieves

THE LEGAL NATURE OF A PARDON

In the first case to be decided concerning the pardoning power, Chief Justice Marshall, speaking for the Court, said: "As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it. A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the Court. * * * A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him." Marshall thereupon proceeded to lay down the doctrine, that "a pardon is a deed to the validity of which delivery is essential, and delivery is not complete without acceptance"; and that to be noticed judicially this deed must be pleaded, like any private instrument.[116]

Qualification of the Above Theory [Pg 407]

In the case of Burdick *v.* United States,[117] decided in 1915, Marshall's doctrine was put to a test that seems to have overtaxed it, perhaps fatally. Burdick, having declined to testify before a federal grand jury on the ground that his testimony would tend to incriminate him, was proffered by President Wilson "a full and unconditional pardon for all offenses against the United States" which he might have committed or participated in in connection with the matter he had been questioned about. Burdick, nevertheless, refused to accept the pardon and persisted in his contumacy with the unanimous support of the Supreme Court. "The grace of a pardon," remarked Justice McKenna sententiously, "may be only a pretense * * * involving consequences of even greater disgrace than those from which it purports to relieve. Circumstances may be made to bring innocence under the penalties of the law. If so brought, escape by confession of guilt implied in the acceptance of a pardon may be rejected, * * *"[118] Nor did the Court give any attention to the fact that the President had accompanied his proffer to Burdick with a proclamation, although a similar procedure had been held to bring President Johnson's amnesties to the Court's notice.[119] In 1927, however, in sustaining the right of the President to commute a sentence of death to one of life imprisonment, against the will of the prisoner, the Court abandoned this view. "A pardon in our days," it said, "is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."[120] Whether these words sound the death knell of the acceptance doctrine is perhaps doubtful.[121] They seem clearly to indicate that by substantiating a commutation order for a deed of pardon, a President can always have his way in such matters, provided the substituted penalty is authorized by law and does not in common understanding exceed the original penalty.[122]

SCOPE OF THE POWER

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The power embraces all "offences against the United States," except cases of impeachment, and includes the power to remit fines, penalties, and forfeitures, except as to money covered into the Treasury or paid an informer;[123] also the power to pardon absolutely or conditionally; and includes the power to commute sentences, which, as seen above, is effective without the convict's consent.[124] It has been held, moreover, in face of earlier English practice, that indefinite suspension of sentence by a court of the United States is an invasion of the Presidential prerogative, amounting as it does to a condonation of the offense.[125] It was early assumed that the power included the power to pardon specified classes or communities wholesale, in short, the power to amnesty, which is usually exercised by proclamation. General amnesties were issued by Washington in 1795, by Adams in 1800, by Madison in 1815, by Lincoln in 1863, by Johnson in 1865, 1867, and 1868, and by the first Roosevelt—to Aguinaldo's followers—in 1902.[126] Not, however, till after the Civil War was the point adjudicated, when it was decided in favor of Presidential prerogative.[127]

"OFFENSES AGAINST THE UNITED STATES"; CONTEMPT OF COURT

In the first place, such offenses are not offenses against the States. In the second place, they are completed offenses;[128] the President cannot pardon by anticipation, otherwise he would be invested with the power to dispense with the laws, his claim to which was the principal cause of James II's forced abdication.[129] Lastly, the term has been held to include criminal contempts of court. Such was the holding in Ex parte Grossman,[130] where Chief Justice Taft, speaking for the Court, resorted once more to English conceptions as being authoritative in construing this clause of the Constitution. Said he: "The King of England before our Revolution, in the exercise of his prerogative, had always exercised the power to pardon contempts of court, just as he did ordinary crimes and misdemeanors and as he has done to the present day. In the mind of a common law lawyer of the eighteenth century the word pardon included within its scope the ending by the King's grace of the punishment of such derelictions, whether it was imposed by the [Pg 409] court without a jury or upon indictment, for both forms of trial for contempts were had. [Citing cases.] These cases also show that, long before our Constitution, a distinction had been recognized at common law between the effect of the King's pardon to wipe out the effect of a sentence for contempt in so far as it had been imposed to punish the contemnor for violating the dignity of the court and the King, in the public interest, and its inefficacy to halt or interfere with the remedial part of the court's order necessary to secure the rights of the injured suitor. Blackstone IV, 285, 397, 398; Hawkins Pleas of the Crown, 6th Ed. (1787), Vol. 2, 553. The same distinction, nowadays referred to as the difference between civil and criminal contempts, is still maintained in English law[131]." Nor was any new or special danger to be apprehended from this view of the pardoning power. "If," says the Chief Justice, "we could conjure up in our minds a President willing to paralyze courts by pardoning all criminal contempts, why not a President ordering a general jail delivery?" Indeed, he queries further, in view of the peculiarities of procedure in contempt cases, "may it not be fairly said that in order to avoid possible mistake, undue prejudice or needless severity, the chance of pardon should exist at least as much in favor of a person convicted by a judge without a jury as in favor of one convicted in a jury trial[132]?"

EFFECTS OF A PARDON; EX PARTE GARLAND

The great leading case is Ex parte Garland[133] which was decided shortly after the Civil War. By an act passed in 1865 Congress had prescribed that before any person should be permitted to practice in a federal court he must take oath asserting that he had never voluntarily borne arms against the United States, had never given aid or comfort to enemies of the United States, and so on. Garland, who had been a Confederate sympathizer and so was unable to take the oath, had however received from President Johnson the same year "a full pardon 'for all offences by him committed, arising from participation, direct or implied, in the Rebellion,' * * *" The question before the Court was whether, armed with this pardon, Garland was entitled to practice in the federal courts despite the act of Congress just mentioned. Said Justice Field for a sharply divided Court: "The inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never [Pg 410] committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; [thereto], if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity."[134] Justice Miller speaking for the minority protested that the act of Congress involved was not penal in character, but merely laid down an appropriate test of fitness to practice the law. "The man who, by counterfeiting, by theft, by murder, or by treason, is rendered unfit to exercise the functions of an attorney or counsellor at law, may be saved by the executive pardon from the penitentiary or the gallows, but he is not thereby restored to the qualifications which are essential to admission to the bar."[135] Justice Field's language must today be regarded as much too sweeping in light of a decision rendered in 1914 in the case of Carlesi *v.* New York.[136] Carlesi had some years before been convicted of committing a federal offense. In the instant case the prisoner was being tried for a subsequent

offense committed in New York. He was convicted as a second offender, although the President had pardoned him for the earlier federal offense. In other words, the fact of prior conviction by a federal court was considered in determining the punishment for a subsequent State offense. This conviction and sentence were upheld by the Supreme Court. While this case involved offenses against different sovereignties, the Court declared by way of dictum that its decision "must not be understood as in the slightest degree intimating that a pardon would operate to limit the power of the United States in punishing crimes against its authority to provide for taking into consideration past offenses committed by the accused as a circumstance of aggravation even although for such past offenses there had been a pardon granted."[137]

LIMITS TO THE EFFICACY OF A PARDON

But Justice Field's latitudinarian view of the effect of a pardon undoubtedly still applies ordinarily where the pardon is issued *before conviction*. He is also correct in saying that a full pardon restores a *convict* to his "civil rights," and this is so even though simple completion of the convict's sentence would not have had that effect. One such right is the right to testify in court, and in Boyd *v.* United States the Court held that the disability to testify being a consequence, according to principles of the common law, of the judgment of conviction, the pardon obliterated that effect.[138] But a pardon cannot "make amends for the past. It affords no relief for what has [Pg 411] been suffered by the offender in his person by imprisonment, forced labor, or otherwise; it does not give compensation for what has been done or suffered, nor does it impose upon the government any obligation to give it. The offence being established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required. Neither does the pardon affect any rights which have vested in others directly by the execution of the judgment for the offence, or which have been acquired by others whilst that judgment was in force. If, for example, by the judgment a sale of the offender's property has been had, the purchaser will hold the property notwithstanding the subsequent pardon. And if the proceeds of the sale have been paid to a party to whom the law has assigned them, they cannot be subsequently reached and recovered by the offender. The rights of the parties have become vested, and are as complete as if they were acquired in any other legal way. So, also, if the proceeds have been paid into the treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress. Moneys once in the treasury can only be withdrawn by an appropriation by law."[139]

CONGRESS AND AMNESTY

Congress cannot limit the effects of a Presidential amnesty. Thus the act of July 12, 1870, making proof of loyalty necessary to recover property abandoned and sold by the government during the Civil War, notwithstanding any Executive proclamation, pardon, amnesty, or other act of condonation or oblivion, was pronounced void. Said Chief Justice Chase for the majority: "* * * the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration. The Court is required to receive special pardons as evidence of guilt and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority and directs the Court to be instrumental to that end."[140] On the other hand, Congress may itself, under the necessary and proper clause, enact amnesty laws remitting penalties incurred under the national statutes,[141] and may stipulate that witnesses before courts or other bodies qualified to take testimony shall not be prosecuted by the National Government for any offenses disclosed by their testimony.[142]

> Clause 2. He shall have Power, by and with the Advice and Consent of the [Pg 412] 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.

The Treaty-Making Power

PRESIDENT AND SENATE

The plan which the Committee of Detail reported to the Federal Convention on August 6, 1787 provided that "the Senate of the United States shall have power to make treaties, and to appoint Ambassadors, and Judges of the Supreme Court."[143] Not until September 7, ten days before the Convention's final adjournment, was the President made a participant in these powers.[144] The constitutional clause evidently assumes that the President and Senate will be associated throughout the entire process of making a treaty, although Jay, writing in The Federalist, foresaw

that the initiative must often be seized by the President without benefit of Senatorial counsel.[145] Yet so late as 1818 Rufus King, Senator from New York, who had been a member of the Convention, declared on the floor of the Senate: "In these concerns the Senate are the Constitutional and the only responsible counsellors of the President. And in this capacity the Senate may, and ought to, look into and watch over every branch of the foreign affairs of the nation; they may, therefore, at any time call for full and exact information respecting the foreign affairs, and express their opinion and advice to the President respecting the same, when, and under whatever other circumstances, they may think such advice expedient."[146]

NEGOTIATION A PRESIDENTIAL MONOPOLY

Actually, the negotiation of treaties had long since been taken over by the President; the Senate's role in relation to treaties is today essentially legislative in character.[147] "He alone negotiates. Into the field of negotiation, the Senate cannot intrude; and Congress itself is powerless to invade it," declared Justice Sutherland for the Court in 1936.[148] The Senate must, moreover, content itself with such information as the President chooses to furnish it.[149] In performing the function that remains to it, however, it has several options. It may consent unconditionally to a proposed treaty, or it may refuse its consent, or it may stipulate conditions in the form of amendments to the treaty or of reservations to the act of ratification, the difference between the two being that, whereas amendments, if accepted by the President and the other party or parties to the Treaty, [150] change it for all parties, reservations limit only the obligations of the United States thereunder. The act of ratification for the United States is the President's act, but may not be forthcoming unless the Senate has consented to it by the required two-thirds of the Senators present, which signifies two-thirds of a quorum, otherwise the consent rendered would not be that of the Senate as organized under the Constitution to do business.[151] Conversely, the President may, if dissatisfied with amendments which have been affixed by the Senate to a proposed treaty or with the conditions stipulated by it to ratification, decide to abandon the negotiation, which he is entirely free to do.[152]

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TREATIES AS LAW OF THE LAND

Treaty commitments of the United States are of two kinds. In the language of Chief Justice Marshall in 1829; "A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially, so far as its operation is infraterritorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States, a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the Court."[153] To the same effect, but more accurate, is Justice Miller's language for the Court a half century later, in Head Money Cases: "A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. * * * But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country."[154]

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Origin of the Conception

How did this distinctive feature of the Constitution come about, by virtue of which the treaty-making authority is enabled to stamp upon its promises the quality of municipal law, thereby rendering them "self-executory," as it is said; in other words, enforceable by the courts? The answer is that article VI, paragraph 2 was, at its inception, an outgrowth of a major weakness of the Articles of Confederation. Although the Articles entrusted the treaty-making power to Congress, fulfillment of Congress' promises was dependent on the State legislatures. The result was that two highly important Articles of the Treaty of Peace of 1783 not only went unenforced, but were in some instances directly flouted by the local legislatures. These were articles IV and VI, which contained stipulations in favor, respectively, of British creditors of American citizens and of the former Loyalists; in short of *private persons*. Confronted with the reiterated protests of the British government, John Jay, Secretary of the United States for Foreign Affairs, suggested to Congress late in 1786 that it request the State legislatures to repeal all legislation repugnant to the Treaty of Peace, and at the same time authorize their courts in all cases arising from the said treaty to decide and adjudge according to the true intent and meaning of the same, "anything in the said acts * * * to the contrary notwithstanding." On April 13, 1787 Congress unanimously voted Jay's proposal, which on the eve of the assembling of the Federal Convention was transmitted to the State legislatures, by seven of which it was promptly adopted.[155]

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TREATY RIGHTS VERSUS STATE POWER

The first case to arise under article VI, clause 2, was Ware *v.* Hylton.[156] The facts and bearing

of the decision are indicated in the syllabus: "A debt, due before the war from an American to a British subject, was during the war, paid into the loan office of Virginia, in pursuance of a law of that State of the 20th of December, 1777, sequestering British property and providing that such payment, and a receipt therefor, should discharge the debt. Held: That the legislature of Virginia which from the 4th of July, 1776, and before the Confederation of the United States, * * * possessed and exercised all the rights of independent governments, had authority to make such law and that the same was obligatory, since every nation at war with another may confiscate all property of, including private debts due, the enemy. Such payment and discharge would therefore be a bar to a subsequent action, unless the creditor's right was revived by the treaty of peace, by which alone the restitution of, or compensation for, British property confiscated during the war by any of the United States could only be provided for. Held, that the fourth article of the treaty of peace between Great Britain and the United States, of September 3, 1783, nullifies said law of Virginia, destroys the payment made under it, and revives the debt, and gives a right of recovery against the principal debtor, notwithstanding such payment thereof, under the authority of State law." In Hopkirk *v.* Bell[157] the Court further held that this same treaty provision prevented the operation of a Virginia statute of limitation to bar collection of antecedent debts. In numerous subsequent cases the Court invariably ruled that treaty provisions supersede inconsistent State laws governing the right of aliens to inherit real estate.[158] Such a case was [Pg 416] Hauenstein *v.* Lynham,[159] in which the Court upheld the right of a citizen of the Swiss Republic, under the treaty of 1850 with that country, to recover the estate of a relative dying intestate in Virginia, to sell the same and to export the proceeds from the sale.[160]

Recent Cases

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Certain more recent cases stem from California legislation, most of it directed against Japanese immigrants. A statute which excluded aliens ineligible to American citizenship from owning real estate was upheld in 1923 on the ground that the treaty in question did not secure the rights claimed.[161] But in Oyama *v.* California,[162] decided in 1948, a majority of the Court indicated a strongly held opinion that this legislation conflicted with the equal protection clause of Amendment XIV, a view which has since received the endorsement of the California Supreme Court by a narrow majority.[163] Meantime, California was informed that the rights of German nationals, under the Treaty of December 8, 1923 between the United States and the Reich, to whom real property in the United States had descended or been devised, to dispose of it, had survived the recent war and certain war legislation, and accordingly prevailed over conflicting State legislation.[164]

WHEN IS A TREATY SELF-EXECUTING?

What is the scope of the power of American courts under article VI, clause 2, to lend ear to private claims based on treaty provisions, on the ground that such provisions are self-executing? Jay had in mind certain intended victims of State legislation; and in fact the cases reviewed above all arose within the normal field of State legislative power. Nevertheless, as early as 1801, in United States *v.* Schooner Peggy,[165] the Supreme Court, speaking by Chief Justice Marshall, took notice of a treaty with France, executed after a court of admiralty had entered a final judgment condemning a captured French vessel, and finding it applicable to the situation before it, set the judgment aside and ordered the vessel restored to her owners. Since that time the Court has declared repeatedly in cases in which State law was not involved that when a treaty prescribes a rule by which private rights are to be determined, the courts are bound to take judicial notice thereof and to accept it as a rule of decision in any appropriate proceeding to [Pg 418] enforce such rights.[166] In short, whether a given treaty provision is self-executing is a question for the Court; although it does not altogether lack guiding principles in deciding it, the most important of which is the doctrine of political questions.[167] *See* pp. 426, 471-472.

CONSTITUTIONAL FREEDOM OF CONGRESS WITH RESPECT TO TREATIES

From the foregoing two other questions arise: first, are there types of treaty provisions which only Congress can put into effect? Second, assuming an affirmative answer to the above question, is Congress under constitutional obligation to supply such implementation? For such answer as exists to the first question resort must be had to the record of practice and nonjudicial opinion. The question arose originally in 1796 in connection with the Jay Treaty, certain provisions of which required appropriations to carry them into effect. In view of the third clause of article I, section 9 of the Constitution, which says that "no money shall be drawn from the Treasury, but in Consequence of Appropriations made by law; * * *," it was universally agreed that Congress must be applied to if the treaty provisions alluded to were to be put into execution. But at this point the second question arose, to the solution of which the Court has subsequently contributed indirectly. (*See* pp. 420-421). A bill being introduced into the House of Representatives to vote the needed funds, supporters of the treaty, Hamilton, Chief Justice Ellsworth, and others, argued that the House must make the appropriation willy nilly; that the treaty, having been ratified by and with the advice and consent of the Senate, was "supreme law of the land," and that the legislative branch was bound thereby no less than the executive and judicial branches.[168] [Pg 419] Madison, a member of the House, opposed this thesis in a series of resolutions, the nub of which is comprised in the following statement: "When a Treaty stipulates regulations on any of the

subjects submitted by the Constitution to the power of Congress, it must depend for its execution, as to such stipulations, on a law or laws to be passed by Congress. And it is the Constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency or inexpediency of carrying such Treaty into effect, and to determine and act thereon, as, in their judgment, may be most conducive to the public good."[169] The upshot of the matter was that the House adopted Madison's resolutions, while at the same time voting the required funds.[170]

THE TREATY-MAKING POWER AND REVENUE LAWS

On the whole, Madison's position has prospered. Discussion whether there are other treaty provisions than those calling for an expenditure of money which require legislation to render them legally operative has centered chiefly on the question whether the treaty-making power can of itself alone modify the revenue laws. From an early date spokesmen for the House have urged that a treaty does not, and cannot, *ex proprio vigore*, become supreme law of the land on this subject; and while the Senate has never conceded this claim formally, yet in a number of instances, "the treaty-making power has inserted in treaties negotiated by it and affecting the revenue laws of the United States, a proviso that they should not be deemed effective until the necessary laws to carry them into operation should be enacted by Congress, and the House has claimed that the insertion of such requirements has been, in substance, a recognition of its claim in the premises,"[171] although there are judicial dicta which inferentially support the Senate's position. Latterly the question has become largely academic. Commercial agreements nowadays are usually executive agreements contracted by authorization of Congress itself. Today the vital issue in this area of Constitutional Law is whether the treaty-making power is competent to assume obligations for the United States in the discharge of which the President can, without violation of his oath to support the Constitution, involve the country in large scale military operations abroad without authorization by the war-declaring power, Congress to wit. Current military operations in Korea appear to assume an affirmative answer to this question. [Pg 420]

CONGRESSIONAL REPEAL OF TREATIES

It is in respect to his contention that when it is asked to carry a treaty into effect Congress has the constitutional right, and indeed the duty, to determine the matter according to its own ideas of what is expedient, that Madison has been most completely vindicated by developments. This is seen in the answer which the Court has returned to the question, as to what happens when a treaty provision and an act of Congress conflict. The answer is, that neither has any intrinsic superiority over the other and that therefore the one of later date will prevail *leges posteriores priores contrarias abrogant*. In short, the treaty commitments of the United States in no wise diminish Congress's constitutional powers. To be sure, legislative repeal of a treaty as law of the land may amount to a violation of it as an international contract in the judgment of the other party to it. In such case, as the Court has said, "Its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress."[172]

TREATIES *Versus* PRIOR ACTS OF CONGRESS [Pg 421]

The cases are numerous in which the Court has enforced statutory provisions which were recognized by it as superseding prior treaty engagements. How as to the converse situation? Two early cases in which Chief Justice Marshall spoke for the Court, stand for the proposition that treaties, so far as self-executing, repeal earlier conflicting acts of Congress. In the case of the "*Peggy*,"[173] certain statutory provisions dealing with the trial of prize cases were held to have been modified by a subsequent treaty with France; and in Foster *v.*. Neilson,[174] while holding— [Pg 422] mistakenly as he later admitted[175]—that the treaty of January 24, 1818 with Spain was not self-executing with respect to certain land grants, he went on to say that if it had been it would have repealed acts of Congress repugnant to it. With one exception, however, judicial dicta which reiterate this idea are obiter, and are disparaged by Willoughby, as follows: "In fact, however, there have been few (the writer is not certain that there have been any) instances in which a treaty inconsistent with a prior act of Congress has been given full force and effect as law in this country without the assent of Congress. There may indeed have been cases in which, by treaty, certain action has been taken without reference to existing Federal laws, as, for example, where by treaty certain populations have been collectively naturalized, but such treaty action has not operated to repeal or annul the existing law upon the subject. Furthermore, with specific reference to commercial arrangements with foreign powers, Congress has explicitly denied that a treaty can operate to modify the arrangements which it, by statute, has provided, and, in actual practice, has in every instance succeeded in maintaining this point."[176] The single exception just alluded to is Cook *v.* United States,[177] which may be regarded as part of the aftermath of National Prohibition. Here a divided Court, speaking by Justice Brandeis, ruled that the authority conferred by § 581 of the Tariff Act of 1922 and its reenactment in the tariff Act of 1930, upon officers of the Coast Guard to stop and board any vessel at any place within four leagues (12 miles) of the coast of the United States and to seize the vessel, if upon examination it shall appear that any violation of the law has been committed by reason of which the vessel or merchandise therein is liable to forfeiture, is, as respects British vessels suspected of being engaged in attempting to import alcoholic beverages into the United States in violation of its

laws, modified by the Treaty of May 22, 1924, between the United States and Great Britain, so as to allow seizure of such vessels only within the distance from the coast which can be traversed in one hour by the vessel suspected of endeavoring to commit the offense.[178] Only one case is cited in support of the proposition that the treaty, being of later date than the act of Congress, superseded it so far as they were in conflict. This is Whitney *v.* Robertson,[179] in which an act of Congress was held to have superseded conflicting provisions of a prior treaty. Moreover, the act of Congress involved in the Cook case had, as above indicated, been reenacted subsequently to the treaty involved. The decision actually accomplishes the singular result of reversing the maxim *leges posteriores*. It may be suspected that it was devised to avoid a diplomatic controversy which in the low estate of Prohibition at that date would not have been worthwhile.[180]

INTERPRETATION AND TERMINATION OF TREATIES AS INTERNATIONAL COMPACTS [Pg 423]

The repeal by Congress of the "self-executing" clauses of a treaty as "law of the land" does not of itself terminate the treaty as an international contract, although it may very well provoke the other party to the treaty to do so. Hence the question arises of where the Constitution lodges this power; also the closely related question of where it lodges the power to interpret the contractual provisions of treaties. The first case of outright abrogation of a treaty by the United States occurred in 1798, when Congress, by the act of July 7 of that year, pronounced the United States freed and exonerated from the stipulations of the Treaties of 1778 with France.[181] This act was followed two days later by one authorizing limited hostilities against the same country; and in the case of Bas *v.* Tingy[182] the Supreme Court treated the act of abrogation as simply one of a bundle of acts declaring "public war" upon the French Republic.

TERMINATION OF TREATIES BY NOTICE

The initial precedent in the matter of termination by notice occurred in 1846, when by the Joint Resolution of April 27, Congress authorized the President at his discretion to notify the British Government of the abrogation of the Convention of August 6, 1827, relative to the joint occupation of the Oregon Territory. As the President himself had requested the resolution, the episode supports the theory that international conventions to which the United States is party, even those terminable on notice, are terminable only by act of Congress.[183] Subsequently Congress has often passed resolutions denouncing treaties or treaty provisions which by their own terms were terminable on notice, and Presidents have usually carried out such resolutions, though not invariably.[184] By the La Follette-Furuseth Seamen's Act, approved March 4, 1915, [185] President Wilson was directed, "within ninety days after the passage of the act, to give notice to foreign governments that so much of any treaties as might be in conflict with the provisions of the act would terminate on the expiration of the periods of notice provided for in [Pg 424] such treaties," and the required notice was given.[186] When, however, by section 34 of the Jones Merchant Marine Act of 1920 the same President was authorized and directed within ninety days to give notice to the other parties to certain treaties, which the act infracted, of the termination thereof, he refused to comply, asserting that he "did not deem the direction contained in section 34 * * * an exercise of any constitutional power possessed by Congress."[187] The same intransigent attitude was continued by Presidents Harding and Coolidge.

DETERMINATION WHETHER A TREATY HAS LAPSED [Pg 425]

At the same time, there is clear judicial recognition that the President may without consulting Congress validly determine the question whether specific treaty provisions have lapsed. The following passage from Justice Lurton's opinion in Charlton *v.* Kelly[188] is pertinent: "If the attitude of Italy was, as contended, a violation of the obligation of the treaty, which, in international law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect. If the United States elected not to declare its abrogation, or come to a rupture, the treaty would remain in force. It was only voidable, not void; and if the United States should prefer, it might waive any breach which in its judgment had occurred and conform to its own obligation as if there had been no such breach. * * * That the political branch of the Government recognizes the treaty obligation as still existing is evidenced by its action in this case. * * * The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant as one imposed by the treaty as the supreme law of the land as affording authority for the warrant of extradition."[189] So also it is primarily for the political departments to determine whether certain provisions of a treaty have survived a war in which the other contracting state ceased to exist as a member of the international community.[190]

STATUS OF A TREATY A POLITICAL QUESTION [Pg 426]

All in all, it would seem that the vast weight both of legislative practice and of executive opinion supports the proposition that the power of terminating outright international compacts to which the United States is party belongs, as a prerogative of sovereignty, to Congress alone, but that the President may, as an incident of his function of interpreting treaties preparatory to enforcing them, sometimes authoritatively find that a treaty contract with another power has or has not

been breached by the latter and whether, for that reason, it is or is not longer binding on the United States.[191] At any rate, it is clear that any such questions which arise concerning a treaty are of a political nature and will not be decided by the courts. In the words of Justice Curtis in Taylor *v.* Morton:[192] It is not "a judicial question, whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty, has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative have given just occasion to the political departments of our government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise. * * * These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them; but to the executive and the legislative departments of our government. They belong to diplomacy and legislation, and not to the administration of existing laws. And it necessarily follows, that if they are denied to Congress and the Executive, in the exercise of their legislative power, they can be found nowhere, in our system of government." Chief Justice Marshall's language in Foster *v.* Neilson[193] is to the same effect.

TREATIES AND THE NECESSARY AND PROPER CLAUSE

What power, or powers, does Congress exercise when it enacts legislation for the purpose of carrying treaties of the United States into effect? When the subject matter of the treaty falls within the ambit of Congress's enumerated powers (those listed in the first 17 clauses of article I, section 8 of the Constitution), then it is these powers which it exercises in carrying such treaty into effect. But if the treaty deals with a subject which falls normally to the States to legislate upon, or a subject which falls within the national jurisdiction because of its international character, then recourse is had to the necessary and proper clause. Thus, of itself, Congress would have no power to confer judicial powers upon foreign consuls in the United States, but the treaty-power can do this and has done it repeatedly and Congress has supplemented these treaties by appropriate legislation.[194] Again, Congress could not confer judicial power upon [Pg 427] American consuls abroad to be there exercised over American citizens, but the treaty-power can and has, and Congress has passed legislation perfecting such agreements and such legislation has been upheld.[195] Again, Congress of itself could not provide for the extradition of fugitives from justice, but the treaty-power can and has done so scores of times, and Congress has passed legislation carrying our extradition treaties into effect.[196] Again, Congress could not ordinarily penalize private acts of violence within a State, but it can punish such acts if they deprive aliens of their rights under a treaty.[197] Referring to such legislation the Court has said: "The power of Congress to make all laws necessary and proper for carrying into execution as well the powers enumerated in section 8 of article I of the Constitution, as all others vested in the Government of the United States, or in any Department or the officers thereof, includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with a foreign power."[198] In a word, the treaty-power cannot purport to amend the Constitution by adding to the list of Congress's enumerated powers, but having acted, the consequence will often be that it has provided Congress with an opportunity to enact measures which independently of a treaty Congress could not pass; and the only question that can be raised as to such measures will be whether they are "necessary and proper" measures for the carrying of the treaty in question into operation. The matter is further treated under the next heading.

CONSTITUTIONAL LIMITS OF THE TREATY-MAKING POWER; MISSOURI *v.* HOLLAND [Pg 428]

Our system being theoretically opposed to the lodgement anywhere in government of unlimited power, the question of the scope of this exclusive power has often been pressed upon the Court, which has sometimes used language vaguely suggestive of limitation, as in the following passage from Justice Field's opinion for the Court in Geofroy *v.* Riggs,[199] which was decided in 1890: "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. * * * But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."[200] The fact is none the less, that no treaty of the United States nor any provision thereof has ever been found by the Court to be unconstitutional. The most persistently urged proposition in limitation of the treaty-making power has been that it must not invade certain reserved powers of the States. In view of the sweeping language of the supremacy clause, it is hardly surprising that this argument has not prevailed.[201] Nevertheless, the Court was forced to answer it as recently as 1923. This was in the case of Missouri *v.* Holland,[202] in which the Court sustained a treaty between the United States and Great Britain providing for the reciprocal protection of migratory birds which make seasonal flights from Canada into the United States and vice versa, and an act of Congress passed in pursuance thereof which authorized the Department of Agriculture to draw up regulations to govern the hunting of such birds, subject to the penalties specified by the act. To the objection that the treaty and implementing legislation invaded the acknowledged police

power of the State in the protection of game within its borders, Justice Holmes, speaking for the Court, answered: "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 [Pg 429] which must belong to and somewhere reside in every civilized government' is not to be found. (Andrews *v.* Andrews, 188 U.S. 14, 33 (1903)). What was said in that case with regard to the powers of the States applies with equal force to the powers of the nation in cases where the States individually are incompetent to act. * * * 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."[203] And again: "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 opinion that the treaty and statute must be upheld."[204]

Justice Sutherland's later assertion in the Curtiss-Wright case[205] that the powers "to declare and wage war, to conclude peace, to make treaties," etc., belong to "the Federal Government as the necessary concomitants of nationality" leaves even less room for the notion of a limited treaty-making power, as indeed appears from his further statement that "as a member of the family of nations, the right and power of the United States * * * are equal to the right and power of the other members of the international family."[206] No doubt there are specific limitations in the Constitution in favor of private rights which "go to the roots" of all power. But these do not include the reserved powers of the States; nor do they appear to limit the National Government in its choice of matters concerning which it may treat with other governments.[207] [Pg 430]

INDIAN TREATIES [Pg 431]

In the early cases of Cherokee Nation *v.* Georgia[208] and Worcester *v.* Georgia[209] the Court, speaking by Chief Justice Marshall, held, first, that the Cherokee Nation was not a foreign state within the meaning of that clause of the Constitution which extends the judicial power of the United States to controversies "between a State or the citizens thereof and foreign states, citizens or subjects"; secondly, that: "The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, had adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense."[210]

Later cases established that the power to make treaties with the Indian tribes was coextensive with the power to make treaties with foreign nations;[211] that the States were incompetent to interfere with rights created by such treaties;[212] that as long as the United States recognized the national character of a tribe, its members were under the protection of treaties and of the laws of Congress and their property immune from taxation by a State;[213] that a stipulation in an Indian treaty that laws forbidding the introduction of liquors into Indian territory was operative without legislation, and binding on the courts although the territory was within an organized county of the States;[214] that an act of Congress contrary to a prior Indian treaty repealed it.[215] [Pg 432]

Present Status of Indian Treaties

Today Indian treaties is a closed account in the Constitutional Law ledger. By a rider inserted in the Indian Appropriation Act of March 3, 1871 it was provided "That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided, further*, that nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe."[216] Subsequently, the power of Congress to withdraw or modify tribal rights previously granted by treaty has been invariably upheld. Thus the admission of Wyoming as a State was found to abrogate, *pro tanto*, a treaty guaranteeing certain Indians the right to hunt on unoccupied lands of the United States so long as game may be found thereon and to bring hunting by the Indians within the police power of the State.[217] Similarly, statutes modifying rights of members in tribal lands,[218] granting a right of way for a railroad through lands ceded

by treaty to an Indian tribe,[219] or extending the application of revenue laws respecting liquor and tobacco over Indian territories, despite an earlier treaty exemption,[220] have been sustained. When, on the other hand, definite property rights have been conferred upon individual Indians, whether by treaty or under an act of Congress, they are protected by the Constitution to the same extent and in the same way as the private rights of other residents or citizens of the United States. Hence it was held that certain Indian allottees under an agreement according to which, in part consideration of their relinquishment of all their claim to tribal property, they were to receive in severalty allotments of lands which were to be nontaxable for a specified period, acquired vested rights of exemption from State taxation which were protected by the Fifth Amendment against abrogation by Congress.[221]

International Agreements Without Senate Approval

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The capacity of the United States to enter into agreements with other nations is not exhausted in the treaty-making power. The Constitution recognizes a distinction between "treaties" and "agreements" or "compacts," but does not indicate what the difference is; and what difference there once may have been has been seriously blurred in practice within recent decades. The President's power to enter into agreements or compacts with other governments without consulting the Senate must be referred to his powers as organ of foreign relations and as Commander in Chief. From an early date, moreover, Congress has authorized executive agreements within the field of its powers, postal agreements, trade-mark and copyright agreements, reciprocal trade agreements. Executive agreements may also stem from treaties. [222]

ROUTINE EXECUTIVE AGREEMENTS

Many types of executive agreements comprise the ordinary daily grist of the diplomatic mill. Among these are such as apply to minor territorial adjustments, boundary rectifications, the policing of boundaries, the regulation of fishing rights, private pecuniary claims against another government or its nationals, in Story's words, "the mere private rights of sovereignty."[223] Crandall lists scores of such agreements entered into with other governments by the authorization of the President.[224] Such agreements are ordinarily directed to particular and comparatively trivial disputes and by the settlement the effect of these cease *ipso facto* to be operative. Also there are such time-honored diplomatic devices as the "protocol" which marks a stage in the negotiation of a treaty, and the *modus vivendi*, which is designed to serve as a temporary substitute for one. Executive agreements become of constitutional significance when they constitute a determinative factor of future foreign policy and hence of the country's destiny. Within recent decades, in consequence particularly of our participation in World War II and our immersion in the conditions of international tension which have prevailed both before and after this war, Presidents have entered into agreements with other governments some of which have approximated temporary alliances. It cannot be justly said, however, that in so doing they have acted without considerable support from precedent.

LAW-MAKING EXECUTIVE AGREEMENTS

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An early instance of executive treaty-making was the agreement by which President Monroe in 1817 brought about a delimitation of armaments on the Great Lakes. The arrangement was effected by an exchange of notes, which nearly a year later was laid before the Senate with a query as to whether it was within the President's power, or whether advice and consent of the Senate were required. The Senate approved the agreement by the required two-thirds vote, and it was forthwith proclaimed by the President without there having been a formal exchange of ratifications.[225] Of a kindred type, and owing much to the President's capacity as Commander in Chief, was a series of agreements entered into with Mexico between 1882 and 1896 according each country the right to pursue marauding Indians across the common border.[226] Commenting on such an agreement, the Court remarked, a bit uncertainly: "While no act of Congress authorizes the executive department to permit the introduction of foreign troops, the power to give such permission without legislative assent was probably assumed to exist from the authority of the President as commander in chief of the military and naval forces of the United States. It may be doubted, however, whether such power could be extended to the apprehension of deserters [from foreign vessels] in the absence of positive legislation to that effect."[227] Justice Gray and three other Justices were of the opinion that such action by the President must rest upon express treaty or statute.[228]

PRESIDENT McKINLEY'S CONTRIBUTION

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Notable expansion of Presidential power in this field first became manifest in the administration of President McKinley. At the outset of war with Spain the President proclaimed that the United States would consider itself bound for the duration by the last three principles of the Declaration of Paris, a course which, as Professor Wright observes, "would doubtless go far toward establishing these three principles as international law obligatory upon the United States in future wars."[229] Hostilities with Spain were brought to an end in August 1898 by an armistice the conditions of which largely determined the succeeding treaty of peace,[230] just as did the

Armistice of November 11, 1918, determine in great measure the conditions of the final peace with Germany in 1918. It was also President McKinley who in 1900, relying on his own sole authority as Commander in Chief, contributed a land force of 5,000 men and a naval force to cooperate with similar contingents from other Powers to rescue the legations in Peking from the Boxers; and a year later, again without consulting either Congress or the Senate, accepted for the United States the Boxer Indemnity Protocol between China and the intervening Powers.[231] Commenting on the Peking protocol Willoughby quotes with approval the following remark: "This case is interesting, because it shows how the force of circumstances compelled us to adopt the European practice with reference to an international agreement, which, aside from the indemnity question, was almost entirely political in character. * * *, purely political treaties are, under constitutional practice in Europe, usually made by the executive alone. The situation in China, however, abundantly justified President McKinley in not submitting the protocol to the Senate. The remoteness of Pekin, the jealousies between the allies, and the shifting evasive tactics of the Chinese Government, would have made impossible anything but an agreement on the spot."[232]

EXECUTIVE AGREEMENTS AFFECTING FAR EASTERN RELATIONS

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It was during this period, too, that John Hay, as McKinley's Secretary of State, initiated his "Open Door" policy, by notes to Great Britain, Germany, and Russia, which were soon followed by similar notes to France, Italy and Japan. These in substance asked the recipients to declare formally that they would not seek to enlarge their respective interests in China at the expense of any of the others; and all responded favorably.[233] Then in 1905 the first Roosevelt, seeking to arrive at a diplomatic understanding with Japan, instigated an exchange of opinions between Secretary of War Taft, then in the Far East, and Count Katsura, amounting to a secret treaty, by which the Roosevelt administration assented to the establishment by Japan of a military protectorate in Korea.[234] Three years later Secretary of State Root and the Japanese ambassador at Washington entered into the Root-Takahira Agreement to uphold the status quo in the Pacific and maintain the principle of equal opportunity for commerce and industry in China.[235] Meantime, in 1907, by a "Gentlemen's Agreement," the Mikado's government had agreed to curb the emigration of Japanese subjects to the United States, thereby relieving the Washington government from the necessity of taking action that would have cost Japan loss of face. The final of this series of executive agreements touching American relations in and with the Far East was the product of President Wilson's diplomacy. This was the Lansing-Ishii Agreement, embodied in an exchange of letters dated November 2, 1917, by which the United States recognized Japan's "special interests" in China, and Japan assented to the principle of the Open Door in that country.[236]

THE INTERNATIONAL OBLIGATION OF EXECUTIVE AGREEMENTS

The question naturally suggests itself: What sort of obligation does an agreement of the above description impose upon the United States? The question was put to Secretary Lansing himself in 1918 by a member of the Foreign Relations Committee, as follows: "Has the so-called Lansing-Ishii Agreement any binding force on this country?" and replied that it had not; that it was simply a declaration of American policy so long as the President or State Department might choose to continue it.[237] Actually, it took the Washington Conference of 1921, two solemn treaties and an exchange of notes to get rid of it; while the "Gentlemen's Agreement," first drawn in 1907, was finally put an end to, after seventeen years, only by an act of Congress.[238] That executive agreements are sometimes cognizable by the courts was indicated earlier. The matter is further treated immediately below.

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THE LITVINOV AGREEMENT OF 1933

The executive agreement attained its fullest development as an instrument of foreign policy under President Franklin D. Roosevelt, even at times threatening to replace the treaty-making power, if not formally yet actually, as a determinative element in the field of foreign policy. Mr. Roosevelt's first important utilization of the executive agreement device took the form of an exchange of notes on November 16, 1933 with Maxim M. Litvinov, People's Commissar for Foreign Affairs, whereby American recognition was extended to the Union of Soviet Socialist Republics in consideration of certain pledges, the first of which was the promise to restrain any persons or organizations "under its direct or indirect control, * * *, from any act overt or covert liable in any way whatsoever to injure the tranquillity, prosperity, order, or security of the whole or any part of the United States, * * *"[239]

United States *v.* Belmont

The Litvinov Agreement is also noteworthy for giving rise to two cases which afforded the Court the opportunity to evaluate the executive agreement in terms of Constitutional Law. The earlier of these was United States *v.* Belmont,[240] decided in 1937. The point at issue was whether a district court of the United States was free to dismiss an action by the United States, as assignee of the Soviet government, for certain moneys which were once the property of a Russian metal corporation whose assets had been appropriated by the Soviet government. The Court, speaking by Justice Sutherland, said "No." The President's act in recognizing the Soviet government, and the accompanying agreements, constituted, said the Justice, an international compact which the

President, "as the sole organ" of international relations for the United States, was authorized to enter upon without consulting the Senate. Nor did State laws and policies make any difference in such a situation; for while the supremacy of treaties is established by the Constitution in express terms, yet the same rule holds "in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the National Government and is not and cannot be subject to any curtailment or interference on the part of the several States."[241]

United States *v.* Pink; National Supremacy

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In the United States *v.* Pink,[242] decided five years later, the same course of reasoning was reiterated with added emphasis. The question here involved was whether the United States was entitled under the Executive Agreement of 1933 to recover the assets of the New York branch of a Russian insurance company. The company argued that the decrees of confiscation of the Soviet Government did not apply to its property in New York, and could not consistently with the Constitution of the United States and that of New York. The Court, speaking by Justice Douglas, brushed these arguments aside. An official declaration of the Russian government itself settled the question of the extraterritorial operation of the Russian decree of nationalization and was binding on American courts. The power to remove such obstacles to full recognition as settlement of claims of our nationals was "a modest implied power of the President who is the 'sole organ of the Federal Government in the field of international relations' * * * It was the judgment of the political department that full recognition of the Soviet Government required the settlement of outstanding problems including the claims of our nationals. * * * We would usurp the executive function if we held that that decision was not final and conclusive on the courts. 'All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature, * * *'[243] * * * It is, of course, true that even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy.[244] But State law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement.[245] Then, the power of a State to refuse enforcement of rights based on foreign law which runs counter to the public policy of the form * * * must give way before the superior Federal policy evidenced by a treaty or international compact or agreement.[246] * * * The action of New York in this case amounts in substance to a rejection of a part of the policy underlying recognition by this nation of Soviet Russia. Such power is not accorded a State in our constitutional system. To permit it would be to sanction a dangerous invasion of Federal authority. For it would 'imperil the amicable relations between governments and vex the peace of nations.'[247] * * * It would tend to disturb that equilibrium in our foreign relations which the political departments of our national government has diligently endeavored to establish. * * * No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to State laws or State policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts." And while "aliens as well as citizens are entitled to the protection of the Fifth Amendment," that amendment did not bar the Federal Government "from securing for itself and our nationals priority [against] creditors who are nationals of foreign countries and whose claims arose abroad."[248]

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THE HULL-LOTHIAN AGREEMENT, 1940

The fall of France in June 1940 inspired President Roosevelt to enter the following summer into two executive agreements the total effect of which was to transform the role of the United States from one of strict neutrality toward the war then waging in Europe to one of semi-belligerency. The first of these agreements was with Canada, and provided that a Permanent Joint Board on Defense was to be set up at once by the two countries which would "consider in the broad sense the defense of the north half of the Western Hemisphere."[249] The second, and more important agreement, was the Hull-Lothian Agreement of September 2, 1940, under which, in return for the lease to it for ninety-nine years of certain sites for naval bases in the British West Atlantic, our Government handed over to the British Government fifty over-age destroyers which had been recently reconditioned and recommissioned.[250] The transaction, as justified in an opinion by the Attorney General, amounted to a claim for the President, in his capacity as Commander in Chief and organ of foreign relations, to dispose of property of the United States, although the only power to do this which the Constitution mentions is that which it assigns to Congress.[251]

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On April 9, 1941, the State Department, in consideration of the fact that Germany had, on April 9, 1940, occupied Denmark, entered into an executive agreement with the Danish minister at Washington, whereby the United States acquired the right to occupy Greenland for the duration, for purposes of defense.[252]

WARTIME AGREEMENTS

That the post-war diplomacy of the United States has been greatly influenced by such executive agreements as those which are associated with Cairo, Teheran, Malta, and Potsdam, is evident.

[253] The Executive Agreement thus became, in an era in which the instability of international relations forbade successful efforts at treaty-making, the principal instrument of Presidential initiative in the field of foreign relations. Whether the United Nations Charter and the Atlantic Pact signalize the end of this era will doubtless appear in due course.

EXECUTIVE AGREEMENTS BY AUTHORIZATION OF CONGRESS

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"The first known use of the executive agreement under the Constitution of the United States," writes Dr. McClure, "was for the development of international communication by means of the postal service. The second Congress, in establishing the Post Office, which had theretofore been dealt with through legislation carrying it on from year to year, enacted that 'the Postmaster General may make arrangements with the Postmasters in any foreign country for the reciprocal receipt and delivery of letters and packets, through the post-offices.' It was further provided that this act, of February 20, 1792, should 'be in force for the term of two years, from the * * * first day of June next, and no longer.'"[254]

Reciprocal Trade Agreements

Under later legislation executive agreements, or what in effect were such, have been authorized by which American patents, copyrights, and trade-marks have secured protection abroad in return for like protection by the United States of similar rights of foreign origin.[255] But the most copious source of executive agreements has been legislation which provided basis for reciprocal trade agreements, with other countries.[256] The culminating act of this species was that of June 12, 1934, which provided, in part, as follows: "* * *, the President, whenever he finds as a fact that any existing duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States and that the purpose above declared will be promoted by the means hereinafter specified, is authorized from time to time—'(1) To enter into foreign trade agreements with foreign governments or instrumentalities thereof'; and '(2) To proclaim such modifications of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are [Pg 442] required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder. No proclamation shall be made increasing or decreasing by more than 50 per centum any existing rate of duty or transferring any article between the dutiable and free lists.'" [257] This act, renewed at three-year intervals, is still in effect, and under it many trade agreements were negotiated by former Secretary of State Hull.

The Constitutionality of Trade Agreements

In Field *v.* Clark,[258] decided in 1892 this type of legislation was sustained against the objection that it attempted an unconstitutional delegation "of both legislative and treaty-making powers." The Court met the first objection with an extensive review of similar legislation from the inauguration of government under the Constitution. The second objection it met with the court statement that, "What has been said is equally applicable to the objection that the third section of the act invests the President with treaty-making power. The Court is of opinion that the third section of the act of October 1, 1890, is not liable to the objection that it transfers legislative and treaty-making power to the President."[259] Although two Justices disagreed, the question has never been revived. However, in Altman and Co. *v.* United States,[260] decided twenty years later, a collateral question was passed upon. This was whether an act of Congress which gave the federal circuit courts of appeal jurisdiction of cases in which "the validity or construction of any treaty, * * *, was drawn in question" embraced a case involving a trade agreement which had been made under the sanction of the Tariff Act of 1897. Said the Court: "While it may be true that this commercial agreement, made under authority of the Tariff Act of 1897, § 3, was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of two sovereign nations and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President. We think such a compact is a treaty under the Circuit Court of Appeals Act, and, where its construction is directly involved, as it is here, there is a right of review by direct appeal to this court."[261]

The Lend-Lease Act

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The most extensive delegation of authority ever made by Congress to the President to enter into executive agreements occurred within the field of the cognate powers of the two departments, the field of foreign relations; and took place at a time when war appeared to be in the offing, and was in fact only a few months away. The legislation referred to was the Lend-Lease Act of March 11, 1941[262] by which the President was empowered for something over two years—and subsequently for additional periods whenever he deemed it in the interest of the national defense to do so, to authorize "the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government," to manufacture in the government arsenals, factories,

and shipyards, or "otherwise procure," to the extent that available funds made possible, "defense articles"—later amended to include foodstuffs and industrial products—and "sell, transfer title to, exchange, lease, lend, or otherwise dispose of," the same to the "government of any country whose defense the President deems vital to the defense of the United States," and on any terms that he "deems satisfactory." Under this authorization the United States entered into Mutual Aid Agreements whereby the government furnished its allies in the recent war forty billions of dollars worth of munitions of war and other supplies.

PRESIDENT PLUS CONGRESS VERSUS SENATE

The partnership which has developed within recent decades between the President and Congress within the field of their cognate powers is also illustrated by the act of February 9, 1922, creating a commission to effect agreements respecting debts owed this country by certain other governments, the resulting agreements to be approved by Congress;[263] by the circumstances attending the drawing up in 1944 of the United Nations Relief and Rehabilitation Convention; [264] by the Joint Resolution of June 19, 1934, by which the President was authorized to accept membership for the United States in the International Labor Office.[265] It is altogether apparent in view of developments like these that the executive agreement power, especially when it is supported by Congressional legislation, today overlaps the treaty-making power.

ARBITRATION AGREEMENTS

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In 1904-1905 Secretary of State John Hay negotiated a series of treaties providing for the general arbitration of international disputes. Article II of the treaty with Great Britain, for example, provided as follows: "In each individual case the High Contracting Parties, before appealing to the Permanent Court of Arbitration, shall conclude a special Agreement defining clearly the matter in dispute and the scope of the powers of the Arbitrators, and fixing the periods for the formation of the Arbitral Tribunal and the several stages of the procedure."[266] The Senate approved the British treaty by the constitutional majority having, however, first amended it by substituting the word "treaty" for "agreement." President Theodore Roosevelt, characterizing the "ratification" as equivalent to rejection, sent the treaties to repose in the archives. "As a matter of historical practice," Dr. McClure comments, "the *compromis* under which disputes have been arbitrated include both treaties and executive agreements in goodly numbers,"[267] a statement supported by both Willoughby and Moore.[268]

AGREEMENTS UNDER THE UNITED NATIONS CHARTER

Article 43 of the United Nations Charter provides: "1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security. 2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided. 3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes."[269] This time the Senate did not boggle over the word "agreement."

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The United Nations Participation Act

The United Nations Participation Act of December 20, 1945 implements these provisions as follows: "The President is authorized to negotiate a special agreement or agreements with the Security Council which shall be subject to the approval of the Congress by appropriate Act or joint resolution, providing for the numbers and types of armed forces, their degree of readiness and general location, and the nature of facilities and assistance, including rights of passage, to be made available to the Security Council on its call for the purpose of maintaining international peace and security in accordance with article 43 of said Charter. The President shall not be deemed to require the authorization of the Congress to make available to the Security Council on its call in order to take action under article 42 of said Charter and pursuant to such special agreement or agreements the armed forces, facilities, or assistance provided for therein: *Provided*, That nothing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council for such purpose armed forces, facilities, or assistance in addition to the forces, facilities, and assistance provided for in such special agreement or agreements."[270]

The Executive Establishment

"OFFICE"

"An office is a public station, or employment, conferred by the appointment of government," and "embraces the ideas of tenure duration, emolument, and duties."[271]

"AMBASSADORS AND OTHER PUBLIC MINISTERS"

The term "ambassadors and other public ministers," comprehends "all officers having diplomatic functions, whatever their title or designation."[272] It was originally assumed that such offices were established by the Constitution itself, by reference to the Law of Nations, with the consequence that appointments might be made to them whenever the appointing authority—the President and Senate—deemed desirable.[273] During the first sixty-five years of the Government Congress passed no act purporting to create any diplomatic rank, the entire question of grades being left with the President. Indeed, during the administrations of Washington, Adams and Jefferson, and the first term of Madison, no mention occurs in any appropriation act even, of [Pg 446] ministers of a specified rank at this or that place, but the provision for the diplomatic corps consisted of so much money "for the expenses of foreign intercourse," to be expended at the discretion of the President. In Madison's second term the practice was introduced of allocating special sums to the several foreign missions maintained by the Government, but even then the legislative provisions did not purport to curtail the discretion of the President in any way in the choice of diplomatic agents.

In 1814, however, when President Madison appointed, during a recess of the Senate, the Commissioners who negotiated the Treaty of Ghent the theory on which the above legislation was based was drawn into question. Inasmuch, it was argued, as these offices had never been established by law, no vacancy existed to which the President could constitutionally make a recess appointment. To this argument it was answered that the Constitution recognizes "two descriptions of offices altogether different in their nature, authorized by the constitution—one to be created by law, and the other depending for their existence and continuance upon contingencies. Of the first kind, are judicial, revenue, and similar offices. Of the second, are Ambassadors, other public Ministers, and Consuls. The first description organize the Government and give it efficacy. They form the internal system, and are susceptible of precise enumeration. When and how they are created, and when and how they become vacant, may always be ascertained with perfect precision. Not so with the second description. They depend for their original existence upon the law, but are the offspring of the state of our relations with foreign nations, and must necessarily be governed by distinct rules. As an independent power, the United States have relations with all other independent powers; and the management of those relations is vested in the Executive."[274]

By the opening section of the act of March 1, 1855, it was provided that "from and after the thirtieth day of June next, the President of the United States shall, by and with the advice and consent of the Senate, appoint representatives of the grade of envoys extraordinary and ministers plenipotentiary," with a specified annual compensation for each, "to the following countries, * * *" In the body of the act was also this provision: "The President shall appoint no other than citizens of the United States, who are residents thereof, or who shall be abroad in the employment of the Government at the time of their appointment, * * *."[275] The question of the interpretation of the [Pg 447] act having been referred to Attorney General Cushing, he ruled that its total effect, aside from its salary provisions, was recommendatory only. It was "to say, that if, and whenever, the President shall, by and with the advice and consent of the Senate, appoint an envoy extraordinary and minister plenipotentiary to Great Britain, or to Sweden, the compensation of that minister shall be so much and no more."[276]

This line of reasoning is today only partially descriptive of facts. The act of March 2, 1909, provides that new ambassadorships may be created only with the consent of Congress,[277] while the Foreign Service Act of 1924[278] organizes the foreign service, both its diplomatic and its consular divisions, in detail as to grades, salaries, appointments, promotions, and in part as to duties. Theoretically the act leaves the power of the President and Senate to appoint consular and diplomatic officials intact, but in practice the vast proportion of the selections are made in conformance with the civil service rules.

PRESIDENTIAL DIPLOMATIC AGENTS

What the President may have lost in consequence of the intervention of Congress in this field, he has made good through his early conceded right to employ, in the discharge of his diplomatic function, so-called "special," "personal," or "secret" agents without consulting the Senate. When President Jackson's right to resort to this practice was challenged in the Senate in 1831, it was defended by Edward Livingston, Senator from Louisiana, to such good purpose that Jackson made him Secretary of State. "The practice of appointing secret agents," said Livingston, "is coeval with our existence as a nation, and goes beyond our acknowledgment as such by other powers. All those great men who have figured in the history of our diplomacy, began their career, and performed some of their most important services in the capacity of secret agents, with full powers. Franklin, Adams, Lee, were only commissioners; and in negotiating a treaty with the Emperor of Morocco, the selection of the secret agent was left to the Ministers appointed to make the treaty; and, accordingly, in the year 1785, Mr. Adams and Mr. Jefferson appointed Thomas Barclay, who went to Morocco and made a treaty, which was ratified by the Ministers at Paris.

"These instances show that, even prior to the establishment of the Federal Government, secret plenipotentiaries were known, as well in the practice of our own country as in the general law of [Pg 448] nations: and that these secret agents were not on a level with messengers, letter-carriers, or

spies, to whom it has been found necessary in argument to assimilate them. On the 30th March, 1795, in the recess of the Senate, by letters patent under the great broad seal of the United States, and the signature of their President, (that President being George Washington,) countersigned by the Secretary of State, David Humphreys was appointed commissioner plenipotentiary for negotiating a treaty of peace with Algiers. By instructions from the President, he was afterwards authorized to employ Joseph Donaldson as agent in that business. In May, of the same year, he did appoint Donaldson, who went to Algiers, and in September of the same year concluded a treaty with the Dey and Divan, which was confirmed by Humphreys, at Lisbon, on the 28th November in the same year, and afterwards ratified by the Senate on the —— day of ——, 1796, and an act passed both Houses on 6th May, 1796, appropriating a large sum, twenty-five thousand dollars annually, for carrying it into effect."[279]

The precedent afforded by Humphrey's appointment without reference to the Senate has since been multiplied many times, as witness the mission of A. Dudley Mann to Hanover and other German states in 1846, of the same gentleman to Hungary in 1849, of Nicholas Trist to Mexico in 1848, of Commodore Perry to Japan in 1852, of J.H. Blount to Hawaii in 1893.[280] The last named case is perhaps the extremest of all. Blount, who was appointed while the Senate was in session but without its advice and consent, was given "paramount authority" over the American resident minister at Hawaii and was further empowered to employ the military and naval forces of the United States, if necessary to protect American lives and interests. His mission raised a vigorous storm of protest in the Senate, but the majority report of the committee which was created to investigate the constitutional question vindicated the President in the following terms: "A question has been made as to the right of the President of the United States to dispatch Mr. Blount to Hawaii as his personal representative for the purpose of seeking the further information which the President believed was necessary in order to arrive at a just conclusion regarding the state of affairs in Hawaii. Many precedents could be quoted to show that such power has been exercised by the President on various occasions, without dissent on the part of Congress or the people of the United States. * * * These precedents also show that the Senate of the United States, though in session, need not be consulted as to the appointment of such agents, * * *"[281] For recent decades the continued vitality of the practice is attested by such names as Colonel House, late Norman H. Davis, who filled the role of "ambassador at large" for a succession of administrations of both parties, and Professor Philip Jessup, Mr. Averell Harriman, and other "ambassadors at large" of the Truman administration. [Pg 449]

How is this practice to be squared with the express words of the Constitution? Apparently, by stressing the fact that such appointments or designations are ordinarily merely temporary and for special tasks, and hence do not fulfill the tests of "office" in the strict sense. (*See* p. 445). In the same way the not infrequent practice of Presidents of appointing Members of Congress as commissioners to negotiate treaties and agreements with foreign governments may be regularized, notwithstanding the provision of article I, section 6, clause 2 of the Constitution, which provides that "no Senator or Representative shall, * * *, be appointed to any civil Office under the Authority of the United States, which shall have been created," during his term; and no officer of the United States, "shall be a Member of either House during his Continuance in Office."[282] The Treaty of Peace with Spain, the treaty to settle the Behring Sea controversy, the treaty establishing the boundary line between Canada and Alaska, were negotiated by commissions containing Senators and Representatives.

CONGRESSIONAL REGULATION OF OFFICES

That the Constitution distinguishes between the creation of an office and appointment thereto for the generality of national offices has never been questioned. The former is *by law*, and takes place by virtue of Congress's power to pass all laws necessary and proper for carrying into execution the powers which the Constitution confers upon the government of the United States and its departments and officers. As incidental to the establishment of an office Congress has also the power to determine the qualifications of the officer, and in so-doing necessarily limits the range of choice of the appointing power. First and last, it has laid down a great variety of qualifications, depending on citizenship, residence, professional attainments, occupational experience, age, race, property, sound habits, and so on. It has required that appointees be representative of a political party, of an industry, of a geographic region, or of a particular branch of the Government. It has confined the President's selection to a small number of persons to be named by others.[283] Indeed, it has contrived at times to designate a definite eligibility, thereby virtually usurping the appointing power.[284] [Pg 450]

CONDUCT IN OFFICE

Furthermore, Congress has very broad powers in regulating the conduct in office of officers and employees of the United States, especially regarding their political activities. By an act passed in 1876 it prohibited "all executive officers or employees of the United States not appointed by the President, with the advice and consent of the Senate, * * * from requesting, giving to, or receiving from, any other officer or employee of the Government, any money or property or other thing of value for political purposes."[285] The validity of this measure having been sustained,[286] the substance of it, with some elaborations, was incorporated in the Civil Service Act of 1883.[287] By the Hatch Act[288] all persons in the executive branch of the Government, or any department or agency thereof, except the President and Vice President and certain "policy

determining" officers, are forbidden to "take an active part in political management or political campaigns," although they are still permitted to "express their opinions on all political subjects and candidates." In the United Public Workers *v.* Mitchell[289] these provisions were upheld as "reasonable" against objections based on Amendments I, V, IX, and X.

THE LOYALTY ISSUE

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By section 9A of the Hatch Act of 1939, it is made "* * * unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States."[290] In support of this provision the 79th Congress in its second session incorporated in its appropriation acts a series of clauses which forbid the use of any of the funds appropriated to pay the salary of any person who advocates, or belongs to an organization which advocates, the overthrow of the Government by force; or any person who strikes, or who belongs to an organization of Government employees which asserts the right to strike against the Government.[291] The apparent intention of this proviso is to lay down a rule by which the appointing and disbursing authorities will be bound. Since Congress has the conceded [Pg 452] power to lay down the qualifications of officers and employees of the United States; and since few people would contend that officers or employees of the National Government have a constitutional right to advocate its overthrow or to strike against it, the above proviso would seem to be entirely constitutional. President Truman's "Loyalty Order"—Executive Order 9835—of March 21, 1947[292] is an outgrowth in part of this legislation.

LEGISLATION INCREASING DUTIES OF AN OFFICER

Finally, Congress may devolve upon one already in office additional duties which are germane to his office without thereby "rendering it necessary that the incumbent should be again nominated and appointed." Such legislation does not constitute an attempt by Congress to seize the appointing power.[293]

"INFERIOR OFFICERS"; "EMPLOYEES"

Except the President and the Vice President all persons in the civil service of the National Government are appointive, and fall into one of three categories, those who are appointed by the President, "by and with the advice and consent of the Senate"; inferior officers, whose appointment Congress has vested by law "in the President alone, in the courts of law, or in the heads of departments"; and employees, a term which is here used in a peculiar sense. Ordinarily it denotes one who stands in a contractual relationship to his employer, but here it signifies all subordinate officials of the National Government receiving their appointments at the hands of officials who are not specifically recognized by the Constitution as capable of being vested by Congress with the appointing power.[294] Inferior officers are usually officers intended to be subordinate to those in whom their appointment is vested;[295] but the requirement is by no means absolute.[296]

STAGES OF APPOINTMENT PROCESS

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Nomination

The Constitution appears to distinguish three stages in appointments by the President with the advice and consent of the Senate. The first is the "nomination" of the candidate by the President alone; the second is the assent of the Senate to the candidate's "appointment"; and the third is the final appointment and commissioning of the appointee, by the President.[297]

Senate Approval

The fact that the power of nomination belongs to the President alone prevents the Senate from attaching conditions to its approval of an appointment, such as it may do to its approval of a treaty. In the words of an early opinion of the Attorney General: "The Senate cannot originate an appointment. Its constitutional action is confined to the simple affirmation or rejection of the President's nominations, and such nominations fail whenever it rejects them. The Senate may suggest conditions and limitations to the President, but it cannot vary those submitted by him, for no appointment can be made except on his nomination, agreed to without qualification or alteration."[298] This view is borne out by early opinion[299] as well as by the record of practice under the Constitution.

When Senate Consent Is Complete

Early in January, 1931 the Senate requested President Hoover to return its resolution notifying him that it advised and consented to certain nominations to the Federal Power Commission. In support of its action the Senate invoked a long-standing rule permitting a motion to reconsider a resolution confirming a nomination within "the next two days of actual executive session of the

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Senate" and the recall of the notification to the President of the confirmation. The nominees involved having meantime taken the oath of office and entered upon the discharge of their duties, the President responded with a refusal, saying: "I cannot admit the power in the Senate to encroach upon the executive functions by removal of a duly appointed executive officer under the guise of reconsideration of his nomination." The Senate thereupon voted to reconsider the nominations in question, again approving two of the nominees, but rejecting the third, against whom it instructed the District Attorney of the District of Columbia to institute *quo warranto* proceedings in the Supreme Court of the District. In United States *v.* Smith[300] the Supreme Court overruled the proceedings on the ground that the Senate had never before attempted to apply its rule in the case of an appointee who had already been installed in office on the faith of the Senate's initial consent and notification to the President. In 1939 the late President Roosevelt rejected a similar demand by the Senate, action which was not challenged.[301]

> SECTION 3. The President * * * shall Commission all the Officers of the United States.

Commissioning the Officer

This, as applied in practice, does not mean that he is under constitutional obligation to commission those whose appointments have reached that stage, but merely that it is he and no one else who has the power to commission them, which he may do at his discretion. The sealing and delivery of the commission is, on the other hand, by the doctrine of Marbury *v.* Madison, in the case both of appointees by the President and Senate and by the President alone, a purely ministerial act which has been lodged by statute with the Secretary of State and the performance of which may be compelled by mandamus unless the appointee has been in the meantime validly removed.[302] By an opinion of the Attorney General many years later, however, the President, even after he has signed a commission, still has a *locus poenitentiae* and may withhold it; nor is the appointee in office till he has his commission.[303] This is probably the correct doctrine.[304]

> Clause 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.

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RECESS APPOINTMENTS

Setting out from the proposition that the very nature of the executive power requires that it shall always be "in capacity for action," Attorneys General early came to interpret "happen" to mean "happen to exist," and long continued practice securely establishes this construction. It results that whenever a vacancy may have occurred in the first instance, or for whatever reason, if it still continues after the Senate has ceased to sit and so cannot be consulted, the President may fill it in the way described.[305] But a Senate "recess" does not include holiday or temporary adjournments,[306] while by an act of Congress, if the vacancy existed when the Senate was in session, the *ad interim* appointee may receive no salary until he has been confirmed by the Senate.[307]

***AD INTERIM* DESIGNATIONS**

To be distinguished from the power to make recess appointments is the power of the President to make temporary or *ad interim* designations of officials to perform the duties of other absent officials. Usually such a situation is provided for in advance by a statute which designates the inferior officer who is to act in place of his immediate superior. But in the lack of such provision both theory and practice concede the President the power to make the designation.[308]

THE REMOVAL POWER; THE MYERS CASE

Save for the provision which it makes for a power of impeachment of "civil officers of the United States," the Constitution contains no reference to a power to remove from office; and until its decision in Myers *v.* United States,[309] October 25, 1926 the Supreme Court had contrived to side-step every occasion for a decisive pronouncement regarding the removal power, its extent, and location. The point immediately at issue in the Myers case was the effectiveness of an order of the Postmaster General, acting by direction of the President, to remove from office a first class postmaster, in face of the following provision of an act of Congress passed in 1876: "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."[310] A divided Court, speaking through Chief Justice Taft, held the order of removal valid, and the statutory provision just quoted void. The Chief Justice's main reliance was on the so-called "decision of 1789," the reference being to Congress's course that year in inserting in the act establishing the Department of State a proviso which was meant to imply recognition that the Secretary would be removable by the President at will. The proviso was especially urged by Madison, who invoked in support of it the opening words of article II and the President's duty to "take care that the laws be faithfully executed." Succeeding passages of the Chief Justice's opinion erect on this basis a highly selective account

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of doctrine and practice regarding the removal power down to the Civil War which was held to yield the following results: "That article II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed; that article II excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices; that Congress is only given power to provide for appointments and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President with the Senate's consent; that the provisions of the second section of article II, which blend action by the legislative branch, or by part of it, in the work of the executive, are limitations to be strictly construed and not to be extended by implication; that the President's power of removal is further established as an incident to his specifically enumerated function of appointment by and with the advice of the Senate, but that such incident does not by implication extend to removals the Senate's power of checking appointments; and finally that to hold otherwise would make it impossible for the President, in case of political or other differences with the Senate or Congress, to take care that the laws be faithfully executed."[311]

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The holding in the Myers case boils down to the proposition that the Constitution endows the President with an illimitable power to remove all officers in whose appointment he has participated with the exception of judges of the United States. The motivation of the holding was not, it may be assumed, any ambition on the Chief Justice's part to set history aright—or awry.[312] Rather it was the concern which he voiced in the following passage in his opinion: "There is nothing in the Constitution which permits a distinction between the removal of the head of a department or a bureau, when he discharges a political duty of the President or exercises his discretion, and the removal of executive officers engaged in the discharge of their other normal duties. The imperative reasons requiring an unrestricted power to remove the most important of his subordinates in their most important duties must, therefore, control the interpretation of the Constitution as to all appointed by him."[313] Thus spoke the former President Taft, and the result of his prepossession was a rule which, as was immediately pointed out, exposed the so-called "independent agencies," the Interstate Commerce Commission, the Federal Trade Commission, and the like, to Presidential domination.

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"The Nature of the Office" Concept

Unfortunately, the Chief Justice, while professing to follow Madison's leadership had omitted to weigh properly the very important observation which the latter had made at the time regarding the office of Comptroller of the Treasury. "The Committee," said Madison, "has gone through the bill without making any provision respecting the tenure by which the comptroller is to hold his office. I think it is a point worthy of consideration, and shall, therefore, submit a few observations upon it. It will be necessary to consider the nature of this office, to enable us to come to a right decision on the subject; in analyzing its properties, we shall easily discover they are not purely of an executive nature. It seems to me that they partake of a judiciary quality as well as executive; perhaps the latter obtains in the greatest degree. The principal duty seems to be deciding upon the lawfulness and justice of the claims and accounts subsisting between the United States and particular citizens: this partakes strongly of the judicial character, and there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of the government."[314] In Humphrey *v.* United States,[315] decided in 1935, the Court seized upon "the nature of the office" concept and applied it as a much needed corrective to the Myers holding.

The Humphrey Case

The material element of this case was that Humphrey, a member of the Federal Trade Commission, was on October 7, 1933, notified by President Roosevelt that he was "removed" from office, the reason being their divergent views of public policy. In due course Humphrey sued for salary. Distinguishing the Myers case, Justice Sutherland, speaking for the unanimous Court, said: "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 office 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. * * * It goes no farther;—much less does it include an officer who occupies no place in the executive department and who exercise no part of the executive power vested by the Constitution in the President.

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"The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute * * * Such a body cannot in any proper sense be characterized as an arm or eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. * * * 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 Interstate Commerce Commission, the Federal Trade Commission, the Court of Claims]. 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 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."[316]

Other Phases of Presidential Removal Power

Congress may "limit and restrict the power of removal as it deems best for the public interests" in the case of inferior officers.[317] But in the absence of specific legislative provision to the contrary, the President may remove at his discretion an inferior officer whose term is limited by statute,[318] or one appointed with the consent of the Senate.[319] He may remove an officer of the army or navy at any time by nominating to the Senate the officer's successor, provided the Senate approves the nomination.[320] In 1940 the President was sustained in removing Dr. E.A. Morgan from the chairmanship of TVA for refusal to produce evidence in substantiation of charges which he had levelled at his fellow directors.[321] Although no such cause of removal by the President is stated in the act creating TVA, the President's action, being reasonably required to promote the smooth functioning of TVA, was within his duty to "take care that the laws be faithfully executed." So interpreted, it did not violate the principle of administrative independence set forth in Humphrey *v.* United States.[322]

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THE PRESIDENTIAL AEGIS

Presidents have more than once had occasion to stand in a protective relation to their subordinates, assuming their defense in litigation brought against them[323] or pressing litigation in their behalf,[324] refusing a call for papers from one of the Houses of Congress which might be used, in their absence from the seat of government, to their disadvantage,[325] challenging the constitutional validity of legislation which he deemed detrimental to their interests.[326] There is one matter, moreover, as to which he is able to spread his own official immunity to them. The courts may not require the divulging of confidential communications from or to the President, that is, communications which they choose to regard as confidential.[327] Whether a Congressional Committee of inquiry would be similarly powerless is an interesting question which has not been adjudicated.[328] Thus far such issues between the two departments have been adjusted politically.

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> 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 * * *

Legislative Role of the President

The above clause, which imposes a duty rather than confers a power, is the formal basis of the President's legislative leadership, which has attained great proportions since 1900. This development, however, represents the play of political and social forces rather than any pronounced change in constitutional interpretation. Especially is it the result of the rise of parties and the accompanying recognition of the President as party leader, of the appearance of the National Nominating Convention and the Party Platform, and of the introduction of the Spoils System, an ever present help to Presidents in times of troubled relations with Congress.[329] It is true that certain pre-Civil War Presidents, mostly of Whig extraction, professed to entertain nice scruples on the score of "usurping" legislative powers;[330] but still earlier ones, Washington, Jefferson, and Jackson among them, took a very different line, albeit less boldly and persistently than their later imitators.[331] Today there is no subject on which the President may not appropriately communicate to Congress, in as precise terms as he chooses, his conception of its duty. Conversely, the President is not obliged by this clause to impart information which, in his judgment, should in the public interest be withheld.[332] The President has frequently summoned both Houses into "extra" or "special sessions" for legislative purposes, and the Senate alone for the consideration of nominations and treaties. His power to adjourn the Houses has never been exercised.

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The Right of Reception

SCOPE OF THE POWER

"Ambassadors and other public ministers" embraces not only "all possible diplomatic agents which any foreign power may accredit to the United States"[333] but also, as a practical construction of the Constitution, all foreign consular agents, who therefore may not exercise their functions in the United States without an exequatur from the President.[334] The power to "receive" ambassadors, etc., includes, moreover, the right to refuse to receive them, to request their recall, to dismiss them, and to determine their eligibility under our laws.[335] Furthermore, this power makes the President the sole mouthpiece of the nation in its dealings with other nations.

A PRESIDENTIAL MONOPOLY

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Wrote Jefferson in 1790: "The transaction of business with foreign nations is Executive altogether. It belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly."[336] So when Citizen Genet, envoy to the United States from the first French Republic, sought an exequatur for a consul whose commission was addressed to the Congress of the United States, Jefferson informed him that "as the President was the only channel of communication between the United States and foreign nations, it was from him alone 'that foreign nations or their agents are to learn what is or has been the will of the nation;' that whatever he communicated as such, they had a right and were bound to consider 'as the expression of the nation;' and that no foreign agent could be 'allowed to question it,' or 'to interpose between him and any other branch of government, under the pretext of either's transgressing their functions.' Mr. Jefferson therefore declined to enter into any discussion of the question as to whether it belonged to the President under the Constitution to admit or exclude foreign agents. 'I inform you of the fact,' he said, 'by authority from the President.' Mr. Jefferson therefore returned the consul's commission and declared that the President would issue no exequatur to a consul except upon a commission correctly addressed."[337]

"THE LOGAN ACT"

When in 1798 a Philadelphia Quaker named Logan went to Paris on his own to undertake a negotiation with the French Government with a view to averting war between France and the United States his enterprise stimulated Congress to pass "An Act to Prevent Usurpation of Executive Functions,"[338] which, "more honored in the breach than the observance," still survives on the statute books.[339] The year following John Marshall, then a Member of the House of Representatives, defended President John Adams for delivering a fugitive from justice to Great Britain under the 27th article of the Jay Treaty, instead of leaving the business to the courts. He said: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him. He possesses the whole Executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him."[340] Ninety-nine years later a Senate Foreign Relations Committee took occasion to reiterate Marshall's doctrine with elaboration.[341]

A FORMAL OR A FORMATIVE POWER?

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In his attack, instigated by Jefferson, upon Washington's Proclamation of Neutrality in 1793, at the outbreak of war between France and Great Britain, Madison advanced the argument that all large questions of foreign policy fell within the ambit of Congress, by virtue of its power "to declare war," and in support of this proposition he disparaged the Presidential function of reception, in the following words: "I shall not undertake to examine, what would be the precise extent and effect of this function in various cases which fancy may suggest, or which time may produce. It will be more proper to observe, in general, and every candid reader will second the observation, that little, if anything, more was intended by the clause, than to provide for a particular mode of communication, *almost* grown into a right among modern nations; by pointing out the department of the government, most proper for the ceremony of admitting public ministers, of examining their credentials, and of authenticating their title to the privileges annexed to their character by the law of nations. This being the apparent design of the constitution, it would be highly improper to magnify the function into an important prerogative, even when no rights of other departments could be affected by it."[342]

THE PRESIDENT'S DIPLOMATIC ROLE

Hamilton, although he had expressed substantially the same view in The Federalist regarding the power of reception,[343] adopted a very different conception of it in defense of Washington's proclamation. Writing over the pseudonym "Pacificus," he said: "The right of the executive to receive ambassadors and other public ministers, may serve to illustrate the relative duties of the executive and legislative departments. This right includes that of judging, in the case of a

revolution of government in a foreign country, whether the new rulers are competent organs of the national will, and ought to be recognized, or not; which, where a treaty antecedently exists [Pg 466] between the United States and such nation, involves the power of continuing or suspending its operation. For until the new government is *acknowledged*, the treaties between the nations, so far at least as regards *public* rights, are of course suspended. This power of determining virtually upon the operation of national treaties, as a consequence of the power to receive public ministers, is an important instance of the right of the executive, to decide upon the obligations of the country with regard to foreign nations. To apply it to the case of France, if there had been a treaty of alliance, offensive and defensive, between the United States and that country, the unqualified acknowledgment of the new government would have put the United States in a condition to become an associate in the war with France, and would have laid the legislature under an obligation, if required, and there was otherwise no valid excuse, of exercising its power of declaring war. This serves as an example of the right of the executive, in certain cases, to determine the condition of the nation, though it may, in its consequences, affect the exercise of the power of the legislature to declare war. Nevertheless, the executive cannot thereby control the exercise of that power. The legislature is still free to perform its duties, according to its own sense of them; though the executive, in the exercise of its constitutional powers, may establish an antecedent state of things, which ought to weigh in the legislative decision. The division of the executive power in the Constitution, creates a *concurrent* authority in the cases to which it relates."[344]

JEFFERSON'S REAL POSITION

Nor did Jefferson himself officially support Madison's point of view, as the following extract from his "minutes of a Conversation," which took place July 10, 1793, between himself and Citizen Genet, show: "He asked if they [Congress] were not the sovereign. I told him no, they were sovereign in making laws only, the executive was sovereign in executing them, and the judiciary in construing them where they related to their department. 'But,' said he, 'at least, Congress are bound to see that the treaties are observed.' I told him no; there were very few cases indeed arising out of treaties, which they could take notice of; that the President is to see that treaties are observed. 'If he decides against the treaty, to whom is a nation to appeal?' I told him the [Pg 467] Constitution had made the President the last appeal. He made me a bow, and said, that indeed he would not make me his compliments on such a Constitution, expressed the utmost astonishment at it, and seemed never before to have had such an idea."[345]

THE POWER OF RECOGNITION

In his endeavor in 1793 to minimize the importance of the President's power of reception Madison denied that it involved cognizance of the question, whether those exercising the government of the accrediting State have the right along with the possession. He said: "This belongs to the nation, and to the nation alone, on whom the government operates. * * * It is evident, therefore, that if the executive has a right to reject a public minister, it must be founded on some other consideration than a change in the government, or the newness of the government; and consequently a right to refuse to acknowledge a new government cannot be implied by the right to refuse a public minister. It is not denied that there may be cases in which a respect to the general principles of liberty, the essential rights of the people, or the overruling sentiments of humanity, might require a government, whether new or old, to be treated as an illegitimate despotism. Such are in fact discussed and admitted by the most approved authorities. But they are great and extraordinary cases, by no means submitted to so limited an organ of the national will as the executive of the United States; and certainly not to be brought by any torture of words, within the right to receive ambassadors."[346]

Hamilton, with the case of Genet before him, had taken the contrary position, which history has ratified. In consequence of his power to receive and dispatch diplomatic agents, but more especially the former, the President possesses the power to recognize new States, communities claiming the status of belligerency, and changes of government in established states; also, by the same token, the power to decline recognition, and thereby decline diplomatic relations with such new States or governments. The affirmative precedents down to 1906 are succinctly summarized by John Bassett Moore in his famous Digest, as follows: "In the preceding review of the recognition, respectively, of the new states, new governments, and belligerency, there has been made in each case a precise statement of facts, showing how and by whom the recognition was accorded. In every case, as it appears, of a new government and of belligerency, the question of recognition was determined solely by the Executive. In the case of the Spanish-American republics, of Texas, of Hayti, and of Liberia, the President, before recognizing the new state, [Pg 468] invoked the judgment and cooperation of Congress; and in each of these cases provision was made for the appointment of a minister, which, when made in due form, constitutes, as has been seen, according to the rules of international law, a formal recognition. In numerous other cases, the recognition was given by the Executive solely on his own responsibility."[347]

The Case of Cuba

The question of Congress's right also to recognize new states was prominently raised in connection with Cuba's final and successful struggle for independence. Beset by numerous legislative proposals of a more or less mandatory character, urging recognition upon the

President, the Senate Foreign Relations Committee, in 1897, made an elaborate investigation of the whole subject and came to the following conclusions as to this power: "The 'recognition' of independence or belligerency of a foreign power, technically speaking, is distinctly a diplomatic matter. It is properly evidenced either by sending a public minister to the Government thus recognized, or by receiving a public minister therefrom. The latter is the usual and proper course. Diplomatic relations with a new power are properly, and customarily inaugurated at the request of that power, expressed through an envoy sent for the purpose. The reception of this envoy, as pointed out, is the act of the President alone. The next step, that of sending a public minister to the nation thus recognized, is primarily the act of the President. The Senate can take [Pg 469] no part in it at all, until the President has sent in a nomination. Then it acts in its executive capacity, and, customarily, in 'executive session.' The legislative branch of the Government can exercise no influence over this step except, very indirectly, by withholding appropriations. * * * Nor can the legislative branch of the Government hold any communications with foreign nations. The executive branch is the sole mouthpiece of the nation in communication with foreign sovereignties. Foreign nations communicate only through their respective executive departments. Resolutions of their legislative departments upon diplomatic matters have no status in international law. In the department of international law, therefore, properly speaking, a Congressional recognition of belligerency or independence would be a nullity. * * * Congress can help the Cuban insurgents by legislation in many ways, but it cannot help them legitimately by mere declarations, or by attempts to engage in diplomatic negotiations, if our interpretation of the Constitution is correct. That it is correct * * * [is] shown by the opinions of jurists and statesmen of the past."[348] Congress was able ultimately to bundle a clause recognizing the independence of Cuba, as distinguished from its government, into the declaration of war of April 11, 1898 against Spain. For the most part, the sponsors of the clause defended it by the following line of reasoning. Diplomacy, they said, was now at an end and the President himself had appealed to Congress to provide a solution for the Cuban situation. In response Congress was about to exercise its constitutional power of declaring war, and it has consequently the right to state the purpose of the war which it was about to declare.[349] The recognition of the Union of Soviet Socialist Republics in 1933 was an exclusively Presidential act.

THE POWER OF NONRECOGNITION

The potentialities of nonrecognition were conspicuously illustrated by President Woodrow Wilson when he refused, early in 1913, to recognize Provisional President Huerta as the *de facto* government of Mexico, thereby contributing materially to Huerta's downfall the year following. At the same time Wilson announced a general policy of nonrecognition in the case of any government founded on acts of violence; and while he observed this rule with considerable discretion, he consistently refused to recognize the Union of Soviet Socialist Republics, and his successors prior to President Franklin D. Roosevelt did the same. The refusal of the Hoover [Pg 470] Administration to recognize the independence of the Japanese puppet state of Manchukuo early in 1932 was based on kindred grounds. Nonrecognition of the Chinese Communist government by the Truman administration has proved to be a decisive element of the current (1952) foreign policy of the United States.

PRESIDENT AND CONGRESS

The relations of President and Congress in the diplomatic field have, first and, last, presented a varied picture of alternate cooperation and tension,[350] from which emerge two outstanding facts: first, the overwhelming importance of Presidential initiative in this area of power; secondly, the ever increasing dependence of foreign policy on Congressional cooperation and support. First one and then the other aspect of the relationship is uppermost. Thus the United Nations Participation Act of December 20, 1945 appeared to contemplate cooperation between the President and Congress in the carrying out of the duties of the United States to back up decisions of the Security Council involving the use of armed force.[351] When, nevertheless, the first occasion arose such action, namely, to repel the invasion in June, 1950 of South Korea by North Korean forces, no such agreement had been negotiated, and the intervention of the United States was authorized by the President without referring the question to Congress.[352]

CONGRESSIONAL IMPLEMENTATION OF PRESIDENTIAL POLICIES [Pg 471]

No President was ever more jealous of his prerogative in the realm of foreign relations than President Woodrow Wilson. When, however, strong pressure was brought to bear upon him by Great Britain respecting his Mexican Policy he was constrained to go before Congress and ask for a modification of the Panama Tolls Act of 1911, which had also aroused British ire. Addressing Congress, he said "I ask this of you in support of the foreign policy of the Administration. I shall not know how to deal with other matters of even greater delicacy and nearer consequence if you do not grant it to me in ungrudging measure."[353] The fact is, of course, that Congress has enormous powers the support of which is indispensable to any foreign policy. In the long run Congress is the body that lays and collects taxes for the common defense, that creates armies and maintains navies, although it does not direct them, that pledges the public credit, that declares war, that defines offenses against the law of nations, that regulates foreign commerce; and it has the further power "to make all laws which shall be necessary and proper"—that is, which *it* deems to be such—for carrying into execution not only its own powers but all the powers

"of the government of the United States and of any department or officer thereof." Moreover, its laws made "in pursuance" of these powers are "supreme law of the land" and the President is bound constitutionally to "take care that" they "be faithfully executed." In point of fact, Congressional legislation has operated to augment Presidential powers in the foreign field much more frequently than it has to curtail them. The Lend-Lease Act of March 11, 1941[354] is the classic example, although it only brought to culmination a whole series of enactments with which Congress had aided and abetted the administration's foreign policy in the years between 1934 and 1941.[355]

THE DOCTRINE OF POLITICAL QUESTIONS

It is not within the province of the courts to inquire into the policy underlying action taken by the "political departments"—Congress and the President—in the exercise of their conceded powers. This commonplace maxim is, however, sometimes given an enlarged application so as to embrace [Pg 472] questions as to the existence of facts and even questions of law which the Court would normally regard as falling within its jurisdiction. Such questions are termed "political questions," and are especially common in the field of foreign relations. The leading case is Foster *v.* Neilson,[356] where the matter in dispute was the validity of a grant made by the Spanish Government in 1804 of land lying to the east of the Mississippi River, involved with which question was the further one whether the region between the Perdido and Mississippi Rivers belonged in 1804 to Spain or the United States. Chief Justice Marshall held that the Court was bound by the action of the political departments, the President and Congress, in claiming the land for the United States. He said: "If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its right of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this, respecting the boundaries of nations, is, as has been truly said, more a political than a legal question, and in its discussion, the courts of every country must respect the pronounced will of the legislature."[357] The doctrine thus clearly stated is further exemplified, with particular reference to Presidential action, by Williams *v.* The Suffolk Insurance Company.[358] In this case the underwriters of a vessel which had been confiscated by the Argentine Government for catching seals off the Falkland Islands contrary to that government's orders sought to escape liability by showing that the Argentinian government was the sovereign over these islands and that, accordingly, the vessel had been condemned for wilful disregard of legitimate authority. The Court decided against the company on the ground that the President had taken the position that the Falkland Islands were not a part of Argentina. It said: "Can there be any doubt, that when the executive branch of the government, which is charged with our foreign relations, shall, in its correspondence with a foreign nation, assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view, it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions, he had decided the question. Having done this, under the responsibilities which belong to him, it is obligatory on the people and government of the Union. If this were not the rule, cases might often arise, in which, on most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one of these departments, a foreign island or country might be considered as at peace with the United States; whilst the other would consider it in a state of war. No well-regulated government [Pg 473] has ever sanctioned a principle so unwise, and so destructive of national character."[359] Thus the right to determine the boundaries of the country is a political function;[360] as is also the right to determine what country is sovereign of a particular region;[361] to determine whether a community is entitled under International Law to be considered a belligerent or an independent state;[362] to determine whether the other party has duly ratified a treaty;[363] to determine who is the *de jure* or *de facto* ruler of a country;[364] to determine whether a particular person is a duly accredited diplomatic agent to the United States;[365] to determine how long a military occupation shall continue in fulfillment of the terms of a treaty;[366] to determine whether a treaty is in effect or not, although doubtless an extinguished treaty could be constitutionally renewed by tacit consent.[367]

Recent Statements of the Doctrine

The assumption underlying the refusal of courts to intervene in such cases is well stated in the recent case of Chicago & S. Airlines *v.* Waterman Steamship Corp.[368] Here the Court refused to review orders of the Civil Aeronautics Board granting or denying applications by citizen carriers to engage in overseas and foreign air transportation which by the terms of the Civil Aeronautics Act[369] are subject to approval by the President and therefore impliedly beyond those provisions of the act authorizing judicial review of board orders.[370] Elaborating on the necessity of judicial abstinence in the conduct of foreign relations, Justice Jackson declared for the Court: "The President, both as Commander in Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in*

camera in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution on the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."[371] [Pg 474]

To the same effect are the Court's holding and opinion in Ludecke *v.* Watkins,[372] where the question at issue was the power of the President to order the deportation under the Alien Enemy Act of 1798 of a German alien enemy after the cessation of hostilities with Germany. Said Justice Frankfurter for the Court: "War does not cease with a cease-fire order, and power to be exercised by the President such as that conferred by the Act of 1798 is a process which begins when war is declared but is not exhausted when the shooting stops. * * * The Court would be assuming the functions of the political agencies of the Government to yield to the suggestion that the unconditional surrender of Germany and the disintegration of the Nazi Reich have left Germany without a government capable of negotiating a treaty of peace. It is not for us to question a belief by the President that enemy aliens who were justifiably deemed fit subjects for internment during active hostilities do not lose their potency for mischief during the period of confusion and conflict which is characteristic of a state of war even when the guns are silent but the peace of Peace has not come. These are matters of political judgment for which judges have neither technical competence nor official responsibility."[373] [Pg 475]

The President as Law Enforcer

TYPES OF EXECUTIVE POWER

The Constitution does not say that the President shall execute the laws, but that "he shall take care that the laws be faithfully executed," i.e., by others, who are commonly, but not always with strict accuracy, termed his subordinates. What powers are implied from this duty? In this connection five categories of executive power should be distinguished: first, there is that executive power which the Constitution confers directly upon the President by the opening clause of article II and, in more specific terms, by succeeding clauses of the same article; secondly, there is the sum total of the powers which acts of Congress at any particular time confer upon the President; thirdly, there is the sum total of discretionary powers which acts of Congress at any particular time confer upon heads of departments and other executive ("administrative") agencies of the National Government; fourthly, there is the power which stems from the duty to enforce the criminal statutes of the United States; finally, there are so-called "ministerial duties" which admit of no discretion as to the occasion or the manner of their discharge. Three principal questions arise: first, how does the President exercise the powers which the Constitution or the statutes confer upon him; second, in what relation does he stand by virtue of the "take care" clause to the powers of other executive, or administrative agencies; third, in what relation does he stand to the enforcement of the criminal laws of the United States? [Pg 476]

HOW THE PRESIDENT'S OWN POWERS ARE EXERCISED

Whereas the British monarch is constitutionally under the necessity of acting always through agents if his acts are to receive legal recognition, the President is presumed to exercise certain of his constitutional powers personally. In the words of an opinion by Attorney General Cushing in 1855: "It may be presumed that he, the man discharging the presidential office, and he alone, grants reprieves and pardons for offences against the United States, * * * So he, and he alone, is the supreme 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. That is a power constitutionally inherent in the person of the President. No act of Congress, no act even of the President himself, can, by constitutional possibility, authorize or create any military officer not subordinate to the President."[374] Moreover, the obligation to act personally may be sometimes enlarged by statute, as, for example, by the act organizing the President with other designated officials into "an Establishment by name of the Smithsonian Institute."[375] Here, says the Attorney General, "the President's name of office is *designatio personae*." He is also of opinion that expenditures from the "secret service" fund in order to be valid, must be vouched for by the President personally.[376] On like grounds the Supreme Court once held void a decree of a court martial, because, though it has been confirmed by the Secretary of War, it was not specifically stated to have received the sanction of the President as required by the 65th Article of War.[377] This case has, however, been virtually overruled, and at any rate such cases are exceptional.[378]

The general rule, as stated by the Court, is that when any duty is cast by law upon the President, it may be exercised by him through the head of the appropriate department, whose acts, if performed within the law, thus become the President's acts.[379] In Williams *v.* United States[380] was involved an act of Congress, which prohibited the advance of public money in any case whatever to disbursing officers of the United States, except under special direction by the President.[381] The Supreme Court held that the act did not require the personal performance by the President of this duty. Such a practice, said the Court, if it were possible, would absorb the [Pg 477]

duties of the various departments of the government in the personal acts of one chief executive officer, and be fraught with mischief to the public service. The President's duty in general requires his superintendence of the administration; yet he cannot be required to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to services which, nevertheless, he is, in a correct sense, by the Constitution and laws required and expected to perform.[382] As a matter of administrative practice, in fact, most orders and instructions emanating from the heads of the departments, even though in pursuance of powers conferred by statute on the President, do not even refer to the President.[383]

POWER AND DUTY OF THE PRESIDENT IN RELATION TO SUBORDINATE EXECUTIVE OFFICERS

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Suppose, that the law casts a duty upon a head of department *eo nomine*, does the President thereupon become entitled by virtue of his duty to "take care that the laws be faithfully executed," to substitute his own judgment for that of the principal officer regarding the discharge of such duty? In the debate in the House in 1789 on the location of the removal power Madison argued that it ought to be attributed to the President alone because it was "the intention of the Constitution, expressed especially in the faithful execution clause, that the first magistrate should be responsible for the executive department"; and this responsibility, he held, carried with it the power to "inspect and control" the conduct of subordinate executive officers. "Vest," said he, "the power [of removal] in the Senate jointly with the President, and you abolish at once the great principle of unity and responsibility in the executive department, which was intended for the security of liberty and the public good."[384] But this was said with respect to the office of Secretary of State; and when shortly afterward the question arose as to the power of Congress to regulate the tenure of the Comptroller of the Treasury, Madison assumed a very different attitude, conceding in effect that this officer was to be an arm of certain of Congress's own powers, and should therefore be protected against the removal power.[385] (*See* p. 458). And in Marbury *v.* Madison,[386] Chief Justice Marshall traced a parallel distinction between the duties of the Secretary of State under the original act which had created a "Department of Foreign Affairs" and those which had been added by the later act changing the designation of the department to its present one. The former were, he pointed out, entirely in the "political field," and hence for their discharge the Secretary was left responsible absolutely to the President. The latter, on the other hand, were exclusively of statutory origin and sprang from the powers of Congress. For these, therefore, the Secretary was "an officer of the law" and "amenable to the law for his conduct."[387]

ADMINISTRATIVE DECENTRALIZATION VERSUS JACKSONIAN CENTRALISM

An opinion rendered by Attorney General Wirt in 1823 asserted the proposition that the President's duty under the "take care" clause required of him scarcely more than that he should bring a criminally negligent official to book for his derelictions, either by removing him or by setting in motion against him the processes of impeachment or of criminal prosecution.[388] The opinion entirely overlooked the important question of the location of the power to interpret the law which is inevitably involved in any effort to enforce it. The diametrically opposed theory that Congress is unable to vest any head of an executive department, even within the field of Congress's specifically delegated powers, with any legal discretion which the President is not entitled to control was first asserted in unambiguous terms in President Jackson's Protest Message of April 15, 1834,[389] defending his removal of Duane as Secretary of the Treasury, on account of the latter's refusal to remove the deposits from the Bank of the United States. Here it is asserted "that the entire executive power is vested in the President"; that the power to remove those officers who are to aid him in the execution of the laws is an incident of that power; that the Secretary of the Treasury was such an officer; that the custody of the public property and money was an executive function exercised through the Secretary of the Treasury and his subordinates: that in the performance of these duties the Secretary was subject to the supervision and control of the President: and finally that the act establishing the Bank of the United States "did not, as it could not change the relation between the President and Secretary—did not release the former from his obligation to see the law faithfully executed nor the latter from the President's supervision and control."[390] In short, the President's removal power, in this case unqualified, was the sanction provided by the Constitution for his power and duty to control his "subordinates" in all their official actions of public consequence.

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CONGRESSIONAL POWER VERSUS PRESIDENTIAL DUTY TO THE LAW

Five years later the case of Kendall *v.* United States[391] arose. The United States owed one Stokes money, and when Postmaster General Kendall, at Jackson's instigation, refused to pay it, Congress passed a special act ordering payment. Kendall, however, still proved noncompliant, whereupon Stokes sought and obtained a mandamus in the United States circuit court for the District of Columbia, and on appeal this decision was affirmed by the Supreme Court. While Kendall *v.* United States, like Marbury *v.* Madison, involved the question of the responsibility of a head of department for the performance of a *ministerial* duty, the discussion by counsel before the Court and the Court's own opinion covered the entire subject of the relation of the President to his subordinates in the performance by them of statutory duties. The lower court had asserted that the duty of the President under the faithful execution clause gave him no other control over

the officer than to see that he acts honestly, with proper motives, but no power to construe the law, and see that the executive action conforms to it. Counsel for Kendall attacked this position vigorously, relying largely upon statements by Hamilton, Marshall, James Wilson, and Story having to do with the President's power in the field of foreign relations. The Court rejected the implication with emphasis. There are, it pointed out, "certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case, where the duty enjoined is of a mere ministerial character."[392] In short, the Court recognized the underlying question of the case to be whether the President's duty to "take care that the laws be faithfully executed" made it constitutionally impossible for Congress ever to entrust the construction of its statutes to anybody but the President; and it answered this in the negative.

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MYERS CASE VERSUS HUMPHREY CASE

How does this issue stand today? The answer to this question, so far as there is one, is to be sought in a comparison of the Court's decisions in the Myers and Humphrey cases respectively.[393] The former decision is still valid to support the President's right to remove, and hence to control the decisions of, all officials through whom he exercises the great political powers which he derives from the Constitution; also all officials—usually heads of departments—through whom he exercises powers conferred upon him by statute. The Humphrey decision assures to Congress the right to protect the tenure, and hence the freedom of decision of all officials upon whom, in the exercise of its delegated powers, it confers duties of a "quasi-legislative" or a "quasi-judicial" nature. The former may be described as duties for the satisfactory discharge of which Congress justifiably feels that a specialized and informed judgment is requisite. The latter are duties the discharge of which closely touches private rights and which ought therefore be accompanied or preceded by a "quasi-judicial" inquiry capable of affording the claimants of such rights the opportunity to be heard. In neither case is the President entitled to force his reading of the law upon the officer, but only to take care that the latter exercise his powers according to his own best lights.

POWER OF THE PRESIDENT TO GUIDE ENFORCEMENT OF THE PENAL LAW

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This matter also came to a head in "the reign of Andrew Jackson," preceding, and indeed foreshadowing, the Duane episode by some months. "At that epoch," Wyman relates in his Principles of Administrative Law, "the first announcement of the doctrine of centralism in its entirety was set forth in an obscure opinion upon an unimportant matter—The Jewels of the Princess of Orange, 2 Opin. 482 (1831). These jewels * * * were stolen from the Princess by one Polari, and were seized by the officers of the United States Customs in the hands of the thief. Representations were made to the President of the United States by the Minister of the Netherlands of the facts in the matter, which were followed by request for return of the jewels. In the meantime the District Attorney was prosecuting condemnation proceedings in behalf of the United States which he showed no disposition to abandon. The President felt himself in a dilemma, whether if it was by statute the duty of the District Attorney to prosecute or not, the President could interfere and direct whether to proceed or not. The opinion was written by Taney, then Attorney-General; it is full of pertinent illustrations as to the necessity in an administration of full power in the chief executive as the concomitant of his full responsibility. It concludes: If it should be said that, the District Attorney having the power to discontinue the prosecution, there is no necessity for inferring a right in the President to direct him to exercise it —I answer that the direction of the President is not required to communicate any new authority to the District Attorney, but to direct him in the execution of a power he is admitted to possess. The most valuable and proper measure may often be for the President to order the District Attorney to discontinue prosecution. The District Attorney might refuse to obey the President's order; and if he did refuse, the prosecution, while he remained in office, would still go on; because the President himself could give no order to the court or to the clerk to make any particular entry. He could only act through his subordinate officer the District Attorney, who is responsible to him and who holds his office at his pleasure. And if that officer still continue a prosecution which the President is satisfied ought not to continue, the removal of the disobedient officer and the substitution of one more worthy in his place would enable the President through him faithfully to execute the law. And it is for this among other reasons that the power of removing the District Attorney resides in the President."[394]

THE PRESIDENT AS LAW INTERPRETER

The power accruing to the President from his function of law interpretation preparatory to law enforcement is daily illustrated in relation to such statutes as the Anti-Trust Acts, the Taft-Hartley Act, the Internal Security Act, and many lesser statutes. Nor is this the whole story. Not only do all Presidential regulations and orders based on statutes which vest power in him or on his own constitutional powers have the force of law, provided they do not transgress the Court's reading of such statutes or of the Constitution,[395] but he sometimes makes law in a more special sense. In the famous Neagle case[396] an order of the Attorney General to a United States

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marshal to protect a Justice of the Supreme Court whose life had been threatened by a suitor was attributed to the President and held to be "a law of the United States" in the sense of section 753 of the Revised Statutes, and as such to afford basis for a writ of *habeas corpus* transferring the said marshal, who had "got his man," from State to national custody. Speaking for the Court, Justice Miller inquired: "Is this duty [the duty of the President to take care that the laws be faithfully executed] 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?"[397] Obviously, an affirmative answer is assumed to the second branch of this inquiry, an assumption which is borne out by numerous precedents. And in United States *v.* Midwest Oil Company[398] it was ruled that the President had, by dint of repeated assertion of it from an early date, acquired the right to withdraw, via the Land Department, public lands, both mineral and nonmineral, from private acquisition, Congress having never repudiated the practice.

MILITARY POWER IN LAW ENFORCEMENT: THE POSSE COMITATUS

"Whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall become impracticable, in the judgment of the President, to enforce, by the ordinary course of judicial proceedings, the laws of the United States within any State or Territory, it shall be lawful for the President to call forth the militia of any or all the States, and to employ such parts of the land and naval forces of the United States as he may deem necessary to enforce the faithful execution of the laws of the United States, or to suppress such rebellion, in whatever State or Territory [Pg 483] thereof the laws of the United States may be forcibly opposed, or the execution thereof forcibly obstructed."[399] This provision of the United States Code consolidates a course of legislation which began at the time of the Whiskey Rebellion of 1792.[400] In Martin *v.* Mott,[401] which arose out of the War of 1812, it was held that the authority to decide whether the exigency has arisen belongs exclusively to the President.[402] Even before that time, Jefferson had in 1808, in the course of his efforts to enforce the Embargo Acts, issued a proclamation ordering "all officers having authority, civil or military, who shall be found in the vicinity" of an unruly combination to aid and assist "by all means in their power, by force of arms and otherwise" the suppression of such combination.[403] Forty-six years later Attorney General Cushing advised President Pierce that in enforcing the Fugitive Slave Act of 1850, marshals of the United States, had authority when opposed by unlawful combinations, to summon to their aid not only bystanders and citizens generally, but armed forces within their precincts, both State militia and United States officers, soldiers, sailors, and marines,[404] a doctrine which Pierce himself improved upon two years later by asserting, with reference to the civil war then raging in Kansas, that it lay within his obligation to take care that the laws be faithfully executed to place the forces of the United States in Kansas at the disposal of the marshal there, to be used as a portion of the *posse comitatus*. Lincoln's call of April 15, 1861, for 75,000 volunteers was, on the other hand, a fresh invocation, though of course on a vastly magnified scale, of Jefferson's conception of a *posse comitatus* subject to Presidential call.[405] The provision above extracted from the United States Code ratifies this conception as regards the State militias and the national forces.

SUSPENSION OF HABEAS CORPUS BY THE PRESIDENT [Pg 484]

See Article I, Section 9, clause 2, pp. 312-315.

PREVENTIVE MARTIAL LAW

The question of executive power in the presence of civil disorder is dealt with in modern terms in Moyer *v.* Peabody,[406] decided in 1909, to which the Debs Case,[407] decided in 1895, may be regarded as an addendum. Moyer, a labor leader, brought suit against Peabody, for having ordered his arrest during a labor dispute which occurred while Peabody was governor of Colorado. Speaking for a unanimous Court, one Justice being absent, Justice Holmes said: "Of course the plaintiff's position is that he has been deprived of his liberty without due process of law. But it is familiar that what is due process of law depends on circumstances. It varies with the subject matter and the necessities of the situation. * * * The facts that we are to assume are that a state of insurrection existed and that the Governor, without sufficient reason but in good faith, in the course of putting the insurrection down held the plaintiff until he thought that he safely could release him. * * * In such a situation we must assume that he had a right under the state constitution and laws to call out troops, as was held by the Supreme Court of the State. * * * That means that he shall make the ordinary use of the soldiers to that end; that he may kill persons who resist and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief. * * * When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process."[408]

THE DEBS CASE

The Debs case of 1895 arose out of a railway strike which had caused the President to dispatch troops to Chicago the previous year. Coincidently with this move, the United States district attorney stationed there, acting upon orders from Washington, obtained an injunction from the [Pg 485] United States circuit court forbidding the strike on account of its interference with the mails and with interstate commerce. The question before the Supreme Court was whether this injunction, for violation of which Debs has been jailed for contempt of court, had been granted with jurisdiction. Conceding, in effect, that there was no statutory warrant for the injunction, the Court nevertheless validated it on the ground that the Government was entitled thus to protect its property in the mails, and on a much broader ground which is stated in the following passage of Justice Brewer's opinion for the Court: "Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other. * * * While it is not the province of the Government to interfere in any mere matter of private controversy between individuals, or to use its granted powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the Government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties."[409]

STATUS OF THE DEBS CASE TODAY

The restrictions imposed by the Norris-LaGuardia Act[410] on the issuance of injunctions by the federal courts in cases "involving or growing out of any labor dispute" later cast a shadow of doubt over the Debs case, which was deepened, if anything, by the Court's decision in 1947, in United States *v.* United Mine Workers.[411] But such doubts have been since dispelled by the Taft-Hartley Act, which provides that whenever in his opinion a threatened or actual strike or lockout affecting the whole or a substantial part of an industry engaged in interstate commerce will, "if permitted to occur or continue, imperil the national health or safety," the President may appoint a board of inquiry and, upon its so finding, "may direct the Attorney General to petition [Pg 486] any district court of the United States having jurisdiction of the parties to enjoin such strike or lockout or the continuing thereof * * *," and the Court shall have jurisdiction to do so, provided it shares the President's view of the situation.[412] Administration and labor critics of the act did not challenge the constitutionality of this provision. They questioned its necessity in view of the President's "inherent powers" in the face of emergency.[413]

THE PRESIDENT'S DUTY IN CASES OF DOMESTIC VIOLENCE IN THE STATES

See Art. IV, sec. 4, p. 705.

THE PRESIDENT AS EXECUTIVE OF THE LAW OF NATIONS

Illustrative of the President's duty to discharge the responsibilities of the United States at International Law with a view to avoiding difficulties with other governments, was the action of President Wilson in closing the Marconi Wireless Station at Siasconset, Massachusetts on the outbreak of the European War in 1914, the company having refused assurance that it would comply with naval censorship regulations. Justifying this drastic invasion of private rights, Attorney General Gregory said: "The President of the United States is at the head of one of the three great coordinate departments of the Government. He is Commander in Chief of the Army and the Navy. * * * If the President is of the opinion that the relations of this country with foreign nations are, or are likely to be, endangered by action deemed by him inconsistent with a due neutrality, it is his right and duty to protect such relations; and in doing so, in the absence of any statutory restrictions, he may act through such executive office or department as appears best [Pg 487] adapted to effectuate the desired end. * * * I do not hesitate, in view of the extraordinary conditions existing, to advise that the President, through the Secretary of the Navy or any appropriate department, close down, or take charge of and operate, the plant * * *, should he deem it necessary in securing obedience to his proclamation of neutrality."[414]

PROTECTION OF AMERICAN RIGHTS OF PERSON AND PROPERTY ABROAD

The right of the President to use force in vindication of American rights of person and property abroad was demonstrated in 1854 by the bombardment of Greytown, Nicaragua by Lieutenant Hollins of the U.S.S. Cyane, in default of reparation from the local authorities for an attack by a mob on the United States consul at that place. Upon his return to the United States Hollins was sued in a federal court by one Durand for the value of certain property which was alleged to have been destroyed in the bombardment. His defense was based upon the orders of the President and Secretary of the Navy, and was sustained by Justice Nelson, then on circuit, in the following words: "As the Executive head of the nation, the President is made the only legitimate organ of the General Government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or of its citizens. It is to him, also, the citizens abroad must look for protection of person and of property, and for the faithful execution

of the laws existing and intended for their protection. For this purpose, the whole Executive power of the country is placed in his hands, under the Constitution, and the laws passed in pursuance thereof; and different Departments of government have been organized, through which this power may be most conveniently executed, whether by negotiation or by force—a Department of State and a Department of the Navy.

"Now, as it respects the interposition of the Executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the President. Acts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not unfrequently, require the most prompt and decided action. Under our system of Government, the citizen abroad is as much entitled to protection as the citizen at home. The great object and duty of Government is the protection of the lives, liberty, and property of the people composing it, whether abroad or at home; and any Government failing in the accomplishment of the object, or the performance of the duty, is not worth preserving."[415]

PRESIDENTIAL WORLD POLICING

[Pg 488]

In his little volume on World Policing and the Constitution[416] Mr. James Grafton Rogers lists 149 episodes similar to the Greytown affair, stretching between the undeclared war with France in 1798 and Pearl Harbor. While inviting some pruning, the list demonstrates beyond peradventure the existence in the President, as Chief Executive and Commander in Chief, of power to judge whether a situation requires the use of available forces to protect American rights of person and property outside the United States and to take action in harmony with his decision. Such employment of the forces have, it is true, been usually justifiable acts of self defense rather than acts of war, but the countries where they occurred were entitled to treat them as acts of war nevertheless, although they have generally been too feeble to assert their prerogative in this respect, and have sometimes actually chosen to turn the other cheek. Thus when in 1900 President McKinley, without consulting Congress, contributed a sizable contingent to the joint forces that went to the relief of the foreign legations in Peking, the Chinese Imperial Government agreed that this action had not constituted war.[417]

The Atlantic Pact

Article V of the Atlantic Pact builds on such precedents. The novel feature is its enlarged conception of defensible American interests abroad. In the words of the published abstract of the Report of the Committee on Foreign Relations on the Pact, "Article 5 records what is a fact, namely, that an armed attack within the meaning of the treaty would in the present-day world constitute an attack upon the entire community comprising the parties to the treaty, including the United States. Accordingly, the President and the Congress, each within their sphere of assigned constitutional responsibilities, would be expected to take all action necessary and appropriate to protect the United States against the consequences and dangers of an armed attack committed against any party to the treaty."[418] But from the very nature of things, the discharge of this obligation against overt force will ordinarily rest with the President in the first instance, just as has the discharge in the past of the like obligation in the protection of American rights abroad. Furthermore, in the discharge of this obligation the President will ordinarily be required to use force and perform acts of war. Such is the verdict of history, a verdict which was [Pg 489] foreseen more or less definitely by the framers themselves.[419]

PRESIDENTIAL ACTION IN THE DOMAIN OF CONGRESS: THE STEEL SEIZURE CASE

Facts[420]

To avert a nation-wide strike of steel workers which he believed would jeopardize the national defense, President Truman, on April 8th, 1952, issued Executive Order 10340[421] directing the Secretary of Commerce to seize and operate most of the steel mills of the country. The Order cited no specific statutory authorization, but invoked generally the powers vested in the President by the Constitution and laws of the United States. Secretary Sawyer forthwith issued an order seizing the mills and directing their presidents to operate them as operating managers for the United States in accordance with his regulations and directions. The President promptly reported these events to Congress, conceding Congress's power to supersede his Order; but Congress failed to do anything about the matter either then or a fortnight later, when the President again brought up the subject in a special message.[422] It had in fact provided other methods of dealing with such situations, in the elaboration of which it had declined repeatedly to authorize governmental seizures of property to settle labor disputes. The steel companies sued the Secretary in a federal district court, praying for a declaratory judgment and injunctive relief. The district court issued a preliminary injunction, which the court of appeals stayed.[423] On certiorari to the court of appeals, the district court's order was affirmed by the Supreme Court by a vote of six justices to three. Justice Black delivered the opinion of the Court in which Justices Frankfurter, Douglas, Jackson, and Burton formally concurred. Justice Clark expressly limited his concurrence to the judgment of the Court. All these Justices presented what are termed "concurring" opinions. The Chief Justice, speaking for himself and Justices Reed and Minton, presented a dissenting opinion.

The Doctrine of the Opinion of the Court [Pg 491]

The chief points urged in the Black opinion are the following: There was no statute which expressly or impliedly authorized the President to take possession of the property involved. On the contrary, in its consideration of the Taft-Hartley Act in 1947, Congress refused to authorize governmental seizures of property as a method of preventing work stoppages and settling labor disputes. Authority to issue such an order in the circumstances of the case was not deducible from the aggregate of the President's executive powers under Article II of the Constitution; nor was the Order maintainable as an exercise of the President's powers as Commander in Chief of the Armed Forces. The power sought to be exercised was the lawmaking power, which the Constitution vests in the Congress alone. Even if it were true that other Presidents have taken possession of private business enterprises without congressional authority in order to settle labor disputes, Congress was not thereby divested of its exclusive constitutional authority to make the laws necessary and proper to carry out all powers vested by the Constitution "in the Government of the United States, or any Department or Officer thereof."[424]

The Factual Record

The pivotal proposition of the opinion is, in brief, that inasmuch as Congress could have ordered the seizure of the steel mills, the President had no power to do so without prior congressional authorization. To support this position no proof is offered in the way of past opinion, and the [Pg 492] following extract from Justice Clark's opinion presents a formidable challenge to it: "One of this Court's first pronouncements upon the powers of the President under the Constitution was made by Mr. Chief Justice John Marshall some one hundred and fifty years ago. In Little *v.* Barreme, [425] he used this characteristically clear language in discussing the power of the President to instruct the seizure of the *Flying Fish*, a vessel bound from a French port: 'It is by no means clear that the president of the United States whose high duty it is to "take care that the laws be faithfully executed," and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce. But when it is observed that [an act of Congress] gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound or sailing to a French port, the legislature seems to have prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not bound to a French port.' Accordingly, a unanimous Court held that the President's instructions had been issued without authority and that they could not 'legalize an act which without those instructions would have been a plain trespass.' I know of no subsequent holding of this Court to the contrary."[426]

Another field which the President and Congress have each occupied at different times is extradition. In 1799 President Adams, in order to execute the extradition provisions of the Jay Treaty, issued a warrant for the arrest of one Jonathan Robbins. As Chief Justice Vinson recites in his opinion: "This action was challenged in Congress on the ground that no specific statute prescribed the method to be used in executing the treaty. John Marshall, then a member of the House of Representatives, in the course of his successful defense of the President's action, said: 'Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but, till this be done, it seems the duty of the Executive department to execute the contract by any means it possesses.'"[427] In 1848 Congress enacted a statute governing this subject which confers upon the courts, both State and Federal, the duty of handling extradition cases.[428]

The first Neutrality Proclamation was issued by President Washington in 1793 without [Pg 493] congressional authorization.[429] The following year Congress enacted the first neutrality statute, [430] and since then proclamations of neutrality have been based on an act of Congress governing the matter. The President may, in the absence of legislation by Congress, control the landing of foreign cables in the United States and the passage of foreign troops through American territory, and has done so repeatedly.[431] Likewise, until Congress acts, he may govern conquered territory[432] and, "in the absence of attempts by Congress to limit his power," may set up military commissions in territory occupied by the armed forces of the United States.[433] He may determine, in a way to bind the courts, whether a treaty is still in force as law of the land, although again the final power in the field rests with Congress.[434] One of the President's most ordinary powers and duties is that of ordering the prosecution of supposed offenders against the laws of the United States. Yet Congress may do the same thing.[435] On September 22, 1862, President Lincoln issued a proclamation suspending the privilege of the writ of habeas corpus throughout the Union in certain classes of cases. By an act passed March 3, 1863, Congress ratified this action of the President and at the same time brought the whole subject of military arrests in the United States under legal control.[436] Conversely, when President Wilson failed in March 1917 to obtain Congress's consent to his arming American merchant vessels with defensive arms, he went ahead and did it anyway, "fortified not only by the known sentiments of the majority in Congress but also by the advice of his Secretary of State and Attorney General." [437]

On the specific matter of property seizures, Justice Frankfurter's concurring opinion in the

Youngstown Case is accompanied by appendices containing a synoptic analysis of legislation authorizing seizures of industrial property and also a summary of seizures of industrial plants and facilities by Presidents without definite statutory warrant. Eighteen such statutes are listed, all but the first of which were enacted between 1916 and 1951. Of presidential seizures unsupported by reference to specific statutory authorization, he lists eight as occurring during World War I. To justify these it was deemed sufficient to refer to "the Constitution and laws" generally. For the World War II period he lists eleven seizures in justification of which no statutory authority was cited. The first of these was the seizure of the North American Aviation, Inc., of Englewood, California. In support of this action Attorney General Jackson, as Chief Justice Vinson points out in his dissenting opinion, "vigorously proclaimed that the President had the moral duty to keep this nation's defense effort a 'going concern.'"[438] Said the then Attorney General, "The Presidential proclamation rests upon the aggregate of the Presidential powers derived from the Constitution itself and from statutes enacted by the Congress. The Constitution lays upon the President the duty 'to take care that the laws be faithfully executed.' Among the laws which he is required to find means to execute are those which direct him to equip an enlarged army, to provide for a strengthened navy, to protect Government property, to protect those who are engaged in carrying out the business of the Government, and to carry out the provisions of the Lend-Lease Act. For the faithful execution of such laws the President has back of him not only each general law-enforcement power conferred by the various acts of Congress but the aggregate of all such laws plus that wide discretion as to method vested in him by the Constitution for the purpose of executing the laws."[439] In the War Labor Disputes Act of June 25, 1943,[440] such seizures were put on a statutory basis. As the Chief Justice points out, the purpose of this measure, as stated by its sponsor, was not to augment presidential power but to "let the country know that the Congress is squarely behind the President."[441]

In United States *v.* Pewee Coal Company, Inc.[442] the Court had before it the claim of a coal mine operator whose property was seized by the President without statutory authorization, "to avert a nation-wide strike of miners." The company brought an action in the Court of Claims to recover under the Fifth Amendment for the total operating losses sustained during the period in which this property was operated by the United States. The Court awarded judgment for $2,241.46 and the Supreme Court sustained this judgment, a result which implied the validity of the seizure.[443] Said Justice Reed, in his concurring opinion of the case: "The relatively new technique of temporary taking by eminent domain is a most useful administrative device: many properties, such as laundries, or coal mines, or railroads, may be subjected to public operation only for a short time to meet war or emergency needs, and can then be returned to their owners." The implications of United States *v.* Pewee Coal Company, Inc.,[444] clearly sustained the Government in Youngstown, assuming that Congress had not acted in the latter case. And one instance of seizure by executive order Justice Frankfurter fails to mention. This was the seizure by President Wilson in the late summer of 1914, following the outbreak of war in Europe, of the Marconi Wireless Station at Siasconset when the Company refused assurance that it would comply with naval censorship regulations. Attorney General Gregory's justification of this action at the time was quoted on an earlier page.[445]

The doctrine dictated by the above considerations as regards the exercise of executive power in the field of legislative power was well stated by Mr. John W. Davis, principal counsel on the present occasion for the steel companies, in a brief which he filed nearly forty years ago as Solicitor General, in defense of the action of the President in withdrawing certain lands from public entry although his doing so was at the time contrary to express statute. "Ours," the brief reads, "is a self-sufficient Government within its sphere. (Ex parte Siebold, 100 U.S. 371, 395; in re Debs, 158 U.S. 564, 578.) 'Its means are adequate to its ends' (McCulloch *v.* Maryland, 4 Wheat. 316, 424), and it is rational to assume that its active forces will be found equal in most things to the emergencies that confront it. While perfect flexibility is not to be expected in a Government of divided powers, and while division of power is one of the principal features of the Constitution, it is the plain duty of those who are called upon to draw the dividing lines to ascertain the essential, recognize the practical, and avoid a slavish formalism which can only serve to ossify the Government and reduce its efficiency without any compensating good. The function of making laws is peculiar to Congress, and the Executive can not exercise that function to any degree. But this is not to say that all of the *subjects* concerning which laws might be made are perforce removed from the possibility of Executive influence. The Executive may act upon things and upon men in many relations which have not, though they might have, been actually regulated by Congress. In other words, just as there are fields which are peculiar to Congress and fields which are peculiar to the Executive, so there are fields which are common to both, in the sense that the Executive may move within them until they shall have been occupied by legislative action. These are not the fields of legislative prerogative, but fields within which the lawmaking power may enter and dominate whenever it chooses. This situation results from the fact that the President is the active agent, not of Congress, but of the Nation. As such he performs the duties which the Constitution lays upon him immediately, and as such, also, he executes the laws and regulations adopted by Congress. He is the agent of the people of the United States, deriving all his powers from them and responsible directly to them. In no sense is he the agent of Congress. He obeys and executes the laws of Congress, not because Congress is enthroned in authority over him, but because the Constitution directs him to do so. Therefore it follows that in ways short of making laws or disobeying them, the Executive may be under a grave constitutional duty to act for the national protection in situations not covered by the acts of Congress, and in which, even, it may not be said that his action is the direct expression of any

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particular one of the independent powers which are granted to him specifically by the Constitution. Instances wherein the President has felt and fulfilled such a duty have not been rare in our history, though, being for the public benefit and approved by all, his acts have seldom been challenged in the courts."[446]

Concurring Opinions

Justice Frankfurter begins the material part of his opinion with the statement: "We must * * * put to one side consideration of what powers the President would have had if there had been no legislation whatever bearing on the authority asserted by the seizure, or if the seizure had been only for a short, explicitly temporary period, to be terminated automatically unless Congressional approval were given."[447] He then enters upon a review of the proceedings of Congress which attended the enactment of the Taft-Hartley Act, and concludes that "Congress has expressed its will to withhold this power [of seizure] from the President as though it had said so in so many words."[448]

Justice Douglas's contribution consists in the argument that: "The branch of government that has the power to pay compensation for a seizure is the only one able to authorize a seizure or make lawful one that the President has effected. That seems to me to be the necessary result of the condemnation provision in the Fifth Amendment."[449] This contention overlooks such cases as Mitchell *v.* Harmony;[450] United States *v.* Russell;[451] Portsmouth Harbor Land and Hotel Co. *v.* United States;[452] and United States *v.* Pewee Coal Co.;[453] in all of which a right of [Pg 497] compensation was recognized to exist in consequence of damage to property which resulted from acts stemming ultimately from constitutional powers of the President. In United States *v.* Pink, [454] Justice Douglas quotes with approval the following words from the Federalist,[455] "all constitutional acts of power, whether in the executive or in the judicial branch, have as much validity and obligation as if they proceeded from the legislature." If this is so as to treaty obligations, then all the more must it be true of obligations which are based directly on the Constitution.[456]

Justice Jackson's opinion contains little that is of direct pertinence to the constitutional issue. Important, however, is his contention, which, seems to align him with Justice Frankfurter, that Congress had "not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure"; from which he concludes that "* * * we can sustain the President only by holding that seizure of such strike-bound industries is within his domain and beyond control by Congress."[457] The opinion concludes: "In view of the ease, expedition and safety with which Congress can grant and has granted large emergency powers, certainly ample to embrace this crisis, I am quite unimpressed with the argument that we should affirm possession of them without statute. Such power either has no beginning or it has no end. If it exists, it need submit to no legal restraint. I am not alarmed that it would plunge us straightway into dictatorship, but it is at least a step in that wrong direction. * * * But I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that 'The tools belong to the man who can use them.' We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers."[458]

Justice Burton, referring to the Taft-Hartley Act, says: "* * * the most significant feature of that Act is its omission of authority to seize," citing debate on the measure.[459] "In the case before us, [Pg 498] Congress authorized a procedure which the President declined to follow."[460] Justice Clark bases his position directly upon Chief Justice Marshall's opinion in Little *v.* Barreme.[461] He says: "I conclude that where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow these procedures in meeting the crisis; * * * I cannot sustain the seizure in question because here, as in Little *v.* Barreme, Congress had prescribed methods to be followed by the President in meeting the emergency at hand."[462] His reference is to the Taft-Hartley Act. At the same time he endorses the view, "taught me not only by the decision of Chief Justice Marshall in Little *v.* Barreme, but also by a score of other pronouncements of distinguished members of this bench," that "the Constitution does grant to the President extensive authority in times of grave and imperative national emergency."[463]

Dissenting Opinion

Chief Justice Vinson launched his opinion of dissent, for himself and Justices Reed and Minton, with a survey of the elements of the emergency which confronted the President: the Korean war; the obligations of the United States under the United Nations Charter and the Atlantic Pact; the appropriations acts by which Congress has voted vast sums to be expended in our defense and that of our Allies in Europe; the fact that steel is a basic constituent of war matériel. He reproaches the Court for giving no consideration to these things, although no one had ventured to challenge the President's finding of an emergency on the basis of them.[464] He asks whether the steel seizure, considering the emergency involved, fits into the picture of presidential emergency action in the past and musters impressive evidence to show that it does. And

"plaintiffs admit," he asserts, more questionably, "that the emergency procedures of Taft-Hartley are not mandatory."[465] He concludes as follows: "The diversity of views expressed in the six opinions of the majority, the lack of reference to authoritative precedent, the repeated reliance upon prior dissenting opinions, the complete disregard of the uncontroverted facts showing the gravity of the emergency and the temporary nature of the taking all serve to demonstrate how far afield one must go to affirm the order of the District Court. The broad executive power granted by Article II to an officer on duty 365 days a year cannot, it is said, be invoked to avert disaster. Instead, the President, must confine himself to sending a message to Congress recommending [Pg 499] action. Under this messenger-boy concept of the Office, the President cannot even act to preserve legislative programs from destruction so that Congress will have something left to act upon. There is no judicial finding that the executive action was unwarranted because there was in fact no basis for the President's finding of the existence of an emergency for, under this view, the gravity of the emergency and the immediacy of the threatened disaster are considered irrelevant as a matter of law."[466]

Evaluation; Presidential Emergency Power

The doctrine of "the opinion of the Court" is that, if Congress can do it under, say, the necessary and proper clause, then the President, lacking authority from Congress, cannot do it on the justification that an emergency requires it. Although four Justices are recorded as concurring in the opinion, their accompanying opinions whittle their concurrence in some instances to the vanishing point. Justice Douglas's supplementary argument on the basis of Amendment V logically confines the doctrine of the opinion to executive seizures of property. Justices Frankfurter and Burton and, less clearly, Justice Jackson insist in effect that Congress had exercised its power in the premises of the case in opposition to seizure. Justice Clark, on the basis of Chief Justice Marshall's opinion in Little *v.* Barreme, holds unambiguously that, Congress having entered the field, its evident intention to rule out seizures supplied the law of the case. That the President does possess a residual of resultant power above, or in consequence of, his granted powers to deal with emergencies in the absence of restrictive legislation is explicitly asserted by Justice Clark, and impliedly held, with certain qualifications, by Justice Frankfurter and, again less clearly, by Justice Jackson; and is the essence of the position of the three dissenting Justices. Finally, the entire Court would in all probability agree to the proposition that any action of the President touching the internal economy of the country for which the justification of emergency is pleaded is always subject to revision and disallowance by the legislative power. It would seem to follow that whenever the President so acts on his own initiative he should at once report his action to Congress, and thenceforth bring the full powers of his office to the support of the desires of the Houses once these are clearly indicated.

PRESIDENTIAL IMMUNITY FROM JUDICIAL DIRECTION

By the decision of the Court in State of Mississippi *v.* Johnson,[467] in 1867, the President was put beyond the reach of judicial direction in the exercise of any of his powers, whether constitutional or statutory, political or otherwise. An application for an injunction to forbid President Johnson to enforce the Reconstruction Acts, on the ground of their unconstitutionality, was answered by [Pg 500] Attorney General Stanbery as follows: "It is not upon any peculiar immunity that the individual has who happens to be President; upon any idea that he cannot do wrong; upon any idea that there is any particular sanctity belonging to him as an individual, as is the case with one who has royal blood in his veins; but it is on account of the office that he holds that I say the President of the United States is above the process of any court or the jurisdiction of any court to bring him to account as President. There is only one court or *quasi* court that he can be called upon to answer to for any dereliction of duty, for doing anything that is contrary to law or failing to do anything which is according to law, and that is not this tribunal but one that sits in another chamber of this Capitol."[468] Speaking by Chief Justice Chase, the Court agreed: "The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance. The impropriety of such interference will be clearly seen upon consideration of its possible consequences. Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would [not?] the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court?"[469] The Court further indicated that the same principle would apply to an application for a mandamus ordering the President to exercise any of his powers.

THE PRESIDENT'S SUBORDINATES AND THE COURTS

But while the courts are unable to compel the President to act or to keep him from acting, yet his acts, when performed are in proper cases subject to judicial review and disallowance.[470] Moreover, the subordinates through whom he acts may always be prohibited by writ of injunction

from doing a threatened illegal act which might lead to irreparable damage,[471] or be compelled by writ of mandamus to perform a duty definitely required by law,[472] such suits being usually brought in the United States District Court for the District of Columbia.[473] Also, by common law principles, a subordinate executive officer is personally liable under the ordinary law for any act done in excess of authority.[474] Indeed, by a recent holding, district courts of the United States are bound to entertain suits for damages arising out of alleged violation of plaintiff's constitutional rights, even though as the law now stands the Court is powerless to award damages.[475] But Congress may, in certain cases, exonerate the officer by a so-called act of indemnity,[476] while as the law stands at present, any officer of the United States who is charged with a crime under the laws of a State for an act done under the authority of the United States is entitled to have his case transferred to the national courts.[477]

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> 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.

Impeachment

"CIVIL OFFICER"

A Member of Congress is not a civil officer within the meaning of this section; nor is a private citizen subject to impeachment;[478] but resignation of an officer does not give immunity from impeachment for acts committed while in office.[479]

"HIGH CRIMES AND MISDEMEANORS"

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Most of the States have drafted their constitutional provisions on this subject in similar language. As there is no enumeration of offenses comprised under the last two categories, no little difficulty has been experienced in defining offenses in such a way that they fall within the meaning of the constitutional provisions. But impeachable offenses were not defined in England, and it was not the intention that the Constitution should attempt an enumeration of crimes or offenses for which an impeachment would lie. Treason and bribery have always been offenses whose nature was clearly understood. Other high crimes and misdemeanors which might be made causes for the impeachment of civil officers were those which embraced any misbehavior while in office. Madison, whose objection led to the insertion of the more definite phrase high crimes and misdemeanors, was the strongest advocate of a broad construction of the impeachment power. He argued that incapacity, negligence, or perfidy of the Chief Magistrate should be ground for impeachment.[480] Again, in discussing the President's power of removal, he maintained that the wanton removal from office of meritorious officers would be an act of maladministration, and would render the President liable to impeachment.[481] Hamilton thought the proceeding could "never be tied down by such strict rules, either in the delineation of the offense by the prosecutors, or in the construction of it by the judges, as in common cases serve to limit the discretion of the courts in favor of personal security."[482]

THE CHASE IMPEACHMENT

The above relatively flexible conception of "high crimes and misdemeanors" was, however, early replaced by a much more rigid one in consequence of Jefferson's efforts to diminish the importance of the Supreme Court, the first step in which enterprise was the impeachment in 1805 of Justice Samuel Chase. The theory of Chase's enemies was given its extremest expression by Jefferson's henchman, Senator Giles of Virginia, as follows: "Impeachment is nothing more than an enquiry, by the two Houses of Congress, whether the office of any public man might not be better filled by another. * * * The power of impeachment was given without limitation to the House of Representatives; and the power of trying impeachments was given equally without limitation to the Senate; * * * A trial and removal of a judge upon impeachment need not imply any criminality or corruption in him. * * * [but] was nothing more than a declaration of Congress to this effect: You hold dangerous opinions, and if you are suffered to carry them into effect you will work the destruction of the nation. *We want your offices*, for the purpose of giving them to men who will fill them better."[483] To this theory Chase's counsel opposed the proposition that "high crimes and misdemeanors" meant offenses indictable at common law; and Chase's acquittal went far to affix this reading to the phrase till after the War between the States.

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THE JOHNSON IMPEACHMENT

But with the impeachment of President Johnson in 1867 for "high crimes and misdemeanors," the controversy was revived. Representative Bingham, leader of the House Managers of the impeachment, defined an impeachable offense as follows: "An impeachable high crime or misdemeanor is one in its nature or consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper

motives or for an improper purpose."[484] Former Justice Benjamin R. Curtis stated the position of the defense in these words: "My first position is, that when the Constitution speaks of 'treason, bribery, and other high crimes and misdemeanors,' it refers to, and includes only, high criminal offences against the United States, made so by some law of the United States existing when the acts complained of were done, and I say that this is plainly to be inferred from each and every provision of the Constitution on the subject of impeachment."[485]

LATER IMPEACHMENTS

With Johnson's acquittal, the narrow view of "high crimes and misdemeanors" appeared again to win out. Two successful impeachments of lower federal judges in recent years have, however, restored something like the broader conception of the term which Madison and Hamilton had endorsed. In 1913 Judge Archbald of the Commerce Court was removed from office by the impeachment process, and disqualified to hold and enjoy any office of honor, profit or trust under the Constitution, for soliciting for himself and friends valuable favors from railroad companies some of which were at the time litigants in his court, although it was conceded that in so doing he had not committed an indictable offense;[486] and in 1936 Judge Ritter of the Florida district court was similarly removed for conduct in relation to a receivership case which evoked serious doubts as to his integrity, although on the specific charges against him he was acquitted.[487] It is probable that in both these instances the final result was influenced by the consideration that judges of the United States hold office during "good behavior" and that the impeachment process is the only method indicated by the Constitution for determining whether a judge's behavior has been "good." In other words, as to judges of the United States at least lack of "good behavior" and "high crimes and misdemeanors" are overlapping if not precisely coincidental concepts.[488]

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Notes

[1] As is pointed out by Hamilton in The Federalist No. 69.

[2] Charles C. Thach, The Creation of the Presidency, 1775-1789 (Baltimore, 1922), 36-37.

[3] Ibid. 109.

[4] Max Farrand, Records, II, 185.

[5] Ibid. II, 572 (September 10), 597.

[6] Annals of Congress 383 ff.

[7] Ibid. 396-397; 481-482. For a thorough-going review and evaluation of this debate, *see* James Hart, The American Presidency in Action, 152-214 (New York, 1948).

[8] Works of Alexander Hamilton, VII, 76, 80-81 (J.C. Hamilton, ed., New York, 1851). Hamilton was here simply interpreting the executive power clause in light of the views of Blackstone, Locke, and Montesquieu as to the location of power in the conduct of foreign relations. *See* Edward S. Corwin, The President, Office and Powers (3d ed.), 459-460. For a parallel argument to Hamilton's respecting "the judicial power of the United States," article 1, section 1, clause 1, *see* Justice Brewer's opinion in Kansas *v.* Colorado, 206 U.S. 46, 82 (1907).

[9] Myers *v.* United States, 272 U.S. 52 (1926).

[10] Ibid. 118.

[11] 299 U.S. 304 (1936).

[12] Ibid. 315-316, 318. *See also* Ibid. 319 citing U.S. Senate Reports, Committee on Foreign Relations, vol. 8, p. 24 (February 15, 1816).

[13] Ibid. 327, citing Panama Refining Co. *v.* Ryan, 293 U.S. 388, 421-422 (1935).

[14] In Youngstown Co. *v.* Sawyer, 343 U.S. 579 (1952) the doctrine is advanced that the President has no power in the field of Congress' legislative powers except such as are delegated him by Congress. This doctrine is considered below in the light of previous practice and adjudication. *See* pp. 489-499.

[15] *See* e.g., Abel Upshur, A Brief Inquiry Into the True Nature and Character of Our Federal Government (1840), 116-117.

[16] The Federalist No. 67, 503.

[17] James Hart, The American Presidency in Action (New York, 1918), 28-43.

[18] 2 Dall. 400 (1790).

[19] Messages and Papers of the Presidents, I, 56.

[20] Corwin, The President, Office and Powers (3d ed.), 377-378, 434-435, 446,

465, 484. "The executive [branch of the government], possessing the rights of self-government from nature, cannot be controlled in the exercise of them but by a law, passed in the forms of the Constitution." Thomas Jefferson, Official Opinion (1790) 5 Ford, ed. 209 (New York, 1892-1899). "In times of peace the people look most to their representatives; but in war, to the Executive solely." Letter to Caesar A. Rodney, (1810) Monticello, 9 Ford, ed. 272.

[21] Corwin 20-21, and citations.

[22] Ibid. 21-22, and citations.

[23] Ibid. 22-24.

[24] Ibid. 386. *See also* ibid. 281.

[25] Ford, The Rise and Growth of American Politics (New York, 1914), 293.

[26] As to the meaning of "the fourth day of March", *see* Charles Warren, Political Practice and the Constitution, 89 Univ. of Pa. L. Rev. (June, 1941) 1003-1025.

[27] On the anti-third term tradition, *see* Corwin, The President, Office and Powers (3d ed.), 43-49, 388-392.

[28] McPherson *v.* Blacker, 146 U.S. 1, 27 (1892).

[29] Ibid. 28-29.

[30] Max Farrand, II, 97.

[31] In re Green, 134 U.S. 377, 379-380 (1890).

[32] United States *v.* Hartwell, 6 Wall. 385, 393 (1868).

[33] Hawke *v.* Smith, 253 U.S. 221 (1920).

[34] Burroughs *v.* United States, 290 U.S. 534, 545 (1934).

[35] Ex parte Yarbrough, 110 U.S. 651 (1884).

[36] Burroughs *v.* United States, 290 U.S. 534 (1934).

[37] Ibid. 546. During the recent war, Congress laid claim in the act of September 16, 1942, to the power "in time of war" to secure to every member of the armed forces the right to vote for Members of Congress and Presidential Electors notwithstanding any provisions of State law relating to the registration of qualified voters or any poll tax requirement under State law. The constitutional validity of this act was open to serious question and by the act of April 1, 1944 was abandoned. The latter act established a War Ballot Commission which was directed to prepare an adequate number of official war ballots, whereby the service men would be enabled in certain contingencies to vote for Members of Congress and Presidential Electors; but the validity of such ballots was left to be determined by State election officials under State laws. 50 (App.) U.S.C.A. §§ 301-302, 331, 341.

[38] 343 U.S. 214 (1952).

[39] *See* pp. 942-944.

[40] 1 Stat. 239.

[41] 3 U.S.C. § 23.

[42] 3 U.S.C. § 21.

[43] Public Law 199, 80th Cong., 1st sess. By section 202 (a) of Public Law 253 of the 80th Cong., 1st sess., approved July 26, 1947, that is, eight days after Public Law 199, the "Secretary of War" and the "Secretary of the Navy" were stricken from the line of succession and the "Secretary of Defense" whose office Public Law 253 created, was inserted instead.

[44] *Cf.* 13 Op. Atty. Gen. 161 (1869), holding that a specific tax by the United States upon the salary of an officer, to be deducted from the amount which otherwise would by law be payable as such salary, is a diminution of the compensation to be paid to him, which, in the case of the President of the United States, would be unconstitutional if the act of Congress levying the tax was passed during his official term.

[45] The Federalist No. 69, 513, 515.

[46] Story's Commentaries, II, § 1492.

[47] Fleming *v.* Page, 9 How. 603, 615, 618 (1850).

[48] Ex parte Milligan, 4 Wall. 2, 139 (1866).

[49] 1 Stat. 424 (1795); 2 Stat. 443 (1807). *See also* Martin *v.* Mott, 12 Wheat. 19, 32-33 (1827), asserting the finality of the President's judgment of the existence of a state of facts requiring his exercise of the powers conferred by the act of 1795.

[50] Messages and Papers of the Presidents, VII, 3221.

[51] 2 Bl. 635 (1863).

[52] Messages and Papers of the Presidents, VII, 3215, 3216, 3481.

[53] 2 Bl. at 668-670.

[54] 12 Stat. 326 (1861).

[55] James G. Randall, Constitutional Problems under Lincoln, 118-139 (New York, 1926).

[56] *See* the Government's brief in United States *v.* Montgomery Ward and Co., 150 F. 2d 369 (1945).

[57] United States *v.* Curtiss-Wright Export Corp., 299 U.S. 304, 327 (1936).

[58] *See* White House Digest of Provisions of Law Which Would Become Operative upon Proclamation of a National Emergency by the President. The Digest is dated December 11, 1950. It was released to the press on December 16th.

[59] 56 Stat. 23.

[60] Cong. Rec. 77th Cong., 2d sess., vol. 88, pt. 5, p. 7044 (September 7, 1942).

[61] 50 U.S.C.A. War, App. 1651. For Emergency War Agencies that were functioning at any particular time, consult the *United States Government Manual* of the approximate date. The executive order creating an agency is cited by number. For a Chronological List of Wartime Agencies (including government corporations) and some account of their creation down to the close of 1942, *see* chapter on War Powers and Their Administration by Dean Arthur T. Vanderbilt in 1942 Annual Survey of American Law (New York University School of Law, 1945), pp. 106-231. At the close of the war there were 29 agencies grouped under OEM, of which OCD, WMC, and OC were the first to fold up. At the same date there were 101 separate government corporations, engaged variously in production, transportation, power-generation, banking and lending, housing, insurance, merchandising, and other lines of business and enjoying the independence of autonomous republics, being subject to neither Congressional nor presidential scrutiny, nor to audit by the General Accounting Office.

[62] 143 F. 2d. 145 (1944).

[63] *See* Corwin, The President, Office and Powers (3d ed.) 296, 492.

[64] Exec. Order 9066, 7 Fed. Reg. 1407.

[65] 56 Stat. 173.

[66] Hirabayashi *v.* United States, 320 U.S. 81, 91-92 (1943).

[67] Korematsu *v.* United States, 323 U.S. 214 (1944).

[68] New York Times, June 10, 1941.

[69] 7 Fed. Reg. 237.

[70] 57 Stat. 163.

[71] "During the course of the year [1945] the President directed the seizure of many of the nation's industries in the course of labor disputes. The total number of facilities taken over is significant: two railroad systems, one public utility, nine industrial companies, the transportation systems of two cities, the motor carriers in one city, a towing company and a butadiene plant. In addition thereto the President on April 10 seized 218 bituminous coal mines belonging to 162 companies and on May 7, 33 more bituminous mines of 24 additional companies. The anthracite coal industry fared no better; on May 3 and May 7 all the mines of 365 companies and operators were taken away from the owners, and on October 6 the President ordered the seizure of 54 plants and pipe lines of 29 petroleum producing companies in addition to four taken over prior thereto.

"During the year disputes between railroad companies and the Brotherhoods resulted in the establishment of twelve Railroad Emergency Boards to investigate disputes and to report to the President. The President also established on October 9 a Railway Express Emergency Board to investigate the dispute between the Railway Express and a union.

"To implement the directives of the National War Labor Board, the Office of Economic Stabilization directed the cancellation of all priority applications, allocation applications and outstanding priorities and allocations in the cases of three clothing companies and one transportation system which refused to comply with orders of the National War Labor Board." Arthur T. Vanderbilt, War Powers and their Administration, 1945, Annual Survey of American Law (New York University School of Law), pp. 271-273.

[72] 8 Fed. Reg. 11463.

[73] 56 Stat. 23.

[74] 322 U.S. 398 (1944).

[75] Ibid. 405-406.

[76] *See* Corwin, The President, Office and Powers (3d ed.) 302-303.

[77] Charles Fairman, The Law of Martial Rule (Chicago, 1930), 20-22. Albert Venn Dicey, Introduction to the Study of the Law of the Constitution (7th ed.), 283-287.

[78] Dicey, Introduction to the Study of the Law of the Constitution, Chap. VIII, 262-271.

[79] 7 How. 1 (1849). *See also* Martin *v.* Mott, 12 Wheat. 19, 32-33 (1827).

[80] 2 Bl. 635 (1863).

[81] 4 Wall. 2 (1866).

[82] Ibid. 127.

[83] Ibid. 139-140. In Ex parte Vallandigham the Court had held while war was still flagrant that it had no power to review by certiorari the proceedings of a military commission ordered by a general officer of the Army, commanding a military department. 1 Wall. 243 (1864).

[84] 31 Stat. 141, 153.

[85] Duncan *v.* Kahanamoku, 327 U.S. 304 (1946).

[86] Ibid. 324.

[87] Ibid. 336.

[88] Ibid. 343.

[89] Ex parte Quirin, 317 U.S. 1 (1942).

[90] 317 U.S. 1, 29-30, 35 (1942).

[91] Ibid. 1, 41-42.

[92] Ibid. 28-29.

[93] 1 Stat. 577 (1798).

[94] 327 U.S. 1 (1946).

[95] Ibid. 81.

[96] *See* Leo Gross, The Criminality of Aggressive War, 41 American Political Science Review (April, 1947), 205-235.

[97] Fleming *v.* Page, 9 How. 603, 615 (1850).

[98] Madsen *v.* Kinsella, 343 U.S. 341, 348 (1952). *See also* Johnson *v.* Eisentrager, 339 U.S. 703, 789 (1950).

[99] Totten *v.* United States, 92 U.S. 105 (1876).

[100] Hamilton *v.* Dillin, 21 Wall. 73 (1875); Haver *v.* Yaker, 9 Wall. 32 (1869).

[101] Mitchell *v.* Harmony, 13 How. 115 (1852); United States *v.* Russell, 13 Wall. 623 (1871); Totten *v.* United States, note 3 above; 40 Op. Atty. Gen. 251-253 (1942).

[102] *Cf.* the Protocol of August 12, 1898, which largely foreshadowed the Peace of Paris; and President Wilson's Fourteen Points, which were incorporated in the Armistice of November 11, 1918.

[103] Fleming *v.* Page, 9 How. 603, 615 (1850).

[104] Santiago *v.* Nogueras, 214 U.S. 260 (1909). As to temporarily occupied territory, *see* Dooley *v.* United States, 182 U.S. 222, 230-231 (1901).

[105] Swaim *v.* United States, 165 U.S. 553 (1897); and cases there reviewed. *See also* Givens *v.* Zerbst, 255 U.S. 11 (1921).

[106] 15 Op. Atty. Gen. 297 and note; 30 ibid. 303; *cf.* 1 ibid. 233, 234, where the contrary view is stated by Attorney General Wirt.

[107] Ex parte Quirin, 317 U.S. 1, 28-29 (1942).

[108] General Orders, No. 100, Official Records, War of Rebellion, ser. III, vol. III; April 24, 1863.

[109] *See* e.g., Mimmack *v.* United States, 97 U.S. 426, 437 (1878); United States *v.* Corson, 114 U.S. 619 (1885).

[110] 10 U.S.C. § 1590.

[111] Mullan *v.* United States, 140 U.S. 240 (1891); Wallace *v.* United States, 257 U.S. 541 (1922).

[112] Surrogate's Court, Dutchess County, New York, ruling July 25, 1950 that the estate of Franklin D. Roosevelt was not entitled to tax benefits under sections 421 and 939 of the Internal Revenue Code, which extends certain tax benefits to persons dying in the military service of the United States. New York Times, July 26, 1950, p. 27, col. 1.

[113] Farrand, I, 70, 97, 110; II, 285, 328, 335-337, 367, 537-542 (*passim*).

[114] Heads of Executive Departments except the Postmaster General have no fixed legal terms. For the history of legislation on the subject. *See* 36 Op. Atty. Gen. 12-16 (April 18, 1929); *also* Everett S. Brown, The Tenure of Cabinet Officers, 42 American Political Science Review 529-532 (June, 1948).

[115] *See* Corwin, The President, Office and Powers (3d ed.), New York University Press, 1948, 21-22, 74, 98-99, 257, 358-364, 372-373, 378-381, 516-519. The only question of a constitutional nature that has arisen concerning the Cabinet meeting is as to its right to meet, on the call of the Secretary of State, in the President's absence. Ibid. 402.

[116] United States *v.* Wilson, 7 Pet. 150, 160-161 (1833).

[117] 236 U.S. 79, 86 (1915).

[118] Ibid. 90-91.

[119] Armstrong *v.* United States, 13 Wall. 154, 156 (1872). In Brown *v.* Walker, 161 U.S. 591 (1896), the Court had said: "It is almost a necessary corollary of the above propositions that, if the witness has already received a pardon, he cannot longer set up his privilege, since he stands with respect to such offence as if it had never been committed." Ibid. 599, citing British cases.

[120] Biddle *v.* Perovich, 274 U.S. 480, 486 (1927).

[121] *Cf.* W.H. Humbert, The Pardoning Power of the President, American Council on Public Affairs (Washington, 1941) 73.

[122] 274 U.S. at 486.

[123] 23 Op. Atty. Gen. 363 (1901); Illinois Central R. Co. *v.* Bosworth, 133 U.S. 92 (1890).

[124] Ex parte Wells, 18 How. 307 (1856). For the contrary view *see* some early opinions of Attorney General, 1 Opins. Atty. Gen. 342 (1820); 2 ibid. 275 (1829); 5 ibid. 687 (1795); *cf.* 4 ibid. 453; United States *v.* Wilson, 7 Pet. 150, 161 (1833).

[125] Ex parte United States, 242 U.S. 27 (1916). Amendment of sentence, however, (within the same term of court) by shortening the term of imprisonment, although defendant had already been committed, is a judicial act and no infringement of the pardoning power. United States *v.* Benz, 282 U.S. 304 (1931).

[126] *See* Messages and Papers of the Presidents, I, 181, 303; II, 543; VII, 3414, 3508; VIII, 3853; XIV, 6690.

[127] United States *v.* Klein, 13 Wall. 128, 147 (1872). *See also* United States *v.* Padelford, 9 Wall. 531 (1870).

[128] Ex parte Garland, 4 Wall. 333, 380 (1867).

[129] F.W. Maitland, Constitutional History of England (Cambridge, 1903), 302-306; 1 Op. Atty. Gen. 342 (1820).

[130] 267 U.S. 87 (1925).

[131] Ibid. 110-111.

[132] Ibid. 121, 122.

[133] 4 Wall. 333, 381 (1867).

[134] Ibid. 380.

[135] Ibid. 396-397.

[136] 233 U.S. 51 (1914).

[137] Ibid. 59.

[138] 142 U.S. 450 (1892).

[139] Knote *v.* United States, 95 U.S. 149, 153-154 (1877).

[140] United States *v.* Klein, 13 Wall. 128, 143, 148 (1872).

[141] The Laura, 114 U.S. 411 (1885).

[142] Brown *v.* Walker, 161 U.S. 591 (1896).

[143] Farrand, II, 183.

[144] Ibid. 538-539.

[145] The Federalist No. 64.

[146] Farrand, III, 424.

[147] Washington sought to use the Senate as a council, but the effort proved futile, principally because the Senate balked. For the details *see* Corwin, The President, Office and Powers (3d ed.), 253-257.

[148] United States *v.* Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

[149] Corwin, The President, Office and Powers (3d ed.), 467-468.

[150] "Obviously the treaty must contain the whole contract between the parties, and the power of the Senate is limited to a ratification of such terms as have already been agreed upon between the President, acting for the United States, and the commissioners of the other contracting power. The Senate has no right to ratify the treaty and introduce new terms into it, which shall be obligatory upon the other power, although it may refuse its ratification, or make such ratifications conditional upon the adoption of amendments to the treaty." Fourteen Diamond Rings *v.* United States, 183 U.S. 176, 183 (1901).

[151] *Cf.* Article I, section 5, clause 1; *also* Missouri Pacific R. Co. *v.* Kansas, 248 U.S. 276, 283-284 (1919).

[152] *See* Samuel Crandall, Treaties, Their Making and Enforcement (2d ed., Washington, 1916), § 53, for instances.

[153] Foster *v.* Neilson, 2 Pet. 253, 314 (1829). "Though several writers on the subject of government place that [the treaty-making] power in the class of executive authorities, yet this is evidently an arbitrary disposition; for if we attend carefully to its operation, it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either. The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society; while the execution of the laws, and the employment of the common strength, either for this purpose, or for the common defence, seem to comprise all the functions of the executive magistrate. The power of making treaties is, plainly, neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the enaction of new ones; and still less to an exertion of the common strength. Its objects are *contracts* with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive." Hamilton in The Federalist No. 75.

[154] Head Money Cases, 112 U.S. 589, 598 (1884). For treaty provisions operative as "law of the land" ("self-executing"), *see* Crandall, Treaties (2d ed.), 36-42, 49-62 (*passim*), 151, 153-163, 179, 238-239, 286, 321, 338, 345-346. For treaty provisions of an "executory" character, *see* ibid. 162-163, 232, 236, 238, 493, 497, 532, 570, 589.

[155] *See* Crandall, Chap. III, 24-42.

[156] 3 Dall. 199 (1796).

[157] 3 Cr. 454 (1806).

[158] "In Chirac *v.* Chirac (2 Wheat. 259), it was held by this court that a treaty with France gave to her citizens the right to purchase and hold land in the United States, removed the incapacity of alienage and placed them in precisely the same situation as if they had been citizens of this country. The State law was hardly adverted to, and seems not to have been considered a factor of any importance in this view of the case. The same doctrine was reaffirmed touching this treaty in Carneal *v.* Banks (10 Wheat. 181) and with respect to the British Treaty of 1794, in Hughes *v.* Edwards (9 Wheat. 489). A treaty stipulation may be effectual to protect the land of an alien from forfeiture by escheat under the laws of a State. Orr *v.* Hodgson (4 Wheat. 458). By the British treaty of 1794, 'all impediment of alienage was absolutely levelled with the ground despite the laws of the States. It is the direct constitutional question in its fullest conditions. Yet the Supreme Court held that the stipulation was within the constitutional powers of the Union. Fairfax's Devisees *v.* Hunter's Lessee, 7 Cr. 627; *see* Ware *v.* Hylton, 3 Dall. 242.' 8 Op. Attys-Gen. 417. Mr. Calhoun, after laying down certain exceptions and qualifications which do not affect this case, says: 'Within these limits all questions which may arise between us and other powers, be the subject-matter what it may, fall within the treaty-making power and may be adjusted by it.' Treat. on the Const. and Gov. of the U.S. 204.

"If the national government has not the power to do what is done by such treaties, it cannot be done at all, for the States are expressly forbidden to 'enter into any treaty, alliance, or confederation.' Const., art. I. sect. 10.

"It must always be borne in mind that the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution. This is a fundamental principle in our system of complex national polity." 100 U.S. at 489-490.

[159] 100 U.S. 483 (1880).

[160] *See also* De Geofroy *v.* Riggs, 133 U.S. 258 (1890); Sullivan *v.* Kidd, 254 U.S. 433 (1921); Nielsen *v.* Johnson, 279 U.S. 47 (1929). But a right under treaty to acquire and dispose of property does not except aliens from the operation of a State statute prohibiting conveyances of homestead property by any instrument not executed by both husband and wife. Todok *v.* Union State Bank, 281 U.S. 449 (1930). Nor was a treaty stipulation guaranteeing to the citizens of each country, in the territory of the other, equality with the natives of rights and privileges in respect to protection and security of person and property, violated by a State statute which denied to a nonresident alien *wife* of a person killed within the State, the right to sue for wrongful death, although such right was afforded to native resident *relatives*. Maiorano *v.* Baltimore & O.R. Co., 213 U.S. 268 (1909). The treaty in question having been amended in view of this decision, the question arose whether the new provision covered the case of death without fault or negligence in which, by the Pennsylvania Workmen's Compensation Act, compensation was expressly limited to resident parents; the Supreme Court held that it did not. Liberato *v.* Royer, 270 U.S. 535 (1926).

[161] Terrace *v.* Thompson, 263 U.S. 197 (1923).

[162] 332 U.S. 633 (1948). *See also* Takahashi *v.* Fish and Game Comm., 334 U.S. 410 (1948), in which a California statute prohibiting the issuance of fishing licenses to persons ineligible to citizenship is disallowed, both on the basis of Amendment XIV and on the ground that the statute invaded a field of power reserved to the National Government, namely, the determination of the conditions on which aliens may be admitted, naturalized, and permitted to reside in the United States. For the latter proposition Hines *v.* Davidowitz, 312 U.S. 52, 66 (1941) was relied upon.

[163] This occurred in the much advertised case of Sei Fujii *v.* State of California, 242 P. 2d, 617 (1952). A lower California court had held that the legislation involved was void under the United Nations Charter, but the California Supreme Court was unanimous in rejecting this view. The Charter provisions invoked in this connection [Arts. 1, 55, and 56], said Chief Justice Gibson, "We are satisfied * * * were not intended to supersede domestic legislation".

[164] Clark *v.* Allen, 331 U.S. 503 (1947).

[165] 1 Cr. 103, 109 (1801).

[166] Foster *v.* Neilson, 2 Pet. 253, 314 (1829); Strother *v.* Lucas, 12 Pet. 410, 439 (1838); Edye *v.* Robertson (Head Money Cases), 112 U.S. 580, 598, 599 (1884); United States *v.* Rauscher, 119 U.S. 407, 419 (1886); Bacardi Corp. *v.* Domenech, 311 U.S. 150 (1940).

[167] The doctrine of political questions is not always strictly adhered to in cases of treaty interpretation. In the case of the "*Appam*" it was conspicuously departed from. This was a British merchant vessel which was captured by a German cruiser early in 1916 and brought by a German crew into Newport News, Virginia. The German Imperial Government claimed that under the Treaties of 1799 and 1828 between the United States and Prussia, the vessel was entitled to remain in American waters indefinitely. Secretary of State Lansing ruled against the claim, and the Supreme Court later did the same, but ostensibly on independent grounds and without reference to the attitude of the Department of State. The Steamship Appam, 243 U.S. 124 (1917). Although it is a principle of International Law that, as respects the rights of the signatory parties, a treaty is binding from the date of signature, a different rule applies in this country as to a treaty as "law of the land" and as such a source of human rights. Before a treaty can thus operate it must have been approved by the Senate. Haver *v.* Yaker, 9 Wall. 32 (1870).

[168] *See* Crandall, Treaties, Their Making and Enforcement, (2d ed.), 165-171, with citations.

[169] Madison Writings (Hunt ed.), 264.

[170] "We express no opinion as to whether Congress is bound to appropriate the money * * * It is not necessary to consider it in this case, as Congress made prompt appropriation of the money stipulated in the treaty" (the Treaty of Paris of 1899 between Spain and the United States). De Lima *v.* Bidwell, 182 U.S. 1, 198 (1901). For a list of earlier appropriations of the same kind, *see* Crandall, 179-180, n. 35.

[171] Willoughby, On the Constitution, I (2d ed., New York, 1929), 558. *See also* H. Rept. 2630, 48th Cong., 2d sess., for an exhaustive review of the subject.

[172] Edye *v.* Robertson (Head Money Cases), 112 U.S. 580, 598-599 (1884). The repealability of treaties by act of Congress was first asserted in an opinion of the Attorney General in 1854 (6 Op. Atty. Gen. 291). The year following the doctrine was adopted judicially in a lengthy and cogently argued opinion of Justice Curtis, speaking for a United States circuit court in Taylor *v.* Morton, 23 Fed. Cas. No. 13,799 (1855). The case turned on the following question: "If an act of Congress should levy a duty upon imports, which an existing commercial treaty declares shall not be levied, so that the treaty is in conflict with the act, does the former or the latter give the rule of decision in a judicial tribunal of the United States, in a case to which one rule or the other must be applied?"

Citing the supremacy clause of the Constitution, Justice Curtis said: "There is nothing in the language of this clause which enables us to say, that in the case supposed, the treaty, and not the act of Congress, is to afford the rule. Ordinarily, treaties are not rules prescribed by sovereigns for the conduct of their subjects, but contracts, by which they agree to regulate their own conduct. This provision of our Constitution has made treaties part of our municipal law. But it has not assigned to them any particular degree of authority in our municipal law, nor declared whether laws so enacted shall or shall not be paramount to laws otherwise enacted. * * * [This] is solely a question of municipal, as distinguished from public law. The foreign sovereign between whom and the United States a treaty has been made, has a right to expect and require its stipulations to be kept with scrupulous good faith; but through what internal arrangements this shall be done, is, exclusively, for the consideration of the United States. Whether the treaty shall itself be the rule of action of the people as well as the government, whether the power to enforce and apply it shall reside in one department, or another, neither the treaty itself, nor any implication drawn from it, gives him any right to inquire. If the people of the United States were to repeal so much of their constitution as makes treaties part of their municipal law, no foreign sovereign with whom a treaty exists could justly complain, for it is not a matter with which he has any concern. * * * By the eighth section of the first article of the Constitution, power is conferred on Congress to regulate commerce with foreign nations, and to lay duties, and to make all laws necessary and proper for carrying those powers into execution. That the act now in question is within the legislative power of Congress, unless that power is controlled by the treaty, is not doubted. It must be admitted, also, that in general, power to legislate on a particular subject, includes power to modify and repeal existing laws on that subject, and either substitute new laws in their place, or leave the subject without regulation, in those particulars to which the repealed laws applied. There is therefore nothing in the mere fact that a treaty is a law, which would prevent Congress from repealing it. Unless it is for some reason distinguishable from other laws, the rule which it gives may be displaced by the legislative power, at its pleasure. * * * I think it is impossible to maintain that, under our Constitution, the President and Senate exclusively, possess

the power to modify or repeal a law found in a treaty. If this were so, inasmuch as they can change or abrogate one treaty, only by making another inconsistent with the first, the government of the United States could not act at all, to that effect, without the consent of some foreign government; for no new treaty, affecting, in any manner, one already in existence, can be made without the concurrence of two parties, one of whom must be a foreign sovereign. That the Constitution was designed to place our country in this helpless condition, is a supposition wholly inadmissible. It is not only inconsistent with the necessities of a nation, but negatived by the express words of the Constitution. * * *" *See also* The Cherokee Tobacco, 11 Wall. 616 (1871); United States *v.* Forty-Three Gallons of Whiskey, 108 U.S. 491, 496 (1883); Botiller *v.* Dominguez, 130 U.S. 238 (1889); Chae Chan Ping *v.* United States, 130 U.S. 581, 600 (1889); Whitney *v.* Robertson, 124 U.S. 190, 194 (1888); Fong Yue Ting *v.* United States, 149 U.S. 688, 721 (1893); etc. "Congress by legislation, and so far as the people and authorities of the United States are concerned, could abrogate a treaty made between this country and another country which had been negotiated by the President and approved by the Senate." La Abra Silver Mining Co. *v.* United States, 175 U.S. 423, 460 (1899). *Cf.* Reichert *v.* Felps, 6 Wall. 160, 165-166 (1868), where it is stated obiter that "Congress is bound to regard the public treaties, and it had no power * * * to nullify [Indian] titles confirmed many years before * * *"

[173] United States *v.* Schooner Peggy, 1 Cr. 103 (1801).

[174] Foster *v.* Neilson, 2 Pet. 253 (1829).

[175] United States *v.* Percheman, 7 Pet. 51 (1833).

[176] Willoughby, On the Constitution, I, (2d ed.), 555.

[177] 288 U.S. 102 (1933).

[178] Ibid. 107-122.

[179] 124 U.S. 190 (1888).

[180] It is arguable that the maximum *leget posteriores* is not the most eligible rule for determining conflicts between "laws of the United States * * * made in pursuance thereof" (i.e. of the Constitution) and "treaties made * * * under the authority of the United States". It may be that the former, being mentioned immediately after "this Constitution" and before "treaties," are entitled always to prevail over the latter, just as both acts of Congress and treaties yield to the Constitution.

[181] 1 Stat. 578.

[182] 4 Dall. 37 (1800).

[183] Crandall, Treaties (2d ed.), 458; *See* Messages and Papers of the Presidents, IV, 2245; and Benton, 15 Abridgment of the Debates of Congress, 478. Mangum of North Carolina denied that Congress could authorize the President to give notice: "He entertained not a particle of doubt that the question never could have been thrown upon Congress unless as a war or *quasi* war measure. * * * Congress had no power of making or breaking a treaty." He owned, however, that he might appear singular in his view of the matter. Ibid. 472.

[184] Crandall, 458-462; Wright, The Control of American Foreign Relations, 258.

[185] 38 Stat. 1164.

[186] Crandall, 460.

[187] *See* Jesse S. Reeves, The Jones Act and the Denunciation of Treaties, 15 American Journal of International Law (January, 1921) 33-38. Among other precedents which call into question the exclusive significance of the legislative role in the termination of treaties as international conventions is one mentioned by Mr. Taft: "In my administration the lower house passed a resolution directing the abrogation of the Russian Treaty of 1832, couched in terms which would have been most offensive to Russia, and it did this by a vote so nearly unanimous as to indicate that in the Senate, too, the same resolution would pass. It would have strained our relations with Russia in a way that seemed unwise. The treaty was an old one, and its construction had been constantly the subject of controversy between the two countries, and therefore, to obviate what I felt would produce unnecessary trouble in our foreign relations, I indicated to the Russian ambassador the situation, and advised him that I deemed it wise to abrogate the treaty, which, as President, I had the right to do by due notice couched in a friendly and courteous tone and accompanied by an invitation to begin negotiations for a new treaty. Having done this, I notified the Senate of the fact, and this enabled the wiser

heads of the Senate to substitute for the house resolution a resolution approving my action, and in this way the passage of the dangerous resolution was avoided." The resolution in question, it should be added, was a joint resolution, and purported to ratify the President's action. The President himself had asked only for ratification and approval of his course by the Senate. William Howard Taft, The Presidency (New York, 1916), 112-114. Two other precedents bearing on outright abrogation of treaties are the following. The question whether to regard the extradition article of the Treaty of 1842 with Great Britain as void on account of certain acts of the British Government was laid before Congress by President Grant in a special message dated June 20, 1876, in the following terms: "It is for the wisdom of Congress to determine whether the article of the treaty relating to extradition is to be any longer regarded as obligatory on the Government of the United States or as forming part of the supreme law of the land. Should the attitude of the British Government remain unchanged, I shall not, without an expression of the wish of Congress that I should do so, take any action either in making or granting requisitions for the surrender of fugitive criminals under the treaty of 1842." Messages and Papers of the Presidents, IX, 4324, 4327. Three years later Congress passed a resolution requiring the President to abrogate articles V and VI of the Treaty of 1868 with China. President Hayes vetoed it, partly on the ground that "the power of modifying an existing treaty, whether by adding or striking out provisions, is a part of the treaty-making power under the Constitution. * * *" At the same time, he also wrote: "The authority of Congress to terminate a treaty with a foreign power by expressing the will of the nation no longer to adhere to it is as free from controversy under our Constitution as is the further proposition that the power of making new treaties or modifying existing treaties is not lodged by the Constitution in Congress, but in the President, by and with the advice and consent of the Senate, as shown by the concurrence of two-thirds of that body." Ibid. 4470-4471. The veto would seem to have been based on a quibble.

[188] 229 U.S. 447 (1913).

[189] Ibid. 473-476.

[190] Clark *v.* Allen, 331 U.S. 503 (1947).

[191] Charlton *v.* Kelly, 229 U.S. 447 (1913).

[192] Fed. Cas. No. 13,799 (1855).

[193] 2 Pet. 253, 309 (1829).

[194] Acts of March 2, 1829 and of February 24, 1855; 4 Stat. 359 and 10 Stat. 614.

[195] In re Ross, 140 U.S. 453 (1891), where the treaty provisions involved are given. The supplementary legislation was later reenacted as Rev. Stat. §§ 4083-4091.

[196] 18 U.S.C.A. §§ 3181-3195.

[197] Baldwin *v.* Franks, 120 U.S. 678, 683 (1887).

[198] Neely *v.* Henkel, 180 U.S. 109, 121 (1901). A different theory is offered by Justice Story in his opinion for the Court in Prigg *v.* Pennsylvania, 16 Pet. 539 (1842), in the following words: "Treaties made between the United States and foreign powers, often contain special provisions, which do not execute themselves, but require the interposition of Congress to carry them into effect, and Congress has constantly, in such cases, legislated on the subject; yet, although the power is given to the executive, with the consent of the senate, to make treaties, the power is nowhere in positive terms conferred upon Congress to make laws to carry the stipulations of treaties into effect. It has been supposed to result from the duty of the national government to fulfil all the obligations of treaties." Ibid. 619. Story was here in quest of arguments to prove that Congress had power to enact a fugitive slave law, which he based on its power "to carry into effect rights expressly given and duties expressly enjoined" by the Constitution. Ibid. 618-619. But the treaty-making power is neither a right nor a duty, but one of the powers "vested by this Constitution in the Government of the United States." Article I, section 8, clause 18.

[199] Geofroy *v.* Riggs, 133 U.S. 258 (1890). *See also* Fort Leavenworth Railroad Co. *v.* Lowe, 114 U.S. 525, 541 (1885), which is cited in the Field opinion in support of the idea that no cession of any portion of a State's territory could be effected without the State's consent. The statement is the purest obiter.

[200] Ibid. 267.

[201] The majority of the cases, as was pointed out earlier, dealt with the

competence of the treaty-making power to grant aliens the right to inherit real property contrary to State Law. The nearest the Court ever came to lending countenance to the State Rights argument in this connection was in Frederickson *v.* Louisiana, 23 How. 445 (1860). *See* ibid. 448.

[202] 252 U.S. 416 (1920).

[203] Ibid. 433-434.

[204] Ibid. 435.

[205] 299 U.S. 304 (1936).

[206] Ibid. 318. "The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments. It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein." In re Ross, 140 U.S. 453, 463 (1891).

[207] Jefferson excepted out of the treaty-making power the delegated powers of Congress, though just what he meant by this exception is uncertain. He may have meant that no international agreement could be constitutionally entered into by the United States within the sphere of such powers, or only that treaty-provisions dealing with matters which are also subject to the legislative power of Congress must, in order to become law of the land, receive the assent of Congress. The latter interpretation, however, does not state a limitation on the power of making treaties in the sense of international conventions, but rather a necessary procedure before certain conventions are cognizable by the courts in the enforcement of rights under them, while the former interpretation has been contradicted in practice from the outset.

Various other limitations to the treaty-making power have been suggested from time to time. Thus, it has been contended that the territory of a State of the Union could not be ceded without such State's consent, *see above*; also, that while foreign territory can be annexed to the United States by the treaty-making power, it could not be incorporated with the United States except with the consent of Congress; also, that while the treaty-making power can consent to the United States being sued for damages in an international tribunal for an alleged incorrect decision of a court of the United States, it could not consent to an appeal being taken from one of its courts to an international tribunal.

The first of these alleged limitations may be dismissed as resting on the unallowable idea that the United States is not as to its powers a territorial government, but only the agent of the States. In the words of Chancellor Kent: "The better opinion would seem to be, that such a power of cession of the territory of a State without its consent does reside exclusively in the treaty-making power, under the Constitution of the United States, yet sound discretion would forbid the exercise of it without the consent of the local government who are interested, except in cases of great necessity, in which the consent might be presumed." 1 Comm. 166-167 and note. This seems also to have been substantially the view of Marshall and Story. *See* Willoughby, On the Constitution, I (2d ed., 1929), 575-576. The second suggested limitation, which was urged at tremendous length by Chief Justice White in his concurring opinion for himself and three other Justices, in Downes *v.* Bidwell, 182 U.S. 244, 310-344 (1901), boils down simply to the question of correct constitutional procedure for the effectuation of a treaty; and much the same may be said of the third alleged limitation. This limitation was first suggested in connection with the Hague Convention of 1907 providing for an International Prize Court as a result of appeal from the prize courts of belligerents. To this arrangement President Taft objected that the treaty-making power could not transfer to a tribunal not known to the Constitution part of the "judicial power of the United States," and upon this view of the matter dispensation was finally granted the United States in a special protocol whereby this nation was allowed, in lieu of granting appeals from its prize courts to the International Court, to be mulcted in damages in the latter for erroneous decisions in the former. It is submitted that President Taft's position was fallacious, for the simple reason that not even the whole American nation is entitled to judge finally of its rights or of those of its citizens under the law which binds all nations and determines their rights; and that, therefore, the whole American nation never had any authority to create a judicial power vested with any such jurisdiction. *See* Edye *v.* Robertson (Head Money Cases), 112 U.S. 580, 598 (1884). The law of nations seems of itself to presuppose a tribunal of nations with coextensive jurisdiction. Thus there is no reason why a completely independent nation like the United States may not consent to be bound by the decisions of such a tribunal without any derogation from its rightful sovereignty. And if "the authority of the United States" is the authority of the nation in the field of

foreign relations—if the National Government has constitutional powers coextensive with its international responsibilities—we must conclude that such consent can be validly given through the existing treaty-making power. *See* Favoring Membership of the United States in the Permanent Court of International Justice, H. Rept. 1569, 68th Cong., 2d sess.

[208] 5 Pet. 1 (1831).

[209] 6 Pet. 515 (1832).

[210] Ibid. 558.

[211] Holden *v.* Joy, 17 Wall. 211, 242 (1872); United States *v.* 43 Gallons of Whiskey, etc., 93 U.S. 188, 192 (1876); Dick *v.* United States, 208 U.S. 340, 355-356 (1908).

[212] The New York Indians, 5 Wall. 761 (1867).

[213] The Kansas Indians, 5 Wall. 737, 757 (1867).

[214] United States *v.* 43 Gallons of Whiskey, etc., 93 U.S. 188, 196 (1876).

[215] The Cherokee Tobacco, 11 Wall. 616 (1871). *See also* Ward *v.* Race Horse, 163 U.S. 504, 511 (1896); and Thomas *v.*. Gay, 169 U.S. 264, 270 (1898).

[216] 16 Stat. 544, 566; Rev. Stat § 2079.

[217] Ward *v.* Race Horse, 163 U.S. 504 (1896).

[218] Lone Wolf *v.* Hitchcock, 187 U.S. 553 (1903).

[219] Cherokee Nation *v.* Southern Kansas R. Co., 135 U.S. 641 (1890).

[220] The Cherokee Tobacco, 11 Wall. 616, 621 (1871).

[221] Choate *v.* Trapp, 224 U.S. 665, 677-678 (1912); Jones *v.* Meehan, 175 U.S. 1 (1899).

[222] For an effort to distinguish "treaties," "compacts," "agreements," "conventions," etc., *see* Chief Justice Taney's opinion in Holmes *v.* Jennison, 14 Pet. 540, 570-572 (1840). Vattel is Taney's chief reliance.

[223] Story, Comm. § 1403. The President has the power in the absence of legislation by Congress, to control the landing of foreign cables on the shores of the United States, 22 Op. Atty. Gen. 13 and 408 (1898, 1899).

[224] Crandall, Treaties (2d ed.) Chap. VIII. *See also* McClure, International Executive Agreements (Columbia University Press, 1941), Chaps. I and II.

[225] Crandall, 102; McClure, 49-50.

[226] Crandall, 104-106; McClure, 81-82.

[227] Tucker *v.* Alexandroff, 183 U.S. 424, 435 (1902).

[228] Ibid. 467. The first of these conventions, signed July 29, 1882, had asserted its constitutionality in very positive terms. "The power to make and enforce such a temporary convention respecting its own territory is a necessary incident to every national government, and adheres where the executive power is vested. Such conventions are not treaties within the meaning of the Constitution, and, as treaties, supreme law of the land, conclusive on the courts, but they are provisional arrangements, rendered necessary by national differences involving the faith of the nation and entitled to the respect of the courts. They are not a casting of the national will into the firm and permanent condition of law, and yet in some sort they are for the occasion an expression of the will of the people through their political organ, touching the matters affected; and to avoid unhappy collision between the political and judicial branches of the government, both which are in theory inseparably all one, such an expression to a reasonable limit should be followed by the courts and not opposed, though extending to the temporary restraint or modification of the operation of existing statutes. Just as here, we think, this particular convention respecting San Juan should be allowed to modify for the time being the operation of the organic act of this Territory [Washington] so far forth as to exclude to the extent demanded by the political branch of the government of the United States, in the interest of peace, all territorial interference for the government of that island." Wright, The Control of American Foreign Relations, 239, quoting Watts *v.* United States, 1 Wash. Terr., 288, 294 (1870).

[229] Quincy Wright, The Control of American Foreign Relations (New York, 1922), 245.

[230] Crandall, 103-104.

[231] Ibid. 104.

[232] Willoughby, On the Constitution, I, 539.

[233] Wallace McClure, International Executive Agreements (Columbia University Press, 1941), 98.

[234] Tyler Dennett, Roosevelt and the Russo-Japanese War (New York, 1925), 112-114.

[235] McClure, International Executive Agreements, 98-99.

[236] Ibid. 99-100.

[237] Willoughby, On the Constitution, I, 547.

[238] Wallace McClure, International Executive Agreements (Columbia University Press, 1941), 97, 100.

[239] McClure, International Executive Agreements, 141.

[240] 301 U.S. 324 (1937).

[241] Ibid. 330-332.

[242] 315 U.S. 203 (1942).

[243] Ibid. 229-230. Citing The Federalist, No. 64.

[244] Ibid. 230. Citing Guaranty Trust Co. *v.* United States, 304 U.S. 126, 143 (1938).

[245] Ibid. 230-231. Citing Nielsen *v.* Johnson, 279 U.S. 47 (1929).

[246] Ibid. 231. Citing Santovincenzo *v.* Egan, 284 U.S. 30 (1931); United States *v.* Belmont, 301 U.S. 324 (1937).

[247] Ibid. 233-234. Citing Oetjen *v.* Central Leather Co., 246 U.S. 297, 304 (1918).

[248] 315 U.S. at 228-234 *passim*. Chief Justice Stone and Justice Roberts dissented, chiefly on the question of the interpretation of the Litvinov Agreement, citing Guaranty Trust Co. *v.* United States, Note 3 above.

[249] McClure, p. 391.

[250] Ibid. 391-393; United States Department of State Bulletin, September 7, 1940, pp. 199-200.

[251] McClure, 394-403; *cf.* The Constitution, article IV, section 3, clause 2. When President John Adams signed a deed conveying property for a legation to the Queen of Portugal, he was informed by his Attorney General that only Congress was competent to grant away public property. *See* W.B. Bryan, A History of the National Capitol From Its Foundation Through the Period of the Adoption of the Organic Act, I, 328-329; 1 American State Papers, Misc., 334. *See also* Chief Justice Hughes, for the Court, in Ashwander *v.* Tennessee Valley Authority, 297 U.S. 288, 330 (1936).

[252] 4 State Department Bulletin, April 12, 1941, pp. 443-447.

[253] What purports to be the correct text of these agreements was published in the New York Times of March 11, 1947. The joint statement by the United States, Great Britain, and France on arms aid for the Middle East which was released by the White House on May 25, 1950 (*See* A.P. dispatches of that date) bears the earmarks of an executive agreement. And the same may be said of the following communique issued by the North Atlantic Council at the close of its Sixth Session at Brussels on December 19, 1950.

"The North Atlantic Council acting on recommendations of the Defense Committee today completed the arrangements initiated in September last for the establishment in Europe of an integrated force under centralized control and command. This force is to be composed of contingents contributed by the participating governments.

"The Council yesterday unanimously decided to ask the President of the United States to make available General of the Army Dwight D. Eisenhower to serve as Supreme Commander. Following receipt this morning of a message from the President of the United States that he had made General Eisenhower available, the Council appointed him. He will assume his command and establish his headquarters in Europe early in the New Year. He will have the authority to train the national units assigned to his command and to organize them into an effective integrated defense force. He will be supported by an international staff drawn from the nations contributing to the force.

"The Council, desiring to simplify the structure of the North Atlantic Treaty

Organization in order to make it more effective, asked the Council Deputies to initiate appropriate action. In this connection the Defense Committee, meeting separately on December 18th, had already taken action to establish a defense production board with greater powers than those of the Military Production and Supply Board which it supersedes. The new board is charged with expanding and accelerating production and with furthering the mutual use of the industrial capacities of the member nations.

"The Council also reached unanimous agreement regarding the part which Germany might assume in the common defense. The German participation would strengthen the defense of Europe without altering in any way the purely defensive character of the North Atlantic Treaty Organization. The Council invited the Governments of France, the United Kingdom and the United States to explore the matter with the Government of the German Federal Republic.

"The decisions taken and the measures contemplated have the sole purpose of maintaining and consolidating peace. The North Atlantic nations are determined to pursue this policy until peace is secure." Department of State release to the press of December 19, 1950 (No. 1247).

[254] McClure, International Executive Agreements, 38; 1 Stat. 232-239; reenacted in 1 Stat. 354, 366.

[255] McClure, 78-81; Crandall, 127-131.

[256] Crandall, 121-127.

[257] 48 Stat. 943. Section 802 of the Civil Aeronautics Act of 1938 (52 Stat. 973) "clearly anticipates the making of agreements with foreign countries concerning civil aviation." 40 Op. Atty. Gen. 451, 452 (1946).

[258] 143 U.S. 649 (1892).

[259] Ibid. 694.

[260] 224 U.S. 583, 596 (1912).

[261] Ibid. 601.

[262] 55 Stat. 31. One specific donation was of a destroyer to the Queen of Holland, a refugee at the time in Great Britain.

[263] 42 Stat. 363, 1325, 1326-1327; extended by 43 Stat. 763.

[264] *See* Corwin, The President, Office and Powers (3d ed.) 264 and notes.

[265] 48 Stat. 1182.

[266] McClure, 13-14.

[267] Ibid. 14.

[268] "There have been numerous instances in which the Senate has approved treaties providing for the submission of specific matters to arbitration, leaving it to the President to determine exactly the form and scope of the matter to be arbitrated and to appoint the arbitrators. Professor J.B. Moore, in the article to which reference has already been made, enumerates thirty-nine instances in which provision has thus been made for the settlement of pecuniary claims. Twenty of these were claims against foreign governments, fourteen were claims against both governments, and five against the United States alone." Willoughby, On the Constitution, I, 543.

[269] A Decade of American Foreign Policy, S. Doc. 123, 81st Cong., 1st sess., 126.

[270] A Decade of American Foreign Policy, S. Doc. 123, 81st Cong., 1st sess., 158.

[271] United States *v.* Hartwell, 6 Wall. 385, 393 (1868).

[272] 7 Op. Atty. Gen. 168 (1855).

[273] It was so assumed by Senator William Maclay. *See* Journal of William Maclay (New York, 1890), 109-110.

[274] 5 Benton, Abridgment of the Debates of Congress, 90-91; 3 Letters and Other Writings of James Madison (Philadelphia, 1867), 350-353, 360-371.

[275] 10 Stat. 619, 623.

[276] 7 Op. Atty. Gen. 220.

[277] 35 Stat. 672; *see also* The act of March 1, 1893, 27 Stat. 497, which purported to authorize the President to appoint ambassadors in certain cases.

[278] 22 U.S.C. §§ 1-231.

[279] 11 Benton, Abridgement of the Debates of Congress, 221-222.

[280] S. Misc. Doc. 109, 50th Cong., 1st sess., 104.

[281] S. Rept. 227, 53d Cong., 2d sess., 25. At the outset of our entrance into World War I President Wilson dispatched a mission to "Petrograd," as it was then called, without nominating the Members of it to the Senate. It was headed by Mr. Elihu Root, with "the rank of ambassador," while some of his associates bore "the rank of envoy extraordinary."

[282] *See* George Frisbie Hoar, Autobiography, II, 48-51.

[283] Justice Brandeis, dissenting in Myers *v.* United States, 272 U.S. 52, 264-274 (1926).

[284] *See* data in Corwin, The President, Office and Powers (3d ed.) 418. Congress has repeatedly designated individuals, sometimes by name, more frequently by reference to a particular office, for the performance of specified acts or for posts of a nongovernmental character; e.g., to paint a picture (Jonathan Trumbull), to lay out a town, to act as Regents of Smithsonian Institution, to be managers of Howard Institute, to select a site for a post office or a prison, to restore the manuscript of the Declaration of Independence, to erect a monument at Yorktown, to erect a statue of Hamilton, and so on and so forth. 42 Harvard Law Review, 426, 430-431. In his message of April 13, 1822, President Monroe stated the thesis that, "as a general principle, * * * Congress have no right under the Constitution to impose any restraint by law on the power granted to the President so as to prevent his making a free selection of proper persons for these [newly created] offices from the whole body of his fellow-citizens." Messages and Papers of the Presidents, II, 698, 701. The statement is ambiguous, but its apparent intention is to claim for the President unrestricted power in determining who are proper persons to fill newly created offices.

[285] 19 Stat. 143, 169 (1876).

[286] In Ex parte Curtis, 106 U.S. 371 (1882), Chief Justice Waite reviews early Congressional legislation regulative of conduct in office. "The act now in question is one regulating in some particulars the conduct of certain officers and employés of the United States. It rests on the same principle as that originally passed in 1789 at the first session of the first Congress, which makes it unlawful for certain officers of the Treasury Department to engage in the business of trade or commerce, or to own a sea vessel, or to purchase public lands or other public property, or to be concerned in the purchase or disposal of the public securities of a State, or of the United States (Rev. Stat., sect. 243); and that passed in 1791, which makes it an offence for a clerk in the same department to carry on trade or business in the funds or debts of the States or of the United States, or in any kind of public property (id., sect. 244); and that passed in 1812, which makes is unlawful for a judge appointed under the authority of the United States to exercise the profession of counsel or attorney, or to be engaged in the practice of the law (id., sect. 713); and that passed in 1853, which prohibits every officer of the United States or person holding any place of trust or profit, or discharging any official function under or in connection with any executive department of the government of the United States, or under the Senate or House of Representatives, from acting as an agent or attorney for the prosecution of any claim against the United States (id., sect. 5498); and that passed in 1863, prohibiting members of Congress from practicing in the Court of Claims (id., sect. 1058); and that passed in 1867, punishing, by dismissal from service, an officer or employé of the government who requires or requests any workingman in a navy-yard to contribute or pay any money for political purposes (id., sect. 1546); and that passed in 1868, prohibiting members of Congress from being interested in contracts with the United States (id., sect. 3739); and another, passed in 1870, which provides that no officer, clerk, or employé in the government of the United States shall solicit contributions from other officers, clerks, or employés for a gift to those in a superior official position, and that no officials or [clerical superiors shall receive any gift or] present as a contribution to them from persons in government employ getting a less salary than themselves, and that no officer or clerk shall make a donation as a gift or present to any official superior (id., sect. 1784). Many others of a kindred character might be referred to, but these are enough to show what has been the practice in the Legislative Department of the Government from its organization, and, so far as we know, this is the first time the constitutionality of such legislation has ever been presented for judicial determination." Ibid. 372-373.

[287] 5 U.S.C. §§ 631-642.

[288] 54 Stat. 767, 771 (1940).

[289] 330 U.S. 75 (1947).

[290] 18 U.S.C. 611.

[291] *See* Bills Listed in Index to Digest of Public General Bills, 79th Cong., 2d sess.

[292] 12 Fed Reg. 1935.

[293] Shoemaker *v.* Unite States, 147 U.S. 282, 301 (1893).

[294] United States *v.* Germaine, 99 U.S. 508 (1879) is the leading case. For further citations *see* Auffmordt *v.* Hedden, 137 U.S. 310, 327 (1890). The Court will, nevertheless, be astute to ascribe to a head of department an appointment made by an inferior of such head. Nishimura Ekiu *v.* United States, 142 U.S. 651, 663 (1892). For the view that there is an intrinsic difference between a "public office" and a "public employment" *see* Mechem, Public Officers, pp. 3-5.

[295] Ex parte Hennen, 13 Pet. 230, 257-258 (1839); United States *v.* Germaine, 99 U.S. 508, 509 (1879). The statement on the point is in both instances obiter.

[296] Ex parte Siebold, 100 U.S. 371, 397 (1880).

[297] "They [the clauses of the Constitution] seem to contemplate three distinct operations: 1st. The nomination. This is the sole act of the President, and is completely voluntary. 2d. The appointment. This is also the act of the President, and is also a voluntary act, though it can only be performed by and with the advice and consent of the Senate. 3d. The commission. To grant a commission to a person appointed, might, perhaps, be deemed a duty enjoined by the constitution. 'He shall,' says that instrument, 'commission all the officers of the United States.'" Marbury *v.* Madison, 1 Cr. 137, 155-156 (1803). Marshall's statement that the appointment "is the act of the President," conflicts with the more generally held, and sensible view that when an appointment is made with its consent, the Senate shares the appointing power. 1 Kent's Comm. 310; 2 Story Comm. § 1539; Ex parte Hennen, 13 Pet. 225, 259 (1839).

[298] 3 Op. Atty. Gen. 188 (1837).

[299] 2 Story Comms., § 1531; 5 Writings of Jefferson (Ford, ed.), 161 (1790); 9 Writings of Madison (Hunt, ed.), 111-113 (1822).

[300] 286 U.S. 6 (1932).

[301] Corwin, The President, Office and Powers (3d ed.), 92.

[302] Marbury *v.* Madison, 1 Cr. 137, 157-158, 182 (1803).

[303] 12 Op. Atty. Gen. 306 (1867).

[304] It should be remembered that, for various reasons, Marbury got neither commission nor office. The case assumes, in fact, the necessity of possession of his commission by the appointee.

[305] Opins. Atty. Gen. 631 (1823); 2 ibid. 525 (1832); 3 ibid. 673 (1841); 4 ibid. 523 (1846); 10 ibid. 356 (1862); 11 ibid. 179 (1865); 12 ibid. 32 (1866); 12 ibid. 455 (1868); 14 ibid. 563 (1875); 15 ibid. 207 (1877); 16 ibid. 523 (1880); 18 ibid. 28 (1884); 19 ibid. 261 (1889); 26 ibid. 234 (1907); 30 ibid. 314 (1914); 33 ibid. 20 (1921). In 4 Opins. Atty. Gen. 361, 363 (1845), the general doctrine was held not to apply to a yet unfilled office which was created during the previous session of Congress, but this distinction is rejected in 12 ibid. 455 (1868); 18 ibid. 28; and 19 ibid. 261.

[306] 23 Opins. Atty. Gen. 599 (1901); 22 ibid. 82 (1898). A "recess" may, however, be merely "constructive," as when a regular session succeeds immediately upon a special session. It was this kind of situation that gave rise to the once famous *Crum* incident. *See* Willoughby, III, 1508-1509.

[307] 5 U.S.C. § 56.

[308] 6 Opins. Atty. Gen. 358 (1854); 12 ibid. 41 (1866); 25 ibid. 259 (1904); 28 ibid. 95 (1909).

[309] 272 U.S. 52.

[310] 19 Stat. 78, 80.

[311] 272 U.S. 163-164.

[312] The reticence of the Constitution respecting removal left room for four possibilities, *first*, the one suggested by the common law doctrine of "estate in

office," from which the conclusion followed that the impeachment power was the only power of removal intended by the Constitution; *second*, that the power of removal was an incident of the power of appointment and hence belonged, at any rate in the absence of legal or other provision to the contrary, to the appointing authority; *third*, that Congress could, by virtue of its power "to make all laws which shall be necessary and proper," etc., determine the location of the removal of power; *fourth*, that the President by virtue of his "executive power" and his duty "to take care that the laws be faithfully executed," possesses the power of removal over all officers of the United States except judges. In the course of the debate on the act to establish a Department of Foreign Affairs (later changed to Department of State) all of these views were put forward, with the final result that a clause was incorporated in the measure which implied, as pointed out above, that the head of the department would be removable by the President at his discretion. Contemporaneously and indeed until after the Civil War, this action by Congress, in other words "the decision of 1789," was interpreted as establishing "a practical construction of the Constitution" with respect to executive officers appointed without stated terms. However, in the dominant opinion of those best authorized to speak on the subject, the "correct interpretation" of the Constitution was that the power of removal was always an incident of the power of appointment, and that therefore in the case of officers appointed by the President with the advice and consent of the Senate the removal power was exercisable by the President only with the advice and consent of the Senate. *See* Hamilton in the Federalist No. 77; 1 Kent's Comm. 310; 2 Story Comm. §§ 1539 and 1544; Ex parte Hennen, 13 Pet. 225, 258-259 (1839). The doctrine of estate in office was countenanced by Chief Justice Marshall in his opinion in Marbury *v.* Madison, 1 Cr. 137, 162-165 (1803), but has long been rejected. *See* Crenshaw *v.* United States, 134 U.S. 99, 108 (1890). The three remaining views are treated by the Chief Justice, at some cost in terms of logic as well as of history, as grist to his mill.

[313] 272 U.S. at 134.

[314] Annals of Congress, cols. 635-636.

[315] 295 U.S. 602 (1935). The case is also styled Rathbun, Executor *v.* United States, Humphrey having, like Myers before him, died in the course of his suit for salary.

[316] 295 U.S. at. 627-629, 631-632. Justice Sutherland's statement, quoted above, that a Federal Trade Commissioner "occupies no place in the executive department" (*See also* to the same effect p. 630 of the opinion) was not necessary to the decision of the case, was altogether out of line with the same Justice's reasoning in Springer *v.* Philippine Islands, 277 U.S. 189, 201-202 (1928), and seems later to have caused the author of it much perplexity. *See* Robert E. Cushman, The Independent Regulatory Commissions (Oxford University Press, 1941), 447-448. As Professor Cushman adds: "Every officer and agency created by Congress to carry laws into effect is an arm of Congress. * * * The term may be a synonym; it is not an argument." Ibid. 451.

[317] United States *v.* Perkins, 116 U.S. 483 (1886).

[318] Parsons *v.* United States, 167 U.S. 324 (1897).

[319] Shurtleff *v.* United States, 189 U.S. 311 (1903).

[320] Blake *v.* United States, 103 U.S. 227 (1881); Quackenbush *v.* United States, 177 U.S. 20 (1900); Wallace *v.* United States, 257 U.S. 541 (1922).

[321] Morgan *v.* TVA, 28 F. Supp. 732 (1939), certiorari refused March 17, 1941. 312 U.S. 701, 702.

[322] *See* United Public Workers *v.* Mitchell, 330 U.S. 75 (1947); *also* Ex parte Curtis, 106 U.S. 371 (1882); and 39 Op. Atty. Gen. 145 (1938).

[323] 6 Op. Atty. Gen. 220 (1853); In re Neagle, 135 U.S. 1 (1890).

[324] United States *v.* Lovett, 328 U.S. 303 (1946).

[325] Messages and Papers of the Presidents, II, 847 (January 10, 1825).

[326] *See* 328 U.S. at 313.

[327] In this connection the following colloquy between Attorney General Lincoln and the Court in course of the proceedings in Marbury *v.* Madison is of first importance: "Mr. Lincoln, attorney-general, having been summoned, and now called, objected to answering. * * * On the one hand he respected the jurisdiction of this court, and on the other he felt himself bound to maintain the rights of the executive. He was acting as secretary of state at the time when this transaction happened. He was of opinion, and his opinion was

supported by that of others whom he highly respected, that he was not bound, and ought not to answer, as to any facts which came officially to his knowledge while acting as secretary of state. He did not think himself bound to disclose his official transactions while acting as secretary of state; * * * The court said, that if Mr. Lincoln wished time to consider what answers he should make, they would give him time; but they had no doubt he ought to answer. There was nothing confidential required to be disclosed. If there had been he was not obliged to answer it; and if he thought that any thing was communicated to him in confidence he was not bound to disclose it; * * *" 1 Cr. 137, 143-145 (1803).

[328] The following letter, dated April 30, 1941, from Attorney General Jackson to Hon. Carl Vinson, Chairman of the House Committee on Naval Affairs is of interest in this connection: "My Dear Mr. Vinson: I have your letter of April 23, requesting that your committee be furnished with all Federal Bureau of Investigation reports since June 1939, together with all future reports, memoranda, and correspondence of the Federal Bureau of Investigation, or the Department of Justice, in connection with 'investigations made by the Department of Justice arising out of strikes, subversive activities in connection with labor disputes, or labor disturbances of any kind in industrial establishments which have naval contracts, either as prime contractors or subcontractors.' Your request to be furnished reports of the Federal Bureau of Investigation is one of the many made by congressional committees. I have on my desk at this time two other such requests for access to Federal Bureau of Investigation files. The number of these requests would alone make compliance impracticable, particularly where the requests are of so comprehensive a character as those contained in your letter. In view of the increasing frequency of these requests, I desire to restate our policy at some length, together with the reasons which require it. It is the position of this Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to 'take care that the laws be faithfully executed,' and that congressional or public access to them would not be in the public interest.

"Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain. * * *

"In concluding that the public interest does not permit general access to Federal Bureau of Investigation reports for information by the many congressional committees who from time to time ask it, I am following the conclusions reached by a long line of distinguished predecessors in this office who have uniformly taken the same view. Example of this are to be found in the following letters, among others:

"Letter of Attorney General Knox to the Speaker of the House, dated April 27, 1904, declining to comply with a resolution of the House requesting the Attorney General to furnish the House with all papers and documents and other information concerning the investigation of the Northern Securities case.

"Letter of Attorney General Bonaparte to the Speaker of the House, dated April 13, 1908, declining to comply with a resolution of the House requesting the Attorney General to furnish to the House information concerning the investigation of certain corporations engaged in the manufacture of wood pulp or print paper.

"Letter of Attorney General Wickersham to the Speaker of the House, dated March 18, 1912, declining to comply with a resolution of the House directing the Attorney General to furnish to the House information concerning an investigation of the smelter trust.

"Letter of Attorney General McReynolds to the Secretary to the President, dated August 28, 1914, stating that it would be incompatible with the public interest to send to the Senate in response to its resolution, reports made to the Attorney General by his associates regarding violations of law by the Standard Oil Co.

"Letter of Attorney General Gregory to the President of the Senate, dated February 23, 1915, declining to comply with a resolution of the Senate requesting the Attorney General to report to the Senate his findings and conclusions in the investigation of the smelting industry.

"Letter of Attorney General Sargent to the chairman of the House Judiciary

Committee, dated June 8, 1926, declining to comply with his request to turn over to the committee all papers in the files of the Department relating to the merger of certain oil companies. * * *

"This discretion in the executive branch has been upheld and respected by the judiciary. The courts have repeatedly held that they will not and cannot require the executive to produce such papers when in the opinion of the executive their production is contrary to the public interests. The courts have also held that the question whether the production of the papers would be against the public interest is one for the executive and not for the courts to determine." Mr. Jackson cites Marbury *v.* Madison, 1 Cr. 137, 169 (1803); and more than a dozen other cases, federal and State, most of which involved "privileged communications" in ordinary court proceedings. The doctrine of the equality of the three departments is also invoked by him.—10 Op. Atty. Gen. 45.

[329] *See* Norman J. Small, Some Presidential Interpretations of the Presidency (Johns Hopkins Press, 1932); Henry C. Black, The Relation of the Executive Power to Legislation (Princeton, 1919); W.E. Binkley, The President and Congress (New York, 1947); Edward S. Corwin, The President, Office and Powers (3d ed., 1948), Chaps. I and VII, *passim*.

[330] The first Harrison, Polk, Taylor, and Fillmore all fathered sentiments to this general effect. *See* Messages and Papers of the President, IV, 1864; V, 2493; VI, 2513-2519, 2561-2562, 2608, 2615.

[331] Note 1, above.

[332] Charles Warren, Presidential Declarations of Independence, 10 Boston University Law Review, No. 1 (January, 1930); Willoughby, On the Constitution, III, 1488-1492.

[333] 7 Op. Atty. Gen. 186, 209 (1855).

[334] 5 Moore, International Law Digest, 15-19.

[335] 4 Ibid. 473-548; 5 Ibid. 19-32.

[336] Opinion on the Question Whether the Senate Has the Right to Negative the Grade of Persons Appointed by the Executive to Fill Foreign Missions, April 24, 1790; Padover, The Complete Jefferson (New York, 1943), 138.

[337] 4 Moore, International Law Digest, 680-681.

[338] This measure, amended by the act of March 4, 1909 (35 Stat. 1088), is now 18 U.S.C.A. § 953.

[339] *See* Memorandum on the History and Scope of the Laws Prohibiting Correspondence with a Foreign Government, S. Doc. 696, 64th Cong., 2d sess., (1917). The author was Mr. Charles Warren, then Assistant Attorney General. Further details concerning the observance of the "Logan" Act are given in Corwin, The President, Office and Powers (3d ed.) 223-224, 469-470. Early in October, 1950 President Harold Stassen of the University of Pennsylvania announced that he had written Premier Stalin offering to confer with him respecting issues between the two governments.

[340] Benton Abridgment of the Debates of Congress, 466-467.

[341] S. Doc. 56, 54th Cong., 2d sess., (1897).

[342] The Federalist, containing the Letters of Pacificus and Helvidius (New ed., 1852) 444; *see also* p. 493, n. 1.

[343] The Federalist No. 69, where he wrote: "The president is also to be authorized to receive ambassadors, and other public ministers. This, though it has been a rich theme of declamation, is more a matter of dignity than of authority. It is a circumstance which will be without consequence in the administration of the government; and it was far more convenient that it should be arranged in this manner, than that there should be a necessity of convening the legislature, or one of its branches, upon every arrival of a foreign minister; though it were merely to take the place of a departed predecessor." Ibid. 518.

[344] "Letters of Pacificus," 7 Works (Hamilton ed.) 76, 82-83.

[345] Moore, International Law Digest, IV, 680-681.

[346] The Federalist containing the Letters of Pacificus and Helvidius (New ed. 1852) 445-446.

[347] Moore, International Law Digest, I, 243-244. The course of the Monroe Administration in inviting the cooperation of Congress in connection with

recognition of the Spanish-American Republics, although it was prompted mainly by the consideration that war with Spain might result, was nonetheless opposed by Secretary of State John Quincy Adams. "Instead," said he, "of admitting the Senate or House of Representatives to any share in the act of recognition, I would expressly avoid that form of doing it which would require the concurrence of those bodies. It was I had no doubt, by our Constitution an act of the Executive authority. General Washington had exercised it in recognizing the French Republic by the reception of Mr. Genet. Mr. Madison had exercised it by declining several years to receive, and by finally receiving, Mr. Onis; and in this instance I thought the Executive ought carefully to preserve entire the authority given him by the Constitution, and not weaken it by setting the precedent of making either House of Congress a party to an act which it was his exclusive right and duty to perform. Mr. Crawford said he did not think there was anything in the objection to sending a minister on the score of national dignity, and that there was a difference between the recognition of a change of government in a nation already acknowledged as sovereign, and the recognition of a new nation itself. He did not, however, deny, but admitted, that the recognition was strictly within the powers of the Executive alone, and I did not press the discussion further.'" Ibid., 244-245; citing Memoirs of John Quincy Adams, IV, 205-206.

[348] S. Doc. 56, 54th Cong., 2d sess., pp. 20-22.

[349] Said Senator Nelson of Minnesota: "The President has asked us to give him the right to make war to expel the Spaniards from Cuba. He has asked us to put that power in his hands; and when we are asked to grant that power—the highest power given under the Constitution—we have the right, the intrinsic right, vested in us by the Constitution, to say how and under what conditions and with what allies that war-making power shall be exercised." 31 Cong. Record, Pt. 4, p. 3984.

[350] *See* in this connection a long list of resolutions or bills originating in the House of Representatives appertaining to foreign relations. H. Rept. 1569 ("Confidential"), 68th Cong., 2d sess. (February 24, 1925).

[351] *See* A Decade of American Foreign Policy, S. Doc. 123, 81st Cong., 1st sess., p. 158.

[352] President Truman's Statement of June 28, 1950, A.P. release: "The Security Council called upon all members of the United Nations to render every assistance to the United Nations in the execution of this resolution.

"In these circumstances I have ordered United States air and sea forces to give the Korean Government troops cover and support.

"The attack upon Korea makes it plain beyond all doubt that communism has passed beyond the use of subversion to conquer independent nations and will now use armed invasion and war.

"It has defied the orders of the Security Council of the United Nations issued to preserve international peace and security. In these circumstances the occupation of Formosa by Communist forces would be a direct threat to the security of the Pacific area and to United States forces performing their lawful and necessary functions in that area.

"Accordingly I have ordered the Seventh Fleet to prevent any attack on Formosa. As a corollary of this action I am calling upon the Chinese Government on Formosa to cease all air and sea operations against the mainland. The Seventh Fleet will see that this is done. The determination of the future status of Formosa must await the restoration of security in the Pacific, a peace settlement with Japan, or consideration by the United Nations.

"I have also directed that United States forces in the Philippines be strengthened and that military assistance to the Philippine Government be accelerated.

"I have similarly directed acceleration in the furnishing of military assistance to the forces of France and the associated states in Indo-China and the dispatch of a military mission to provide close working relations with those forces."

[353] Messages and Papers of the Presidents, XVII, (1914), 7934.

[354] 55 Stat. 31; 22 U.S.C. (1940), Supp. IV, §§ 411-413.

[355] James F. Green, The President's Control of Foreign Policy, Foreign Policy Reports (April 1, 1939), 17-18; Corwin, The President, Office and Powers (3d ed.), 224-235; 463-465, 473-474.

[356] 2 Pet. 253 (1829).

[357] Ibid. 308.

[358] 13 Pet. 415 (1839).

[359] Ibid. 420.

[360] Foster *v.* Neilson, supra.

[361] Williams *v.* Suffolk Ins. Co., 13 Pet. 415 (1839).

[362] United States *v.* Palmer, 3 Wheat. 610 (1818).

[363] Doe *v.* Braden, 16 How. 636, 657 (1853).

[364] Jones *v.* United States, 137 U.S. 202 (1890); Oetjen *v.* Central Leather Co., 246 U.S. 297 (1918).

[365] In re Baiz, 135 U.S. 403 (1890).

[366] Neely *v.* Henkel, 180 U.S. 109 (1901).

[367] Terlinden *v.* Ames, 184 U.S. 270 (1902); Charlton *v.* Kelly, 229 U.S. 447 (1913).

[368] 333 U.S. 103 (1948).

[369] 49 U.S.C. § 601.

[370] Ibid. § 646.

[371] Chicago & S. Airlines *v.* Waterman S.S. Corp., 333 U.S. 103, 111 (1948). *See also* Oetjen *v.* Central Leather Co., 246 U.S. 297 (1918); Ricaud *v.* American Metal Co., 246 U.S. 304 (1918); and Compania Espanola de Navegacion Maritima, S.A. *v.* The Navemar, 303 U.S. 68, 74 (1938). In this last case the Court declared: "The vessel of a friendly government in its possession and service is a public vessel, even though engaged in the carriage of merchandise for hire, and as such is immune from suit in the courts of admiralty of the United States. * * * It is open to a friendly government to assert that such is the public status of the vessel and to claim her immunity from suit, either through diplomatic channels or, if it chooses, as a claimant in the courts of the United States. If the claim is recognized and allowed by the executive branch of the government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction. * * * The foreign government is also entitled as of right upon a proper showing, to appear in a pending suit, there to assert its claim to the vessel, and to raise the jurisdictional question in its own name or that of its accredited and recognized representative." Similarly, it has been held that courts may not exercise their jurisdiction by the seizure and detention of the property of a friendly sovereign, so as to embarrass the executive arm of the government in conducting foreign relations. Ex parte Republic of Peru, 318 U.S. 578 (1943).

[372] 335 U.S. 160 (1948).

[373] Ibid. 167, 170. Four Justices dissented, by Justice Black, who said: "The Court * * * holds, as I understand its opinion, that the Attorney General can deport him whether he is dangerous or not. The effect of this holding is that any unnaturalized person, good or bad, loyal or disloyal to this country, if he was a citizen of Germany before coming here, can be summarily seized, interned and deported from the United States by the Attorney General, and that no court of the United States has any power whatever to review, modify, vacate, reverse, or in any manner affect the Attorney General's deportation order. * * * I think the idea that we are still at war with Germany in the sense contemplated by the statute controlling here is a pure fiction. Furthermore, I think there is no act of Congress which lends the slightest basis to the claim that after hostilities with a foreign country have ended the President or the Attorney General, one or both, can deport aliens without a fair hearing reviewable in the courts. On the contrary, when this very question came before Congress after World War I in the interval between the Armistice and the conclusion of formal peace with Germany, Congress unequivocally required that enemy aliens be given a fair hearing before they could be deported." Ibid. 174-175. *See also* Woods *v.* Miller, 333 U.S. 138 (1948), where the continuation of rent control under the Housing and Rent Act of 1947, enacted after the termination of hostilities was unanimously held to be a valid exercise of the war power, but the constitutional question raised was asserted to be a proper one for the Court. Said Justice Jackson, in a concurring opinion: "Particularly when the war power is invoked to do things to the liberties of people, or to their property or economy that only indirectly affect conduct of the war and do not relate to the management of the war

itself, the constitutional basis should be scrutinized with care." Ibid. 146-147.

[374] 7 Op. Atty. Gen. 453, 464-465 (1855).

[375] 9 Stat. 102 (1846); 20 U.S.C. §§ 41 and 48.

[376] *Cf.* 2 Stat. 78. The provision has long since dropped out of the statute book.

[377] Runkle *v.* United States, 122 U.S. 543 (1887).

[378] *Cf.* In re Chapman, 166 U.S. 661, 670-671 (1897), where it is held that presumptions in favor of official action "preclude collateral attack on the sentences of courts-martial." *See also* United States *v.* Fletcher, 148 U.S. 84, 88-89 (1893); and Bishop *v.* United States, 197 U.S. 334, 341-342 (1905); both of which in effect repudiate Runkle *v.* United States.

[379] "The President, in the exercise of his executive powers under the Constitution, may act through the head of the appropriate executive department. The heads of departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts." Wilcox *v.* Jackson ex dem McConnel, 13 Pet. 498, 513 (1839). *See also*, United States *v.* Eliason, 16 Pet. 291 (1842); Williams *v.* United States, 1 How. 290, 297 (1843); United States *v.* Jones, 18 How. 92, 95 (1856); United States *v.* Clarke (Confiscation Cases), 20 Wall. 92 (1874); United States *v.* Farden, 99 U.S. 10 (1879); Wolsey *v.* Chapman, 101 U.S. 755 (1880).

[380] 1 How. 290 (1843).

[381] 3 Stat. 723 (1823).

[382] 1 How. at 297-298.

[383] "It is manifestly impossible for the President to execute every duty, and every detail thereof, imposed upon him by the Congress. The courts have recognized this and have further recognized that he usually and properly acts through the several executive departments. Every reasonable presumption of validity is to be indulged with respect to the performance by the head of a department of a duty imposed upon the President and executed by the department head ostensibly in behalf of the President. Nevertheless, the authorities indicate that the President cannot, without statutory authority, delegate a discretionary duty, relieving himself of all responsibility, so that the duty when performed will not be his act but wholly the act of another. Williams *v.* United States, 1 How. 290, 297 (1843); Runkle *v.* United States, 122 U.S. 543, 557 (1887); United States *v.* Fletcher, 148 U.S. 84, 88 (1893); French *v.* Weeks, 259 U.S. 326, 334 (1922)"; 38 Op. Atty. Gen. 457-459 (1936).

[384] 1 Annals of Congress, cols. 515-516.

[385] Ibid. cols. 635-636.

[386] 1 Cr. 137 (1803).

[387] Ibid. 165-166.

[388] Op. Atty. Gen. 624 (1823).

[389] Messages and Papers of the Presidents, III, 1288.

[390] Ibid. 1304.

[391] 12 Pet. 524 (1838).

[392] Ibid. 610.

[393] 272 U.S. 52 (1926); 295 U.S. 602 (1935).

[394] Bruce Wyman, The Principles of the Administrative Law Governing the Relations of Public Officers (St. Paul, 1903), 231-232.

[395] United States *v.* Eliason, 16 Pet. 291, 301-302 (1842); Kurtz *v.* Moffitt, 115 U.S. 487, 503 (1885); Smith *v.* Whitney, 116 U.S. 167, 180-181 (1886).

[396] 135 U.S. 1 (1890).

[397] Ibid. 64. The phrase "a law of the United States" came from the act of March 2, 1833 (4 Stat. 632). However, in 28 U.S.C. 2241 (c) (2), as it stands following the amendment of May 24, 1949, c. 139, the phrase is replaced by the term an act of Congress, thereby eliminating the basis of the holding in In re Neagle.

[398] 236 U.S. 459 (1915); Mason *v.* United States, 260 U.S. 545 (1923).

[399] Rev. Stat. § 5298; 50 U.S.C. § 202.

[400] 1 Stat. 264 (1792); 1 Stat. 424 (1795); 2 Stat. 443 (1807); 12 Stat. 281 (1861).

[401] 12 Wheat. 19 (1827).

[402] Ibid. 31-32.

[403] "Federal Aid in Domestic Disturbances," S. Doc. 209, 59th Cong., 2 sess., p. 51 (1907).

[404] Op. Atty. Gen. 466 (1854). By the Posse Comitatus Act of 1878 (20 Stat. 152) it was provided that "* * * it shall not be lawful to employ any part of the Army of the United States, as a *posse comitatus*, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress * * *" The effect of this prohibition, however, was largely nullified by a ruling of the Attorney General "that by Revised Statutes §§ 5298 and 5300, the military forces, under the direction of the President, could be used to assist a marshal. 16 Op. Atty. Gen. 162." Bennett Milton Rich, The Presidents and Civil Disorder (The Brookings Institution, 1941), 196 fn. 21.

[405] 12 Stat (App.) 1258.

[406] 212 U.S. 78 (1909).

[407] In re Debs, 158 U.S. 565 (1895).

[408] 212 U.S. at 84-85. *See also* Sterling *v.* Constantin, 287 U.S. 378 (1932), which endorses Moyer *v.* Peabody, while emphasizing the fact that it applies only to a condition of disorder.

[409] 158 U.S. at 584, 586. Some years earlier, in the United States *v.* San Jacinto Tin Co., the Courts sustained the right of the Attorney General and of his assistants to institute suits simply by virtue of their general official powers. "If," the Court said, "the United States in any particular case has a just cause for calling upon the judiciary of the country, in any of its courts, for relief * * *" in the question of appealing to them "must primarily be decided by the Attorney General * * *" and if restrictions are to be placed upon the exercise of this authority it is for Congress to enact them. 125 U.S. 273, 279 (1888). *Cf.* Hayburn's case, 2 Dall. 409 (1792), in which the Court rejected Attorney General Randolph's contention that he had the right *ex officio* to move for a writ of *mandamus* ordering the United States circuit court for Pennsylvania to put the Invalid Pension Act into effect.

[410] 29 U.S.C. §§ 101-105; 47 Stat. 70 (1932).

[411] 330 U.S. 258. Here it was held that the Norris-LaGuardia Act did not apply to a case brought by the government as operator, under the War Labor Disputes Act of 1943, of a large proportion of the nation's soft coal mines. In reaching this result Chief Justice Vinson invoked the "rule that statutes which in general terms divest preexisting rights or privileges will not be applied to the sovereign without express words to that effect." Standing by itself these words would seem to save the Debs case. But they do not stand by themselves, for the Chief Justice presently added "that Congress, in passing the [Norris-LaGuardia] Act, did not intend to permit the United States to continue to intervene by injunction in purely private labor disputes. * * * where some public interest was thought to have become involved," words which seem intended to repudiate the Debs case. However, the Chief Justice goes on at once to say, "* * * whether Congress so intended or not is a question different from the one before us now." Ibid. 272, 278.

[412] Public Law 101, 80th Cong., 1st sess., §§ 206-210.

[413] *See* Louis Stark in New York Times, February 4, 1949; Labor Relations, Hearings before the Senate Committee on Labor and Public Welfare on S. 249, 81st Cong., 1st sess., pp. 263, 285, 295, 905, 911; Julius and Lillian Cohen, The Divine Rights of Presidents, 29 Nebraska Law Review, p. 416, March 1950.

[414] 30 Op. Atty. Gen. 291, 292, 293.

[415] Durand *v.* Hollins, 4 Blatch. 451, 454 (1860).

[416] Published by World Peace Foundation (Boston, 1945) *See also*, for the period 1811 to 1934, J. Reuben Clark's Memorandum as Solicitor of the Department of State entitled Right to Protect Citizens in Foreign Countries by Landing Forces (Government Printing Office, 1912, 1934). The great majority of the landings were for "the simple protection of American citizens in disturbed areas," and only about a third involved belligerent action.

[417] 5 Moore, International Law Digest, 478-510, *passim*.

[418] A Decade of American Foreign Policy, S. Doc. 123, 81st Cong., 1st Sess., p. 1347.

[419] *See* Max Farrand, Records, II, 318-319.

[420] Youngstown Co. *v.* Sawyer, 343 U.S. 579 (1952).

[421] 17 Fed. Reg. 3139-3143.

"Whereas on December 16, 1950, I proclaimed the existence of a national emergency which requires that the military, naval, air, and civilian defenses of this country be strengthened as speedily as possible to the end that we may be able to repel any and all threats against our national security and to fulfill our responsibilities in the efforts being made throughout the United Nations and otherwise to bring about a lasting peace; and

"Whereas American fighting men and fighting men of other nations of the United Nations are now engaged in deadly combat with the forces of aggression in Korea, and forces of the United States are stationed elsewhere overseas for the purpose of participating in the defense of the Atlantic Community against aggression; and

"Whereas the weapons and other materials needed by our armed forces and by those joined with us in the defense of the free world are produced to a great extent in this country, and steel is an indispensable component of substantially all of such weapons and materials; and

"Whereas steel is likewise indispensable to the carrying out of programs of the Atomic Energy Commission of vital importance to our defense efforts; and

"Whereas a continuing and uninterrupted supply of steel is also indispensable to the maintenance of the economy of the United States, upon which our military strength depends; and

"Whereas a controversy has arisen between certain companies in the United States producing and fabricating steel and the elements thereof and certain of their workers represented by the United Steel Workers of America, CIO, regarding terms and conditions of employment; and

"Whereas the controversy has not been settled through the processes of collective bargaining or through the efforts of the Government, including those of the Wage Stabilization Board, to which the controversy was referred on December 22, 1951, pursuant to Executive Order No. 10233, and a strike has been called for 12:01 A.M., April 9, 1952; and

"Whereas a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field; and

"Whereas in order to assure the continued availability of steel and steel products during the existing emergency, it is necessary that the United States take possession of and operate the plants, facilities, and other property of the said companies as hereinafter provided:

"Now, Therefore, by virtue of the authority vested in me by the Constitution and laws of the United States, and as President of the United States and Commander in Chief of the armed forces of the United States, it is hereby ordered as follows:

"1. The Secretary of Commerce is hereby authorized and directed to take possession of all or such of the plants, facilities, and other property of the companies named in the list attached hereto, or any part thereof, as he may deem necessary in the interests of national defense; and to operate or to arrange for the operation thereof and to do all things necessary for, or incidental to, such operation.

"2. In carrying out this order the Secretary of Commerce may act through or with the aid of such public or private instrumentalities or persons as he may designate; and all Federal agencies shall cooperate with the Secretary of Commerce to the fullest extent possible in carrying out the purposes of this order.

"3. The Secretary of Commerce shall determine and prescribe terms and conditions of employment under which the plants, facilities, and other properties possession of which is taken pursuant to this order shall be operated. The Secretary of Commerce shall recognize the rights of workers to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining,

adjustment of grievances or other mutual aid or protection, provided that such activities do not interfere with the operation of such plants, facilities, and other properties.

"4. Except so far as the Secretary of Commerce shall otherwise provide from time to time, the managements of the plants, facilities, and other properties possession of which is taken pursuant to this order shall continue their functions, including the collection and disbursement of funds in the usual and ordinary course of business in the names of their respective companies and by means of any instrumentalities used by such companies.

"5. Except so far as the Secretary of Commerce may otherwise direct, existing rights and obligations of such companies shall remain in full force and effect, and there may be made, in due course, payments of dividends on stock, and of principal, interest, sinking funds, and all other distributions upon bonds, debentures, and other obligations, and expenditures may be made for other ordinary corporate or business purposes.

"6. Whenever in the judgment of the Secretary of Commerce further possession and operation by him of any plant, facility, or other property is no longer necessary or expedient in the interest of national defense, and the Secretary has reason to believe that effective future operation is assured, he shall return the possession and operation of such plant, facility, or other property to the company in possession and control thereof at the time possession was taken under this order.

"7. The Secretary of Commerce is authorized to prescribe and issue such regulations and orders not inconsistent herewith as he may deem necessary or desirable for carrying out the purposes of this order; and he may delegate and authorize subdelegation of such of his functions under this order as he may deem desirable. Harry S. Truman. The White House, April 8, 1952."

[422] 343 U.S. 579, 583.

[423] Ibid. 584.

[424] 343 U.S. 579, 585-589.

[425] 2 Cr. 170 (1804).

[426] 343 U.S. 579, 660, 661.

[427] 343 U.S. 579, 684, citing 10 Annals of Congress, 619 (1800). *See also* p. 418.

[428] 9 Stat. 302; R.S. §§ 5270-5279.

[429] For the controversy thereby precipitated between Hamilton ("Pacificus") and Madison (Helvidius), *see* Edward S. Corwin, The President's Control of Foreign Relations (Princeton University Press, 1916), Chap. I.

[430] The Act of June 5, 1794; 1 Stat. 381. The Act was the direct outcome of suggestions made by Washington in his message of December 5, 1793. 1 Richardson 139.

[431] 22 Opins. A.G. 13 (1898); Tucker *v.* Alexandroff, 183 U.S. 424, 435 (1902). An act was passed May 27, 1921 (42 Stat. 8) which requires presidential license for the landing and operation of cables connecting the United States with foreign countries. Quincy Wright, The Control of American Foreign Relations (New York, 1922) 302 fn. 75.

[432] Santiago *v.* Nogueras, 214 U.S. 260 (1909).

[433] Madsen *v.* Kinsella, 343 U.S. 341 (1952).

[434] Charlton *v.* Kelly, 229 U.S. 447 (1913). *See also* Botiller *v.* Dominguez, 130 U.S. 238 (1889).

[435] Sinclair *v.* United States, 279 U.S. 263, 289, 297 (1929).

[436] 12 Stat. 755.

[437] Berdahl, War Powers of the Executive in the United States (University of Illinois, 1921), 69.

[438] 343 U.S. 579, 695.

[439] 89 Cong. Rec. 3992 (1943).

[440] 57 Stat. 163.

[441] 343 U.S. 579, 697.

[442] 341 U.S. 114 (1951).

[443] *See* Hooe *v.* United States, 218 U.S. 322, 335-336 (1910); United States *v.* North American Co., 253 U.S. 330, 333 (1920). *Cf.* Larson *v.* Domestic and Foreign Corp., 337 U.S. 682, 701-702 (1949).

[444] 341 U.S. 114, 119.

[445] *See* p. 486.

[446] Brief for the United States, No. 278, October Term, 1914, pp. 11, 75-77, quoted by the Chief Justice in 343 U.S. 579, 689-691. Assistant Attorney General Knaebel's name was also on the Brief.

[447] 343 U.S. 579, 597.

[448] Ibid. 602.

[449] 343 U.S. 579, 631-632.

[450] 13 How. 115 (1852).

[451] 13 Wall. 623 (1872).

[452] 260 U.S. 327 (1922).

[453] 341 U.S. 114 (1949).

[454] 315 U.S. 203, 230 (1942).

[455] Federalist No. 64.

[456] *See also* 40 Op. Atty. Gen. 250, 253 (1942).

[457] 343 U.S. 579, 639, 640.

[458] Ibid. 653, 654.

[459] 343 U.S. 579, 657.

[460] Ibid. 659.

[461] 2 Cr. 170 (1804).

[462] 343 U.S. 579, 662, 663.

[463] Ibid. 662.

[464] 343 U.S. 579, 678, 679.

[465] Ibid. 705.

[466] Ibid. 708-709.

[467] 4 Wall. 475 (1867).

[468] Ibid. 484.

[469] Ibid. 500-501.

[470] Kendall *v.* United States, 12 Pet. 524 (1838); United States *v.* Lee, 106 U.S. 196 (1882). It should be noted, however, that if the President fails to act, or if he adopts a narrow construction of a statute which he dislikes, and on this ground professes inability to act, the only remedy available against him is impeachment.

[471] Noble *v.* Union River Logging R. Co., 147 U.S. 165 (1893); Philadelphia Co. *v.* Stimson, 223 U.S. 605 (1912).

[472] Kendall *v.* United States, above; United States *v.* Schurz, 102 U.S. 378 (1880); United States ex rel. Dunlap *v.* Black, 128 U.S. 40 (1888). *Cf.* Decatur *v.* Paulding, 14 Pet. 497 (1840); and Riverside Oil Co. *v.* Hitchcock, 190 U.S. 316 (1903), where the rule is reiterated that neither injunction nor mandamus will lie against an officer to control him in the exercise of an official duty which requires the exercise of his judgment and discretion.

[473] This was originally on the theory that the Supreme Court of the District had inherited, via the common law of Maryland, the jurisdiction of the King's Bench "over inferior jurisdictions and officers." 12 Pet. at 614 and 620-621.

[474] Little *v.* Barreme, 2 Cr. 170 (1804); United States *v.* Lee, above; Spaulding *v.* Vilas, 161 U.S. 483 (1896).

[475] Bell *v.* Hood, 327 U.S. 678 (1946). The decision is based on an interpretation of 28 U.S.C. § 41 (1).

[476] Mitchell *v.* Clark, 110 U.S. 633 (1884). An official action is indemnifiable if Congress could have authorized it in the first place, or if it was done under "imperative orders which could not be resisted," or "under necessity or

mistake." Ibid. 640-641.

[477] Tennessee *v.* Davis, 100 U.S. 257 (1880); In re Neagle, 135 U.S. 1 (1890). *Cf.* Maryland *v.* Soper, 270 U.S. 9 (1926).

[478] 17 Op. Atty. Gen. 419 (1882). *See also* Hinds' Precedents, III, §§ 2315-2318 (1907).

[479] The Belknap Case, ibid. § 2445.

[480] Elliot, Debates, V, 341, 528.

[481] Ibid. IV, 375.

[482] The Federalist No. 65. For the above *see* William S. Carpenter, Judicial Tenure in the United States (Yale University Press, 1918), 105-106.

[483] John Quincy Adams, Memoirs, I, 321, 322 (1874).

[484] Trial of Andrew Johnson, I, (Government Printing Office, 1868), 147.

[485] Ibid. 409. Johnson and his Cabinet were much concerned over rumors that it was the intention of his enemies in the House, following impeachment and pending the trial, to put him under arrest and/or suspend him from office. Gideon Welles, Diary, III, 21, 27, 50, 57, 60, 62, 151, 200, 235, 237, 238, 291, 313. But no such step was attempted. Several state constitutions contain provisions authorizing suspension from office in such a case.

[486] Carpenter, Judicial Tenure, 145-153.

[487] Senate proceedings in Cong. Record, vol. 80, pp. 5558-5559, (April 16, 1936).

[488] On this account, as well as because of the cumbersomeness of the impeachment process and the amount of time it is apt to consume, it has been suggested that a special court could, and should, be created to try cases of alleged misbehavior in office of inferior judges of the United States, this type of officer having furnished the great majority of cases of impeachment under the Constitution. *See* Memorandum on Removal Power of Congress with Respect to the Supreme Court, Senate Judiciary Committee, 80th Cong., 1st sess.; *also* Burke Shartel, Federal Judges—Appointment, Supervision, and Removal—Some Possibilities under the Constitution, 28 Mich. L. Rev., 870-907 (May 1930). Is impeachment the only way in which Congress, or either house thereof, is constitutionally entitled to call the President to account for his conduct in office? *Cf.* George Wharton Pepper, Family Quarrels, The President, the Senate, and the House (New York, 1931), 138 ff.; and Corwin, The President, Office and Powers (3d ed.), 411-413.

ARTICLE III

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THE JUDICIAL DEPARTMENT

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JUDICIAL DEPARTMENT

[Pg 511]

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.

Characteristics and Attributes of Judicial Power

"JUDICIAL POWER"

Judicial power, as Justice Miller defined it in 1891, 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";[1] or in the words of the Court in Muskrat *v.* United States,[2] it is "the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction."[3] Although the terms "judicial power" and "jurisdiction" are frequently used interchangeably and jurisdiction is defined as the power to hear and determine the subject matter in controversy between parties to a suit,[4] or as the "power to entertain the suit, consider the merits and render a binding decision thereon,"[5] the cases and commentaries support and, for that matter, necessitate a distinction between the two concepts. Jurisdiction is the authority of a court to exercise judicial power in a specific case and is, of course, a prerequisite to the exercise of judicial power, which is the totality of powers a court exercises when it assumes jurisdiction and hears and decides a case.[6] Included with the general power to decide cases are the ancillary powers of courts to punish for contempts of their authority,[7] to issue writs in aid of jurisdiction when authorized by statute;[8] to make rules governing their process in the absence of statutory authorizations or prohibitions;[9] inherent equitable powers over their own process to prevent abuse, oppression and injustice, and to protect their own jurisdiction and officers in the protection of property in custody of law;[10] the power to appoint masters in chancery, referees, auditors, and other investigators;[11] and to admit and disbar attorneys.[12]

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"SHALL BE VESTED"

The distinction between judicial power and jurisdiction is especially pertinent to the meaning of the words "shall be vested." Whereas all of the judicial power of the United States is vested in the Supreme Court and the lower federal judiciary, neither has ever been vested with all the jurisdiction they are capable of receiving under article III. Except for the original jurisdiction of the Supreme Court, which flows directly from the Constitution,[13] two prerequisites to jurisdiction must be present. First, the Constitution must have given the courts the capacity to receive it; second, an act of Congress must have conferred it.[14]

FINALITY OF JUDGMENT

Since 1792 the federal courts have emphasized finality of judgment as an essential attribute of judicial *power*. In Hayburn's Case[15] a motion for mandamus was filed in the Supreme Court to direct the Circuit Court for the District of Pennsylvania to act upon a petition for a pension under the pensions act which placed the administration of pensions in the judges of the federal courts, but which made the action of the courts on application subject to review by Congress and the Secretary of War. The Court took the case under advisement, but Congress changed the law by the act of February 28, 1793, before decision was rendered. In view of the attitude of the circuit courts of the United States for the districts of New York, North Carolina and Pennsylvania there can be no doubt what the decision would have been. The judges of the circuit courts in each of these districts refused to administer the pensions, because the revisory powers of Congress and the Secretary of War were regarded as making the administration of the law nonjudicial in nature. At the time of this episode, Chief Justice Jay and Justice Cushing were members of the Circuit Court in the New York district, Justices Wilson and Blair in Pennsylvania and Justice Iredell in North Carolina.

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The Taney Doctrine

On these foundations Chief Justice Taney posthumously erected finality into a judicial absolute.[16] The original act creating the Court of Claims provided for an analogous procedure with appeals to the Supreme Court after which judgments in favor of claimants were to be referred to the Secretary of the Treasury for payments out of the general appropriation for the payment of private claims. However, section 14 of the act provided that no money should be paid out of the Treasury for any claims "till after an appropriation therefor shall be estimated by the Secretary of the Treasury." In Gordon *v.* United States,[17] the Court refused to hear an appeal, probably for the reasons given in Chief Justice Taney's opinion which he did not deliver because of his death before the Court reconvened but which was published many year later.[18] In any event the reiteration of Taney's opinion in subsequent cases made much of it good law. Because the judgment of the Court of Claims and the Supreme Court depended for execution upon future action of the Secretary of the Treasury and of Congress, the Chief Justice regarded it as nothing more than a certificate of opinion and in no sense a judicial judgment. Congress, therefore, could not authorize the Supreme Court to take appeals from an auditor or require it to express an opinion in a case where its judicial power could not be exercised, where its judgment would not be final and conclusive upon the parties, and where processes of execution were not awarded to carry it into effect. The Chief Justice then proceeded to formulate a rule, repeated in many subsequent cases until modified in 1927 and reversed in 1933, to the effect that the award of execution is a part and an essential part of every judgment passed by a court exercising judicial powers; it was no judgment in the legal sense of the term without it.[19] This rule was given rigid application in Liberty Warehouse Co. *v.* Grannis,[20] where the Supreme Court sustained a district court in refusing to entertain a declaratory proceeding for lack of jurisdiction because such a proceeding was regarded as nonjudicial. One year later, the Court applied the extreme of the rule in Liberty Warehouse *v.* Burley Tobacco Growers Association,[21] when it ruled that it could exercise no appellate jurisdiction in a declaratory proceeding in a State court.

Award of Execution

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Meanwhile in 1927 the Supreme Court began to qualify its insistence upon an award of execution, holding in Fidelity National Bank and Trust Co. *v.* Swope[22] that an award of execution is not an indispensable adjunct of the judicial process. This ruling prepared the way for Nashville, Chattanooga and St. Louis R. Co. *v.* Wallace[23] which reversed the decision in the Grannis case, sustained an appeal from a State court to the Supreme Court in a declaratory proceeding, and effectively interred the rule that award of execution is essential to judicial power. Regardless, nevertheless, of the fate of an award of execution, the rule that finality of judgment is an essential attribute of judicial power remains unimpaired.

Ancillary Powers

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THE CONTEMPT POWER; THE ACT OF 1789

The summary power of the courts of the United States to punish contempts of their authority had its origin in the law and practice of England where disobedience of court orders was regarded as contempt of the King himself and attachment was a prerogative process derived from presumed contempt of the sovereign.[24] By the latter part of the eighteenth century summary power to punish was extended to all contempts whether committed in or out of court.[25] In the United States, the Judiciary Act of 1789 in section 17[26] conferred power on all courts of the United States "to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." The only limitation placed on this power was that summary attachment was made a negation of all other modes of punishment. The abuse of this extensive power led, following the unsuccessful impeachment of Judge James H. Peck of the Federal District Court of Missouri, to the passage of the act of 1831 limiting the power of the federal courts to punish contempts to misbehavior in the presence of the courts, "or so near thereto as to obstruct the administration of justice," to the misbehavior of officers of courts in their official capacity, and to disobedience or resistance to any lawful writ, process or order of the court.[27]

An Inherent Power

The validity of the act of 1831 was sustained forty-three years later in Ex parte Robinson,[28] where Justice Field for the Court propounded principles full of potentialities for conflict. He declared: "The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they become possessed of this power." Expressing doubts concerning the validity of the act as to the Supreme Court, he declared, however, there could be no question of its validity as applied to the lower courts on the ground that they are created by Congress and that their "powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction."[29] With the passage of time, later adjudications,

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especially after 1890, came to place more emphasis on the inherent power of courts to punish contempts than upon the power of Congress to regulate summary attachment. By 1911 the Court was saying that the contempt power must be exercised by a court without referring the issues of fact or law to another tribunal or to a jury in the same tribunal.[30] In Michaelson *v.* United States[31] the Supreme Court intentionally placed a narrow interpretation upon those sections of the Clayton Act[32] relating to punishment for contempt of court by disobedience to injunctions in labor disputes. The sections in question provided for a jury trial upon the demand of the accused in contempt cases in which the acts committed in violation of district court orders also constituted a crime under the laws of the United States or of those of the State where they were committed. Although Justice Sutherland reaffirmed earlier rulings establishing the authority of Congress to regulate the contempt power, he went on to qualify this authority and declared that "the attributes which inhere in that power [to punish contempt] and are inseparable from it can neither be abrogated nor rendered practically inoperative." The Court mentioned specifically "the power to deal summarily with contempts committed in the presence of the courts or so near thereto as to obstruct the administration of justice," and the power to enforce mandatory decrees by coercive means.[33]

The Contempt Power Exalted

The phrase "in the presence of the Court or so near thereto as to obstruct the administration of justice" was interpreted in Toledo Newspaper Co. *v.* United States[34] so broadly as to uphold the action of a district court judge in punishing for contempt a newspaper for publishing spirited editorials and cartoons on questions at issue in a contest between a street railway company and the public over rates. A majority of the Court held that the test to be applied in determining the obstruction of the administration of justice is not the actual obstruction resulting from an act, but "the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty." Similarly the test of whether a particular act is an attempt to influence or intimidate a court is not the influence exerted upon the mind of a particular judge but "the reasonable tendency of the acts done to influence or bring about the baleful result * * * without reference to the consideration of how far they may have been without influence in a particular case."[35] In Craig *v.* Hecht[36] these criteria were applied to sustain the imprisonment of the [Pg 517] comptroller of New York City for writing and publishing a letter to a public service commissioner which criticized the action of a United States district judge in receivership proceedings.

Recession of the Doctrine

The decision in the Toledo Newspaper case did not follow earlier decisions interpreting the act of 1831 and was grounded on historical error. For these reasons it was reversed in Nye *v.* United States[37] and the theory of constructive contempt based on the "reasonable tendency" rule rejected in a proceeding wherein defendants in a civil suit, by persuasion and the use of liquor, induced a plaintiff feeble in mind and body to ask for dismissal of the suit he had brought against them. The events in the episode occurred more than 100 miles from where the Court was sitting, and were held not to put the persons responsible for them in contempt of court.

Bridges *v.* California

Although Nye *v.* United States is exclusively a case of statutory construction, it is significant from a constitutional point of view in that its reasoning is contrary to that of earlier cases narrowly construing the act of 1831 and asserting broad inherent powers of courts to punish contempts independently of and contrary to Congressional regulation of this power. Bridges *v.* California,[38] though dealing with the power of State courts to punish contempts, in the face of the due process clause of the Fourteenth Amendment, is significant for the dictum of the majority that the contempt power of all courts, federal as well as State, is limited by the guaranty of the First Amendment against interference with freedom of speech or of the press.

Summary Punishment of Contempt; Misbehavior of Counsel

There have been three notable cases within the last half century raising questions concerning the power of a trial judge to punish counsel summarily for alleged misbehavior in the course of a trial. In *ex parte* Terry,[39] decided in 1888, Terry had been jailed by the United States Circuit Court of California for assaulting in its presence a United States marshal. The Supreme Court denied his petition for a writ of habeas corpus. In Cooke *v.* United States,[40] however, decided in 1925, the Court remanded for further proceedings a judgment of the United States Circuit Court [Pg 518] of Texas sustaining the judgment of a United States District judge sentencing to jail an attorney and his client for presenting the judge a letter which impugned his impartiality with respect to their case, still pending before him. Distinguishing the case from that of Terry, Chief Justice Taft, speaking for the unanimous Court, said: "The important distinction * * * is that this contempt was not in open court. * * * To preserve order in the court room for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such summary vindication of the court's dignity and authority is necessary. It has always been so in the courts of the

common law and the punishment imposed is due process of law."[41] The Chief Justice then added: "Another feature of this case seems to call for remark. The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court is most important and indispensable. But its exercise is a delicate one and care is needed to avoid arbitrary or oppressive conclusions. This rule of caution is more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge. The judge must banish the slightest personal impulse to reprisal, but he should not bend backward and injure the authority of the court by too great leniency. The substitution of another judge would avoid either tendency but it is not always possible. Of course where acts of contempt are palpably aggravated by a personal attack upon the judge in order to drive the judge out of the case for ulterior reasons, the scheme should not be permitted to succeed. But attempts of this kind are rare. All of such cases, however, present difficult questions for the judge. All we can say upon the whole matter is that where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place. Cornish *v.* United States, 299 F. 283, 285; Toledo Newspaper Co. *v.* United States, 237 F. 986, 988. The case before us is one in which the issue between the judge and the parties had come to involve marked personal feeling that did not make for an impartial and calm judicial consideration and conclusion, as the statement of the proceedings abundantly shows."[42]

Contempt Power: Punishment of Counsel; Sacher Case

[Pg 519]

This case[43] is an outgrowth of the trial of the eleven Communists,[44] in which Sacher et al. were counsel for the defense. The facts of the case were as follows: On receiving the verdict of conviction of the defendants, trial Judge Medina at once issued a certificate under Rule 42 (a) of Federal Rules of Criminal Procedure, finding counsel guilty of criminal contempt and imposing various jail terms up to six months. The immediate question raised was whether the contempt charged was one which the judge was authorized to determine for himself, or one which under Rule 42 (b) could only be passed upon by another judge and after notice and hearing; but behind this issue loomed the same constitutional issue which was dealt with by the Court in the Cooke case, of the requirements of due process of law. The Court sustained the Circuit Court of Appeals in affirming the convictions and sentences, at the same time, however, reversing some of Judge Medina's specifications of contempt, one of these being the charge that the petitioners entered into an agreement deliberately to "impair my health." "We hold," said Justice Jackson, speaking for the majority, "that Rule 42 allows the trial judge, upon the occurrence in his presence of a contempt, immediately and summarily to punish it, if, in his opinion, delay will prejudice the trial. We hold, on the other hand, that if he believes the exigencies of the trial require that he defer judgment until its completion he may do so without extinguishing his power. * * * We are not unaware or unconcerned that persons identified with unpopular causes may find it difficult to enlist the counsel of their choice. But we think it must be ascribed to causes quite apart from fear of being held in contempt, for we think few effective lawyers would regard the tactics condemned here as either necessary or helpful to a successful defense. That such clients seem to have thought these tactics necessary is likely to contribute to the bar's reluctance to appear for them rather more than fear of contempt. But that there may be no misunderstanding, we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever. But it will not equate contempt with courage or insults with independence. It will also protect the processes of orderly trial, which is the supreme object of the lawyer's calling."[45]

Contempt by Disobedience of Orders

[Pg 520]

Disobedience of injunction orders, particularly in labor disputes, has been a fruitful source of cases dealing with contempt of court. In United States *v.* United Mine Workers[46] the Court held that disobedience of a temporary restraining order issued for the purpose of maintaining existing conditions, pending the determination of the court's jurisdiction, is punishable as criminal contempt where the issue is not frivolous but substantial. Secondly, the Court held that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings, even though the statute under which the order is issued is unconstitutional. Thirdly, on the basis of United States *v.* Shipp,[47] it was held that violations of a court's order are punishable as criminal contempt even though the order is set aside on appeal as in excess of the court's jurisdiction or though the basic action has become moot. Finally, the Court held that conduct can amount to both civil and criminal contempt, and the same acts may justify a court in resorting to coercive and to punitive measures, which may be imposed in a single proceeding.

Criminal Versus Civil Contempts

[Pg 521]

Prior to the United Mine Workers Case, the Court had distinguished between criminal and civil contempts on the basis of the vindication of the authority of the courts on the one hand and the preservation and enforcement of the rights of the parties on the other. A civil contempt consists of the refusal of a person in a civil case to obey a mandatory order. It is incomplete in nature and

may be purged by obedience to the Court order. In criminal contempt, however, the act of contempt has been completed, punishment is imposed to vindicate the authority of the Court, and a person cannot by subsequent action purge himself of such contempt.[48] In a dictum in Ex parte Grossman,[49] Chief Justice Taft, while holding for the Court on the main issue that the President may pardon a criminal contempt, declared that he may not pardon a civil contempt. In an analogous case, the Court was emphatic in a dictum that Congress cannot require a jury trial where the contemnor has failed to perform a positive act for the relief of private parties.[50]

Judicial Power Aids Administrative Power

Proceedings to enforce the orders of administrative agencies and subpoenas issued by them to appear and produce testimony have become increasingly common since the leading case of Interstate Commerce Commission *v.* Brimson,[51] where it was held that the contempt power of the courts might by statutory authorization be utilized in aid of the Interstate Commerce Commission in enforcing compliance with its orders. In 1947 a proceeding to enforce a *subpoena duces tecum* issued by the Securities and Exchange Commission during the Course of an investigation was ruled to be civil in character on the ground that the only sanction was a penalty designed to compel obedience. The Court then enunciated the principle that where a fine or imprisonment imposed on the contemnor is designed to coerce him to do what he has refused to do, the proceeding is one for civil contempt.[52]

POWER TO ISSUE WRITS; THE ACT OF 1789 [Pg 522]

From the beginning of government under the Constitution of 1789 Congress has assumed under the necessary and proper clause, its power to establish inferior courts, its power to regulate the jurisdiction of federal courts and the power to regulate the issuance of writs. The Thirteenth section of the Judiciary Act of 1789 authorized the circuit courts to issue writs of prohibition to the district courts, and the Supreme Court to issue such writs to the circuit courts. The Supreme Court was also empowered 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."[53] Section 14 provided that all courts of the United States should "have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."[54] Issuance of the writ of *habeas corpus* was limited in that it was to extend only to persons in custody under or by color of authority of the United States. Although the act of 1789 left the power over writs subject largely to the common law, it is significant as a reflection of the belief, in which the courts have on the whole concurred, that an act of Congress is necessary to confer judicial power to issue writs.

Common Law Powers of the District of Columbia Courts

That portion of section 13 which authorized the Supreme Court to issue writs of mandamus in the exercise of its original jurisdiction was held invalid in Marbury *v.* Madison,[55] as an unconstitutional enlargement of the Supreme Court's original jurisdiction. After two more futile efforts to obtain a writ of mandamus, in cases in which the Court found that power to issue the writ had not been vested by statute in the courts of the United States except in aid of already existing jurisdiction,[56] a litigant was successful in Kendall *v.* United States ex rel. Stokes[57] in finding a court which would take jurisdiction in a mandamus proceeding. This was the circuit court of the United States for the District of Columbia which was held to have jurisdiction, on the theory that the common law, in force in Maryland when the cession of that part of the State which became the District of Columbia was made to the United States, remained in force in the District. At an early time, therefore, the federal courts established the rule that mandamus can be issued only when authorized by a constitutional statute and within the limits imposed by the common law and the separation of powers.

Habeas Corpus [Pg 523]

Although the writ of *habeas corpus* has something of a special status by virtue of article I, section 9, paragraph 2, the power of a specific court to issue the writ has long been held to have its authorization only in written law.[58] In Ex parte Yerger,[59] where the petitioner was held in custody by the military authorities under the Reconstruction Acts, the Court, referring to the prohibition against the suspension of the writ of *habeas corpus*, clearly indicated that Congress is not bound to provide for the protection of federal rights by investing the federal courts with jurisdiction to protect them. Furthermore, the case also incorporates the rule that power to issue the writ may be withdrawn even in pending cases.[60] The rules pertaining to mandamus and *habeas corpus* are applicable to the other common law and statutory writs, the power to issue which, though judicial in nature, must be derived from the statutes and cannot go beyond them.

Congress Limits the Inquisition Power

Although the speculations of some publicists and some judicial dicta[61] support the idea of an inherent power of the federal courts sitting in equity to issue injunctions independently of

statutory limitations, neither the course taken by Congress nor the specific rulings of the Supreme Court support any such principle. Congress has repeatedly exercised its power to limit the use of the injunction in the federal courts. The first limitation on the equity jurisdiction of the federal courts is to be found in section 16 of the Judiciary Act of 1789, which provided that no equity suit should be maintained where there was a full and adequate remedy at law. Although this provision did no more than declare a pre-existing rule long applied in chancery courts,[62] it did assert the power of Congress to regulate the equity powers of the federal courts. The act of March 2, 1793,[63] prohibited the issuance of any injunction by any court of the United States to stay proceedings in State courts except where such injunctions may be authorized by any law relating to bankruptcy proceedings. In subsequent statutes Congress has prohibited the issuance of injunctions in the federal courts to restrain the collection of taxes;[64] provided for a three-judge court, as a prerequisite to the issuance of injunctions to restrain the enforcement of State statutes for unconstitutionality,[65] for enjoining federal statutes for unconstitutionality,[66] and for enjoining orders of the Interstate Commerce Commission;[67] limited the power to issue injunctions restraining rate orders of State public utility commissions,[68] and the use of injunctions in labor disputes;[69] and placed a very rigid restriction of the power to enjoin orders of the administrator under the Emergency Price Control Act.[70]

All of these restrictions have been sustained by the Supreme Court as constitutional and applied with varying degrees of thoroughness. The Court has made exceptions to the application of the prohibition against the stay of proceedings in State courts,[71] but has on the whole adhered to the statute. The exceptions raise no constitutional issues, and the later tendency is to contract the scope of the exceptions.[72] [Pg 524]

In Duplex Printing Company *v.* Deering,[73] the Supreme Court placed a narrow construction upon the labor provisions of the Clayton Act and thereby contributed in part to the more extensive restriction by Congress of the use of injunctions in labor disputes in the Norris-LaGuardia Act of 1932 which has not only been declared constitutional,[74] but has been applied liberally,[75] and in such a manner as to repudiate the notion of an inherent power to issue injunctions contrary to statutory provisions.

Injunctions Under the Emergency Price Control Act of 1942 [Pg 525]

Lockerty *v.* Phillips[76] justifies the same conclusion. Here the validity of the special appeals procedure of the Emergency Price Control Act of 1942 was sustained. This act provided for a special Emergency Court of Appeals which, subject to review by the Supreme Court, was given exclusive jurisdiction to determine the validity of regulations, orders, and price schedules issued by the Office of Price Administration. The Emergency Court and the Emergency Court alone was permitted to enjoin regulations or orders of OPA, and even it could enjoin such orders only after finding that the order was not in accordance with law, or was arbitrary or capricious. The Emergency Court was expressly denied power to issue temporary restraining orders or interlocutory decrees; and in addition the effectiveness of any permanent injunction it might issue was to be postponed for thirty days. If review was sought in the Supreme Court by certiorari, effectiveness was to be postponed until final disposition. A unanimous court speaking through Chief Justice Stone declared that there "is nothing in the Constitution which requires Congress to confer equity jurisdiction on any particular inferior federal court." All federal courts, other than the Supreme Court, it was asserted, derive their jurisdiction solely from the exercise of the authority to ordain and establish inferior courts conferred on Congress by article III, § 1, of the Constitution. This power, which Congress is left free to exercise or not, was held to include the power "'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'"[77] Although the Court avoided passing upon the constitutionality of the prohibition against interlocutory decrees, the language of the Court was otherwise broad enough to support it, as was the language of Yakus *v.* United States[78] which sustained a different phase of the special procedure for appeals under the Emergency Price Control Act.

THE RULE-MAKING POWER AND POWERS OVER PROCESS

Among the incidental powers of courts is that of making all necessary rules governing their process and practice and for the orderly conduct of their business.[79] However, this power too is derived from the statutes and cannot go beyond them. The landmark case is Wayman *v.* Southard[80] which sustained the validity of the process acts of 1789 and 1792 as a valid exercise of authority under the necessary and proper clause. Although Chief Justice Marshall regarded the rule-making power as essentially legislative in nature, he ruled that Congress could delegate to the courts the power to vary minor regulations in the outlines marked out by the statute. Fifty-seven years later in Fink *v.* O'Neil,[81] in which the United States sought to enforce by summary process the payment of a debt, the Supreme Court ruled that under the process acts the law of Wisconsin was the law of the United States and hence the Government was required to bring a suit, obtain a judgment, and cause execution to issue. Justice Matthews for a unanimous Court declared that the courts have "no inherent authority to take any one of these steps, except as it [Pg 526]

may have been conferred by the legislative department; for they can exercise no jurisdiction, except as the law confers and limits it."

Limits to the Power

The principal function of court rules is that of regulating the practice of courts as regards forms, the operation and effect of process, and the mode and time of proceedings. However, rules are sometimes employed to state in convenient form principles of substantive law previously established by statutes or decisions. But no such rule "can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law." This rule is applicable equally to courts of law, equity, and admiralty, to rules prescribed by the Supreme Court for the guidance of lower courts, and to rules "which lower courts make for their own guidance under authority conferred." [82] As incident to the judicial power, courts of the United States possess inherent authority to supervise the conduct of their officers, parties, witnesses, counsel, and jurors by self-preserving rules for the protection of the rights of litigants and the orderly administration of justice.[83]

The courts of the United States possess inherent equitable powers over their process to prevent abuse, oppression and injustice, and to protect their jurisdiction and officers in the protection of property in the custody of law.[84] Such powers are said to be essential to and inherent in the organization of courts of justice.[85] The courts of the United States also possess inherent power to amend their records, correct the errors of the clerk or other court officers, and to rectify defects or omissions in their records even after the lapse of a term, subject, however, to the qualification that the power to amend records conveys no power to create a record or re-create one of which no evidence exists.[86]

APPOINTMENT OF REFEREES, MASTERS, AND SPECIAL AIDS [Pg 527]

The administration of insolvent enterprises, investigations into the reasonableness of public utility rates, and the performance of other judicial functions often require the special services of masters in chancery, referees, auditors, and other special aids. The practice of referring pending actions to a referee was held in Heckers *v.* Fowler[87] to be coeval with the organization of the federal courts. In the leading case of Ex parte Peterson[88] a United States district court appointed an auditor with power to compel the attendance of witnesses and the production of testimony. The Court authorized him to conduct a preliminary investigation of facts and file a report thereon for the purpose of simplifying the issues for the jury. This action was neither authorized nor prohibited by statute. In sustaining the action of the district judge, Justice Brandeis, speaking for the Court, declared: "Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. * * * This power includes authority to appoint persons unconnected with the Court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause."[89] The power to appoint auditors by federal courts sitting in equity has been exercised from their very beginning, and here it was held that this power is the same whether the Court sits in law or equity.

THE POWER TO ADMIT AND DISBAR ATTORNEYS

Subject to general statutory qualifications for attorneys, the power of the federal courts to admit and disbar attorneys rests on the common law from which it was originally derived. According to Chief Justice Taney, it was well settled by the common law that "it rests exclusively with the Court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed." Such power, he made clear, however, "is not an arbitrary and despotic one, to be exercised at the pleasure of the Court, or from passion, prejudice, or personal hostility; but it is the duty of the Court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the Court, as the right and dignity of the Court itself." [90] The Test-Oath Act of July 2, 1862, which purported to exclude former Confederates from the practice of law in the federal courts, was invalidated in Ex parte Garland.[91] In the course of his opinion for the Court, Justice Field discussed generally the power to admit and disbar attorneys. The exercise of such a power, he declared, is judicial power. The attorney is an officer of the Court and though Congress may prescribe qualifications for the practice of law in the federal [Pg 528] courts, it may not do so in such a way as to inflict punishment contrary to the Constitution or to deprive a pardon of the President of its legal effect.[92]

Organization of Courts, Tenure and Compensation of Judges

"ONE SUPREME COURT"

The Constitution is almost completely silent concerning the organization of the federal judiciary. Although it provides for one Supreme Court, it makes no reference to the size and composition of the Court, the time or place for sitting, or its internal organization save for the reference to the Chief Justice in the impeachment provision of article I, § 3, relating to impeachment of the President. All these matters are therefore confided to Congressional determination. Under the terms of the Judiciary Act of 1789, the Court consisted of a Chief Justice and five Associate

Justices. This number was gradually increased until it reached a total of ten judges under the act of March 3, 1863. Due to the exigencies of Reconstruction and the tension existing between Congress and the President the number was reduced to seven as vacancies should occur, by the act of April 16, 1866. The number never actually fell below eight, and on April 10, 1869, with Andrew Johnson out of the White House, Congress restored the number to nine, where it has since remained. There have been proposals at various times for an organization of the Court into sections or divisions. No authoritative judicial expression is available, although Chief Justice Hughes in a letter to Senator Wheeler of March 21, 1937, expressed doubts concerning the validity of such a device and stated that "the Constitution does not appear to authorize two or more Supreme Courts functioning in effect as separate courts."[93] Congress has also determined the time and place of sessions of the Court, going so far in 1801 as to change its terms so that for fourteen months, between December, 1801 and February, 1803 the Court did not convene.

INFERIOR COURTS MADE AND ABOLISHED

By article I, § 8, paragraph 9, Congress is expressly declared to have the power to constitute tribunals inferior to the Supreme Court, and the power is repeated in a different formula in article III, § 1, when provision is also made for tenure during good behavior and for a compensation which shall not be diminished. Since 1789 Congress, with repeated judicial [Pg 529] acquiescence and concurrence, has interpreted both of these sections as leaving it free to establish inferior courts or not, as it deems fit in the exercise of a boundless discretion. By the Judiciary Act of 1789, Congress constituted thirteen district courts which were to have four sessions annually[94] and three circuit courts which were to consist jointly of the Supreme Court judges and the district judge of such districts which were to meet annually at the time and places designated by the statute.[95] By the Judiciary Act of February 13, 1801, passed in the closing weeks of the Adams Administration, the number of judges of the Supreme Court was to be reduced to five after the next vacancy, the districts were reorganized, and six circuit courts consisting of three judges each and organized independently of the Supreme Court and the district courts were created.[96] Whatever merits this plan of organization possessed were lost in the fierce partisanship of the period, which led the expiring Federalist Administration to appoint Federalists almost exclusively to the new judgeships to the dismay of the Jeffersonians who, upon coming into power, set plans in motion to repeal the act. In a bitter debate the major constitutional issue to emerge centered about the abolition of courts once they were created in the light of the provision for tenure during good behavior. Suffice it to say, the repeal bill was passed and approved by the President on March 8, 1802[97] without any provision for the displaced judges. The validity of the act of 1802 was questioned in Stuart *v.* Laird,[98] where Justice Paterson in a terse opinion, which hardly touched Charles Lee's argument that Congress lacked power to abolish or destroy courts and judges, held for the Court that Congress has the power to establish inferior courts from time to time as it may think proper and to transfer a cause from one tribunal to another. In answer to the argument that Supreme Court Justices could not constitutionally sit as circuit judges, he pointed to practice and acquiescence contemporaneous with the Constitution as an interpretation too strong and obstinate to be shaken or controlled.

Abolition of the Commerce Court

Since 1802 Congress has many times exercised its power to constitute inferior courts, but not until 1913 did it again abolish a court. This was the unfortunately launched Commerce Court [Pg 530] from which so much was expected and so little came. Again, as in 1802, there was a constitutional debate on the power of Congress to abolish courts without providing for the displaced judges, but unlike the act of 1802 the act of 1913[99] provided for the redistribution of the Commerce Court judges among the Circuit Courts of Appeals and the transfer of its jurisdiction to the district courts.[100]

COMPENSATION

The prohibition against the diminution of judicial salaries has presented very little litigation. In 1920 in Evans *v.* Gore[101] the Court invalidated the application of the Income Tax as applied to a federal judge, over the strong dissent of Justice Holmes, who was joined by Justice Brandeis. This ruling was extended in Miles *v.* Graham[102] to exempt the salary of a judge of the Court of Claims appointed subsequent to the enactment of the taxing act. Evans *v.* Gore was disapproved and Miles *v.* Graham in effect overruled in O'Malley, Collector of Internal Revenue *v.* Woodrough, [103] where the Court upheld section 22 of the Revenue Act of 1932 (now 26 U.S.C.A. 22 (a)) which extended the application of the Income Tax to salaries of judges taking office after June 6, 1932. Such a tax was regarded neither as an unconstitutional diminution of the compensation of judges nor as an encroachment on the independence of the judiciary.[104] To subject judges who take office after a stipulated date to a nondiscriminatory tax laid generally on an income, said the Court, "is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering." [105]

Diminution of Salaries

The Appropriations Act of 1932 reduced "the salaries and retired pay of all judges (except judges whose compensation may not, under the Constitution, be diminished during their continuance in office)," by 8-1/3 per cent if below $10,000, or to $10,000 if above that figure. While this provision presented no questions of its own constitutionality, it did raise the question of what judges' salaries could be constitutionally reduced. In O'Donoghue *v.* United States[106] the [Pg 531] section was held inapplicable to the salaries of judges of the courts of the District of Columbia on the ground that as to their organization and tenure and compensation, Congress was limited by the provisions of article III. In Williams *v.* United States,[107] on the other hand, it was ruled that the reduction was applicable to the salaries of the judges of the Court of Claims, that being a legislative court created in pursuance of the power of Congress to pay the debts of the United States and to consent to suits against the United States. As such it is not within the provisions of article III respecting the tenure and compensation of judges.

COURTS OF SPECIALIZED JURISDICTION

By virtue of its power "to ordain and establish" courts Congress has occasionally created courts under article III to exercise a specialized jurisdiction. Otherwise these tribunals are like other article III courts in that they exercise "the judicial power of the United States," and only that power, that their judges must be appointed by the President and the Senate and must hold office during good behavior subject to removal by impeachment only, and that the compensation of their judges cannot be diminished during their continuance in office. One example of such courts was the Commerce Court created by the Mann-Elkins Act of 1910,[108] which was given exclusive jurisdiction of all cases to enforce orders of the Interstate Commerce Commission except those involving money penalties and criminal punishment; of cases brought to enjoin, annul, or set aside orders of the Commission; of cases brought under the act of 1903 to prevent unjust discriminations; and of all mandamus proceedings authorized by the act of 1903. This court actually functioned for less than three years, being abolished in 1913, as was mentioned above.

The Emergency Court of Appeals of 1942

Another court of specialized jurisdiction but created for a limited time only was the Emergency Court of Appeals organized by the Emergency Price Control Act of January 30, 1942.[109] By the terms of the statute this court consisted of three or more judges designated by the Chief Justice from the judges of the United States district courts and circuit courts of appeal. The Chief Justice was authorized to designate one of the judges as chief judge, to designate additional judges from time to time, and to revoke designations. The chief judge in turn was authorized to divide the Court into divisions of three or more members each, with any such division empowered to render [Pg 532] judgment as the judgment of the Court. The Court was vested with jurisdiction and powers of a district court to hear appeals filed within thirty days against denials of protests by the Price Administrator and with exclusive jurisdiction to set aside regulations, orders, or price schedules, in whole or in part, or to remand the proceeding. But no regulation or price schedule could be set aside or enjoined unless the Court was satisfied that it was contrary to law or was arbitrary or capricious. Even then the effectiveness of a restraining order was to be suspended for thirty days and, if appealed to the Supreme Court within thirty days, until its final disposition. Although the act deprived the district courts of the power to enjoin the enforcement of orders and price schedules, it vested them with jurisdiction to enforce the act and orders issued thereunder in actions brought by the Administrator to enjoin violations and to try criminal prosecutions brought by the Attorney General. Since the Emergency Court of Appeals, subject to review by the Supreme Court, was given exclusive jurisdiction to determine the validity of any order issued under the act, it resulted that the district courts were deprived of the power to inquire into the validity of orders involved in civil or criminal proceedings in which they had jurisdiction.[110]

Judicial Review Restrained

In Yakus *v.* United States[111] the Court held in an opinion by Chief Justice Stone that there is "no principle of law or provision of the Constitution which precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity, or which precludes the practice, in many ways desirable, of splitting the trial for violations of an administrative regulation by committing the determination of the issue of its validity to the agency which created it, and the issue of violation to a court which is given jurisdiction to punish violations. Such a requirement presents no novel constitutional issue."[112] In a dissent Justice Rutledge took issue with this holding, saying: "It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them. Once it is held that Congress can require the courts criminally to enforce unconstitutional laws or statutes, including regulations, or to do so without regard for their validity, the way will have been found to circumvent the supreme law and, what is more, to make the courts parties to doing so. This Congress cannot do. There are limits to the judicial power. Congress may impose others. And in some matters Congress or the President has final say under the Constitution. But whenever the [Pg 533] judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it. The problem therefore is not solely one of individual right or due process of law. It is equally one of the

separation and independence of the powers of government and of the constitutional integrity of the judicial process, more especially in criminal trials."[113]

LEGISLATIVE COURTS: THE CANTER CASE

Quite distinct from special courts exercising the judicial power of the United States, but at the same time a significant part of the federal judiciary, are the legislative courts, so called because they are created by Congress in pursuance of its general legislative powers. The distinction between constitutional courts and legislative courts was first made in American Insurance Company *v.* Canter,[114] which involved the question of the admiralty jurisdiction of the territorial court of Florida, the judges of which were limited to a four-year term in office. Said Chief Justice Marshall for the Court: "These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3rd article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States."[115] The Court went on to hold that admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of article III, but that the same limitation does not apply to the territorial courts; for, in legislating for them, "Congress exercises the combined powers of the general, and of a State government."[116]

Other Legislative Courts

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The distinction made in the Canter case has been repeated with elaborations since 1828, receiving its fullest exposition in Ex parte Bakelite Corporation,[117] which contains a review of the history of legislative courts and the cases supporting the power of Congress to create them. In addition to discussing the derivation of power to establish legislative courts, the Bakelite case ruled that such courts "also may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within Congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals."[118] Among the matters susceptible of judicial determination but not requiring it are claims against the States,[119] the disposal of the public lands and claims arising therefrom,[120] questions concerning membership in the Indian tribes,[121] and questions arising out of the administration of the customs and internal revenue laws.[122] For the determination of these matters Congress has created the Court of Claims, the Court of Private Land Claims, the Choctaw and Chickasaw Citizenship Court, the Court of Customs, the Court of Customs and Patent Appeals, and the Tax Court of the United States (formerly the Board of Tax Appeals).

Power of Congress Over Legislative Courts

In creating legislative courts Congress is not limited by the restrictions imposed in article III concerning tenure during good behavior and the prohibition against limitation of salaries. Congress may limit tenure to a term of years, as it has done in acts creating territorial courts and the Tax Court of the United States, and it may subject the judges of legislative courts to removal by the President.[123] In McAllister *v.* United States,[124] the removal of a territorial judge was sustained on the basis of the principle that: "The whole subject of the organization of territorial courts, the tenure by which the judges of such courts shall hold their offices, the salary they receive and the manner in which they may be removed or suspended from office, was left, by the Constitution, with Congress under its plenary power over the Territories of the United States."[125] Long afterwards the Court held in Williams *v.* United States[126] that the reduction of the [Pg 535] salaries of the judges of the Court of Claims, and inferentially of judges of other legislative courts, to $10,000 per year by the Appropriation Act of June 30, 1932, was constitutional. In so doing the Court rejected dicta in earlier cases which classified the Court of Claims as a constitutional court and silently reversed Miles *v.* Graham,[127] which had held that Congress could not include the salary of a judge of the Court of Claims in his taxable income.

Status of the Court of Claims

It follows, too, that in creating legislative courts, Congress can vest in them nonjudicial functions of a legislative or advisory nature and deprive their judgments of finality. Thus in Gordon *v.* United States[128] there was no objection to the power of the Secretary of the Treasury and Congress to revise or suspend the early judgments of the Court of Claims. Likewise in United States *v.* Ferreira[129] the Court sustained the act conferring powers on the Florida territorial court to examine claims arising under the Spanish treaty and to report his decisions and the evidence on which they were based to the Secretary of the Treasury for subsequent action. "A power of this description," it was said, "may constitutionally be conferred on a Secretary as well as on a commissioner. But [it] is not judicial in either case, in the sense in which judicial power is

granted by the Constitution to the courts of the United States."

A Judicial Paradox

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Chief Justice Taney's view in the Gordon case that the judgments of legislative courts could never be reviewed by the Supreme Court was tacitly rejected in De Groot *v.* United States,[130] when the Court took jurisdiction from a final judgment of the Court of Claims. Since the decision of this case in 1867 the authority of the Supreme Court to exercise appellate jurisdiction over legislative courts has turned not upon the nature or status of such courts, but rather upon the nature of the proceeding before the lower Court and the finality of its judgment. Consequently in proceedings before a legislative court which are judicial in nature and admit of a final judgment the Supreme Court may be vested with appellate jurisdiction. Thus there arises the workable anomaly that though the legislative courts can exercise no part of the judicial power of the United States and the Supreme Court can exercise only that power, the latter nonetheless can review judgments of the former. However, it should be emphasized that the Supreme Court will neither review the administrative proceedings of legislative courts nor entertain appeals from the advisory or interlocutory decrees of such courts.[131]

STATUS OF THE COURTS OF THE DISTRICT OF COLUMBIA

Through a long course of decisions the courts of the District of Columbia were regarded as legislative courts upon which Congress could impose nonjudicial functions. In Butterworth *v.* United States ex rel. Hoe,[132] the Court sustained an act of Congress which conferred revisionary powers upon the Supreme Court of the District in patent appeals and made its decisions binding only upon the Commissioner of Patents. Similarly, the Court later sustained the authority of Congress to vest revisionary powers in the same court over rates fixed by a public utilities commission.[133] Not long after this the same rule was applied to the revisionary power of the District Supreme Court over orders of the Federal Radio Commission.[134] These rulings were based on the assumption, express or implied, that the courts of the District were legislative courts, created by Congress in pursuance of its plenary power to govern the District of Columbia. In an obiter dictum in Ex parte Bakelite Corporation,[135] while reviewing the history and analyzing the nature of legislative courts, the Court stated that the courts of the District were legislative courts.

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In 1933, nevertheless, the Court, abandoning all previous dicta on the subject, found the courts of the District of Columbia to be constitutional courts exercising judicial power of the United States,[136] with the result of shouldering the task of reconciling the performance of nonjudicial functions by such courts with the rule that constitutional courts can exercise only the judicial power of the United States. This task was easily accomplished by the argument that in establishing courts for the District, Congress is performing dual functions in pursuance of two distinct powers, the power to constitute tribunals inferior to the Supreme Court, and its plenary and exclusive power to legislate for the District of Columbia. However, article III, § 1, limits this latter power with respect to tenure and compensation, but not with regard to vesting legislative and administrative powers in such courts. Subject to the guarantees of personal liberty in the Constitution, "Congress has as much power to vest courts of the District with a variety of jurisdiction and powers as a State legislature has in conferring jurisdiction on its courts."[137] The effect of the O'Donoghue decision is to confer a dual status on the courts of the District of Columbia. As regards their organization, and the tenure and compensation of their judges they are constitutional courts, as regards jurisdiction and powers they are simultaneously legislative and constitutional courts, and as such can be vested with nonjudicial powers while sharing the judicial power of the United States.[138]

Jurisdiction: Cases and Controversies

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> SECTION 2. 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;—between Citizens 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.

THE TWO CLASSES OF CASES AND CONTROVERSIES

By the terms of the foregoing section the judicial power extends to nine classes of cases and controversies, which fall into two general groups. In the words of Chief Justice Marshall in Cohens *v.* Virginia:[139] "In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends '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.' This cause extends the jurisdiction of the Court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied, against the express words of the article. In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended 'controversies between two or more States, between a State and citizens of another State,' and 'between a State and foreign States, citizens or subjects.' If these be the parties, it is entirely unimportant, what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union."[140]

Judicial power 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."[141] The meaning attached to the terms "cases" and "controversies" determines therefore the extent of the judicial power, as well as the capacity of the federal courts to receive jurisdiction. As Chief Justice Marshall declared in Osborn *v.* Bank of the United States, judicial power is capable of acting only when the subject is submitted in a case, and a case arises only when a party asserts his rights "in [Pg 539] a form prescribed by law."[142] Many years later Justice Field, relying upon Chisholm *v.* Georgia, [143] and Tucker's edition of Blackstone, amended this definition by holding that "controversies," to the extent that they differ from "cases," include only suits of a civil nature. He continued: "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."[144] The definitions propounded by Chief Justice Marshall and Justice Field were quoted with approval in Muskrat *v.* United States,[145] where the Court held that the exercise of judicial power is limited to cases and controversies and emphasized "adverse litigants," "adverse interests," an "actual controversy," and conclusiveness or finality of judgment as essential elements of a case.[146]

ADVERSE LITIGANTS

The necessity of adverse litigants with real interests has been stressed in numerous cases,[147] and has been particularly emphasized in suits to contest the validity of a federal or State statute. A few illustrations will suffice to describe the practical operation of these limitations. In Chicago and Grand Trunk Railroad Co. *v.* Wellman,[148] which originated in the courts of Michigan on an agreed statement of facts between friendly parties desiring to contest a rate-making statute, the Supreme Court ruled there was no case or controversy. In the course of its opinion, which held that the courts have no "immediate and general supervision" of the constitutionality of legislative enactments, the Court said: "Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, [Pg 540] determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It 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."[149]

In applying the rule requiring adverse litigants to present an honest and actual antagonistic assertion of rights, the Court invalidated an act of Congress which authorized certain Indians to bring suits against the United States to test the constitutionality of the Indian allotment acts, on the ground that such a proceeding was not a case or controversy in that the United States had no interest adverse to the claimants.[150] The Court has also held that in contesting the validity of a statute, the issue must be raised by one adversely affected and not a stranger to the operation of the statute,[151] and that the interest must be of a personal as contrasted with an official interest. [152] Hence a county court cannot contest the validity of a statute in the interest of third parties, [153] nor can a county auditor contest the validity of a statute even though he is charged with its enforcement,[154] nor can directors of an irrigation district occupy a position antagonistic to it. [155] It is a well settled rule that: "The Court will not pass upon the constitutionality of legislation * * *, or upon the complaint of one who fails to show that he is injured by its operation, * * *"[156] It is equally well established as a corollary that, "litigants may challenge the constitutionality of a statute only insofar as it affects them."[157]

STOCKHOLDERS' SUITS [Pg 541]

It must be noted, however, that adversity is a relative element which the courts may or may not discover. Thus in Pollock *v.* Farmers' Loan and Trust Co.,[158] the Supreme Court sustained the jurisdiction of a district court which had enjoined the company from paying an income tax even though the suit was brought by a stockholder against the company, thereby circumventing

section 3224 of the Revised Statutes, which forbids the maintenance in any court of a suit "for the purpose of restraining the collection of any tax."[159] Subsequently the Court has found adversity of parties in a suit brought by a stockholder to restrain a title company from investing its funds in farm loan bonds issued by the federal land banks,[160] and in a suit brought by certain preferred stockholders against the Alabama Power Company and the TVA to enjoin the performance of contracts between the company and the authority and a subsidiary, the Electric Home and Farm Authority, on the ground that the act creating these agencies was unconstitutional.[161] The ability to find adversity in narrow crevices of casual disagreement is well illustrated by Carter *v.* Carter Coal Co.,[162] where the President of the company brought suit against the company and its officials, among whom was Carter's father who was Vice President of the Company.[163] The Court entertained the suit and decided the case on its merits.

SUBSTANTIAL INTEREST DOCTRINE

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Equally important as an essential element of a case is the concept of real or substantial interests. As a general rule the interest of taxpayers in the general funds of the federal Treasury is insufficient to give them a standing in court to contest the expenditure of public funds on the ground that this interest "is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity."[164] Likewise, the Court has held that the general interest of a citizen in having the government administered by law does not give him a standing to contest the validity of governmental action.[165] Nor can a member of the bar of the Supreme Court challenge the validity of an appointment to the Court since his "is merely a general interest common to all members of the public."[166] Similarly an electric power company has been held not to have a sufficient interest to maintain an injunction suit to restrain the making of federal loans and grants to municipalities for the construction or purchase of electric power distribution plants on the ground that the "lender owes the sufferer no enforcible duty to refrain from making the unauthorized loan; and the borrower owes him no obligation to refrain from using the proceeds in any lawful way the borrower may choose."[167] Recent cases, involving the issue of religion in the schools, reach somewhat divergent results. In Illinois ex rel. McCollum *v.* Board of Education, [168] the Court held that a litigant had the requisite standing to bring a mandamus suit challenging, on the basis of her interests as a resident and taxpayer of the school district and the parent of a child required by law to attend the school or one meeting the State's educational requirements, the validity of a religious education program involving the use of public school rooms one half hour each week. But in Doremus *v.* Board of Education,[169] decided early in 1952, the Court declined jurisdiction in a case challenging the validity of a New Jersey statute which requires the reading at the opening of each public school day of five verses of the Old Testament. Appellants' interest as taxpayers was found to be insufficient to sustain the proceeding.

Substantial Interest in Suits by States

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These principles have been applied in a number of cases to which a State was one of the parties and in suits between States. One of the most important of these is State of Georgia *v.* Stanton, [170] which was an original suit in equity brought by the State of Georgia against the Secretary of War and others to enjoin the enforcement of the Reconstruction Acts. The State's counsel contended that enforcement of the acts brought about "an immediate paralysis of all the authority and power of the State government by military force; * * * [which was divesting the State] of her legally and constitutionally established and guaranteed existence as a body politic and a member of the Union." The Supreme Court dismissed the suit for want of jurisdiction, holding that for a case to be presented for the exercise of the judicial power, the rights threatened "must be rights of persons or property, not merely political rights, which do not belong to the jurisdiction of a court, either in law or equity."[171] The rule of the Stanton case was applied and elaborated in Massachusetts *v.* Mellon,[172] where the State in its own behalf and as *parens patriae* sought to enjoin the administration of the Maternity Act[173] which, it was alleged, was an unconstitutional invasion of the reserved rights of the State and an impairment of its sovereignty. The suit was held not justiciable on the ground that a State cannot maintain a suit either to protect its political rights or as *parens patriae* to protect citizens of the United States against the operation of a federal law. Concerning the right of a State to sue in its own behalf to protect its political rights, the Court said: "In that aspect of the case we are called upon to adjudicate, not rights of person or property, not rights of dominion over physical domain, not quasi sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of government."[174] However, these holdings do not affect the right of a State as *parens patriae* to intervene in behalf of the economic welfare of its citizens against discriminatory rates set by an alleged illegal combination of carriers,[175] or the right of a State to assert its quasi sovereign rights over wild life within its domain,[176] or to protect its citizens against the discharge of noxious gases by an industrial plant in an adjacent State.[177]

ABSTRACT, CONTINGENT, AND HYPOTHETICAL QUESTIONS

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Closely related to the requirements of adverse parties and substantial interests is that of a *real* issue as contrasted with *speculative*, abstract, hypothetical, or moot cases. As put by Chief Justice Stone in Alabama State Federation of Labor *v.* McAdory,[178] it has long been the Court's "considered practice not to decide abstract, hypothetical or contingent questions," or as Justice Holmes said years earlier by way of dictum, a party cannot maintain a suit "for a mere declaration in the air."[179] Texas *v.* Interstate Commerce Commission,[180] presents a good illustration of an abstract question. Here, Texas attempted to enjoin the enforcement of the Transportation Act of 1920 on the ground that it invaded the reserved rights of the State. The Court dismissed the complaint as presenting no case or controversy, declaring: "It is only where rights, in themselves appropriate subjects of judicial cognizance, are being, or about to be, affected prejudicially by the application or enforcement of a statute that its validity may be called in question by a suitor and determined by an exertion of the judicial power."[181] Again in Ashwander *v.* Tennessee Valley Authority,[182] the Court refused to decide any issue save that of the validity of the contracts between the Authority and the Company because, "The pronouncements, policies and program of the Tennessee Valley Authority and its directors, their motives and desires, did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining." Chief Justice Hughes cited New York *v.* Illinois,[183] where the Court dismissed a suit as presenting abstract questions "as to the possible effect of the diversion of water from Lake Michigan upon hypothetical water power developments in the indefinite future."[184] He also cited among other cases Arizona *v.* California,[185] where it was held that claims based merely upon assumed potential invasions of rights were not enough to warrant judicial intervention.

The concepts of real interests and abstract questions again appear prominently in United Public Workers of America *v.* Mitchell.[186] Here a number of government employees sued to enjoin the Civil Service Commission from enforcing the prohibitions of the Hatch Act against activity in political management or campaigns, and to obtain a declaratory judgment that the act was invalid. Except for one of the employees none had violated the act, but they did state that they desired to engage in the forbidden political activities. The Court held that as to all the parties save the one who had violated the act there was no justiciable controversy. "Concrete legal issues, presented in actual cases, not abstractions" were declared to be requisite. The generality of their objection was regarded as really an attack on the political expediency of the Hatch Act.[187] [Pg 545]

From the rule that courts will not render advisory opinions or write essays in political theory on speculative issues, it follows logically that they will not determine moot cases or suits arranged by collusion between parties who have no opposing interests. A moot case has been defined as "one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy."[188] Cases may become moot because of a change in the law, or the status of the litigants, or because of some act of the parties which dissolves the controversy.[189] Just as courts will not speculate an hypothetical question, so they will not analyze dead issues.[190] The duty of every federal court, said Justice Gray, "is to decide actual controversies by a judgment which can be carried into effect, and not give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter at issue in the case before it."[191]

POLITICAL QUESTIONS [Pg 546]

The rule has been long established that the courts have no general supervisory power over the executive or administrative branches of government.[192] In Decatur *v.* Paulding,[193] which involved an attempt by mandamus to compel the Secretary of the Navy to pay a pension, the Supreme Court in sustaining denial of relief stated: "The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied, that such a power was never intended to be given to them."[194] It follows, therefore, that mandamus will lie against an executive official only to compel the performance of a ministerial duty which admits of no discretion as contrasted with executive or political duties which admit of discretion.[195] It follows, too, that an injunction will not lie against the President,[196] or against the head of an executive department to control the exercise of executive discretion.[197] These principles are well illustrated by Georgia *v.* Stanton,[198] Mississippi *v.* Johnson,[199] and Kendall *v.* United States ex rel. Stokes.[200]

Origin of the Concept

The concept of "political question" is an old one. As early as Marbury *v.* Madison,[201] Chief Justice Marshall stated: "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws,

submitted to the executive, can never be made in this court." The concept, as distinguished from that of interference with executive functions, was first elaborated in Luther *v.* Borden,[202] which involved the meaning of "a republican form" of government and the question of the lawful government of Rhode Island among two competing groups purporting to act as the lawful authority. "It is the province of a court to expound the law, not to make it," declared Chief Justice Taney. "And certainly it is no part of the judicial functions of any court of the United States to prescribe the qualification of voters in a State, * * *; nor has it the right to determine what political privileges the citizens of a State are entitled to, unless there is an established constitution or law to govern its decision."[203] The Court went on to hold that such matters as the guaranty to a State of a republican form of government and of protection against invasion and domestic violence are political questions committed to Congress and the President whose decisions are binding upon the courts.[204]

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Exemplifications of the Doctrine

From this case and later applications of it, a political question may be defined as a question relating to the possession of political power, of sovereignty, of government, the determination of which is vested in Congress and the President whose decisions are conclusive upon the courts. The more common classifications[205] of cases involving political questions are: (1) those which raise the issue of what proof is required that a statute has been enacted,[206] or a constitutional amendment ratified;[207] (2) questions arising out of the conduct of foreign relations;[208] (3) the termination of wars,[209] or rebellions;[210] the questions of what constitutes a republican form of government,[211] and the right of a state to protection against invasion or domestic violence;[212] questions arising out of political actions of States in determining the mode of choosing presidential electors,[213] State officials,[214] and reapportionment of districts for Congressional representation;[215] and suits brought by States to test their political and so-called sovereign rights.[216] The leading case on the evidence required to prove the enactment of a statute is Field *v.* Clark,[217] where it was held that the enactment of a statute is conclusively proved by the enrolled act signed by the speaker of the House of Representatives and the President of the Senate, and the Court will not look beyond these formalities of record by examining the journals of the two houses of Congress or other records. Similarly, the Court has held that the efficacy of the ratification of a proposed constitutional amendment in the light of previous rejection or subsequent attempted withdrawal is political in nature, pertaining to the political departments, with the ultimate authority in Congress by virtue of its control over the promulgation of the adoption of amendments.[218] Simultaneously, the Court ruled that the question of the lapse of a reasonable length of time between proposal and ratification is for Congress to determine and not the Court.[219]

Recent Cases

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A few cases will suffice to illustrate the application of the concept of political questions since 1938. In Colegrove *v.* Green,[220] a declaratory judgment was sought to have the division of Illinois into Congressional districts declared invalid as a violation of the equal protection of the laws. Justice Frankfurter in announcing the judgment of the Court, in an opinion in which Justices Reed and Burton joined, was of the opinion that dismissal of the suit was required both by the decision in Wood *v.* Broom,[221] that there is no federal requirement that Congressional districts shall contain as nearly as practicable an equal number of inhabitants, and because the question was not justiciable. Justice Rutledge thought that Smiley *v.* Holm[222] indicated that the question was justiciable but concurred in the result on the ground that the case was one in which the courts should decline to exercise jurisdiction.[223] Justice Black in a dissent supported by Justices Douglas and Murphy thought that the case was justiciable and would have invalidated the reapportionment, leaving the State free to elect all of its representatives from the State at large.[224] In MacDougall *v.* Green,[225] however, the Court seemed to regard as justiciable the question of the validity of the provision of the Illinois Election Code requiring that a petition for the nomination of candidates of a new political party be signed by 25,000 voters including at least 200 from each of at least 50 of the States' 102 counties, for it went on to sustain the provision in a brief *per curiam* opinion. In Ludecke *v.* Watkins,[226] the Court held, as it had earlier, that the determination of the cessation of a state of war is a question for the political branch of the Government and not for the courts. Nevertheless, the Court actually found a state of war to exist between the United States and Germany after the end of hostilities, and ruled that an enemy alien is not entitled to judicial review in a deportation proceeding. Very recently in South *v.* Peters,[227] the Court refused to pass upon the validity of the county unit scheme used in Georgia for the nomination of candidates in primary elections.

ADVISORY OPINIONS

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Perhaps no portion of Constitutional Law pertaining to the judiciary has evoked such unanimity as the rule that the federal courts will not render advisory opinions. In 1793 the Supreme Court refused to grant the request of President Washington and Secretary of State Jefferson to construe the treaties and laws of the United States pertaining to questions of international law arising out

of the wars of the French Revolution. After convening the Court which considered the request, Chief Justice Jay replied to President Washington concerning the functions of the three departments of government: "These being in certain respects checks upon each other, and our being Judges of a Court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *Executive* departments."[228] Since 1793 the Court has frequently reiterated the early view that the federal courts organized under article III cannot render advisory opinions or that the rendition of advisory opinions is not a part of the judicial power of the United States.[229]

Even in the absence of this early precedent, the rule that constitutional courts will render no advisory opinions would have logically emerged from the rule subsequently developed, that constitutional courts can only decide cases and controversies in which an essential element is a final and binding judgment on the parties. As stated by Justice Jackson, when the Court refused to review an order of the Civil Aeronautics Board, which in effect was a mere recommendation to the President for his final action, "To revise or review an administrative decision which has only the force of a recommendation to the President would be to render an advisory opinion in its most obnoxious form—advice that the President has not asked, tendered at the demand of a private litigant, on a subject concededly within the President's exclusive, ultimate control. This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive. It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action."[230] The early refusal of the Court to render advisory opinions has discouraged direct requests for advice so that the advisory opinion has appeared only collaterally in cases where there was a lack of adverse parties,[231] or where the judgment of the Court was subject to later review or action by the executive or legislative branches of government,[232] or where the issues involved were abstract or contingent.[233] [Pg 550]

DECLARATORY JUDGMENTS [Pg 551]

The rigid emphasis placed upon such elements of the judicial power as finality of judgment and an award of execution in United States *v.* Ferreira,[234] Gordon *v.* United States[235], and Liberty Warehouse *v.* Grannis,[236] coupled with the equally rigid emphasis upon adverse parties and real interests as essential elements of a case or controversy in Muskrat *v.* United States,[237] created serious doubts concerning the validity of a proposed federal declaratory judgment act. These were dispelled to some extent by Fidelity National Bank *v.* Swope,[238] which held that an award of execution is not an essential part of every judgment and contained general statements in opposition to the principles of the Grannis and Willing cases. Then in 1933 the Supreme Court entertained an appeal from a declaratory judgment rendered by the Tennessee Courts in Nashville, C. & St. L.R. Co. *v.* Wallace,[239] and in doing so declared that the Constitution does not require that a case or controversy be presented by traditional forms of procedure, involving only traditional remedies, and that article III defined and limited judicial power not the particular method by which that power may be invoked or exercised. The Federal Declaratory Judgments Act of 1934 was in due course upheld in Aetna Life Insurance Co. *v.* Haworth,[240] as a valid exercise of Congressional power over the practice and procedure of federal courts which includes the power to create and improve as well as to abolish or restrict.

The Declaratory Judgment Act of 1934

The act of 1934 was carefully drawn, and provided that: "In cases of actual controversy the courts of the United States shall have power * * * 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." The other two sections provided for further relief whenever necessary and proper and for jury trials of matters of fact.[241] In the first case involving private parties exclusively to arise under the act, Aetna Life Insurance Co. *v.* Haworth,[242] the Court held that a declaration should have been issued by the district court, although it reiterated with the usual emphasis the necessity of adverse parties, a justiciable controversy and specific relief. In the Ashwander case it approved the refusal of the lower Court to issue a declaration generally on the constitutionality of the Tennessee Valley Authority, because the act of 1934 applied only to "cases of actual controversy." In the same case the Court itself refused to pass upon the navigability of the New and Kanawha rivers and the authority of the Federal Power Commission even at the request of the United States, on the ground that the bill did no more than state a difference of opinion between the United States and West Virginia to which the judicial power did not extend.[243] Similarly, in Electric Bond & Share Co. *v.* Securities and Exchange Commission,[244] the Court refused to decide any constitutional issues arising out of the Public Utility Holding Company Act of 1935 except the registration provisions because the cross bill in which the company had asked for a declaration that the whole act was unconstitutional was regarded as presenting a variety of hypothetical questions that might never become real. [Pg 552]

The "Case" or "Controversy" Test in Declaratory Judgment Proceedings

The insistence of the Court upon the rule that "the requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit,"[245] and the fact that many actions for a declaration of rights have involved the validity of legislation, where the Court is even more insistent upon the essentials of a case, have done much to limit the use of the declaratory judgment. There are, nevertheless, a number of cases, some of which involved constitutional issues, in which a declaratory judgment has been rendered. Among these are Currin *v.* Wallace,[246] where tobacco warehousemen and auctioneers contested the validity of the Tobacco Inspection Act under which the Secretary of Agriculture had already designated a tobacco market for inspection and grading; Perkins *v.* Elg,[247] where a natural-born citizen of naturalized parents who left the country during her minority sought to establish her status as a citizen; Maryland Casualty Co. *v.* Pacific Coal and Oil Co.,[248] where a liability insurer sought to establish his lack of liability in an automobile collision case; and Aetna Life Insurance Co. *v.* Haworth,[249] where a declaration was sought under the disability benefit clauses of an insurance policy. As stated by Justice Douglas for the Court in the Maryland Casualty case: "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."[250] It remains, therefore, for the courts to determine in each case the degree of controversy necessary to establish a case for purposes of jurisdiction. Even, then, however, the Court is under no compulsion to exercise its jurisdiction.[251]

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Cases Arising Under the Constitution, Laws and Treaties of the United States

DEFINITION

Cases arising under the Constitution are cases which require an interpretation of the Constitution for their correct decision.[252] They arise when a litigant claims an actual or threatened invasion of his constitutional rights by the enforcement of some act of public authority, usually an act of Congress or of a State legislature, and asks for judicial relief. The clause furnishes the textual basis for the fountain-head of American Constitutional Law, in the strict sense of the term, which fountain-head is Judicial Review, or the power and duty of the courts to pass upon the constitutional validity of legislative acts which they are called upon to recognize and enforce in cases coming before them, and to declare void and refuse enforcement to such as do not accord with their own interpretation of the Constitution.

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JUDICIAL REVIEW

The supremacy clause clearly recognizes judicial review of State legislative acts in relation not only to the Constitution, but also in relation to acts of Congress which are "in pursuance of the Constitution," and in relation to "treaties made or which shall be made under the authority of the United States." These constitute "the supreme law of the land," and "the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." This provision was originally implemented by the famous twenty-fifth section of the Judiciary Act of 1789 which provided that final judgments or decrees of the highest courts of law or equity in the States in which a decision could be had, "where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error, * * *"[253]

JUDICIAL REVIEW AND NATIONAL SUPREMACY

A quarter of a century after its enactment the validity of this section was challenged on States' Rights premises in Martin *v.* Hunter's Lessee,[254] and seven years after that in Cohens *v.* Virginia.[255] The States' Rights argument was substantially the same in both cases. It amounted to the contention that while the courts of Virginia were constitutionally obliged to prefer "the supreme law of the land" as defined in the supremacy clause over conflicting State laws it was only by their own interpretation of the said supreme law that they, as the courts of a sovereign State, were bound. Furthermore, it was contended that cases did not "arise" under the Constitution unless they were brought in the first instance by some one claiming such a right, from which it followed that "the judicial power of the United States" did not "extend" to such cases unless they were brought in the first instance in the courts of the United States. In answer to these arguments Chief Justice Marshall declared that: "A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the

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Constitution or a law of the United States, whenever its correct decision depends upon the construction of either."[256] Passing then to broader considerations, he continued: "Let the nature and objects of our Union be considered; let the great fundamental principles, on which the fabric stands, be examined; and we think, the result must be, that there is nothing so extravagantly absurd, in giving to the Court of the nation the power of revising the decisions of local tribunals, on questions which affect the nation, as to require that words which import this power should be restricted by a forced construction."[257]

JUDICIAL REVIEW OF ACTS OF CONGRESS

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Judicial review of acts of Congress is not provided for in the Constitution in such explicit terms as is judicial review of State legislation, but it is nevertheless fairly evident that its existence is assumed. In the first place, the term "cases arising under the Constitution" is just as valid a textual basis for the one type of constitutional case as for the other; and, in the second place, it is clearly indicated that acts of Congress are not "supreme law of the land" unless they are "in pursuance of the Constitution," thus evoking a question which must be resolved in the first instance by State judges, when State legislation coming before them for enforcement is challenged in relation to "the supreme law of the land." Furthermore, most of the leading members of the Federal Convention are on record contemporaneously, though not always in the Convention itself, as accepting the idea.[258]

HAMILTON'S ARGUMENT

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The argument for judicial review of acts of Congress was first elaborated in full by Alexander Hamilton in the Seventy-eighth Number of *The Federalist* while the adoption of the Constitution was pending. Said Hamilton: "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 must therefore belong 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 [legislative] agents."[259] It was also set forth as something commonly accepted by Justice Iredell in 1798 in Calder *v.* Bull[260] in the following words: "If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case." And between these two formulations of the doctrine, the membership of the Supreme Court had given it their sanction first individually, then as a body. In Hayburn's Case,[261] the Justices while on circuit court duty refused to administer the Invalid Pensions Act,[262] which authorized the circuit courts to dispose of pension applications subject to review by the Secretary of War and Congress on the ground that the federal courts could be assigned only those functions such as are properly judicial and to be performed in a judicial manner. In Hylton *v.* United States,[263] a made case in which Congress appropriated money to pay counsel on both sides of the argument, the Court passed on the constitutionality of the carriage tax and sustained it as valid, and in so doing tacitly assumed that it had the power to review Congressional acts.

MARBURY *v.* MADISON

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All the above developments were, however, only preparatory. Judicial review of acts of Congress was made Constitutional Law, and thereby the cornerstone of American constitutionalism, by the decision of the Supreme Court, speaking through Chief Justice Marshall in the famous case of Marbury *v.* Madison[264] decided in February, 1803. The facts of the case briefly stated are that Marbury had been appointed a justice of the peace in the District of Columbia by John Adams almost at the close of his administration, and John Marshall who was serving simultaneously as Secretary of State failed to deliver to Marbury his commission which had been signed before the new administration had begun. One of the first acts of Jefferson was his instruction to Secretary of State Madison to withhold commissions to office which remained undelivered. Thereupon Marbury sought to compel Madison to deliver the commission by seeking a writ of mandamus in the Supreme Court in the exercise of its original jurisdiction and in pursuance of section 13 of the Judiciary Act of 1789[265] which prescribed the original jurisdiction of the Court and authorized it 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."

Marshall's Argument

In the portion of his opinion dealing with judicial review Marshall began his argument with the assumption 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 * * *" and, once established, these principles are fundamental. Second, the Government of the United States is limited in its powers by a written Constitution. The Constitution either "controls any legislative act repugnant to it; or, * * * the legislature may alter the Constitution by an ordinary act." But the Constitution is paramount law and written as such. "It is emphatically the province and duty of the judicial department to say what the law is. * * * If two laws conflict with each other, the

courts must decide on the operation of each. * * * 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." To declare otherwise, the Chief Justice concluded, would be subversive of the very foundation of all written constitutions, would force the judges to close their eyes to the Constitution, and would make the judicial oath "a solemn mockery."[266] The Court must therefore look into some portions of the Constitution, and if they can open it at all, what part of it are they forbidden to read or obey? In conclusion the Chief Justice declared that the Constitution is mentioned first in the supremacy clause and that "the particular phraseology of the Constitution * * * 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, [of government] are bound by that instrument."[267]

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Importance of Marbury *v.* Madison

The decision in Marbury *v.* Madison has never been disturbed, although it has often been criticized. Nor was its contemporary effect confined to the national field. From that time on judicial review by State courts of local legislation in relation to the local constitutions made rapid progress and was securely established in all States by 1850 under the influence not only of Marbury *v.* Madison, but also of early principles of judicial review established in the circuit courts of the United States.[268]

LIMITS TO THE EXERCISE OF JUDICIAL REVIEW

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Because judicial review is an outgrowth of the fiction that courts only declare what the law is in specific cases,[269] and are without will or discretion,[270] its exercise is surrounded by the inherent limitations of the judicial process and notably the necessity of a case or controversy between adverse litigants with a standing in court to present the issue of unconstitutionality in which they are directly interested. The requisites to a case or controversy have been treated more extensively above, but it may be noted that the Supreme Court has repeatedly emphasized the necessity of "an honest and actual antagonistic assertion of rights by one individual against another,"[271] and its lack of power to supervise legislative functions in friendly proceedings, moot cases, or cases which present abstract issues.[272]

The Doctrine of "Strict Necessity"

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But even when a case involving a constitutional issue is presented, the Court has repeatedly stated that it will decide constitutional questions only if strict necessity requires it to do so. Hence constitutional issues will not be decided in broader terms than are required by the precise state of facts to which the ruling is to be applied; nor if the record presents some other ground upon which to decide the case; nor at the instance of one who has availed himself of the benefit of a statute or who fails to show he is injured by its operation; nor if a construction of the statute is fairly possible by which the question may be fairly avoided.[273] Speaking of the policy of avoiding the decision of constitutional issues except when necessary Justice Rutledge, speaking for the Court, declared in 1947: "The policy's ultimate foundations, some if not all of which also sustain the jurisdictional limitation, lie in all that goes to make up the unique place and character, in our scheme, of judicial review of governmental action for constitutionality. They are found in the delicacy of that function, particularly in view of possible consequences for others stemming also from constitutional roots; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement; withal in the paramount importance of constitutional adjudication in our system."[274]

The Doctrine of Political Questions

A third limitation to the exercise of judicial review is the rule, partly inherent in the judicial process, but also partly a precautionary rule adopted by the Court in order to avoid clashes with the "political branches," is that the federal courts will not decide "political questions."[275]

The "Reasonable Doubt" Doctrine

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A fourth rule, of a precautionary nature, is that no act of legislation will be declared void except in a very clear case, or unless the act is unconstitutional beyond all reasonable doubt.[276] Sometimes this rule is expressed in another way, in the formula that an act of Congress or a State legislature is presumed to be constitutional until proved otherwise "beyond all reasonable doubt."[277] In operation this rule is subject to two limitations which seriously impair its efficacy. The first is that the doubts which are effective are the doubts of the majority only. If five Justices of learning and attachment to the Constitution are convinced that the statute is invalid and four others of equal learning and attachment to the Constitution are convinced that it is valid or are uncertain that it is invalid, the convictions of the five prevail over the convictions or doubts of the four, and vice versa. Second, the Court has made exceptions to this rule in certain categories of

cases. At one time statutes interfering with freedom of contract were presumed to be unconstitutional until proved valid,[278] and more recently presumptions of invalidity have appeared to prevail against statutes alleged to interfere with freedom of expression and of religious worship, which have been said to occupy a preferred position in the Constitution.[279]

Exclusion of Extra-Constitutional Tests

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A fifth maxim of constitutional interpretation runs to the effect that the Courts are concerned only with the constitutionality of legislation and not with its motives, policy or wisdom, or with its concurrence with natural justice, fundamental principles of government, or spirit of the Constitution.[280] In various forms this maxim has been repeated to such an extent that it has become trite and has increasingly come to be incorporated in constitutional cases as a reason for fortifying a finding of unconstitutionality. Through absorption of natural rights doctrines into the text of the Constitution, the Court was enabled to reject natural law and still to partake of its fruits, and the same is true of the *laissez faire* principles incorporated in judicial decisions from about 1890 to 1937. Such protective coloration is transparent in such cases as Lochner *v.* New York[281] and United States *v.* Butler.[282]

Disallowance by Statutory Interpretation

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A sixth principle of constitutional interpretation designed by the courts to discourage invalidation of statutes is that if at all possible the courts will construe the statute so as to bring it within the law of the Constitution.[283] At times this has meant that a statute was construed so strictly in order to avoid constitutional difficulties that its efficacy was impaired if not lost.[284] A seventh principle closely related to the preceding one is that in cases involving statutes, portions of which are valid and other portions invalid, the courts will separate the valid from the invalid and throw out only the latter unless such portions are inextricably connected.[285] Sometimes statutes expressly provide for the separability of provisions, but it remains for the courts in the last resort to determine whether the provisions are separable.[286]

Stare Decisis in Constitutional Law

An eighth limitation on the power of the federal courts to invalidate legislation springs from the principle of *stare decisis*, a limitation which has been progressively weakened since the Court proceeded to correct "a century of error" in Pollock *v.* Farmers' Loan & Trust Co.[287] Because of the difficulty of amending the Constitution the Court has long taken the position that it will reverse its previous decisions on constitutional issues when convinced they are grounded on error more quickly than in other types of cases in which earlier precedents are not absolutely binding.[288] The "constitutional revolution" of 1937 produced numerous reversals of earlier precedents as other sections of this study disclose, and the process continues. In Smith *v.* Allwright,[289] which reversed Grovey *v.* Townsend,[290] Justice Reed cited fourteen cases decided between March 27, 1937, and June 14, 1943, in which one or more earlier decisions of constitutional questions were overturned. Although the general effect of the numerous reversals of precedent between 1937 and 1950 was to bring judicial interpretation more generally into accord with the formal text of the Constitution, and to dispose of a considerable amount of constitutional chaff, Justice Roberts was moved to say in the Allwright case that frequent [Pg 566] reversals of earlier decisions tended to bring adjudications of the Supreme Court "into the same class as a restricted railroad ticket, good for this day and train only."[291] A ninth limitation which has nothing to do with statutory or constitutional construction as such and which is altogether precautionary is that the Court will declare no legislative act void unless a majority of its full membership so concurs.[292]

The cumulative effect of these limitations is difficult to measure. The limitation imposed by the case concept definitely has the effect of postponing judicial nullification, but beyond this the most that can be said is that constitutional issues affecting important issues can ordinarily be presented in a case and so will sooner or later reach the Court. The limitations of the presumptions of statutory validity, lack of concern with the wisdom of the legislation, alternative construction, separability of provisions and the like depend for their effectiveness upon the consciousness of the individual judge of the judicial proprieties and have been equally endorsed by those judges most frequently addressing themselves to the task of finding legislation invalid. The limitation imposed by the concept of political questions does not limit in any significant way the power of the federal courts to review legislation, but does remove from judicial scrutiny vast areas of executive action. In general, therefore, the extent to and manner in which the courts will exercise their power to review legislation is a matter of judicial discretion.

ALLEGATIONS OF FEDERAL QUESTION

The question of jurisdiction of cases involving federal questions is determined by the allegations made by the plaintiff and not upon the facts as they may emerge or by a decision of the merits. [Pg 567] [293] Plaintiffs seeking to docket such cases in the federal courts must set forth a substantial claim under the Constitution, laws or treaties of the United States.[294] Nor does jurisdiction arise simply because an averment of a federal right is made, "if it plainly appears that such

averment is not real and substantial, but is without color of merit."[295] The federal question averred may be insubstantial because obviously without merit, or because its unsoundness so clearly results from previous decisions of the Supreme Court as to foreclose the issue and leaves no room for the inference that the questions sought to be raised can be subjects of controversy.[296] In Gully *v.* First National Bank[297] the Court reviewed earlier precedents and endeavored to restate the rules for determining when a case arises. First there must be a right or immunity created by the Constitution, laws, or treaties of the United States which must be such that it will be supported if the Constitution, laws, or treaties are given one construction, or defeated if given another. Second, a genuine and present controversy as distinguished from a possible or conjectural one must exist with reference to the federal right. Third, the controversy must be disclosed upon the face of the complaint unaided by the answer.[298]

CORPORATIONS CHARTERED BY CONGRESS

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The earlier hospitality of the federal courts to cases involving federal questions is also manifested in suits by corporations chartered by Congress. Although in Bank of United States *v.* Deveaux[299] the Court held that the first Bank of the United States could not sue in the federal courts merely because it was incorporated by an act of Congress, the act incorporating the second bank authorized such suits and this authorization was not only sustained in Osborn *v.* Bank of United States,[300] but an act of incorporation was declared to be a law of the United States for purposes of jurisdiction in cases involving federal questions. Consequently, the door was opened to other federally chartered corporations to go into the federal courts after the act of 1875 vested original jurisdiction generally in the lower courts of such questions. Corporations, chartered by Congress, particularly railroads, quickly availed themselves of this opportunity, and succeeded in the Pacific Railroad Removal Cases[301] in removing suits from the State to the federal courts in cases involving no federal question solely on the basis of federal incorporation. The result of this and similar cases was Congressional legislation depriving national banks of the right to sue in the federal courts solely on the basis of federal incorporation in 1882,[302] depriving railroads holding federal charters of this right in 1915,[303] and finally in 1925 removing from federal jurisdiction involving federal questions all suits brought by federally chartered corporations, solely on the basis of federal incorporation, except where the United States holds half of the stock.[304]

REMOVAL FROM STATE COURTS OF SUITS AGAINST FEDERAL OFFICIALS

Of greater significance and of immediate importance to the maintenance of national supremacy are those cases involving State prosecution of federal officials for acts committed under the color of federal authority. As early as 1815 Congress provided temporarily for the removal of prosecutions against customs officials for acts done or omitted as an officer or under color of an act of Congress, except for offenses involving corporal punishment.[305] In 1833, in partial answer to South Carolina's Nullification Proclamation, Congress enacted the so-called Force Act providing for removal from State courts of all prosecutions against any officer of the United States or under color thereof.[306] As a part of the Civil War legislation and limited to the war period, an act in 1863 provided for removal from State courts of cases brought against federal officials for acts committed during the war and justified under the authority of Congress and the President.[307] The act of 1833, with amendments, has been kept in force. Since 1948 the United States Code has provided for the removal to a federal district court of civil actions or criminal prosecutions in State courts against "any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue."[308]

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Tennessee *v.* Davis

The validity of the act of 1833 as it was carried over into the Revised Statutes, § 643, was contested in Tennessee *v.* Davis,[309] which involved the attempt of a State to prosecute a deputy collector of internal revenue who had killed a man while seeking to seize an illicit distilling apparatus. In an opinion in the tradition of Martin *v.* Hunter's Lessee[310] and Cohens *v.* Virginia,[311] Justice Strong emphasized the power of the National Government to protect itself in the exercise of its constitutional powers, the inability of a State to exclude it from the exercise of any authority conferred by the Constitution, and the comprehensive nature of the term "cases in law and equity arising under the Constitution, the laws of the United States, and treaties * * *" which was held to embrace criminal prosecutions as well as civil actions. Then speaking of a case involving federal questions he said: "It is not merely one where a party comes into court to demand something conferred upon him by the Constitution or by a law or treaty. A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted."[312]

In addition to the constitutional issues presented earlier by § 25 of the act of 1789, which was superseded in 1934 when the "Writ of error" was replaced by "Appeal," issues have continued to arise concerning its application which go directly to the nature and extent of the Supreme Court's appellate jurisdiction. These have to do with such matters as the existence of a federal question, exhaustion of remedies in State courts, and review of findings of fact by State courts. Whether a federal question has been adequately presented to and decided by a State court has been held to be in itself a federal question, to be decided by the Supreme Court on appeal.[313] Likewise a contention that a decision of a State court disregarded decrees of a United States Court has been held to bring a case within the Court's jurisdiction;[314] also a decision by a State court which was adverse to an asserted federal right although, as the record of the case showed, it might have been based upon an independent and adequate nonfederal ground.[315] This latter ruling, however, was qualified during the same term of Court in a case which held that it is essential to the jurisdiction of the Supreme Court, in reviewing a decision of a State court that it must appear affirmatively from the record, not only that a federal question was presented for determination, but that its decision was necessary to the determination of the cause; that the federal question was actually decided, or that the judgment could not have been given without deciding it.[316]

These rules all flow from the broader principle that if the laws and Constitution of the United States are to be observed, the Supreme Court cannot accept as final the decision of a State court on matters alleged to give rise to an asserted federal right.[317] Consequently, the Supreme Court will review the findings of fact by a State court where a federal right has been denied by a finding shown by the record to be without evidence to support it, and where a conclusion of law as to a federal right and findings of facts are so intermingled as to make it necessary to analyze the facts in order to pass upon the federal question.[318] It should be noted, too, that barring exceptional circumstances such as those in Gilchrist *v.* Interborough Rapid Transit Co.,[319] which involved intricate contracts between the City of New York and the company, the meaning of which had not been determined by the State courts, or explicit statutory provisions as in 28 U.S.C.A. §§ 1331-1332, 1345, 1359, resort to a federal court may precede the exhaustion of remedies of State courts.[320]

Suits Affecting Ambassadors, Other Public Ministers, and Consuls [Pg 571]

The earliest interpretation of the grant of original jurisdiction to the Supreme Court came in the Judiciary Act of 1789, which conferred on the federal district courts jurisdiction of suits to which a consul might be a party. This legislative interpretation was sustained in 1793 in a circuit court case in which the judges held that Congress might vest concurrent jurisdiction involving consuls in the inferior courts and sustained an indictment against a consul.[321] Many years later, in 1884, the Supreme Court held that consuls could be sued in the federal courts,[322] and in another case in the same year declared sweepingly that Congress could grant concurrent jurisdiction to the inferior courts in cases where the Supreme Court has been invested with original jurisdiction.[323] Nor does the grant of original jurisdiction to the Supreme Court in cases affecting ambassadors and consuls of itself preclude suits in State courts against consular officials. The leading case is Ohio ex rel. Popovici *v.* Agler[324] in which a Rumanian vice-consul contested an Ohio judgment against him for divorce and alimony. Justice Holmes, speaking for the Court, said: "The words quoted from the Constitution do not of themselves and without more exclude the jurisdiction of the State. * * * It has been understood that, 'the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.' * * * In the absence of any prohibition in the Constitution or laws of the United States it is for the State to decide how far it will go."

WHEN "AMBASSADORS" ETC., ARE "AFFECTED"

A number of incidental questions arise in connection with the phrase "affecting ambassadors and consuls." Does the ambassador or consul to be affected have to be a party in interest, or is a mere indirect interest in the outcome of the proceeding sufficient? In United States *v.* Ortega,[325] the Court ruled that a prosecution of a person for violating international law and the laws of the United States by offering violence to the person of a foreign minister was not a suit "affecting" the minister, but a public prosecution for vindication of the laws of nations and the United States. [Pg 572] Another question concerns the official status of a person claiming to be an ambassador, etc. In Ex parte Baiz,[326] the Court refused to review the decision of the Executive with respect to the public character of a person claiming to be a public minister and laid down the rule that it has the right to accept a certificate from the Department of State on such a question. A third question was whether the clause included ambassadors and consuls accredited by the United States to foreign governments. The Court held that it includes only persons accredited to the United States by foreign governments.[327] However, matters of especial delicacy such as suits against ambassadors and public ministers or their servants, where the law of nations permits such suits, and in all controversies of a civil nature to which a State is a party,[328] Congress has made the original jurisdiction of the Supreme Court exclusive of that of other courts. By its compliance with the Congressional distribution of exclusive and concurrent original jurisdiction, the Court

has tacitly sanctioned the power of Congress to make such jurisdiction exclusive or concurrent as it may choose. Likewise, as in the Popovici case, it has implied that Congress, if it chose, could make the court's jurisdiction of consular officials exclusive of State Courts.

Cases of Admiralty and Maritime Jurisdiction

ORIGIN AND CHARACTERISTICS

The admiralty and maritime jurisdiction of the federal courts had its origin in the jurisdiction vested in the courts of the Admiral of the English Navy. Prior to independence, vice-admiralty courts were created in the Colonies by commissions from the English High Court of Admiralty. After independence, the States established admiralty courts, from which at a later date appeals could be taken to a court of appeals set up by Congress under the Articles of Confederation.[329] Since one of the objectives of the Philadelphia Convention was the promotion of commerce and the removal of obstacles to it, it was only logical that the Constitution should deprive the States of all admiralty jurisdiction and vest it exclusively in the federal courts.

CONGRESSIONAL INTERPRETATION OF THE ADMIRALTY CLAUSE

The Constitution uses the terms "admiralty and maritime jurisdiction" without defining them. Though closely related the words are not synonyms. In England the word "maritime" referred to the cases arising upon the high seas, whereas "admiralty" meant primarily cases of a local nature [Pg 573] involving police regulations of shipping, harbors, fishing, and the like. A long struggle between the admiralty and common law courts had, however, in the course of time resulted in a considerable curtailment of English admiralty jurisdiction. For this and other reasons, a much broader conception of admiralty and maritime jurisdiction existed in the United States at the time of the framing of the Constitution than in the Mother Country.[330] At the very beginning of government under the Constitution, Congress conferred on the federal district courts exclusive original cognizance "of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts, as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; * * *"[331] This broad legislative interpretation of admiralty and maritime jurisdiction soon won the approval of the federal circuit courts, which ruled that the extent of admiralty and maritime jurisdiction was not to be determined by English law but by the principles of maritime law "as respected by maritime courts of all nations and adopted by most, if not by all, of them on the continent of Europe."[332]

JUDICIAL APPROVAL OF CONGRESSIONAL INTERPRETATION

Although a number of Supreme Court decisions had earlier sustained the broader admiralty jurisdiction on specific issues,[333] it was not until 1848 that the Court ruled squarely in its favor, which it did by declaring that, "whatever may have been the doubt, originally, as to the true construction of the grant, whether it had reference to the jurisdiction in England, or to the more enlarged one that existed in other maritime countries, the question has become settled by legislative and judicial interpretation, which ought not now to be disturbed."[334] The Court thereupon proceeded to hold that admiralty had jurisdiction *in personam* as well as *in rem*, over controversies arising out of contracts of affreightment between New York and Providence.

TWO TYPES OF CASES

Admiralty and maritime jurisdiction comprises two types of cases: (1) those involving acts committed on the high seas or other navigable waters; and (2) those involving contracts and transactions connected with shipping employed on the seas or navigable waters. In the first [Pg 574] category, which includes prize cases, and torts, injuries, and crimes committed on the high seas, jurisdiction is determined by the locality of the act; while in the second category subject matter is the primary determinative factor.[335] Specifically, contract cases include suits by seamen for wages,[336] cases arising out of marine insurance policies,[337] actions for towage[338] or pilotage[339] charges, actions on bottomry or respondentia bonds,[340] actions for repairs on a vessel already used in navigation,[341] contracts of affreightment,[342] compensation for temporary wharfage,[343] agreements of consortship between the masters of two vessels engaged in wrecking,[344] and surveys of damaged vessels.[345] In the words of the Court in Ex parte Easton,[346] admiralty jurisdiction "extends to all contracts, claims and services essentially maritime."

MARITIME TORTS

Jurisdiction of maritime torts depends exclusively upon the commission of the wrongful act upon navigable waters[347] regardless of the voyage and the destination of the vessel.[348] By statutory elaboration, as well as judicial decision, maritime torts include injuries to persons,[349] damages to property arising out of collisions or other negligent acts,[350] and violent dispossession of

property.[351] But until Congress makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured, a State statute providing "that when the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission," applies, and, as thus applied, it constitutes no encroachment upon the commerce power of Congress.[352]

PRIZE CASES, FORFEITURES, ETC. [Pg 575]

From the earliest days of the Republic, the federal courts sitting in admiralty have been held to have exclusive jurisdiction of prize cases.[353] Also, in contrast to other phases of admiralty jurisdiction prize law as applied by the British courts continued to provide the basis of American law so far as practicable,[354] and so far as it was not modified by subsequent legislation, treaties, or executive proclamations. Finally, admiralty and maritime jurisdiction comprises the seizure and forfeiture of vessels engaged in activities in violation of the laws of nations or municipal law, such as illicit trade,[355] infraction of revenue laws,[356] and the like.[357]

PROCEEDINGS *IN REM*

Procedure in admiralty jurisdiction differs in few respects from procedure in actions at law, but the differences that do exist are significant. Suits in admiralty take the form of a proceeding *in rem* against the vessel and, with exceptions to be noted, proceedings *in rem* concerning navigable waters are confined exclusively to federal admiralty courts. However, if a common law remedy exists, a plaintiff may bring an action at law in either a State or federal court of competent jurisdiction,[358] but in this event the action is a proceeding *in personam* against the owner of the vessel. On the other hand, although the Court has sometimes used language which would confine proceedings *in rem* to admiralty courts,[359] yet it has sustained proceedings *in rem* in the State courts in actions of forfeiture. Thus in the case of C.J. Hendry Co. *v.* Moore,[360] the Court held that a proceeding *in rem* in a State court against fishing nets in the navigable waters of California was a common law proceeding within the meaning of § 9 of the Judiciary Act of 1789, and therefore within the exception to the grant of admiralty jurisdiction to the federal courts. At the same time, however, the Court was careful to confine such proceedings to forfeitures arising out of violations of State law. [Pg 576]

ABSENCE OF A JURY

Another procedural difference between actions at law and in admiralty is the absence of jury trial in civil proceedings in admiralty courts unless Congress specifically provides for it. Otherwise the judge of an admiralty court tries issues of fact as well as of law.[361] Indeed, the absence of a jury in admiralty proceedings appears to have been one of the reasons why the English government vested a broad admiralty jurisdiction in the colonial vice-admiralty courts of America, since they provided a forum where the English authorities could enforce the Navigation Laws without what Chief Justice Stone called "the obstinate resistance of American juries."[362]

TERRITORIAL EXTENT OF ADMIRALTY AND MARITIME JURISDICTION

As early as 1821 a federal district court in Kentucky asserted admiralty jurisdiction over inland waterways to the consternation of certain interests in Kentucky which succeeded in inducing the Senate to pass a bill confining admiralty jurisdiction to the ebb and flow of the tide, only to see it defeated in the House.[363] However, in 1825, in *The Thomas Jefferson*[364] the Court relieved these tensions by confining admiralty jurisdiction to the high seas and upon rivers as far as the ebb and flow of the tide extended in accordance with the English rule. Twenty-two years later this rule was qualified in Waring *v.* Clarke,[365] when the Court ruled that the admiralty jurisdiction under the Constitution was not to be limited or interpreted by English rules of admiralty and extended the jurisdiction of the federal courts to a collision on the Mississippi River ninety-five miles above New Orleans. In this ruling the Court moved in the direction of accommodating the rising commerce on the inland waterways and prepared the way for the Genesee Chief,[366] which reversed The Thomas Jefferson and sustained the constitutionality of an act of Congress passed in 1845 giving the district courts jurisdiction over the Great Lakes and connecting waters, and so in effect extended the admiralty jurisdiction to all the navigable waters of the United States.[367] The Genesee Chief therefore vastly expanded federal power,[368] and marked a trend which was continued in Ex parte Boyer,[369] where admiralty jurisdiction was extended to canals, and in The Daniel Ball,[370] where it was extended to waters wholly within a given State provided they form a connecting link in interstate commerce. This latter case is also significant for its definition of navigable waters of the United States as those that are navigable in fact, and as navigable in fact when so "used, or * * * susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[371] The doubts left by the Ball case in its distinction between navigable waters of the United States and navigable waters of the States were clarified by In re Garnett,[372] where it was held that the power of Congress to [Pg 577]

amend the maritime law was coextensive with that law and not confined "to the boundaries or class of subjects which limit and characterize the power to regulate commerce," and that the admiralty jurisdiction extends "to all public navigable lakes and rivers." In United States *v.* Appalachian Electric Power Co.,[373] the concept of "navigable waters of the United States" was further expanded to include waterways which by reasonable improvement can be made navigable for use in interstate commerce provided there is a balance between cost and need at a time when the improvement would be useful. Nor is it necessary that the improvement shall have been undertaken or authorized. Conversely, a navigable waterway of the United States does not cease to be so because navigation has ceased, and it may be a navigable waterway for only part of its course. Although this doctrine was announced as an interpretation of the commerce clause, the Garnett case and the decision rendered in Southern S.S. Co. *v.* National Labor Relations Board, [374] to the effect that admiralty jurisdiction includes all navigable waters within the country, makes it applicable also to the admiralty and maritime clause.

ADMIRALTY JURISDICTION VERSUS STATE POWER

[Pg 578]

The extension of the admiralty and maritime jurisdiction to navigable waters within a State does not, however, of its own force include general or political powers of government. Thus in the absence of legislation by Congress, the States through their courts may punish offenses upon their navigable waters and upon the sea within one marine league of the shore. In United States *v.* Bevans[375] the Court denied the jurisdiction of a federal circuit court to try defendant for a murder committed in Boston Harbor in the absence of statutory authorization of trials in federal courts for offenses committed within the jurisdiction of a State. While admitting that Congress may pass all laws which are necessary and proper for giving complete effect to admiralty jurisdiction, Chief Justice Marshall at the same time declared that "the general jurisdiction over the place, subject to this grant of power, adheres to the territory, as a portion of sovereignty not yet given away. The residuary powers of legislation are still in Massachusetts."[376]

Exclusiveness of the Jurisdiction

Determination of the bounds of admiralty jurisdiction is a judicial function, and "no State law can enlarge it, nor can an act of Congress or a rule of court make it broader than the judicial power may determine to be its true limits."[377] Nor is the jurisdiction self-executing. It can only be [Pg 579] exercised under acts of Congress vesting it in the federal courts.[378] The admiralty jurisdiction of the federal courts was made exclusive of State court jurisdiction by the Judiciary Act of 1789 according to The "Moses Taylor,"[379] which also held that State laws conferring remedies *in rem* could only be enforced in the federal courts. Consequently, the State courts were deprived of jurisdiction of a great number of cases arising out of maritime contracts and torts over which they had exercised jurisdiction prior to 1866. However, as before noted, the ninth section of the act of 1789 contained a provision, still in effect, which enables parties to avail themselves in State courts of such remedies as the common law is competent to give,[380] but in such cases the rights and obligations involved are still determined by the maritime law.[381]

Concessions to State Power

Nor does the exclusiveness of federal admiralty jurisdiction preclude the States from creating rights enforceable in admiralty courts. In The "Lottawanna,"[382] it was held that federal district courts sitting in admiralty could enforce liens given for security of a contract even when created by State laws. Likewise liabilities created by State statutes for injuries resulting in death have been enforced by proceedings *in rem* in federal admiralty courts,[383] and, in the absence of Congressional legislation, a State may enact laws governing the rights and obligations of its citizens on the high seas. Under this general rule a law of Delaware providing for damages for wrongful death was enforced in an admiralty proceeding against a vessel arising out of a collision at sea of two vessels owned by Delaware corporations.[384] And in 1940, in Just *v.* Chambers,[385] the Supreme Court held specifically applicable in admiralty proceedings the law of Florida whereby a cause of action for personal injury due to another's negligence survives the death of the tort-feasor against his estate and against the vessel.

The Jensen Case and Its Sequelae

[Pg 580]

In the face of these decisions, except the last, the Court, nevertheless, held in 1917 in Southern Pacific Co. *v.* Jensen[386] that a New York Workman's Compensation statute was unconstitutional as applied to employees engaged in maritime work. Proceeding on the assumption that "Congress has paramount power to fix and determine the maritime law which shall prevail through the country," and that in the absence of a controlling statute the general maritime law as accepted by the federal courts is a part of American national law, Justice McReynolds proceeded to draw an analogy between the power of the States to legislate on admiralty and maritime matters and their power to legislate on matters affecting interstate commerce. Just as the States may not regulate interstate commerce where the subject is national in character and requires uniform regulation, so, he argued, they may not legislate on maritime matters in such fashion as to destroy "the very uniformity in respect to maritime matters which the Constitution was designed to establish" or to hamper and impede freedom of navigation between the States and with foreign countries. Nor

could the act be covered by the saving clause of the act of 1789 governing common law remedies, since the remedy provided by the compensation statute was unknown to the common law.[387]

Following the Jensen decision Congress enacted a statute saving to claimants their rights and remedies under State workmen's compensation laws.[388] In Knickerbocker Ice Co. *v.* Stewart[389] the same majority of judges, with Justice McReynolds again their spokesman, invalidated this statute as an unconstitutional delegation of legislative power to the States. The holding was based on the premise, stated as follows: "The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations."[390] And a like fate overtook the attempt of Congress in 1922 to protect [Pg 581] longshoremen and other workers under State compensation laws by excluding masters and crew members of vessels from those who might claim compensation for maritime injuries.[391] Finally, in 1927 Congress passed the Longshoremen's and Harbor Workers' Act,[392] which provided accident compensation for those workers who could not validly be compensated under State statutes. This time it seems to have succeeded, the constitutionality of the 1927 statute being apparently taken for granted.[393]

The net result of the Jensen Case and its progeny has been a series of cases which hold that in some circumstances the States can apply their compensation laws to maritime employees and in other circumstances cannot, if to do so "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations."[394] But, as Justice Black pointed out in 1942 in Davis *v.* Department of Labor,[395] "when a State could, and when it could not, grant protection under a compensation act was left as a perplexing problem, for it was held 'difficult, if not impossible,' to define this boundary with exactness."[396] Nor, he continued, has the Court been able "to give any guiding, definite rule to determine the extent of state power in advance of litigation, and has held that the margins of state authority must 'be determined in view of surrounding circumstances as cases arise.'"[397] As to the specific claim involved in the Davis Case, Justice Black stated further that it was "fair to say that a number of cases can be cited both in behalf of and in opposition to recovery here."[398] Concurring in the Davis Case, Justice Frankfurter referred to the Jensen case as "that ill-starred decision," but agreed that reversal would not eliminate its resultant complexities and confusions until Congress attempted another comprehensive solution of the problem. Until then all the Court could do was "to bring order out of the remaining judicial chaos as marginal situations" were presented.[399]

POWER OF CONGRESS TO MODIFY THE MARITIME LAW; THE "LOTTAWANNA" [Pg 582]

In view of the chaos created by the Jensen case and its apparent disharmony with earlier as well as some later decisions the question arises as to the scope of Congress's power to revise and codify the maritime law. In the "Lottawanna"[400] Justice Bradley as spokesman of the Court, while admitting the existence of a general body of maritime law, asserted that it is operative as law only insofar "as it is adopted by the laws and usages of that country,"[401] subject to such modifications and qualifications as may be made. So adopted and qualified it becomes the law of a particular nation, but not until then. "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.'" [Pg 583] Continuing, Justice Bradley stated that "the Constitution must have referred to a system of law coextensive with and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."[402] However, the framers of the Constitution could not have contemplated that the law should remain ever the same, especially as Congress "has authority under the commercial power, if no other, to introduce such changes as are likely to be needed."[403] Sixteen years later in the Garnett case[404] Justice Bradley, speaking for a unanimous court, asserted that the power of Congress to amend the maritime law is coextensive with that law and not limited by the boundaries of the commerce clause, and that the maritime law is "subject to such amendments as Congress may see fit to adopt."[405] Likewise, Justice McReynolds in Southern Pacific Co. *v.* Jensen[406] emphasizes Congress' "paramount power to fix and determine the maritime law which shall prevail throughout the country," albeit in the absence of a controlling statute the general maritime law prevails; and the language of Knickerbocker Ice Co. *v.* Stewart[407] is to like effect, as is also that of Swanson *v.* Marra Bros.,[408] decided in 1946.

The law administered by the federal courts sitting in admiralty is therefore an amalgam of the

general maritime law insofar as it is acceptable to the courts, modifications of that law by Congressional enactments, the common law of torts and contracts as modified by State or National legislation, and international prize law. This body of law, however, is subject at all times to the paramount authority of Congress to change it in pursuance of its powers under the commerce clause, the admiralty and maritime clause, and the necessary and proper clause. That portion of the Jensen opinion emphasizing Congressional power in this respect has never been in issue in either the opinions of the dissenters in that case or in subsequent opinions critical of it, which in effect invite Congress to exercise its power to modify the maritime law.[409]

Cases to Which the United States Is a Party: Right of the United States To Sue

[Pg 584]

As Justice Story pointed out in his Commentaries, "It would be a perfect novelty in the history of national jurisprudence, as well as of public law, that a sovereign had no authority to sue in his own courts."[410] As early as 1818 the Supreme Court ruled that the United States could sue in its own name in all cases of contract without Congressional authorization of such suits.[411] Later this rule was extended to other types of actions. In the absence of statutory provisions to the contrary such suits are initiated by the Attorney General in the name of the United States.[412] As in other judicial proceedings, the United States, like any other party plaintiff, must have an interest in the subject matter and a legal right to the remedy sought.[413] By the Judiciary Act of 1789 and subsequent amendments Congress has vested jurisdiction in the federal district courts to hear all suits of a civil nature at law or in equity, brought by the United States as a party plaintiff.[414]

SUITS AGAINST STATES

Controversies to which the United States is a party include suits brought against States as party defendants. The first such suit occurred in United States *v.* North Carolina[415] which was an action by the United States to recover upon bonds issued by North Carolina. Although no question of jurisdiction was raised, in deciding the case on its merits in favor of the State, the Court tacitly assumed that it had jurisdiction of such cases. The issue of jurisdiction was directly raised by Texas a few years later in a bill in equity brought by the United States to determine the boundary between Texas and the Territory of Oklahoma, and the Court sustained its jurisdiction over strong arguments by Texas to the effect that it could not be sued by the United States without its consent and that the Supreme Court's original jurisdiction did not extend to cases to which the United States is a party.[416] Stressing the inclusion within the judicial power of cases to which the United States and a State are parties, Justice Harlan pointed out that the Constitution made no exception of suits brought by the United States. In effect, therefore, consent to be sued by the United States "was given by Texas when admitted to the Union upon an equal footing in all respects with the other States."[417]

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Suits brought by the United States against States have, however, been infrequent. All of them have arisen since 1889, and they have become somewhat more common since 1926. That year the Supreme Court decided a dispute between the United States and Minnesota over land patents issued to the State by the United States in breach of its trust obligations to the Indians.[418] In United States *v.* West Virginia,[419] the Court refused to take jurisdiction of a suit in equity brought by the United States to determine the navigability of the New and Kanawha Rivers on the ground that the jurisdiction in such suits is limited to cases and controversies and does not extend to the adjudication of mere differences of opinion between the officials of the two governments. A few years earlier, however, it had taken jurisdiction of a suit by the United States against Utah to quiet title to land forming the beds of certain sections of the Colorado River and its tributaries within the States.[420] Similarly, it took jurisdiction of a suit brought by the United States against California to determine the ownership of and paramount rights over the submerged land and the oil and gas thereunder off the coast of California between the low-water mark and the three-mile limit.[421] Like suits were decided against Louisiana and Texas in 1950.[422]

IMMUNITY OF THE UNITED STATES FROM SUIT

In pursuance of the general rule that a sovereign cannot be sued in his own courts, it follows that the judicial power does not extend to suits against the United States unless Congress by general or special enactment consents to suits against the Government. This rule first emanated in embryo form in an *obiter dictum* by Chief Justice Jay in Chisholm *v.* Georgia, where he indicated that a suit would not lie against the United States because "there is no power which the courts can call to their aid."[423] In Cohens *v.* Virginia,[424] also by way of dictum, Chief Justice Marshall asserted, "the universally received opinion is, that no suit can be commenced or prosecuted against the United States." The issue was more directly in question in United States *v.* Clarke[425] where Chief Justice Marshall stated that as the United States is "not suable of common right, the party who institutes such suit must bring his case within the authority of some act of Congress, or the court cannot exercise jurisdiction over it." He thereupon ruled that the act of May 26, 1830, for the final settlement of land claims in Florida condoned the suit. The doctrine of the exemption of the United States from suit was repeated in various subsequent cases, without discussion or examination.[426] Indeed, it was not until United States *v.* Lee[427] that the Court

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examined the rule and the reasons for it, and limited its application accordingly.

Waiver of Immunity by Congress

Since suits against the United States can be maintained only by permission, it follows that they can be brought only in the manner prescribed by Congress and subject to the restrictions imposed.[428] Only Congress can take the necessary steps to waive the immunity of the United States from liability for claims, and hence officers of the United States are powerless by their actions either to waive such immunity or to confer jurisdiction on a federal court.[429] Even when authorized, suits can be brought only in designated courts.[430] These rules apply equally to suits by States against the United States.[431] Although an officer acting as a public instrumentality is liable for his own torts, Congress may grant or withhold immunity from suit on behalf of government corporations.[432]

United States *v.* Lee [Pg 587]

United States *v.* Lee, a five-to-four decision, qualified earlier holdings to the effect that where a judgment affected the property of the United States the suit was in effect against the United States, by ruling that title to the Arlington estate of the Lee family, then being used as a national cemetery, was not legally vested in the United States but was being held illegally by army officers under an unlawful order of the President. In its examination of the sources and application of the rule of sovereign immunity, the Court concluded that the rule "if not absolutely limited to cases in which the United States are made defendants by name, is not permitted to interfere with the judicial enforcement of the rights of plaintiffs when the United States is not a defendant or a necessary party to the suit."[433] Except, nevertheless, for an occasional case like Kansas *v.* United States,[434] which held that a State cannot sue the United States, most of the cases involving sovereign immunity from suit since 1883 have been cases against officers, agencies, or corporations of the United States where the United States has not been named as a party defendant. Thus, it has been held that a suit against the Secretary of the Treasury to review his decision on the rate of duty to be exacted on imported sugar would disturb the whole revenue system of the Government and would in effect be a suit against the United States.[435] Even more significant is Stanley *v.* Schwalby,[436] which resembles without paralleling United States *v.* Lee, where it was held that an action of trespass against an army officer to try title in a parcel of land occupied by the United States as a military reservation was a suit against the United States because a judgment in favor of the plaintiffs would have been a judgment against the United States.

Difficulties Created by the Lee Case [Pg 588]

Subsequent cases repeat and reaffirm the rule of United States *v.* Lee that where the right to possession or enjoyment of property under general law is in issue, the fact that defendants claim the property as officers or agents of the United States, does not make the action one against the United States until it is determined that they were acting within the scope of their lawful authority.[437] Contrariwise, the rule that a suit in which the judgment would affect the United States or its property is a suit against the United States has also been repeatedly approved and reaffirmed.[438] But, as the Court has pointed out, it is not "an easy matter to reconcile all of the decisions of the court in this class of cases,"[439] and, as Justice Frankfurter quite justifiably stated in a dissent, "the subject is not free from casuistry."[440] Justice Douglas' characterization of Land *v.* Dollar, "this is the type of case where the question of *jurisdiction* is dependent on decision of the *merits*,"[441] is frequently applicable.

Official Immunity Today [Pg 589]

The recent case of Larson *v.* Domestic and Foreign Corp.,[442] illuminates these obscurities somewhat. Here a private company sought to enjoin the Administrator of the War Assets in his official capacity from selling surplus coal to others than the plaintiff who had originally bought the coal, only to have the sale cancelled by the Administrator because of the company's failure to make an advance payment. Chief Justice Vinson and a majority of the Court looked upon the suit as one brought against the Administrator in his official capacity, acting under a valid statute, and therefore a suit against the United States. It held that although an officer in such a situation is not immune from suits for his own torts, yet his official action, though tortious cannot be enjoined or diverted, since it is also the action of the sovereign.[443] The Court then proceeded to repeat the rule that "the action of an officer of the sovereign (be it holding, taking, or otherwise legally affecting the plaintiff's property) can be regarded as so individual only if it is not within the officer's statutory powers, or, if within those powers, only if the powers or their exercise in the particular case, are constitutionally void."[444] The Court rejected the contention that the doctrine of sovereign immunity should be relaxed as inapplicable to suits for specific relief as distinguished from damage suits, saying: "The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right."[445]

CLASSIFICATION OF SUITS AGAINST OFFICERS

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Suits against officers involving the doctrine of sovereign immunity have been classified by Justice Frankfurter in a dissenting opinion into four general groups. First, there are those cases in which the plaintiff seeks an interest in property which belongs to the Government, or calls "for an assertion of what is unquestionably official authority."[446] Such suits, of course, cannot be maintained.[447] Second, cases in which action adverse to the interests of a plaintiff is taken under an unconstitutional statute or one alleged to be so. In general these suits are maintainable.[448] Third, cases involving injury to a plaintiff because the official has exceeded his statutory authority. In general these suits are also maintainable.[449] Fourth, cases in which an officer seeks immunity behind statutory authority or some other sovereign command for the commission of a common law tort.[450] This category of cases presents the greatest difficulties since these suits can as readily be classified as falling into the first group if the action directly or indirectly is one for specific performance or if the judgment would affect the United States.

SUITS AGAINST GOVERNMENT CORPORATIONS

The multiplication of government corporations during periods of war and depression has provided one motivation for limiting the doctrine of sovereign immunity. In Keifer & Keifer *v.* Reconstruction Finance Corp. and Regional Agricultural Credit Corp.,[451] the Court held that the Government does not become a conduit of its immunity in suits against its agents or instrumentalities merely because they do its work. Nor does the creation of a government corporation confer upon it legal immunity. Whether Congress endows a public corporation with governmental immunity in a specific instance, is a matter of ascertaining the Congressional will. [Pg 591] Moreover, it has been held that waivers of governmental immunity in the case of federal instrumentalities and corporations should be construed liberally.[452] On the other hand, Indian nations are exempt from suit without further Congressional authorization; it is as though their former immunity as sovereigns passed to the United States for their benefit, as did their tribal properties.[453]

Suits Between Two or More States

The extension of the federal judicial power to controversies between States and the vesting of original jurisdiction in the Supreme Court of suits to which a State is a party had its origin in experience. Prior to independence disputes between colonies claiming charter rights to territory were settled by the Privy Council. Under the Articles of Confederation Congress was made "the last resort on appeal" to resolve "all disputes and differences * * * between two or more States concerning boundary, jurisdiction, or any other cause whatever," and to constitute what in effect were *ad hoc* arbitral courts for determining such disputes and rendering a final judgment therein. When the Philadelphia Convention met in 1787, serious disputes over boundaries, lands, and river rights involved ten States.[454] It is hardly surprising, therefore, that during its first sixty years the only State disputes coming to the Supreme Court were boundary disputes[455] or that such disputes constitute the largest single number of suits between States. Since 1900, however, as the result of the increasing mobility of population and wealth and the effects of technology and industrialization other types of cases have occurred with increasing frequency.

BOUNDARY DISPUTES; THE LAW APPLIED

Of the earlier examples of suits between States, that between New Jersey and New York is significant for the application of the rule laid down earlier in Chisholm *v.* Georgia,[456] that the Supreme Court may proceed *ex parte* if a State refuses to appear when duly summoned. The long [Pg 592] drawn out litigation between Rhode Island and Massachusetts is of even greater significance for its rulings, after the case had been pending for seven years, that though the Constitution does not extend the judicial power to all controversies between States, yet it does not exclude any;[457] that a boundary dispute is a justiciable and not a political question;[458] and that a prescribed rule of decision is unnecessary in such cases. On the last point Justice Baldwin stated: "The submission by the sovereigns, or states, to a court of law or equity, of a controversy between them, without prescribing any rule of decision, gives power to decide according to the appropriate law of the case (11 Ves. 294); which depends on the subject-matter, the source and nature of the claims of the parties, and the law which governs them. From the time of such submission, the question ceases to be a political one, to be decided by the *sic volo*, *sic jubeo*, of political power; it comes to the court, to be decided by its judgment, legal discretion and solemn consideration of the rules of law appropriate to its nature as a judicial question, depending on the exercise of judicial power; as it is bound to act by known and settled principles of national or municipal jurisprudence, as the case requires."[459]

MODERN TYPES OF SUITS BETWEEN STATES

Beginning with Missouri *v.* Illinois and the Sanitary District of Chicago,[460] which sustained jurisdiction to entertain an injunction suit to restrain the discharge of sewage into the Mississippi River, water rights, the use of water resources, and the like have become an increasing source of suits between States. Such suits have been especially frequent in the western States, where

water is even more of a treasure than elsewhere, but they have not been confined to any one region. In Kansas *v.* Colorado,[461] the Court established the principle of the equitable division of river or water resources between conflicting State interests. In New Jersey *v.* New York[462] where New Jersey sought to enjoin the diversion of waters into the Hudson River watershed for New York in such a way as to diminish the flow of the Delaware River in New Jersey, injure its shad fisheries, and increase harmfully the saline contents of the Delaware, Justice Holmes stated for the Court: "A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And, on the other hand, equally little could New Jersey be permitted to require New York to give up its power altogether in order that the river might come down to it undiminished. Both States have real and substantial interests in the river that must be reconciled as best they may be."[463] [Pg 593]

Other types of interstate disputes of which the Court has taken jurisdiction include suits by a State as the donee of the bonds of another to collect thereon,[464] by Virginia against West Virginia to determine the proportion of the public debt of the original State of Virginia which the latter owed the former,[465] of one State against another to enforce a contract between the two,[466] of a suit in equity between States for the determination of a decedent's domicile for inheritance tax purposes,[467] and of a suit by two States to restrain a third from enforcing a natural gas measure which purported to restrict the interstate flow of natural gas from the State in the event of a shortage.[468] In general in taking jurisdiction of these suits, along with those involving boundaries and the diversion or pollution of water resources, the Supreme Court proceeded upon the liberal construction of the term "controversies between two or more States" enunciated in Rhode Island *v.* Massachusetts,[469] and fortified by Chief Justice Marshall's dictum in Cohens *v.* Virginia[470] concerning jurisdiction because of the parties to a case, that "it is entirely unimportant, what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the Courts of the Union."

CASES OF WHICH THE COURT HAS DECLINED JURISDICTION [Pg 594]

In other cases, however, the Court, centering its attention upon the elements of a case or controversy, has declined jurisdiction. Thus in Alabama *v.* Arizona[471] where Alabama sought to enjoin 19 States from regulating or prohibiting the sale of convict-made goods, the Court went far beyond holding that it had no jurisdiction, and indicated that jurisdiction of suits between States will be exercised only when absolutely necessary, that the equity requirements in a suit between States are more exacting than in a suit between private persons, that the threatened injury to a plaintiff State must be of great magnitude and imminent, and that the burden on the plaintiff State to establish all the elements of a case is greater than that generally required by a petitioner seeking an injunction suit in cases between private parties.

Pursuing a similar line of reasoning, the Court declined to take jurisdiction of a suit brought by Massachusetts against Missouri and certain of its citizens to prevent Missouri from levying inheritance taxes upon intangibles held in trust in Missouri by resident trustees. In holding that the complaint presented no justiciable controversy, the Court declared that to constitute such a controversy, the complainant State must show that it "has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to * * * the common law or equity systems of jurisprudence."[472] The fact that the trust property was sufficient to satisfy the claims of both States and that recovery by either would not impair any rights of the other distinguished the case from Texas *v.* Florida,[473] where the contrary situation obtained. Furthermore, the Missouri statute providing for reciprocal privileges in levying inheritance taxes did not confer upon Massachusetts any contractual right. The Court then proceeded to reiterate its earlier rule that a State may not invoke the original jurisdiction of the Supreme Court for the benefit of its residents or to enforce the individual rights of its citizens.[474] Moreover, Massachusetts could not invoke the original jurisdiction of the Court by the expedient of making citizens of Missouri parties to a suit not otherwise maintainable.[475] Accordingly, Massachusetts was held not to be without an adequate remedy in Missouri's courts or in a federal district court in Missouri.[476]

THE PROBLEM OF ENFORCEMENT; VIRGINIA *v.* WEST VIRGINIA [Pg 595]

A very important issue that presents itself in interstate litigation is the enforcement of the Court's decree, once it has been entered. In some types of suits, as Charles Warren has indicated, this issue may not arise; and if it does, it may be easily met. Thus a judgment putting a State in possession of disputed territory is ordinarily self-executing. But if the losing State should oppose execution, refractory State officials, as individuals, would be liable to civil suits or criminal prosecutions in the federal courts. Likewise an injunction decree may be enforced against State officials as individuals by civil or criminal proceedings. Those judgments, on the other hand, which require a State in its governmental capacity to perform some positive act present the issue of enforcement in more serious form. The issue arose directly in the long and much litigated case between Virginia and West Virginia over the proportion of the State debt of original Virginia owed by West Virginia after its separate admission to the Union under a compact which provided

that West Virginia assume a share of the debt. The suit was begun in 1906, and a judgment was rendered against West Virginia in 1915. Finally in 1917 Virginia filed a suit against West Virginia to show cause why, in default of payment of the judgment, an order should not be entered directing the West Virginia legislature to levy a tax for payment of the judgment.[477] Starting with the rule that the judicial power essentially involves the right to enforce the results of its exertion,[478] the Court proceeded to hold that it applied with the same force to States as to other litigants,[479] and to consider appropriate remedies for the enforcement of its authority. In this connection, Chief Justice White declared: "As the powers to render the judgment and to enforce it arise from the grant in the Constitution on that subject, looked at from a generic point of view, both are federal powers and, comprehensively considered, are sustained by every authority of the federal government, judicial, legislative, or executive, which may be appropriately exercised."[480] The Court, however, left open the question of its power to enforce the judgment under existing legislation and scheduled the case for reargument at the next term, but in the meantime West Virginia accepted the Court's judgment and entered into an agreement with Virginia to pay it.[481]

Controversies Between a State and Citizens of Another State

[Pg 596]

The decision in Chisholm *v.* Georgia[482] that this category of cases included equally those where a State was a party defendant provoked the proposal and ratification of the Eleventh Amendment, and since then controversies between a State and citizens of another State have included only those cases where the State has been a party plaintiff or has consented to be sued. As a party plaintiff, a State may bring actions against citizens of other States to protect its legal rights or as *parens patriae* to protect the health and welfare of its citizens. In general, the Court has tended to construe strictly this grant of judicial power which simultaneously comes within its original jurisdiction by perhaps an even more rigorous application of the concepts of cases and controversies than that in cases between private parties.[483] This it does by holding rigorously to the rule that all the party defendants be citizens of other States,[484] and by adhering to Congressional distribution of its original jurisdiction concurrently with that of other federal courts.[485]

NON-JUSTICIABLE CONTROVERSIES

The Supreme Court has refused to take jurisdiction of a number of suits brought by States because of the lack of a justiciable controversy. In cases like Mississippi *v.* Johnson[486] and Georgia *v.* Stanton,[487] the political nature of the controversy constituted the dominant reason. In others, like Massachusetts *v.* Mellon[488] and Florida *v.* Mellon,[489] the political issue, though present, was accompanied by the inability of a State to sue in behalf of its citizens as *parens patriae* to contest the validity of an act of Congress when in national matters the National Government bore the relation of *parens patriae* to the same persons as citizens of the United States. Moreover, a State may not bring a suit in its own name for the benefit of particular persons.[490]

JURISDICTION CONFINED TO CIVIL CASES

[Pg 597]

In Cohens *v.* Virginia[491] there is a dictum to the effect that the original jurisdiction of the Supreme Court does not include suits between a State and its own citizens. Long afterwards, the Supreme Court dismissed an action for want of jurisdiction because the record did not show the corporation against which the suit was brought was chartered in another State.[492] Subsequently the Court has ruled that it will not entertain an action by a State to which its citizens are either parties of record, or would have to be joined because of the effect of a judgment upon them.[493] In his dictum in Cohens *v.* Virginia, Chief Justice Marshall also indicated that perhaps no jurisdiction existed over suits by States to enforce their penal laws.[494] Sixty-seven years later the Court wrote this dictum into law in Wisconsin *v.* Pelican Insurance Co.[495] Here Wisconsin sued a Louisiana corporation to recover a judgment rendered in its favor by one of its own courts. Relying partly on the rule of international law that the courts of no country execute the penal laws of another, partly upon the 13th section of the Judiciary Act of 1789 which vested the Supreme Court with exclusive jurisdiction of controversies of a civil nature where a State is a party, and partly on Justice Iredell's dissent in Chisholm *v.* Georgia,[496] where he confined the term "controversies" to civil suits, Justice Gray ruled for the Court that for purposes of original jurisdiction, "controversies between a State and citizens of another State" are confined to civil suits.[497]

SUITS BY A STATE AS *PARENS PATRIAE*; JURISDICTION DECLINED

The distinction between suits brought by States to protect the welfare of the people as a whole and suits to protect the private interests of individual citizens is not easily drawn. In Oklahoma ex rel. Johnson *v.* Cook,[498] the Court dismissed a suit brought by Oklahoma to enforce the statutory liability of a stockholder of a State bank then in the process of liquidation through a State officer. Although the State was vested with legal title to the assets under the liquidation

procedure, the State's action was independent of that and it was acting merely for the benefit of the bank's creditors and depositors. A generation earlier the Court refused jurisdiction of [Pg 598] Oklahoma *v.* Atchison, Topeka & Santa Fe R. Co.[499] in which Oklahoma sought to enjoin unreasonable rate charges by a railroad on the shipment of specified commodities, inasmuch as the State was not engaged in shipping these commodities and had no proprietary interest in them.

SUITS BY A STATE AS *PARENS PATRIAE*; JURISDICTION ACCEPTED

Georgia *v.* Evans,[500] on the other hand, presents the case of a clear State interest as a purchaser of materials. Here, Georgia sued certain asphalt companies for treble damages under the Sherman Act arising allegedly out of a conspiracy to control the prices of asphalt of which Georgia was a large purchaser. The matter of Georgia's interest was not contested and did not arise. The case is primarily significant for the ruling that a State is a person under section 7 of the Sherman Act authorizing suits by "any person" for treble damages arising out of violations of the Sherman Act. A less clear-cut case, and one not altogether in accord with Oklahoma *v.* Atchison, Topeka & Santa Fe R. Co.,[501] is Georgia *v.* Pennsylvania R. Co.[502] in which the State, suing as *parens patriae* and in its proprietary capacity, was permitted to file a bill of complaint against twenty railroads for injunctive relief from freight rates, allegedly discriminatory against the State and asserted to have been fixed through coercive action by the northern roads against the southern roads in violation of the 16th section of the Clayton Act. Although the rights of Georgia were admittedly based on federal laws, the Court indicated that the enforcement of the Sherman and Clayton acts depends upon civil as well as criminal sanctions. Moreover, the interests of a State for purposes of invoking the original jurisdiction of the Supreme Court were held, as in Georgia *v.* Tennessee Copper Co.,[503] not to be confined to those which are proprietary but to "embrace the so-called 'quasi-sovereign' interests which * * * are 'independent of and behind the titles of its citizens, in all the earth and air within its domain.'"[504]

GEORGIA *v.* PENNSYLVANIA RAILROAD

In the course of his opinion Justice Douglas, speaking for a narrowly divided Court, treated the alleged injury to Georgia as a proprietor as a "makeweight," and remarked that the "original jurisdiction of this Court is one of the mighty instruments which the framers of the Constitution provided so that adequate machinery might be available for the peaceful settlement of disputes [Pg 599] between States and between a State and citizens of another State * * * Trade barriers, recriminations, intense commercial rivalries had plagued the colonies. The traditional methods available to a sovereign for the settlement of such disputes were diplomacy and war. Suit in this Court was provided as an alternative."[505] Discriminatory freight rates, said he, may cause a blight no less serious than noxious gases in that they may arrest the development of a State and put it at a competitive disadvantage. "Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. Georgia's interest is not remote; it is immediate. If we denied Georgia as *parens patriae* the right to invoke the original jurisdiction of the Court in a matter of that gravity, we would whittle the concept of justiciability down to the stature of minor or conventional controversies. There is no warrant for such a restriction."[506]

Controversies Between Citizens of Different States

THE MEANING OF "STATE"; HEPBURN *v.* ELLZEY

Despite stringent definitions of the words "citizen" and "State" and strict statutory safeguards against abuse of the jurisdiction arising out of it, the diversity of citizenship clause is one of the more prolific sources of federal jurisdiction. In Hepburn *v.* Ellzey,[507] Chief Justice Marshall, speaking for the Court, confined the meaning of the word "State," as used in the Constitution, to "the members of the American confederacy" and ruled that a citizen of the District of Columbia could not sue a citizen of Virginia on the basis of diversity of citizenship. In the course of his brief opinion Marshall owned that it was "extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every State in the union should be closed" to the residents of the District, but the situation, he indicated, was "a subject for legislative, not for judicial consideration."[508] The same restrictive rule was later extended to citizens of territories of the United States.[509]

Extension of Jurisdiction by the Act of 1940 [Pg 600]

Whether Chief Justice Marshall had in mind a constitutional amendment or an act of Congress when he spoke of legislative consideration is not clear. At any rate, not until 1940 did Congress enact a statute to confer on federal district courts jurisdiction of civil actions (involving no federal question) "between citizens of different States, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska and any State or Territory."[510] In National Mutual Insurance Co. *v.* Tidewater Transfer Co.,[511] this act was sustained by five judges, but for widely different

reasons. Justice Jackson, in an opinion in which Justices Black and Burton joined, was for adhering to the rule that the District of Columbia is not a State, but held the act to be valid nevertheless because of the exclusive and plenary power of Congress to legislate for the District and its broad powers under the necessary and proper clause.[512] Justice Rutledge, in a concurring opinion, in which Justice Murphy joined, agreed that the act was valid and asserted that the Ellzey case should be overruled.[513] Chief Justice Vinson in a dissent in which Justice Douglas concurred[514] and Justice Frankfurter in a dissent in which Justice Reed joined[515] thought the act invalid and would have adhered to the rule in the Ellzey case. The net result is that the Ellzey case still stands insofar as it holds that the District of Columbia is not a State, but that under Congressional enactment citizens of the District may now sue citizens of States in the absence of a federal question, on the basis of no statable constitutional principle, but through the grace of what Justice Frankfurter called "conflicting minorities in combination."[516]

CITIZENSHIP, NATURAL PERSONS

For purposes of diversity jurisdiction State citizenship is determined by domicile or residence, for the determination of which various tests have been stated: removal to a State, acquiring real estate there, and paying taxes;[517] residence in a State for a considerable time;[518] and removal to a State with the intent of making it one's home for an indefinite period of time.[519] Where citizenship is dependent on intention, acts may disclose it more satisfactorily than declarations.[520] The fact that removal to another State is motivated solely by a desire to acquire citizenship for diversity purposes does not oust the federal courts of jurisdiction so long as the new [Pg 601] residence is indefinite or the intention to reside there indefinitely is shown.[521] But a mere temporary change of domicile for the purpose of suing in a federal court is not sufficient to effectuate a change in citizenship.[522] Exercise of the right of suffrage is a conclusive test of citizenship in a State, and the acquisition of the right to vote without exercising it is sufficient to establish citizenship.[523]

CITIZENSHIP, CORPORATIONS

In Bank of United States *v.* Deveaux,[524] Chief Justice Marshall declared: "That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and consequently cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name." He proceeded then to look beyond the corporate entity and hold that the bank could sue under the diversity provisions of the Constitution and the Judiciary Act of 1789 because the members of the bank as a corporation were citizens of one State and Deveaux was a citizen of another. This holding was reaffirmed a generation later, in Commercial and Railroad Bank of Vicksburg *v.* Slocomb,[525] at a time when corporations were coming to play a more important role in the national economy. The same rule, combined with the rule that in a diversity proceeding all the persons on one side of a suit must be citizens of different States from all persons on the other side,[526] could in the course of time have closed the federal courts in diversity cases to the larger corporations having stockholders in all or most of the States.

If such corporations were to have the benefits of diversity jurisdiction, either the Deveaux or the Strawbridge rule would have to yield. By 1844, only four years after the Slocomb Case, the interests of corporations in docketing cases in the federal courts as citizens of different States appeared more important to the Supreme Court than the weight to be attached to precedents, even those set by John Marshall, and in Louisville, Cincinnati, and Charleston R. Co. *v.* Letson,[527] both the Deveaux and Slocomb cases were overruled. After elaborate arguments by counsel, the Court, speaking through Justice Wayne, held that "a corporation created by and doing [Pg 602] business in a particular State, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same State, for the purposes of its incorporation, capable of being treated as a citizen of that State, as much as a natural person."[528]

In the Letson Case the emphasis is upon the place of incorporation of a joint stock company as something completely separate from the citizenship of its members. In succeeding cases, however, this fiction of corporate personality has undergone modifications so that a corporation, though still a citizen of the State where it is chartered, is such by virtue of the jurisdictional fiction that all the stockholders are citizens of the State which by its laws created the corporation.[529] This presumption is conclusive and irrebuttable and resembles in many ways the English jurisdictional fiction that for providing remedies for wrongs done in the Mediterranean "the Island of Minorca was at London, in the Parish of St. Mary Le Bow in the Ward of Cheap."[530] This fiction creates a logical anomaly, which the Letson rule had avoided, in those cases in which a stockholder of one State sues a corporation chartered in another State. Although all stockholders are conclusively presumed to be citizens of the State where the corporation is chartered, an individual stockholder from a different State may nevertheless aver his actual citizenship so as to maintain a diversity suit against the corporation.[531] These rulings lead to some extraordinary results, as John Chipman Gray has indicated: "The Federal courts take cognizance of a suit by a stockholder who is a citizen, say, of Kentucky, against the corporation in which he owns stock, which has been incorporated, say, by Ohio. Since he is a stockholder of an Ohio corporation, the court conclusively presumes that he is a citizen of Ohio, but if he were a

citizen of Ohio, he could not sue an Ohio corporation in the Federal courts. Therefore the court considers that he is and he is not at the same time a citizen of Ohio, and it would have no jurisdiction unless it considered that he both was and was not at the same time a citizen both of Ohio and Kentucky."[532]

The Black and White Taxicab Case

[Pg 603]

These fictions of corporate citizenship make it easy for corporations to go into the federal courts on matters of law that are purely local in nature, and they have availed themselves of the opportunity to the full. For a time the Supreme Court tended to look askance at collusory incorporations and the creation of dummy corporations for purposes of getting cases into the federal courts,[533] but as a result of the Kentucky Taxicab Case,[534] decided in 1928, the limitation of collusion lost much of its force. Here the Black and White company, a Kentucky corporation, dissolved itself and obtained a charter as a Tennessee corporation in order to get the benefit of a federal rule which would condone an exclusive contract with a railroad to park its cabs in and around a station whereas the State rule forbade such contracts. The only change made was of the State of incorporation. The name of the company, its officers, and shareholders, and the location of its business all remained the same. Yet no collusion was found, and the company received the benefit of the federal rule—a measure of salvation by being born again in Tennessee. The odd result in the Taxicab Case, whereby citizens of Kentucky could conduct business there contrary to State law with the sanction of the Supreme Court of the United States, did not stem solely from the rule that the citizenship of a corporation is determined by the State of its incorporation, but also from this rule combined with the rule of Swift *v.* Tyson,[535] another by-product of diversity jurisdiction.

THE LAW APPLIED IN DIVERSITY CASES: SWIFT *v.* TYSON

Section 34 of the Judiciary Act of 1789 provided that in diversity cases at common law the laws of the several States should be the rules of decision in the United States courts. However, in Swift *v.* Tyson[536] the Supreme Court refused to apply this section on the ground that it did not extend to contracts or instruments of a commercial nature, the interpretation of which therefore ought to be according to "the general principles and doctrines of jurisprudence"; and while the decisions of State courts on such subjects were entitled to and would receive attention and respect, they could not be conclusive or binding upon the federal courts.[537]

[Pg 604]

Extension of the Tyson Case

For ninety-six years the Court followed this opinion, which the other Justices saw only the evening before it was delivered, and which invoked a precedent of Lord Mansfield on the law of the sea and an epigram of Cicero on the law of nature.[538] Later decisions expanded the concept of matters of a commercial nature so that the scope of the Tyson rule was greatly extended.[539] In many instances the State courts followed their own rules of decision even when contrary to the federal rules, so that Justice Story's attempt at uniformity in matters of a commercial nature paradoxically led to a greater diversity and to the mischief in many instances of two conflicting rules of law in the same State, with the outcome of suits dependent upon whether the case was docketed in a State or a federal court. Simultaneously, the Supreme Court was holding under the Tyson rule that the federal courts were not bound by decisions of State courts interpreting State constitutions[540] or State statutes.[541]

The Tyson Rule Protested

Moreover, decisions extending the scope of the Tyson rule were frequently rendered by a divided Court over the strong protests of dissenters.[542] In Baltimore and Ohio R. Co. *v.* Baugh,[543] which further projected the Tyson rule into the law of torts in disregard of State law, Justice Field wrote a sharp dissent in which he indicated an opinion that the Supreme Court's disregard of State court decisions was unconstitutional. Such disregard, nevertheless, was further aggravated in Kuhn *v.* Fairmont Coal Co.,[544] where the Court held that in construing a contract in a case involving real estate and mining law a federal court was not bound by a West Virginia decision touching the same subject. This evoked a provocative dissent from Justice Holmes, who later wrote one of his more famous dissents in the Black and White Taxicab Company case,[545] in which he asserted emphatically that the Court's extensions of the Tyson rule were unconstitutional.[546]

[Pg 605]

ERIE RAILROAD CO. *v.* TOMPKINS; TYSON OVERRULED

Increasing criticism of the Tyson rule led to a restriction of it in Mutual Life Ins. Co. *v.* Johnson,[547] where the Court chose to apply Virginia decisions rather than exercise its independent judgment on the ground that the case was "balanced with doubt."[548] The federal judicial power was subordinated to what Justice Cardozo called "a benign and prudent comity."[549] Four years later, and without further preparation other than a change in two of the Justices, the Court overturned Swift *v.* Tyson and its judicial progeny in Erie Railroad Co. *v.* Tompkins,[550] in an

opinion by Justice Brandeis which is remarkable in a number of ways. In the first place, it reversed a ninety-six year old precedent which counsel had not questioned; secondly, for the first and only time in American constitutional history, it held action of the Supreme Court itself to have been unconstitutional, to wit, action taken by it in reliance on its interpretation of the 34th section of the Judiciary Act of 1789, a question which also was not before the Court; and thirdly, it completely ignored the power of Congress under the commerce clause, as well as its power to prescribe rules of decision for the federal courts in the cases enumerated in article III. [Pg 606]

Like the Fairmont Coal and Taxicab cases, the Tompkins Case presented the possibility of a head-on conflict between State and federal rules of decision. Tompkins was seriously injured by a passing freight train while he was walking along the railroad's right of way in Pennsylvania. As a citizen of Pennsylvania, Tompkins could have sued in that State, but he could also have sued in the federal district court in Pennsylvania, or in New York because the railroad was incorporated in the latter State. He elected to sue in the federal court for the southern district of New York, where he obtained a verdict for $30,000 after the trial judge had ruled that the applicable law did not preclude recovery. The circuit court of appeals affirmed the judgment because it thought it unnecessary to consider whether the law of Pennsylvania precluded recovery, inasmuch as the question was one of general law to be decided by the federal courts in the exercise of their independent judgment. Citing Warren's discovery that Swift *v.* Tyson was an erroneous interpretation of the Judiciary Act of 1789, criticism of the Tyson doctrine both on and off the bench, and the political and social defects of the rule in working discriminations against citizens of a State in favor of noncitizens and in producing injustice and confusion, Justice Brandeis declared: "If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely * * * [followed for] nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so. * * * There is, [he continued], 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."[551] After quoting Justice Field and Justice Holmes on the unconstitutionality of the Tyson rule, Justice Brandeis made it clear that the Court was not invalidating § 34 of the Federal Judiciary Act of 1789, but was merely declaring that the Supreme Court and the lower federal courts had, in their application of it, "invaded rights which * * * are reserved by the Constitution to the several States."[552]

Justice Butler, joined by Justice McReynolds, concurred in the result, because in his view Tompkins was not entitled to damages under general law, but he deprecated the reversal of Swift *v.* Tyson. He also objected to the decision of the constitutional issue as unnecessary.[553] Justice Reed likewise concurred, but thought it questionable to raise the constitutional issue. "If the opinion, [said he], commits this Court to the position that the Congress is without power to declare what rules of substantive law shall govern the federal courts, that conclusion also seems questionable."[554] [Pg 607]

Extension of the Tompkins Rule

Since 1938 the federal courts have been most assiduous in following the decisions of the State courts in diversity cases. The decisions followed, moreover, include not only those of the highest State courts, but those also of intermediate courts. In West *v.* American Telephone and Telegraph Co.[555] the Supreme Court held that a decision of an Ohio county court of appeals which the Supreme Court of the State had declined to review was binding on the lower federal courts regardless of the desirability of the rule of the decision or of the belief that the highest court of the State might establish a different rule in future litigation. In Fidelity Union Trust Co. *v.* Field[556] the Court went even farther and ruled that the lower courts were bound to follow the decisions of two chancery courts in New Jersey although there had been no appeal to the highest State court, and obviously other New Jersey courts were not bound by the decisions of two vice-chancellors. The anomaly of this decision was partially removed in King *v.* Order of United Commercial Travelers,[557] where the Court held that the federal courts were not bound by the decision of a court of first instance of South Carolina, which was the only decision applicable to the interpretation of the insurance policy in dispute. Nor is this the whole story. In the event of a State Supreme Court's reversal of its earlier decisions the federal courts are bound by the latest decision. Hence a judgment of a federal district court, correctly applying State law as interpreted by the State's highest court, must be reversed on appeal if the State court in the meantime has reversed its earlier rulings and adopted a contrary interpretation. Though aware of possible complications from this rule, the Court insisted that "until such time as a case is no longer *sub judice*, the duty rests upon the federal courts to apply the Rules of Decision statute in accordance with the then controlling decision of the highest state court."[558]

Although the Rules of Decision Act[559] requires the federal courts to follow State decisions only in civil cases, the application of the Tompkins rule has been extended to suits in equity.[560] In Guaranty Trust Co. *v.* York,[561] the Court held that when a statute of limitations barred recovery in a State court, a federal court sitting in equity could not entertain the suit because of diversity of citizenship. This ruling was based on the express premise that "a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, * * * "[562] It was held to be immaterial, therefore, [Pg 608]

whether statutes of limitations were designated as substantive or procedural. The Tompkins Case, it was said, was not an endeavor to formulate scientific legal terminology. "In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court."[563]

Controversies Between Citizens of the Same State Claiming Lands Under Grants of Different States

This clause was not in the first draft of the Constitution, but was added without objection.[564] Undoubtedly the motivation for this extension of the judicial power was the existence of boundary disputes affecting ten States at the time the Philadelphia Convention met. With the Northwest Ordinance of 1787, the ultimate settlement of boundary disputes between States, and the passing of land grants by States, this clause, never productive of many cases, has become obsolete.[565] [Pg 609]

Controversies Between a State, or the Citizens Thereof, and Foreign States, Citizens or Subjects

The scope of this jurisdiction has been limited both by judicial decisions and the Eleventh Amendment. By judicial application of the Law of Nations a foreign State is immune from suit in the federal courts without its consent,[566] an immunity which extends to suits brought by States of the American Union.[567] Conversely, the Eleventh Amendment has been construed to bar suits by foreign States against a State of the American Union.[568] Consequently, the jurisdiction conferred by this clause comprehends only suits brought by a State against citizens or subjects of foreign States, by foreign States against American citizens, citizens of a State against the citizens or subjects of a foreign State, and by aliens against citizens of a State.

SUITS BY FOREIGN STATES

The privilege of a recognized foreign State to sue in the courts of a foreign State upon the principle of comity is recognized by both International Law and American Constitutional Law.[569] To deny a sovereign this privilege "would manifest a want of comity and friendly feeling."[570] Although national sovereignty is continuous, a suit in behalf of a national sovereign can be maintained in the courts of the United States only by a government which has been recognized by the political branches of our own government as the authorized government of the foreign State.[571] Once a foreign government avails itself of the privilege of suing in the courts of the United States, it subjects itself to the procedure and rules of decision governing those courts and accepts whatever liabilities the Court may decide to be a reasonable incident of bringing the suit.[572] Also, certain of the benefits extending to the domestic sovereign do not extend to a foreign sovereign suing in the courts of the United States. Thus a foreign sovereign does not receive the benefit of the rule which exempts the United States and its member States from the operation of the statute of limitations, because considerations of public policy back of the rule are regarded as absent.[573] [Pg 610]

Indian Tribes

Within the terms of article III, an Indian tribe is not a foreign State and hence cannot sue in the courts of the United States. This rule was applied in the case of Cherokee Nation *v.* Georgia,[574] where Chief Justice Marshall conceded that the Cherokee Nation was a State, but not a foreign State, being a part of the United States and dependent upon it. Other passages of the opinion specify the elements essential to a foreign State for purposes of jurisdiction, such as sovereignty and independence.

NARROW CONSTRUCTION OF THE JURISDICTION

As in cases of diversity jurisdiction, suits brought to the federal courts under this category must clearly state in the record the nature of the parties. As early as 1809 the Supreme Court ruled that a federal court could not take jurisdiction of a cause where the defendants were described in the record as "late of the district of Maryland," but were not designated as citizens of Maryland, and plaintiffs were described as aliens and subjects of the United Kingdom.[575] The meticulous care manifested in this case appeared twenty years later when the Court narrowly construed section 11 of the Judiciary Act of 1789, vesting the federal courts with jurisdiction where an alien was a party, in order to keep it within the limits of this clause. The judicial power was further held not to extend to private suits in which an alien is a party, unless a citizen is the adverse party.[576] This interpretation was extended in 1870 by a holding that if there is more than one plaintiff or defendant, each plaintiff or defendant must be competent to sue or liable to suit.[577] These rules, however, do not preclude a suit between citizens of the same State if the plaintiffs are merely nominal parties and are suing on behalf of an alien.[578] [Pg 611]

Clause 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.

The Original Jurisdiction of the Supreme Court

AN AUTONOMOUS JURISDICTION

Acting on the assumption that its existence is derived directly from the Constitution, the Supreme Court has held since 1792 that its original jurisdiction flows directly from the Constitution and is therefore self-executing without further action by the Congress. In the famous case of Chisholm *v.* Georgia[579] the Supreme Court entertained an action of assumpsit against Georgia by a citizen of another State. Although the 13th section of the Judiciary Act of 1789 invested the Supreme Court with original jurisdiction in suits between a State and citizens of another State, it did not authorize actions of assumpsit in such cases, nor did it prescribe forms of process for the Court in the exercise of original jurisdiction. Over the dissent of Justice Iredell, the Court in opinions by Chief Justice Jay and Justices Blair, Wilson, and Cushing, sustained its jurisdiction and its power, in the absence of Congressional enactments, to provide forms of process and rules of procedure. So strong were the States' rights sentiments of the times that Georgia refused to appear as a party litigant, and other States were so disturbed that the Eleventh Amendment was proposed forthwith and ratified. This amendment, however, did not affect the direct flow of original jurisdiction to the Court, which continued to take jurisdiction of cases to which a State was party plaintiff and of suits between States without specific provision by Congress for forms of process. [Pg 612] By 1861 Chief Justice Taney could enunciate with confidence, after a review of the precedents, that in all cases where original jurisdiction is given by the Constitution, the Supreme Court has authority "to exercise it without further act of Congress to regulate its powers or confer jurisdiction, and that the Court may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice."[580]

CANNOT BE ENLARGED; MARBURY *v.* MADISON

Since the original jurisdiction is derived directly from the Constitution, it follows logically that Congress can neither restrict it nor, as was held in the great case of Marbury *v.* Madison,[581] enlarge it. In holding void the 13th section of the Judiciary Act of 1789, which was interpreted as giving the Court power to issue a writ of mandamus in an original proceeding, Chief Justice Marshall declared that "a negative or exclusive sense" had to be given to the affirmative enunciation of the cases to which original jurisdiction extends.[582] While the rule that the Supreme Court is vested with original jurisdiction by the Constitution and that this jurisdiction cannot be extended or restricted deprives Congress of any power to define it, it allows a considerable latitude of interpretation to the Court itself. In some cases, as in Missouri *v.* Holland,[583] the Court has manifested a tendency toward a liberal construction of original jurisdiction; in others, as in Massachusetts *v.* Mellon,[584] it has placed a narrow construction upon the grant through the device of a restrictive interpretation of cases and controversies; and in still other cases, as in California *v.* Southern Pacific Co.,[585] it has stated that its original jurisdiction "is limited and manifestly to be sparingly exercised, and should not be expanded by construction."

CONCURRENT JURISDICTION OF THE LOWER FEDERAL COURTS [Pg 613]

Although Congress can neither enlarge nor restrict the original jurisdiction of the Supreme Court, it may vest concurrent jurisdiction in the lower federal courts in cases over which the Supreme Court has original jurisdiction.[586] Thus among the grounds given for the decision in Wisconsin *v.* Pelican Insurance Co.,[587] that the Court had no original jurisdiction of an action by a State to enforce a judgment for a pecuniary penalty awarded by one of its own courts, was the provision of the 13th section of the Judiciary Act of 1789[588] that "the Supreme Court shall have exclusive jurisdiction of controversies of a civil nature, where a State is a party, except between a State and its citizens; and except also between a State and citizens of other States, or aliens, in which latter case it shall have original but not exclusive jurisdiction." Speaking of that act with particular reference to this section, Justice Gray declared that it "was passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning."[589] In cases affecting consuls, moreover, the original jurisdiction of the Supreme Court is shared concurrently with State courts unless Congress by positive action makes such jurisdiction exclusive.[590]

The Appellate Jurisdiction of the Supreme Court [Pg 614]

SUBJECT TO LIMITATION BY CONGRESS

Unlike its original jurisdiction, the appellate jurisdiction of the Supreme Court is subject to control by Congress in the exercise of the broadest discretion. Although the provisions of article III seem, superficially at least, to imply that its appellate jurisdiction would flow directly from the Constitution until Congress should by positive enactment make exceptions to it, rulings of the Court since 1796 establish the contrary rule. Consequently, before the Supreme Court can

exercise appellate jurisdiction, an act of Congress must have bestowed it, and affirmative bestowals of jurisdiction are interpreted as exclusive in nature so as to constitute an exception to all other cases. This rule was first applied in Wiscart *v.* Dauchy[591] where the Court held that in the absence of a statute prescribing a rule for appellate proceedings, the Court lacked jurisdiction. It was further stated that if a rule were prescribed, the Court could not depart from it. Fourteen years later Chief Justice Marshall observed for the Court that its appellate jurisdiction is derived from the Constitution, but proceeded nevertheless to hold that an affirmative bestowal of appellate jurisdiction by Congress, which made no express exceptions to it, implied a denial of all others.[592]

The McCardle Case

The power of Congress to make exceptions to the court's appellate jurisdiction has thus become, in effect, a plenary power to bestow, withhold, and withdraw appellate jurisdiction, even to the point of its abolition. And this power extends to the withdrawal of appellate jurisdiction even in pending cases. In the notable case of Ex parte McCardle,[593] a Mississippi newspaper editor who was being held in custody by the military authorities acting under the authority of the Reconstruction Acts filed a petition for a writ of *habeas corpus* in the circuit court for Southern Mississippi. He alleged unlawful restraint and challenged the validity to the Reconstruction statutes. The writ was issued, but after a hearing the prisoner was remanded to the custody of the military authorities. McCardle then appealed to the Supreme Court which denied a motion to dismiss the appeal, heard arguments on the merits of the case, and took it under advisement. Before a conference could be held, Congress, fearful of a test of the Reconstruction Acts, enacted a statute withdrawing appellate jurisdiction from the Court in certain *habeas corpus* proceedings.[594] The Court then proceeded to dismiss the appeal for want of jurisdiction. Chief Justice Chase, [Pg 615] speaking for the Court said: "Without jurisdiction the Court cannot proceed at all in any cause. Jurisdiction is the power to declare the law and when it ceases to exist, the only function remaining to the Court is that of announcing the fact and dismissing the cause."[595]

Although the McCardle Case goes to the ultimate in sustaining Congressional power over the court's appellate jurisdiction and although it was born of the stresses and tensions of the Reconstruction period, it has been frequently reaffirmed and approved.[596] The result is to vest an unrestrained discretion in Congress to curtail and even abolish the appellate jurisdiction of the Supreme Court, and to prescribe the manner and forms in which it may be exercised. This principle is well expressed in The "Francis Wright"[597] where the Court sustained the validity of an act of Congress which limited the court's review in admiralty cases to questions of law appearing on the record. A portion of the opinion is worthy of quotation: "Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to reexamination and review, while others are not. To our minds it is no more unconstitutional to provide that issues of fact shall not be retried in any case, than that neither issues of law nor fact shall be retried in cases where the value of the matter in dispute is less than $5,000. The general power to regulate implies the power to regulate in all things. The whole of a civil appeal may be given, or a part. The constitutional requirements are all satisfied if one opportunity is had for the trial of all parts of a case. Everything beyond that is a matter of legislative discretion."[598]

The Power of Congress To Regulate the Jurisdiction of the Lower Federal Courts [Pg 616]

MARTIN *v.* HUNTER'S LESSEE

The power of Congress to vest, withdraw, and regulate the jurisdiction of the lower federal courts is derived from the power to create tribunals under article I, the necessary and proper clause, and the clause in article III, vesting the judicial power in the Supreme Court and such inferior courts as "the Congress may from time to time ordain and establish." Balancing these provisions, however, are the phrases in article III to the effect that the judicial power "shall be vested" in courts and "shall extend" to nine classes of cases and controversies and the question of what is the force of the word "shall." In Martin *v.* Hunter's Lessee,[599] Justice Story declared obiter that it was imperative upon Congress to create inferior federal courts and vest in them all the jurisdiction they were capable of receiving. This dictum was criticized by Justice Johnson in his dissent, in which he contended that the word "shall" was used "in the future sense," and had "nothing imperative in it."[600] And for that matter in another portion of his opinion Justice Story expressly recognized that Congress may create inferior courts and "parcel out such jurisdiction among such courts, from time to time at their own pleasure";[601] and in his Commentaries he took a broad view of the power of Congress to regulate jurisdiction.[602]

PLENARY POWER OF CONGRESS OVER JURISDICTION

Neither legislative construction nor judicial interpretation has sustained Justice Story's position in Martin *v.* Hunter's Lessee. The Judiciary Act of 1789, which was a contemporaneous interpretation of the Constitution by the Congress, rests on the assumption of a broad discretion on the part of Congress to create courts and to grant jurisdiction to and withhold it from them.

This act conferred original jurisdiction upon the district and circuit courts in certain cases, but by no means all they were capable of receiving. Thus suits at the common law to which the United States was a party were limited by the amount in controversy. Except for offenses against the United States, seizures and forfeitures made under the impost, navigation, or trade laws of the United States, and suits by aliens under International Law or treaties, that whole group of cases involving the Constitution, laws, and treaties of the United States was withheld from the jurisdiction of the district and circuit courts,[603] with the result that original jurisdiction in these cases was exercised by the State courts subject to appeal to the Supreme Court under section 25. Jurisdiction was vested in the district courts over admiralty and maritime matters and in the circuit courts over suits between citizens of different States where the amount exceeded $500, or suits to which an alien was a party.[604] The act of 1789 empowered the courts to issue writs, to require parties to produce testimony, to punish contempts, to make rules, and to grant stays of execution.[605] Finally, equity jurisdiction was limited to those cases where a "plain, adequate, and complete remedy" could not be had at law.[606] [Pg 617]

This care for detail in conferring jurisdiction upon the inferior courts and vesting them with ancillary powers in order to render such jurisdiction effective is of the utmost significance in the later development of the law pertaining to Congressional regulation of jurisdiction, inasmuch as it demonstrates conclusively that a majority of the members of the first Congress regarded positive action on the part of Congress to be necessary before jurisdiction and judicial powers could be exercised by courts of its own creation. Ten years later this practical construction of article III was accepted by the Supreme Court in Turner *v.* Bank of North America.[607] The case involved an attempt to recover on a promissory note in a diversity case contrary to § 11 of the act of 1789 which forbade diversity suits involving assignments unless the suit was brought before the assignment was made. Counsel for the bank argued that the circuit courts were not inferior courts and that the grant of judicial power by the Constitution was a direct grant of jurisdiction. This argument evoked questions from Chief Justice Ellsworth and the following statement from Justice Chase: "The notion has been frequently entertained, that the federal courts derive their power immediately from the Constitution; but the political truth is, that the judicial power (except in a few specified instances) belongs to Congress. If Congress has given the power to this Court, we possess it, not otherwise; and if Congress has not given the power to us, or to any other court, it still remains at the legislative disposal. Besides, Congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal courts, to every subject, in every form, which the Constitution might warrant."[608] The Court applied § 11 of the Judiciary Act and ruled that the circuit court lacked jurisdiction. [Pg 618]

Eight years later Chief Justice Marshall in distinguishing between common law and statutory courts declared that "courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction."[609] This rule was reaffirmed in the famous case of United States *v.* Hudson and Goodwin[610] on the assumption that the power of Congress to create inferior courts necessarily implies "the power to limit the jurisdiction of those Courts to particular objects."[611] After pointing to the original jurisdiction which flows immediately from the Constitution, Justice Johnson asserted: "All other Courts created by the general Government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general Government will authorize them to confer."[612] To the same affect is Rhode Island *v.* Massachusetts[613] where Justice Baldwin declared that "the distribution and appropriate exercise of the judicial power must therefore be made by laws passed by Congress and cannot be assumed by any other department * * *"

A more sweeping assertion of Congressional power over jurisdiction was made by the Supreme Court in Cary *v.* Curtis,[614] which bears more directly upon the issue than some of the earlier cases. Here counsel had argued that a statute which made final the decisions of the Secretary of the Treasury in tax disputes was unconstitutional in that it deprived the federal courts of the judicial power vested in them by the Constitution. In reply to this argument the Court speaking through Justice Daniel declared: "The judicial power of the United States * * * is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) * * * and of investing them with jurisdiction, either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." Continuing, Justice Daniel said: "It follows then that courts created by statute, must look to the statute as the warrant for their authority; certainly they cannot go beyond the statute, and assert an authority with which they may not be invested by it, or which may clearly be denied to them."[615] [Pg 619]

The principles of Cary *v.* Curtis were reiterated five years later in Sheldon *v.* Sill[616] where the validity of § 11 of the Judiciary Act of 1789 was directly questioned. The assignee of a negotiable instrument filed a suit in a circuit court even though no diversity of citizenship existed as between the original parties to the mortgage. The circuit court entertained jurisdiction in spite of the prohibition against such suits in § 11 and ordered a sale of the property in question. On appeal to the Supreme Court, counsel for the assignee contended that § 11 was void because the right of a citizen of any State to sue citizens of another in the federal courts flowed directly from article III and Congress could not restrict that right. The Supreme Court unanimously rejected

these contentions and held that since the Constitution had not established the inferior courts or distributed to them their respective powers, and since Congress had the authority to establish such courts, it could define their jurisdiction and withhold from any court of its own creation jurisdiction of any of the enumerated cases and controversies in article III.[617] Sheldon *v.* Sill has been cited, quoted, and reaffirmed many times.[618] Its effect and that of the cases following it is that as regards the jurisdiction of the lower federal courts two elements are necessary to confer jurisdiction: first, the Constitution must have given the courts the capacity to receive it, and second, an act of Congress must have conferred it. The manner in which the inferior federal courts acquire jurisdiction, its character, the mode of its exercise, and the objects of its operation are remitted without check or limitation to the wisdom of the legislature.[619]

JUDICIAL POWER UNDER THE EMERGENCY PRICE CONTROL ACT

[Pg 620]

The plenary power of Congress to withhold and restrict jurisdiction was given renewed vitality by the Emergency Price Control Act of 1942[620] and the cases arising therefrom. Fearful that the price control program might be effectively nullified by injunctions, Congress provided for a special court and special procedures for contesting the validity of price regulations. In Lockerty *v.* Phillips[621] the Supreme Court sustained the power of Congress to confine equity jurisdiction, to restrain enforcement of the act to the specially created Emergency Court of Appeals, with appeal to the Supreme Court. The Court went much farther than this in Yakus *v.* United States, [622] and held that the provision of the act conferring on the Emergency Court of Appeals and the Supreme Court exclusive jurisdiction to determine the validity of any regulation or order, and providing that no court should have jurisdiction or power to consider the validity of any regulation, precluded the plea of invalidity of such a regulation as a defense to its violation in a criminal proceeding in a district court. Although Justice Rutledge protested in his dissent that this provision of the act conferred jurisdiction on the district courts from which essential elements of the judicial power had been abstracted,[623] Chief Justice Stone declared for the majority that the provision presented no novel constitutional issue.

LEGISLATIVE CONTROL OVER WRITS

[Pg 621]

The authority of Congress to regulate the jurisdiction of the lower federal courts includes that of controlling the power of the courts to issue writs in cases where they have jurisdiction and to regulate other ancillary powers generally.[624] Among some of the more notable restrictions in this regard are the limitations on the power of courts to issue injunctions, particularly in the field of taxation and labor disputes. By the act of March 2, 1867,[625] Congress provided that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." There have never been any constitutional doubts concerning this provision, which was strictly applied for many years[626] until 1916 when the Supreme Court began to make exceptions[627] which in the later cases[628] made the provision so inefficacious that by October, 1935, more than 1600 suits had been filed to restrain the collection of processing taxes under the Agricultural Adjustment Act.[629] None of these cases, however, raises any issue other than that of statutory interpretation, and since 1936 the Court has interpreted the exceptions to the statute somewhat more strictly.[630]

Injunctions in Labor Disputes; the Norris-LaGuardia Act

The Norris-LaGuardia Act of 1932[631] is significant for its restrictions on the powers of the federal courts to issue injunctions in labor disputes in the form of requirements for hearings followed by findings that unlawful acts are threatened and will be committed unless restrained, or if already committed will be continued; that substantial injury to the property of complainants will ensue; that as to the relief granted greater injury will be inflicted upon complainants by denying relief than will be inflicted on defendants by granting it; that the complainants have no adequate remedy at law; and, finally, that the public officials charged with the protection of complainants' property are either unable or unwilling to do so. This act has been scrupulously [Pg 622] applied by the Supreme Court, which has implicitly sustained its constitutionality by construing its restrictions liberally[632] in every case except United States *v.* United Mine Workers,[633] where it was held that the statute did not apply to suits brought by the United States to enjoin a strike in the coal industry while the Government technically was operating the mines.

JUDICIAL POWER EQUATED WITH DUE PROCESS OF LAW

Although the cases point to a plenary power in Congress to withhold jurisdiction from the inferior courts and to withdraw it at any time after it has been conferred, even as applied to pending cases, there are a few cases in addition to Martin *v.* Hunter's Lessee[634] which slightly qualify the cumulative effect of this impressive array of precedents. As early as 1856, the Supreme Court in Murray *v.* Hoboken Land and Improvement Co.[635] distinguished between matters of private right which from their nature were the subject of a suit at the common law, equity, or admiralty and cannot be withdrawn from judicial cognizance and those matters of public right which, though susceptible of judicial determination, did not require it and which might or might not be brought within judicial cognizance. Seventy-seven years later the Court elaborated this

distinction in Crowell *v.* Benson,[636] which involved the finality to be accorded administrative findings of jurisdictional facts in compensation cases. In holding that an employer was entitled to a trial *de novo* of the constitutional jurisdictional facts of the matter of the employer-employee relationship and of the occurrence of the injury in interstate commerce, Chief Justice Hughes, speaking for the majority fused the due process clause of Amendment V and article III, but emphasized that the issue ultimately was "rather a question of the appropriate maintenance of the Federal judicial power," and "whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency * * * for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend." To do so, contended the Chief Justice, "would be to sap the judicial power as it exists under the Federal Constitution and to establish a government of a bureaucratic character alien to our system, wherever constitutional rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law."[637]

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JUDICIAL *VERSUS* NONJUDICIAL FUNCTIONS

The power of Congress to confer jurisdiction on the lower federal courts is qualified by the rule that before Congress can vest jurisdiction in the inferior courts, they must have the capacity to receive it. The capacity of the lower judiciary to receive jurisdiction is defined in the enumeration of cases and controversies in article III. Consequently in vesting courts with jurisdiction, Congress cannot go beyond this enumeration.[638] It follows from the rule that constitutional courts can perform only judicial functions that Congress, in vesting courts with jurisdiction, cannot impose upon them nonjudicial duties such as administering pensions,[639] deciding issues subject to later executive or legislative action,[640] rendering advisory opinions, or opinions which are not final and conclusive upon the parties,[641] or taking jurisdiction of matters from which any essential element of the judicial power has been abstracted.[642] To be sure, Congress may clothe some matters of an administrative nature with the mantle of a case or controversy and thereby make it a matter of judicial cognizance, as it has done with naturalization proceedings,[643] the administration of certain laws relating to the expulsion of aliens,[644] the limited administration of funds received from the Government of Mexico to compensate American citizens for claims against that government,[645] and, of course, the traditional administration of bankrupt enterprises through the medium of a receiver.

Federal-State Court Relations

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PROBLEMS RAISED BY CONCURRENCY

The American Federal System with its dual system of courts, exercising concurrent jurisdiction in a number of classes of cases, presents numerous possibilities of inter-court conflicts and interference. Subject to Congressional enactments to the contrary, the State courts have concurrent jurisdiction over all the classes of cases and controversies enumerated in article III except suits between States, those to which the United States is a party, those to which a foreign state is a party, and cases of admiralty and maritime jurisdiction. Even in admiralty cases the State courts, though unable to exercise any portion of admiralty or maritime jurisdiction by delegation or otherwise,[646] may have a concurrent jurisdiction when the same issues assume the form of a case at common law.[647] In addition to conflicts arising out of concurrent jurisdiction, relations between federal and State courts are exposed to other frictions, such as injunctions in one jurisdiction restraining judicial processes in another, the use of the writ of *habeas corpus* by a court of concurrent jurisdiction to release persons in custody of another, and the refusal by State courts to comply with orders of the Supreme Court. The relations between federal and State courts are governed in part by Constitutional Law with respect to State court interference with the federal courts and State court refusal to comply with the judgments of federal tribunals, by statutes as regards interference by federal courts with those of the States, and by self-imposed rules of comity applied for the avoidance of unseemly conflicts.

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DISOBEDIENCE OF SUPREME COURT ORDERS BY STATE COURTS

The refusal of State courts to make returns on writs of errors issued by the Supreme Court has already been noted in connection with the disobedience of the Virginia courts in Martin *v.* Hunter's Lessee[648] and Cohens *v.* Virginia[649] and in that of the Wisconsin court in Ableman *v.* Booth.[650] More spectacular disobedience to federal authority arose out of the Cherokee Indian case involving actions of Georgia and its courts. In the first of these the Supreme Court had issued a writ of error to the Georgia Supreme Court to review the conviction of Corn Tassel for the murder of another Cherokee Indian. The writ was served, but before a hearing could be held Corn Tassel was executed on the day originally set for punishment contrary to the federal law that a writ of error superseded sentence until the appeal was decided. This action ensued as a result of the legislature's approval of the governor's policy that he would permit no interference with Georgia's courts by orders of the Supreme Court and would resist by force any attempt to enforce them with all the forces at his command.[651]

Worcester *v.* Georgia

Two years later Georgia renewed its defiance of the Supreme Court in Worcester *v.* Georgia[652] which involved the conviction of two missionaries for residing among the Indians without a license. The Supreme Court reversed the conviction on the ground that the State had no jurisdiction over the Cherokee reservations and ordered Worcester's discharge in a special mandate to the superior court of Gwinnett County. The State court ignored the mandate and once again the governor of the State announced that he would meet such usurpation by the Supreme Court with determined resistance. Consequently, Worcester and Butler remained in jail until they agreed to abandon further efforts for their discharge by federal authority in the form of a writ of error, whereupon the governor pardoned them on the condition that they leave the State.

CONFLICTS OF JURISDICTION: COMITY

[Pg 626]

Aside from these more dramatic assertions of independence of federal courts, State court interference with the federal judiciary has occurred for the most part in conflicts of jurisdiction which affect only the lower federal courts as courts of concurrent jurisdiction and in attempts to release persons in federal custody. To the extent that this phase of federal-state relations is not governed by statute or the supremacy clause of article VI, it is governed by comity, a self-imposed rule of judicial morality whereby independent tribunals of concurrent or coordinate jurisdiction exercise a mutual restraint in order to prevent interference with each other and to avoid collisions of authority. Although the Court on one occasion has stated that the principle of comity is not a rule of law but "one of practice, convenience, and expediency"[653] which persuades, but does not command, it has also declared that in the American Federal System it has come to have "a higher sanction than the utility which comes from concord" and has been converted into a principle "of right and of law, and therefore of necessity."[654] As developed and applied by the Supreme Court the rule of comity is exemplified in three classes of cases: First, those in which a court has acquired jurisdiction of the *res* or the possession of property and another court interferes with that jurisdiction or possession; second, those in which a court has acquired jurisdiction or custody of the person and another interferes with such jurisdiction or custody, most frequently by discharges from custody in *habeas corpus* proceedings; and, third, those in which injunctions are used to stay proceedings in another court or to enjoin official action before the courts of proper jurisdiction have had an opportunity to adjudicate the issue.

JURISDICTION OF THE *RES*

As applied by the Supreme Court in cases involving concurrent jurisdiction the principle of comity means that when the jurisdiction of a court and the right of a plaintiff to prosecute a suit therein have attached and when a court has acquired constructive possession of property, such jurisdiction cannot be taken away or obstructed by proceedings in another court, nor can the possession of the property be disturbed by proceedings in another court; and the court which has first acquired jurisdiction of the cause or the possession of the *res* has exclusive jurisdiction to hear and determine the case and all controversies relating thereto, provided that the subject matter of the suit, the remedies sought, and the parties to it are the same, and provided further that it is not necessary for the federal courts to exercise jurisdiction in order to enforce the supremacy of the Constitution and laws of the United States.[655]

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STATE INTERFERENCE BY INJUNCTION WITH FEDERAL JURISDICTION

It has long been settled as a general rule that State courts have no power to enjoin proceedings or judgments of the federal courts.[656] In United States ex rel. Riggs *v.* Johnson County[657] this rule was attributed to no paramount jurisdiction of the federal courts, but rather to the complete independence of the State and federal courts in their spheres of action. Like many of the rules governing federal-state court relations, this rule is not absolute, as shown by a case arising in Pennsylvania. Two surviving trustees had filed an account for themselves and a deceased trustee in a court of common pleas. Thereafter, two of the five beneficiaries sued the two trustees and the deceased trustee in a federal district court, charging mismanagement and praying for an accounting and restitution and removal of the trustees. The Supreme Court held that the State court upon the filing of the account acquired jurisdiction over the trust *quasi in rem* exclusively and therefore sustained the State court's injunction restraining the parties from further proceeding in the federal court while simultaneously holding that the district court could not enjoin the parties from proceeding in the State court.[658] The power of a State court to enjoin parties from proceeding in a federal court obviously does not include that of enjoining a federal court.

FEDERAL INTERFERENCE BY INJUNCTION WITH STATE JURISDICTION

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The discretion of the federal courts to enjoin proceedings in State courts has not been left exclusively to doctrines of comity, for since 1793 the federal courts have been prohibited by statute from restraining proceedings in State courts.[659] Initially this statute was applied with strict literalness in condemning attempts by the lower federal courts to enter exceptions to it,[660] but gradually the Supreme Court began to interpret the provision as not prohibitive of all injunctions. First, it has been held that an injunction will lie against proceedings in a State court to protect the lawfully acquired jurisdiction of a federal court against impairment or defeat.[661] This exception is notably applicable to cases where the federal court has taken possession of

property which it may protect by injunction from interference by State courts.[662] Second, in order to prevent irreparable damages to persons and property the federal courts may restrain the legal officers of a State from taking proceedings in State courts to enforce State legislation alleged to be unconstitutional.[663] Nor does the prohibition of § 265 of the Judicial Code [28 U.S.C.A. § 2283] prevent injunctions restraining the execution of judgments in State courts obtained by fraud,[664] the restraint of proceedings in State courts in cases which have been removed to the federal courts,[665] nor, until lately, to proceedings in State courts to relitigate issues previously adjudicated and finally settled by decrees of a federal court.[666]

In Toucey *v.* New York Life Insurance Co.,[667] Justice Frankfurter, as spokesman for the Court, [Pg 629] reviewed earlier cases and in effect overruled the exception of suits designed to relitigate issues previously adjudicated by a federal court, and held that a suit for injunction would not lie to restrain a proceeding in a State court on the ground that the claim had been previously adjudicated. In so doing he placed this issue in its proper context of *res judicata*. In addition he went beyond the requirements of the case at bar to cast doubts upon the exception of suits brought to enjoin the execution of judgments of State courts obtained by fraud. Furthermore, by regarding the exception of suits restraining proceedings in State courts in cases which had been removed to the federal courts as emanating from the removal acts, Justice Frankfurter concluded that only one exception had been made by judicial construction to § 265, [28 U.S.C.A. § 2283] namely, that permitting injunction of proceedings in State courts to protect the possession of property previously acquired.[668] The rule of this case was extended on the same day to forbid an injunction to restrain proceedings in a State court in support of jurisdiction previously begun earlier and still pending in the federal court.[669]

Federal Injunctions of State Official Action

Injunctions by federal courts restraining State officials from enforcing unconstitutional State statutes constitute an indirect interference with State courts and a serious obstruction to the administration of public policy. From Osborn *v.* Bank of the United States,[670] which was the first case in which an injunction was used to restrain State action under an unconstitutional statute, to Ex parte Young[671] the Supreme Court established firmly the rule that jurisdiction exists in the federal courts to restrain the enforcement of unconstitutional State statutes and to enjoin State officials charged with the duty of enforcing State laws from bringing criminal or civil proceedings to enforce an invalid statute. Until Ex parte Young, the Court had been careful to sustain the jurisdiction of the lower federal courts to enjoin the enforcement of unconstitutional State legislation only after a finding of unconstitutionality,[672] but Ex parte Young abandoned [Pg 630] this rule by holding that the enforcement of a State statute by the attorney general of the State through proceedings in State courts could be enjoined pending the determination of its constitutionality.

Ex Parte Young

Although a suit to restrain the attorney general of a State from proceeding in the courts of the State to enforce a State law not declared unconstitutional would seem effectively to stay proceedings in a State court, Justice Peckham drew a distinction between the power to enjoin the attorney general and other law officers as individuals and a suit against a State court on the ground that the former does not include the "power to prevent any investigation or action by a grand jury. The latter body is part of the machinery of a criminal court, and an injunction against a State court would be a violation of the whole scheme of our Government."[673] Justice Harlan, not convinced by this distinction, characterized the suit as an attempt "*to tie the hands* of the *State* so that it could not in any manner or by any mode of proceeding *in its own courts*, test the validity of the statutes and orders in question."[674]

Although the rigor of the rule of Ex parte Young has been mitigated by subsequent decisions[675] and the mode of its exercise somewhat narrowed by statute, it has not been overruled and remains a source of friction in federal-state relations. Simultaneously, however, § 266 (*see* note 2 above) has been construed strictly as designed "to secure the public interest in 'a limited class of cases of special importance,'"[676] and not "a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such."[677]

STATE INTERFERENCE BY *HABEAS CORPUS* PROCEEDINGS WITH FEDERAL JURISDICTION [Pg 631]

The most spectacular type of State court interference with federal courts has been their use of the writ of *habeas corpus* to release persons in federal custody. Between 1815 and 1861, judges in nine State courts asserted the right to release persons in federal custody,[678] and the issue was not finally settled until 1859, when Ableman *v.* Booth[679] was decided. Here a Justice of the Wisconsin Supreme Court first released a prisoner held by a United States commissioner on charges of violating the fugitive slave law. After the trial, conviction, and sentence of the defendant, the State supreme court issued a second writ of *habeas corpus* and after hearing ordered the release of the prisoner. The national Supreme Court then issued a writ of error to the

State court which refused to make a return. In an opinion based in part on national supremacy and in part on dual sovereignty, Chief Justice Taney, speaking for the Court, laid down the absolute rule that no State court has the power to release prisoners held in custody under the authority of the United States.[680]

Notwithstanding the strong language of the Court in Ableman *v.* Booth, the Wisconsin courts thirteen years later again asserted the power to release persons in federal custody by directing the release of an enlisted soldier in the custody of a recruiting officer of the United States Army. Once again the Court held that a State court has no authority to issue a writ of *habeas corpus* for the release of persons held under the authority or claim and color of authority of the United States. Justice Field for the Court went on to lay down the generalization that neither government "can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National Government to preserve its rightful supremacy in cases of conflict of authority."[681]

FEDERAL INTERFERENCE BY REMOVAL AND *HABEAS CORPUS*

[Pg 632]

Another potential source of friction between State and federal courts is the use of the writ of *habeas corpus* or of removal proceedings in the federal courts to release persons from State custody. As has already been indicated the rule of national supremacy deprives the courts of the States of any power to release persons held in federal custody. Recourse to *habeas corpus* or removal proceedings in the federal courts to release persons in the custody of State courts is governed by statute and comity. The Judiciary Act of 1789[682] conferred jurisdiction upon the federal courts to issue writs of *habeas corpus* to release persons in State custody only for the purpose of having them appear as witnesses in federal proceedings. The same act also provided for the removal before trial into a federal court of civil cases arising under the laws of the United States. Both branches of this jurisdiction were broadened as a result of the nullification movement in South Carolina so as to make either removal or *habeas corpus* available to persons held in State custody for any act done or omitted in pursuance of the laws of the United States.[683] These recourses were in 1842 made available to aliens restrained by State authority in violation of their international rights,[684] and in 1867 to all persons restrained in violation of the Constitution, laws, or treaties of the United States.[685] In substance all these acts still remain on the statute book.[686]

Of these provisions the most important are those governing the release of persons held under State authority for an act done or omitted under federal authority and persons held in violation of the Constitution, laws, or treaties of the United States. In the leading case of Tennessee *v.* Davis,[687] decided in 1880, the question was faced of their constitutionality. Davis was a federal revenue officer who, in the discharge of his duties, killed a man, and was arraigned by Tennessee for murder. He thereupon applied for removal of his case to a federal court under the act of 1867. To Tennessee's evocation of the doctrine of State sovereignty, the Court rejoined with a ringing assertion of the principle of National Supremacy. Subsequently, the same provisions have been construed to procure the release of a deputy United States marshal from State custody for killing a man while protecting a Justice of the Supreme Court under a Presidential order which was regarded as a "law" of the United States;[688] the release of an election official held under State authority for perjury on the ground that jurisdiction to punish a false witness belonged to the federal courts in this instance;[689] and the release of a collector of internal revenue held in [Pg 633] Kentucky for his refusal to file copies of his official papers with a State court.[690] Similarly, the governor of a national home for disabled soldiers was released from Ohio custody for serving oleomargarine in the home in violation of an Ohio statute.[691] A more extreme exercise of *habeas corpus* jurisdiction is illustrated by Hunter *v.* Wood[692] where a ticket agent of a railroad held in State custody for an overcharge on a ticket was released because prior to his trial in the State court, a United States circuit court had enjoined the enforcement of the statute. The element common to all of these cases is the supremacy of the National Government and the inability of the States through judicial proceedings or otherwise to obstruct the enforcement of federal authority. The doctrine of comity is inapplicable in this category of cases.

COMITY AS A PRINCIPLE OF STATUTORY CONSTRUCTION

On the other hand, in Ex parte Royall,[693] decided in 1886, the Court held that the jurisdiction of the lower federal courts in the above category of cases involved no duty to release persons from State custody but only a discretion to do so. Such discretion, the Court declared, "should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between the courts equally bound to guard and protect rights secured by the Constitution."[694] In pursuance of these principles the Court has subsequently formulated rules to the effect that mere error in the prosecution and trial of a suit cannot confer jurisdiction upon a federal court to review the proceedings upon a writ of *habeas corpus*;[695] that the writ of *habeas corpus* cannot be substituted for the writ of error, however serious the errors committed by the State court;[696] that except in extreme and urgent cases the federal courts will not discharge a prisoner in State custody prior to final disposition of the case in the State courts, where the prisoner must first

exhaust all State remedies; and even after the State courts have acted, the federal courts will usually leave the prisoner to the usual and orderly procedure of appeal to the Supreme Court. Furthermore, the Supreme Court will, in the exercise of a sound discretion, issue a writ of mandamus to compel a federal court to remand to a State court a prosecution of a federal officer removed to it, when it appears that the officer in question, in seeking removal, failed to make a candid, specific, and positive explanation of his relation to the transaction giving rise to the crime for which he was indicted.[697] [Pg 634]

Because of the care with which the discretion to issue writs of *habeas corpus* and to grant removals has been exercised by the federal courts to release persons from State custody there has been a minimum of friction in this area of federal-state relations, in contrast to that produced by their extensive use of injunctions to restrain the enforcement of State statutes. In Wade *v.* Mayo,[698] Justice Murphy cited the statistics of the Administrative Office of the United States Courts which revealed that during the fiscal years of 1943, 1944, and 1945, there was an average of 451 *habeas corpus* petitions filed each year in federal district courts by persons in State custody, and that of these petitions, an average of only six per year resulted in a reversal of the conviction and the release of the prisoner.

COMITY AS COOPERATION

Moreover, cold comity may become on occasion warm cooperation between the two systems of courts. In Ponzi *v.* Fessenden,[699] the matter at issue was the authority of the Attorney General of the United States to consent to the transfer on a writ of *habeas corpus* of a federal prisoner to a State court to be there put on trial upon indictments there pending against him. The Court, speaking by Chief Justice Taft, while conceding that there was no express statutory authority for such action, sustained it. Said the Chief Justice: "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 fulfil 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."[700] [Pg 635]

EARLY USE OF STATE COURTS IN ENFORCEMENT OF FEDERAL LAW

The final phase of the relation of State courts has to do with their administration of federal law. Although it is the general rule that Congress cannot vest the judicial power of the United States in courts other than those created in pursuance of article III,[701] it has from the beginning of the National Government left to the State courts wide areas of jurisdiction which it might have vested exclusively in the federal courts, section 25 of the Judiciary Act of 1789 offering the supreme illustration. But going far beyond that, in the latter years of the eighteenth century and the early part of the nineteenth, Congress provided that suits by the National Government itself for fines, forfeitures, and penalties imposed by the revenue laws might be brought in State courts of competent jurisdiction as well as in the federal courts.[702] The Fugitive Slave Act of 1793,[703] the Naturalization Act of 1795,[704] and the Alien Enemies Act of 1798,[705] all imposed positive duties on State courts to enforce federal law. In 1799 the State courts were vested with jurisdiction to try criminal offenses against federal laws.[706] Extensive reliance was placed on State courts for the enforcement of the Embargo Acts;[707] and the act of March 3, 1815,[708] vested in State or county courts within or directly adjoining a federal tax-collection district cognizant "of all complaints, suits and prosecutions for taxes, duties, fines, penalties, and forfeitures."

Retreat From This Practice [Pg 636]

The indifference, however, of the State courts in New England to the Embargo Acts, the later hostility of courts in the northern States to the Fugitive Slave Act, and the refusal of courts in other States to administer federal law on the general principle that the courts of no nation are bound to enforce the penal laws of another,[709] all combined to produce strong sentiments against the use of State courts to administer federal law. These sentiments came in time to be incorporated in dissenting opinions,[710] and in 1842 in Prigg *v.* Pennsylvania[711] the Court definitely ruled that the States could not be compelled to enforce federal law. However, it was later held that this ruling did not prevent Congress from authorizing State courts to administer federal law or the action taken by them, if they choose to do so, from being valid.[712]

Resumption of the Practice

Near the end of the nineteenth century and afterwards Congress resumed its earlier practice of vesting concurrently the enforcement of federally created rights in the State and federal courts. The administration of Indian lands and the determination of rights to inherit allotted lands[713] marked the beginning of the restoration of the use of State courts to apply federal law, and the

Federal Employers' Liability Act of 1908[714] carried the practice further, not only by vesting concurrent jurisdiction in suits arising under the act, in State courts but also in prohibiting the removal of cases begun in State courts to the federal courts. Soon afterwards the Connecticut courts in a compensation case applied the State's common law rules of liability contrary to the federal act and held that Congress could not require a State court to grant a remedy which local law did not permit. The Connecticut courts further held that enforcement of the federal act was contrary to the public policy of the State.[715] This decision was overruled in the Second Employers' Liability Cases,[716] where it was held on the basis of national supremacy that rights [Pg 637] arising under the act can be enforced "as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion." Subsequently, the Supreme Court has held that the rights created under this statute cannot be defeated by forms of local practice and that it is the duty of the Supreme Court to construe allegations in a complaint asserting a right under the liability act in order to determine whether a State court has denied a right of trial guaranteed by Congress.[717]

STATE OBLIGATION TO ENFORCE FEDERAL LAW

The issue of State obligation to administer federal law was presented most recently by Testa *v.* Katt.[718] This case arose out of the Emergency Price Control Act of 1942,[719] which provided that persons who had been overcharged in violation of the act or, in the alternative, the Price Administrator, could sue for treble damages in any court of competent jurisdiction. On the ground that one sovereign cannot enforce the penal laws of another, the Rhode Island Supreme Court ruled that the State courts had no jurisdiction of such suits. Assuming for the purposes of the case that the treble damage provision, was "penal" in nature, Justice Black for a unanimous Court proceeded to lay to rest the principle that a State court is not bound to enforce federal criminal law as an assumption flying "in the face of the fact that the States of the Union constitute a nation" and one which disregarded the supremacy clause. Justice Black also pointed to early acts of Congress and early decisions of the Supreme Court as establishing the rule that "State courts do not bear the same relation to the United States as they do to foreign countries." [720] The Prigg case, though not overruled expressly, was ignored save for its citation in a footnote.[721]

RIGHT OF FOREIGN CORPORATIONS TO RESORT TO FEDERAL COURTS [Pg 638]

In a series of cases the Court has been called upon to adjudicate between the power of a State to exclude foreign corporations from doing a purely domestic business within its borders and the right of such foreign corporations to resort to the federal courts. After deciding first one way and then the other, on the basis of some highly refined distinctions,[722] it finally, in 1922, came out unqualifiedly for the latter right. This was in Terral *v.* Burke Construction Co.,[723] in which an Arkansas statute requiring the cancellation of the license of a foreign corporation to do business in the State, upon notice that such corporation had removed a case to a federal court, was pronounced void. At the same time all contrary decisions were explicitly overruled.

> Clause 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. *See* Amendment VI, pp. 878-881.
>
> SECTION 3. 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.

Treason

The provisions and phraseology of this section are derived from the English Statute of Treasons enacted in 1351, in the reign of Edward III,[724] as an expression of grievance against the application of the doctrine of constructive treasons by the common law courts. The constitutional definition is, of course, much more restrictive than the enumeration of treasons in the English [Pg 639] statute, but like that statute, it is emphatically a limitation on the power of government to define treason and to prove its existence. The rigid and exclusive definition of treason takes from Congress all power to define treason and prescribes limitations on the power to prescribe punishment thereupon.

LEVYING WAR

Early judicial interpretation of the meaning of treason in terms of levying war was conditioned by the partisan struggles of the early nineteenth century, in which were involved the treason trials of Aaron Burr and his associates. In Ex parte Bollman,[725] which involved two of Burr's confederates, Chief Justice Marshall, speaking for himself and three other Justices, confined the meaning of levying of war to the actual waging of war. "However flagitious may be the crime of

conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war and actually to levy war, are distinct offences. The first must be brought into open action, by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed. So far has this principle been carried, that * * * it has been determined that the actual enlistment of men, to serve against the government, does not amount to the levying of war."[726] Chief Justice Marshall was careful, however, to state that the Court did not mean that no person could be guilty of this crime who had not appeared in arms against the country. "On the contrary, if it be actually levied, that is, if a body of men be actually assembled, for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men, for the treasonable purpose, to constitute a levying of war."[727] On the basis of these considerations and due to the fact that no part of the crime charged had been committed in the District of Columbia, the Court held that Bollman and Swartwout could not be tried in the District and ordered their discharge. He continued by saying that "the crime of treason should not be extended by construction to doubtful cases" and concluded that no conspiracy for overturning the Government and "no enlisting of men to effect it, would be an actual levying of war."[728]

The Burr Trial

[Pg 640]

Not long afterward the Chief Justice went to Richmond to preside over the trial of Burr himself. His ruling[729] denying a motion to introduce certain collateral evidence bearing on Burr's activities is significant both for rendering the latter's acquittal inevitable and for the qualifications and exceptions made to the Bollman decision. In brief this ruling held that Burr, who had not been present at the assemblage on Blennerhassett's Island, could be convicted of advising or procuring a levying of war, only upon the testimony of two witnesses to his having procured the assemblage. This operation having been covert, such testimony was naturally unobtainable. The net effect of Marshall's pronouncements was to make it extremely difficult to convict one of levying war against the United States short of the conduct of or personal participation in actual hostilities.[730]

AID AND COMFORT TO THE ENEMY; THE CRAMER CASE

Since the Bollman case only three treason cases have ever reached the Supreme Court, all of them outgrowths of World War II and all charging adherence to enemies of the United States and giving them aid and comfort. In the first of these, Cramer *v.* United States,[731] the issue was whether the "overt act" had to be "openly manifest treason" or if it was enough if, when supported by other proper evidence, it showed the required treasonable intention.[732] The Court in a five-to-four opinion by Justice Jackson in effect took the former view holding that "the two- [Pg 641] witness principle" interdicted "imputation of *incriminating acts* to the accused by circumstantial evidence or by the testimony of a single witness,"[733] even though the single witness in question was the accused himself. "Every act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses,"[734] Justice Jackson asserted. Justice Douglas in a dissent, in which Chief Justice Stone and Justices Black and Reed concurred, contended that Cramer's treasonable intention was sufficiently shown by overt acts as attested to by two witnesses each, plus statements made by Cramer on the witness stand.

THE HAUPT CASE

The Supreme Court sustained a conviction of treason, for the first time in its history in 1947 in Haupt *v.* United States.[735] Here it was held that although the overt acts relied upon to support the charge of treason—defendant's harboring and sheltering in his home his son who was an enemy spy and saboteur, assisting him in purchasing an automobile, and in obtaining employment in a defense plant—were all acts which a father would naturally perform for a son, this fact did not necessarily relieve them of the treasonable purpose of giving aid and comfort to the enemy. Speaking for the Court, Justice Jackson said: "No matter whether young Haupt's mission was benign or traitorous, known or unknown to the defendant, these acts were aid and comfort to him. In the light of his mission and his instructions, they were more than casually useful; they were aid in steps essential to his design for treason. If proof be added that the defendant knew of his son's instructions, preparation and plans, the purpose to aid and comfort the enemy becomes clear."[736]

The Court held that conversations and occurrences long prior to the indictment were admissible evidence on the question of defendant's intent. And more important, it held that the constitutional requirement of two witnesses to the same overt act or confession in open court does not operate to exclude confessions or admissions made out of court, where a legal basis for [Pg 642] the conviction has been laid by the testimony of two witnesses of which such confessions or admissions are merely corroborative. This relaxation of restrictions surrounding the definition of treason evoked obvious satisfaction from Justice Douglas who saw in the Haupt decision a vindication of his position in the Cramer case. His concurring opinion contains what may be called a restatement of the law of treason and merits quotation at length;

"As the *Cramer* case makes plain, the overt act and the intent with which it is done are separate and distinct elements of the crime. Intent need not be proved by two witnesses but may be inferred from all the circumstances surrounding the overt act. But if two witnesses are not required to prove treasonable intent, two witnesses need not be required to show the treasonable character of the overt act. For proof of treasonable intent in the doing of the overt act necessarily involves proof that the accused committed the overt act with the knowledge or understanding of its treasonable character.

"The requirement of an overt act is to make certain a treasonable project has moved from the realm of thought into the realm of action. That requirement is undeniably met in the present case, as it was in the case of *Cramer*.

"The *Cramer* case departed from those rules when it held that 'The two-witness principle is to interdict imputation of *incriminating acts* to the accused by circumstantial evidence or by the testimony of a single witness.' 325 U.S. p. 35. The present decision is truer to the constitutional definition of treason when it forsakes that test and holds that an act, quite innocent on its face, does not need two witnesses to be transformed into an incriminating one."[737]

THE KAWAKITA CASE [Pg 643]

The third case referred to above is Kawakita *v.* United States,[738] which was decided on June 2, 1952. The facts are sufficiently stated in the following headnote: "At petitioner's trial for treason, it appeared that originally he was a native-born citizen of the United States and also a national of [Pg 644] Japan by reason of Japanese parentage and law. While a minor, he took the oath of allegiance to the United States; went to Japan for a visit on an American passport; and was prevented by the outbreak of war from returning to this country. During the war, he reached his majority in Japan; changed his registration from American to Japanese; showed sympathy with Japan and hostility to the United States; served as a civilian employee of a private corporation producing war materials for Japan; and brutally abused American prisoners of war who were forced to work there. After Japan's surrender, he registered as an American citizen; swore that he was an American citizen and had not done various acts amounting to expatriation; and returned to this country on an American passport." The question whether, on this record Kawakita had intended to renounce American citizenship, said the Court, in sustaining conviction, was peculiarly one for the jury and their verdict that he had not so intended was based on sufficient evidence. An American citizen, it continued, owes allegiance to the United States wherever he may reside, and dual nationality does not alter the situation.[739]

DOUBTFUL STATE OF THE LAW OF TREASON TODAY

The vacillation of Chief Justice Marshall between the Bollman[740] and Burr[741] cases and the vacillation of the Court in the Cramer[742] and Haupt[743] cases leaves the law of treason in a somewhat doubtful condition. The difficulties created by the Burr case have been obviated to a considerable extent through the punishment of acts ordinarily treasonable in nature under a different label within a formula provided by Chief Justice Marshall himself in the Bollman case. The passage reads: "Crimes so atrocious as those which have for their object the subversion by violence of those laws and those institutions which have been ordained in order to secure the peace and happiness of society, are not to escape punishment, because they have not ripened into treason. The wisdom of the legislature is competent to provide for the case; and the framers of our Constitution * * * must have conceived it more safe that punishment in such cases should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occasion seldom fails to excite, and which a flexible definition of the crime, or a construction which would render it flexible, might bring into operation."[744]

> Clause 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. [Pg 645]

CORRUPTION OF BLOOD AND FORFEITURE

The Confiscation Act of 1862[745] "to Suppress Insurrection; to Punish Treason and Rebellion; to Seize and Confiscate the Property of Rebels raised issues under article III, section 3, clause 2." Because of the constitutional doubts of the President the act was accompanied by an explanatory joint resolution which stipulated that only a life estate terminating with the death of the offender could be sold and that at his death his children could take the fee simple by descent as his heirs without deriving any title from the United States. In applying this act, passed in pursuance of the war power and not the power to punish treason,[746] the Court in one case[747] quoted with approval the English distinction between a disability absolute and perpetual and one personal or temporary. Corruption of blood as a result of attainder of treason was cited as an example of the former and was defined as the disability of any of the posterity of the attainted person "to claim any inheritance in fee simple, either as heir to him, or to any ancestor above him."[748]

Notes

[1] Miller, On the Constitution, 314 (New York, 1891).

[2] 219 U.S. 346 (1911)

[3] Ibid. 361.

[4] United States *v.* Arredondo, 6 Pet. 691 (1832).

[5] General Investment Co. *v.* New York Central R. Co., 271 U.S. 228, 230 (1926).

[6] For distinctions between judicial power and jurisdiction *see* Williams *v.* United States, 289 U.S. 553, 566 (1933); and the dissent of Justice Rutledge in Yakus *v.* United States, 321 U.S. 414, 467-468 (1944).

[7] Michaelson *v.* United States, 266 U.S. 42 (1924).

[8] McIntire *v.* Wood, 7 Cr. 504 (1813); Ex parte Bollman, 4 Cr. 75 (1807).

[9] Wayman *v.* Southard, 10 Wheat. 1 (1825)

[10] Gumbel *v.* Pitkin, 124 U.S. 131 (1888).

[11] Ex parte Peterson, 253 U.S. 300 (1920).

[12] Ex parte Garland, 4 Wall. 333, 378 (1867).

[13] Chisholm *v.* Georgia, 2 Dall. 419 (1793); Kentucky *v.* Dennison, 24 How. 66, 98 (1861) contains a review of authorities on this point.

[14] Mayor of Nashville *v.* Cooper, 6 Wall. 247, 252 (1868); Cary *v.* Curtis, 3 How. 236 (1845); Shelden *v.* Sill, 8 How. 441 (1850); Kline *v.* Burke Construction Co., 260 U.S. 226 (1922). *See also* the cases discussed under the heading of the Power of Congress to regulate the jurisdiction of the lower federal courts, *infra*, p. 616.

[15] 2 Dall. 409 (1792).

[16] His initial effort was in United States *v.* Ferreira, 13 How. 40 (1852). This case involved the validity of an act of Congress directing the judge of the territorial court of Florida to examine and adjudge claims of Spanish subjects against the United States and to report his decisions with evidence thereon to the Secretary of the Treasury who in turn was to pay the award to the claimant if satisfied that the decisions were just and within the terms of the treaty of cession. After Florida became a State and the territorial court a district court of the United States, the Supreme Court refused to entertain an appeal under the statute for want of jurisdiction to review nonjudicial proceedings. The duties required by the act, it was said "are entirely alien to the legitimate functions of a judge or court of justice, and have no analogy to the general or special powers ordinarily and legally conferred on judges or courts to secure the due administration of the laws." Ibid. 51.

[17] 2 Wall. 561 (1865).

[18] 117 U.S. 697 Appx. (1864). *See also* De Groot *v.* United States, 5 Wall. 419 (1867) and United States *v.* Klein, 13 Wall. 128 (1872), which sustained Supreme Court revision after the jurisdiction of the Court of Claims had been made final. The Gordon decision had indicated that the Supreme Court could not review the decision of any legislative court.

[19] 117 U.S. 697, 703. This last doctrine was repeated to the extent that for many years an award of execution as distinguished from finality of judgment came to be regarded as an essential attribute of judicial power. *See* In re Sanborn, 148 U.S. 222, 226 (1893); Interstate Commerce Commission *v.* Brimson, 154 U.S. 447, 483 (1894); La Abra Silver Mining Co. *v.* United States, 175 U.S. 423, 457 (1899); Frasch *v.* Moore, 211 U.S. 1 (1908); Muskrat *v.* United States, 219 U.S. 346, 355, 361-362 (1911), and Postum Cereal Co. *v.* California Fig Nut Co., 272 U.S. 693 (1927).

[20] 273 U.S. 70 (1927).

[21] 276 U.S. 71 (1928).

[22] 274 U.S. 123 (1927). This case also clarified any doubts concerning a federal declaratory judgment act which was passed in 1934 and sustained in Aetna Life Insurance Co. *v.* Haworth, 300 U.S. 227 (1937).

[23] 288 U.S. 249 (1933). The decision in the Swope and Wallace cases removed all constitutional doubts which had previously shrouded a proposed federal declaratory judgment act which was enacted in 1934 (48 Stat. 955) and sustained in Aetna Life Ins. Co. *v.* Haworth, 300 U.S. 227 (1937).

[24] John Charles Fox, The King *v.* Almon, 24 Law Quarterly Review 184, 194-195 (1908).

[25] John Charles Fox, The Summary Power to Punish Contempt, 25 Law Quarterly Review, 238, 252 (1909).

[26] 1 Stat. 73, 83.

[27] Act of March 2, 1831, 4 Stat. 487, now 18 U.S.C.A. 401. For a summary of the Peck Impeachment and the background of the act of 1831, *see* Felix Frankfurter and James Landis, Power of Congress Over Procedure in Criminal Contempts in Inferior Federal Courts—A Study in Separation of Powers, 37 Harvard Law Review, 1010, 1024-1028 (1924).

[28] 19 Wall. 505 (1874).

[29] Ibid. 505, 510-511.

[30] Gompers *v.* Bucks Stove & Range Co., 221 U.S. 418, 450 (1911). *See also* In re Debs, 158 U.S. 504, 595 (1895).

[31] U.S. 42 (1924).

[32] 38 Stat. 730 (1914).

[33] 266 U.S. 42, 65-66.

[34] 247 U.S. 402 (1918).

[35] Ibid. 418-421.

[36] 263 U.S. 255 (1923). In his dissent in this case, Justice Holmes stated that unless a judge has power to "lay hold of anyone who ventures to publish anything that tends to make him unpopular or to belittle him * * *. A man cannot be summarily laid by the heels because his words may make public feeling more unfavorable in case the judge should be asked to act at some later date, any more than he can for exciting feeling against a judge for what he already has done." Ibid. 281-282.

[37] 313 U.S. 33, 47-53 (1941).

[38] 314 U.S. 252, 260 (1941). *See* pp. 783-784 (Amendment I).

[39] 128 U.S. 289 (1888).

[40] 267 U.S. 517 (1925).

[41] Ibid. 534, 535.

[42] Ibid. 539.

[43] Sacher *v.* United States, 343 U.S. 1 (1952).

[44] Dennis *v.* United States, 341 U.S. 494 (1951).

[45] 343 U.S. 1, 11, 13-14. Justice Clark did not participate. Justices Black, Frankfurter, and Douglas dissented. Justice Frankfurter's opinion is accompanied by an elaborate review of exchanges between the trial judge and defense counsel, excerpted from the record of the case. On the constitutional issue he said: "Summary punishment of contempt is concededly an exception to the requirements of Due Process. Necessity dictates the departure. Necessity must bound its limits. In this case the course of events to the very end of the trial shows that summary measures were not necessary to enable the trial to go on. Departure from established judicial practice, which makes it unfitting for a judge who is personally involved to sit in his own case, was therefore unwarranted. Neither self-respect nor the good name of the law required it. Quite otherwise. Despite the many incidents of contempt that were charged, the trial went to completion, nine months after the first incident, without a single occasion making it necessary to lay any one of the lawyers by the heel in order to assure that the trial proceed. The trial judge was able to keep order and to continue the court's business by occasional brief recesses calculated to cool passions and restore decorum, by periodic warnings to defense lawyers, and by shutting off obstructive arguments whenever rulings were concisely stated and firmly held to." Ibid. 36. Justice Douglas summarized the position of all three dissenters, as follows: "I agree with Mr. Justice Frankfurter that one who reads this record will have difficulty in determining whether members of the bar conspired to drive a judge from the bench or whether the judge used the authority of the bench to whipsaw the lawyers, to taunt and tempt them, and to create for himself the role of the persecuted. I have reluctantly concluded that neither is blameless, that there is fault on each side, that we have here the spectacle of the bench and the bar using the courtroom for an unseemly demonstration of

garrulous discussion and of ill will and hot tempers. I therefore agree with Mr. Justice Black and Mr. Justice Frankfurter that this is the classic case where the trial for contempt should be held before another judge. I also agree with Mr. Justice Black that petitioners were entitled by the Constitution to a trial by jury." Ibid. 80.

[46] 330 U.S. 258, 293-307 (1947).

[47] 203 U.S. 563 (1906)

[48] Gompers *v.* Bucks Stove & Range Co., 221 U.S. 418, 441-443 (1911); Ex parte Grossman, 267 U.S. 87 (1925). *See also* Bessette *v.* W.B. Conkey Co., 194 U.S. 324, 327-328 (1904).

[49] 267 U.S. 87, 119-120 (1925).

[50] Michaelson *v.* United States, 266 U.S. 42, 65-66 (1924).

[51] 154 U.S. 447 (1894).

[52] Penfield Co. *v.* Securities and Exchange Commission, 330 U.S. 585 (1947). Note the dissent of Justice Frankfurter. For delegations of the subpoena power to administrative agencies and the use of judicial process to enforce them *see also* McCrone *v.* United States, 307 U.S. 61 (1939); Endicott Johnson Corp. *v.* Perkins, 317 U.S. 501 (1943); Oklahoma Press Pub. Co. *v.* Walling, 327 U.S. 186 (1946). In the last mentioned case Justice Murphy dissented on the ground that delegation of the subpoena power to nonjudicial officers is unconstitutional as "a corrosion of liberty." In the Endicott Johnson Case he expressed dissatisfaction with the exercise of this power by administrative agencies but confined his dissent to emphasizing greater judicial scrutiny in enforcing administrative orders to appear and produce testimony.

[53] 1 Stat. 73, 81.

[54] Ibid. 81-82.

[55] 1 Cr. 137 (1803). *Cf.* Wiscart *v.* Dauchy, 3 Dall. 321 (1796).

[56] McIntire *v.* Wood, 7 Cr. 504 (1813); and McClung *v.* Silliman, 6 Wheat. 598 (1821).

[57] 12 Pet. 524 (1838).

[58] Ex parte Bollman, 4 Cr. 74, 93, 94 (1807).

[59] Ex parte Yerger, 8 Wall. 85 (1869).

[60] *See also* Ex parte McCardle, 7 Wall. 506 (1869).

[61] In United States *v.* Detroit Timber & Lumber Co., 200 U.S. 321, 339 (1906), Justice Brewer, speaking for the Court, approached a theory of inherent equity jurisdiction when he declared: "The principles of equity exist independently of and anterior to all Congressional legislation, and the statutes are either annunciations of those principles or limitations upon their application in particular cases." It should be emphasized, however, that the Court made no suggestion that it could apply pre-existing principles of equity without jurisdiction over the subject matter. Indeed, the inference is to the contrary. In a dissenting opinion in which Justices McKenna and Van Devanter joined, in Paine Lumber Co. *v.* Neal, 244 U.S. 459, 475 (1917), Justice Pitney contended that article III, section 2, "had the effect of adopting equitable remedies in all cases arising under the Constitution and laws of the United States where such remedies are appropriate."

[62] Boyce's Executors *v.* Grundy, 3 Pet. 210 (1830).

[63] 1 Stat. 333; 28 U.S.C.A. 1651.

[64] 14 Stat. 475 (1867); 26 U.S.C.A. 3653 (a).

[65] 36 Stat. 557 (1910); 28 U.S.C.A. 2281.

[66] 50 Stat. 752 (1937); 28 U.S.C.A. 2282.

[67] 38 Stat. 220 (1913); 28 U.S.C.A. 2325.

[68] 48 Stat. 775 (1934); 28 U.S.C.A. 1342.

[69] 38 Stat. 730 (1914) (Clayton Act); 29 U.S.C.A. 52, and 47 Stat. 70 (1932) (Norris-LaGuardia Act); 29 U.S.C.A. 101-115.

[70] 56 Stat. 31 (1942), § 204; 50 U.S.C.A. 924 (App.).

[71] Freeman *v.* Howe, 24 How. 450 (1861); Gaines *v.* Fuentes, 92 U.S. 10 (1876);

Ex parte Young, 209 U.S. 123 (1908).

[72] Langnes *v.* Green, 282 U.S. 531 (1931); Riehle *v.* Margolies, 270 U.S. 218 (1929), and Essanay Film Mfg. Co. *v.* Kane, 258 U.S. 358 (1922). *See also* Hill *v.* Martin, 296 U.S. 393, 403 (1935); Kohn *v.* Central Distributing Co., 306 U.S. 531, 534 (1939); and Oklahoma Packing Co. *v.* Oklahoma Gas and Electric Co., 309 U.S. 4, 9 (1940).

[73] 254 U.S. 443 (1921).

[74] Lauf *v.* E.G. Shinner & Co., 303 U.S. 323 (1938); New Negro Alliance *v.* Sanitary Grocery Co., 303 U.S. 552 (1938).

[75] In addition to the cases cited in note 2, *see* Milk Wagon Drivers' Union *v.* Lake Valley Farm Products Co., 311 U.S. 91, 100-103 (1940).

[76] 319 U.S. 182 (1943).

[77] Ibid. 187, quoting Cary *v.* Curtis, 3 How. 236, 245 (1845).

[78] 321 U.S. 414 (1944).

[79] Washington-Southern Navigation Co. *v.* Baltimore Co., 263 U.S. 629 (1924).

[80] 10 Wheat. 1 (1825).

[81] 106 U.S. 272, 280 (1882).

[82] Washington-Southern Navigation Co. *v.* Baltimore Co., 263 U.S. 629, 635, 636 (1924).

[83] McDonald *v.* Pless, 238 U.S. 264, 266 (1915); Griffin *v.* Thompson, 2 How. 244, 257 (1844).

[84] Gumbel *v.* Pitkin, 124 U.S. 131 (1888); Covell *v.* Heyman, 111 U.S. 176 (1884), and Buck *v.* Colbath, 3 Wall. 334 (1866).

[85] Eberly *v.* Moore, 24 How. 147 (1861); Arkadelphia Milling Co. *v.* St. Louis S.W.R. Co., 249 U.S. 134 (1919).

[86] Gagnon *v.* United States, 193 U.S. 451, 458 (1904).

[87] 2 Wall. 123, 128-129 (1864).

[88] 253 U.S. 300 (1920).

[89] Ibid. 312.

[90] Ex parte Secombe, 19 How. 9, 13 (1857).

[91] 4 Wall. 333 (1867).

[92] Ibid. 378-380. For an extensive treatment of disbarment and American and English precedents thereon, *see* Ex parte Wall, 107 U.S. 265 (1883).

[93] Reorganization of the Judiciary, Hearings on S. 1392; 75th Cong., 1st sess., 1937, Pt. 3, p. 491. Justices Van Devanter and Brandeis approved the letter. For earlier proposals to have the Court sit in divisions, *see* Felix Frankfurter and James M. Landis, The Business of the Supreme Court, pp. 81-83, (New York, 1928).

[94] 1 Stat. 73-74, § 2-3.

[95] Ibid. 73, 74-76; § 4-5.

[96] 2 Stat. 89.

[97] 2 Stat. 132. For a general account of the events leading to the acts of 1801 and 1802, *see* Felix Frankfurter and James M. Landis, The Business of the Supreme Court; a study in the federal judicial system (New York, 1928), pp. 25-32. This book also contains an excellent account of the organization and reorganization of the judiciary by statute from time to time. For another account of the acts of 1801 and 1802 *see* Charles Warren, The Supreme Court in United States History (Boston, Rev. ed., 1932), 189-215.

[98] 1 Cr. 299, 309 (1803).

[99] 38 Stat. 208, 219-221.

[100] Prior to the act of 1913 Congress had voted to abolish the Commerce Court, but President Taft vetoed the bill which converted the Commerce Court judges into ambulatory circuit judges. For a general account of the abolition of the Commerce Court, *see* Felix Frankfurter and James M. Landis, The Business of the Supreme Court (New York, 1928), pp. 166-173.

[101] Evans *v.* Gore, 253 U.S. 245 (1920).

[102] 268 U.S. 501 (1925).

[103] 307 U.S. 277 (1939).

[104] Ibid. 278-282.

[105] Ibid. 282.

[106] 289 U.S. 516, 526 (1933).

[107] 289 U.S. 553 (1933).

[108] 36 Stat. 539 (1910). For the legislative history of the Commerce Court *see* Felix Frankfurter and James M. Landis, The Business of the Supreme Court (New York, 1928), pp. 155-164.

[109] 56 Stat. 23, 31-33.

[110] In Lockerty *v.* Phillips, 319 U.S. 182 (1943), the limitations on the use of injunctions, except the prohibition against interlocutory decrees, was unanimously sustained.

[111] 321 U.S. 414 (1944).

[112] Ibid. 444.

[113] Ibid. 468.

[114] Pet. 511 (1928).

[115] Ibid. 546.

[116] Ibid. 546. Closely analogous to the territorial courts are extraterritorial and consular courts created in the exercise of the foreign relations power. *See* In re Ross, 140 U.S. 453 (1891).

[117] 279 U.S. 438 (1929).

[118] Ibid. 451.

[119] Gordon *v.* United States, 117 U.S. 697 (1886); McElrath *v.* United States, 102 U.S. 426 (1880); Williams *v.* United States, 289 U.S. 553 (1933).

[120] United States *v.* Coe, 155 U.S. 76 (1894).

[121] Wallace *v.* Adams, 204 U.S. 415 (1907).

[122] Old Colony Trust Co. *v.* Commissioner of Internal Revenue, 279 U.S. 716 (1929); Ex parte Bakelite Corporation, 279 U.S. 438 (1929).

[123] The general tendency in the evolution of legislative courts is to provide for tenure during good behavior. This is true of the judges of the Court of Claims, the Customs Court, the Court of Customs and Patent Appeals. The terms of the judges of the Tax Court are limited to twelve years and the judges are subject to removal by the President after notice and hearing. For the provisions of the statutes governing these matters *see* 28 U.S.C. §§ 241, 296, 301-301a; 26 U.S.C. §§ 1102b, d, f. The territorial judges in Alaska (48 U.S.C. § 112) have four-year terms subject to removal by the President; in Hawaii six years unless removed by the President (48 U.S.C. § 643), eight years in Puerto Rico (28 U.S.C. § 803); eight years in the Canal Zone subject to removal by the President (48 U.S.C. § 1353); and four years in the Virgin Islands unless sooner removed by the President (48 U.S.C. § 1405y).

[124] 141 U.S. 174 (1891).

[125] Ibid. 188

[126] 289 U.S. 553 (1933).

[127] 268 U.S. 501 (1925).

[128] 117 U.S. 697 (1886).

[129] 13 How. 40, 48 (1852). *See also* Keller *v.* Potomac Electric Power Co., 261 U.S. 428 (1923); Federal Radio Commission *v.* General Electric Co., 231 U.S. 464 (1930).

[130] 5 Wall. 419 (1867).

[131] Postum Cereal Co. *v.* California Fig Nut Co., 272 U.S. 693 (1927); Federal Radio Commission *v.* General Electric Co., 281 U.S. 464 (1930); Pope *v.* United States, 323 U.S. 1 (1944).

[132] 112 U.S. 50 (1884).

[133] Keller *v.* Potomac Electric Co., 261 U.S. 428 (1923).

[134] Federal Radio Commission *v.* General Electric Co., 281 U.S. 464 (1930).

[135] 279 U.S. 438 (1929). All of these rulings with respect to the vesting of revisory powers in the courts of the District carried the qualification that revisory actions and interlocutory opinions, as nonjudicial functions, were not reviewable on appeal to the Supreme Court of the United States. Frasch *v.* Moore, 211 U.S. 1 (1908); E.C. Atkins & Co. *v.* Moore, 212 U.S. 285 (1909); Keller *v.* Potomac Electric Co., 261 U.S. 428 (1923); Federal Radio Commission *v.* General Electric Co., 281 U.S. 464 (1930).

[136] O'Donoghue *v.* United States, 289 U.S. 516 (1933).

[137] Ibid. 545-546.

[138] Ibid. 545. Chief Justice Hughes in a dissent joined by Justice Van Devanter and Cardozo took the position that the plenary power of Congress over the District is complete in itself and its power to create courts in the District is not derived from article III. Consequently, they argued that the limitations of article III do not apply to the organization of such courts. The O'Donoghue Case is discussed in the opinions of Justices Jackson and Rutledge and in the dissent of Chief Justice Vinson in National Mutual Insurance Co. *v.* Tidewater Transfer Co., 337 U.S. 582, 601-602, 608-611, 638-640 (1949).

[139] 6 Wheat. 264 (1821).

[140] Ibid. 378.

[141] Miller, Constitution, 314, quoted in Muskrat *v.* United States, 219 U.S. 346, 356 (1911).

[142] 9 Wheat. 738, 819 (1824).

[143] 2 Dall. 419, 431, 432 (1793).

[144] In re Pacific Railway Commission, 32 F. 241, 255 (1887). Justice Field repeated the substance of this definition in Smith *v.* Adams, 130 U.S. 167, 173-174 (1889).

[145] 219 U.S. 346, 357 (1911).

[146] Ibid. 361-362. Judicial power is here defined by Justice Day as "the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction." Ibid. 361.

[147] Muskrat *v.* United States, 219 U.S. 346 (1911); Chicago & Grand Trunk R. Co. *v.* Wellman, 143 U.S. 339 (1892); Lampasas *v.* Bell, 180 U.S. 276 (1901); Braxton County Court *v.* West Virginia, 208 U.S. 192 (1908); Smith *v.* Indiana, 191 U.S. 138 (1903); Tregea *v.* Modesto Irrigation District, 164 U.S. 179 (1896).

[148] 143 U.S. 339 (1892).

[149] Ibid. 345.

[150] Muskrat *v.* United States, 219 U.S. 346 (1911).

[151] Lampasas *v.* Bell, 180 U.S. 276, 284 (1901).

[152] Braxton County Court *v.* West Virginia, 208 U.S. 192 (1908).

[153] Ibid. 198.

[154] Smith *v.* Indiana, 191 U.S. 138, 149 (1903).

[155] Tregea *v.* Modesto Irrigation District, 164 U.S. 179 (1896).

[156] Coffman *v.* Breeze Corporations, Inc., 323 U.S. 316, 324-325 (1945), citing Tyler *v.* The Judges, 179 U.S. 405 (1900); Hendrick *v.* Maryland, 235 U.S. 610 (1915).

[157] Fleming *v.* Rhodes, 331 U.S. 100, 104 (1947). *See also* Blackmer *v.* United States, 284 U.S. 421, 442 (1932); Virginian R. Co. *v.* System Federation, 300 U.S. 515 (1937); Carmichael *v.* Southern Coal & Coke Co., 301 U.S. 495, 513 (1937).

[158] 157 U.S. 429 (1895). The first injunction suit by a stockholder to restrain a corporation from paying the tax appears to be Dodge *v.* Woolsey, 18 How. 331 (1856) which involved the validity of an Ohio tax. The suit was entertained on the basis of English precedents. A case similar to the Pollock Case is Brushaber *v.* Union Pacific R. Co., 240 U.S. 1 (1916). Hawes *v.* Oakland, 104 U.S. 450 (1881) is cited in the Pollock Case, although it in fact threw out a stockholder's suit.

[159] *Cf.* Cheatham et al. *v.* United States, 92 U.S. 85 (1875); and Snyder *v.* Marks,

109 U.S. 189 (1883).

[160] Smith *v.* Kansas City Title Co., 255 U.S. 180, 201, 202 (1921).

[161] Ashwander *v.* Tennessee Valley Authority, 297 U.S. 288 (1936). Although the holdings of the plaintiffs amounted to only one-three hundred and fortieth of the preferred stock, the Court ruled that the right to maintain the suit was not affected by the smallness of the holdings.

[162] 298 U.S. 238 (1936).

[163] Robert L. Stern, in The Commerce Clause and the National Economy, 59 Harv. L. Rev. 645, 667-668 (1948), gives the following account of the litigation in the first bituminous coal case: On the same day that the Bituminous Coal Act became law, the directors of the Carter Coal Company met in New York. James Carter presented a letter saying the Coal Act was unconstitutional and that the company should not join the Code. His father agreed that the act was invalid, but thought the company should not take the risk of paying the tax required of nonmembers in the event the act should be sustained. The third director agreed with the elder Carter, and the board passed a resolution rejecting James Carter's proposals. This action was subsequently approved by a majority of the voting stock held by James Carter's father and mother who outvoted him and his wife.

[164] Massachusetts *v.* Mellon, 262 U.S. 447, 487 (1923). *See also* Williams *v.* Riley, 280 U.S. 78 (1929).

[165] Fairchild *v.* Hughes, 258 U.S. 126 (1922).

[166] Ex parte Levitt, 302 U.S. 633 (1937). *See*, however, Massachusetts State Grange *v.* Benton, 272 U.S. 525 (1926), where the Supreme Court, though affirming the dismissal of a suit to enjoin a day-light-saving statute, nonetheless, sustained the jurisdiction of the district court to entertain the suit.

[167] Alabama Power Co. *v.* Ickes, 302 U.S. 464, 480-481 (1938).

[168] 333 U.S. 203 (1948).

[169] 342 U.S. 429 (1952). *See* p. 763 (Amendment I).

[170] 6 Wall. 50, 64 (1868). *See also* State of Mississippi *v.* Johnson, 4 Wall. 475 (1867).

[171] 6 Wall. at 76.

[172] 262 U.S. 447 (1923).

[173] 42 Stat. 224 (1921).

[174] 262 U.S. 447, 484-485. *See also* New Jersey *v.* Sargent, 269 U.S. 328, 338-340 (1926), where the Court refused jurisdiction of a suit to enjoin the federal water power act because of its effect on the conservation of potable waters in New Jersey. A similar situation arose in Arizona *v.* California, 283 U.S. 423, 450 (1931), where the Court declined to take jurisdiction of an injunction suit to restrain the Secretary of the Interior and the five States of the Colorado River Compact from constructing Boulder Dam.

[175] Georgia *v.* Pennsylvania R. Co., 324 U.S. 439 (1945).

[176] Missouri *v.* Holland, 252 U.S. 416 (1920).

[177] Georgia *v.* Tennessee Copper Co., 206 U.S. 230 (1907).

[178] Alabama State Federation of Labor *v.* McAdory, 325 U.S. 450, 461 (1945).

[179] Giles *v.* Harris, 189 U.S. 475, 486 (1903).

[180] 258 U.S. 158 (1922).

[181] Ibid. 162.

[182] 297 U.S. 288, 324 (1936).

[183] 274 U.S. 488 (1927).

[184] Ashwander *v.* Tennessee Valley Authority, 297 U.S. 288, 324 (1936).

[185] 283 U.S. 423 (1931).

[186] 330 U.S. 75 (1947).

[187] Ibid. 89-91. Justices Black and Douglas wrote separate dissents, but each contended that the controversy was justiciable. Justice Douglas could not agree that the men should violate the act and lose their jobs in order to test

their rights.

[188] Ex parte Steele, 162 F. 694, 701 (1908).

[189] Pennsylvania *v.* Wheeling & Belmont Bridge Co., 13 How. 518 (1852); United States *v.* Chambers, 291 U.S. 217 (1934); Mills *v.* Green, 159 U.S. 651 (1895); United States *v.* Evans, 213 U.S. 297 (1909).

[190] Mills *v.* Green, 159 U.S. 651 (1895). This case came to the Supreme Court on appeal from a decree of the circuit court of appeals dissolving an injunction restraining certain registration officials from excluding the appellant from the voting list. However, the election in which appellant desired to vote was held prior to the appeal, and the case thereby became moot. *See also* St. Pierre *v.* United States, 319 U.S. 41 (1943).

[191] Ibid. 653.

[192] Keim *v.* United States, 177 U.S. 290, 293 (1900); Georgia *v.* Stanton, 6 Wall. 50, 71 (1868).

[193] 14 Pet. 497 (1840).

[194] Ibid. 516.

[195] Ibid., and Kendall *v.* United States ex rel. Stokes, 12 Pet. 524, 621 (1838); *see also* Marbury *v.* Madison, 1 Cr. 137 (1803).

[196] Mississippi *v.* Johnson, 4 Wall. 475 (1867).

[197] Georgia *v.* Stanton, 6 Wall. 50 (1868).

[198] Ibid.

[199] 4 Wall. 475 (1867).

[200] 12 Pet. 524 (1838).

[201] 1 Cr. 137, 170 (1803).

[202] 7 How. 1 (1849).

[203] Ibid. 41.

[204] Ibid. 42-45.

[205] This classification follows in the main that of Melville Fuller Weston, Political Questions, 38 Harv. L. Rev. 296 (1925).

[206] Field *v.* Clark, 143 U.S. 649 (1892).

[207] Coleman *v.* Miller, 307 U.S. 433 (1939).

[208] Foster *v.* Neilson, 2 Pet. 253 (1829). *See* p. 472, supra.

[209] Commercial Trust Co. of New Jersey *v.* Miller, 262 U.S. 51 (1923).

[210] United States *v.* Anderson, 9 Wall. 56 (1870).

[211] Luther *v.* Borden, 7 How. 1 (1849); Pacific States Telephone & Telegraph Co. *v.* Oregon, 223 U.S. 118 (1912).

[212] Luther *v.* Borden, 7 How. 1 (1849).

[213] McPherson *v.* Blacker, 146 U.S. 1 (1892), where the Court refused to pass upon the act of the Michigan legislature in 1892 providing for the election of presidential electors by Congressional districts.

[214] South *v.* Peters, 339 U.S. 276 (1950).

[215] Colegrove *v.* Green, 328 U.S. 549 (1946).

[216] Massachusetts *v.* Mellon, 262 U.S. 447 (1923); Georgia *v.* Stanton, 6 Wall. U.S. 50 (1868); Cherokee Nation *v.* Georgia, 5 Pet. 1 (1831).

[217] 143 U.S. 649, 670-672 (1892).

[218] Coleman *v.* Miller, 307 U.S. 433, 450 (1939).

[219] Ibid. 452-453.

[220] 328 U.S. 549 (1946).

[221] 287 U.S. 1 (1932). This case involved an unsuccessful attempt to enjoin an election of representatives in Congress in Mississippi because the districts formed by the legislature for that purpose were not a contiguous and compact territory and of equal population and that the redistricting violated article I, § 4 and the Fourteenth Amendment. The Court held that the provisions of the

Reapportionment Act of 1929 did not reenact the requirements of the act of 1911 and that it was therefore unnecessary to determine whether the questions raised were justiciable.

[222] 285 U.S. 355 (1932). Here the Court held that the act of the Minnesota legislature redistricting the State required the governor's signature, and that representatives should be chosen at large until a redistricting was passed.

[223] 328 U.S. 549, 565-566.

[224] Ibid. 566 ff.

[225] 335 U.S. 281 (1948).

[226] 335 U.S. 160 (1948).

[227] 339 U.S. 276 (1950).

[228] Charles Warren, The Supreme Court in United States History, I, (Boston, 1922), 110-111. For the full correspondence *see* 3 Correspondence and Public Papers of John Jay (1890-1893), (edited by Henry Phelps Johnston), 486. According to E.F. Albertsworth, Advisory Functions in Federal Supreme Court, 23 Georgetown L.J., 643, 644-647 (May 1935), the Court rendered an advisory opinion to President Monroe in response to a request for legal advice on the power of the Government to appropriate federal funds for public improvements by responding that Congress might do so under the war and postal powers. The inhibitions of the Court against advisory opinions do not prevent the individual Justices from giving advice or aiding the political departments in their private capacities. Ever since Chief Justice Jay went on a mission to England to negotiate a treaty the members of the Court have performed various nonjudicial functions. John Marshall served simultaneously as Secretary of State and Chief Justice, and later Justice Robert Jackson served as war crimes prosecutor.

[229] For example, Muskrat *v.* United States, 219 U.S. 346, 354 (1911); Chicago & Southern Airlines *v.* Waterman Steamship Corp., 333 U.S. 103, 113 (1948); United Public Workers of America *v.* Mitchell, 330 U.S. 75, 89 (1947).

[230] Chicago & Southern Airlines *v.* Waterman Steamship Corp., 333 U.S. 103, 113-114 (1948), citing Hayburn's Case, 2 Dall. 409 (1792); United States *v.* Ferreira, 13 How. 40 (1852); Gordon *v.* United States, 117 U.S. 697 (1864); In re Sanborn, 148 U.S. 222 (1893); Interstate Commerce Commission *v.* Brimson, 154 U.S. 447 (1894); La Abra Silver Mining Co. *v.* United States, 175 U.S. 423 (1899); Muskrat *v.* United States, 219 U.S. 346 (1911); United States *v.* Jefferson Electric Co., 291 U.S. 386 (1934).

[231] Muskrat *v.* United States, 219 U.S. 346 (1911).

[232] United States *v.* Ferreira, 13 How. 40 (1852).

[233] United Public Workers of America *v.* Mitchell, 330 U.S. 75, 89 (1947). Here, Justice Reed, for the Court, after asserting that constitutional courts do not render advisory opinions, declared that "'concrete legal issues, presented in actual cases, not abstractions,' are requisite" for the adjudication of constitutional issues, citing Electric Bond and Share Co. *v.* Securities & Exchange Commission, 303 U.S. 419, 443 (1938); United States *v.* Appalachian Electric Power Co., 311 U.S. 377, 423 (1940); Alabama State Federation of Labor *v.* McAdory, 325 U.S. 450, 461 (1945); and Coffman *v.* Breeze Corporations, 323 U.S. 316, 324 (1945).

[234] 13 How. 40 (1852).

[235] 117 U.S. 697 (1864).

[236] 273 U.S. 70 (1927). In Willing *v.* Chicago Auditorium Association, 277 U.S. 274 (1928) certain lessees desired to ascertain their rights under a lease to demolish a building after the lessors had failed to admit such rights on the allegation that claims, fears, and uncertainties respecting the rights of the parties greatly impaired the value of the leasehold. Because there was no showing that the lessors had hampered the full use of the premises or had committed or threatened a hostile act, the Supreme Court sustained the decree of the lower Court dismissing the bill on the ground that the plaintiff was seeking a mere declaratory judgment. The Court admitted that the proceeding was not moot, that there were adverse parties with substantial interests, and that a final judgment could have been rendered, but held, nonetheless, that the proceeding was not a case or controversy merely because plaintiffs were thwarted by its own doubts, or by the fears of others. Ibid. 289-290.

[237] 219 U.S. 346 (1911).

[238] 274 U.S. 123 (1927).

[239] 288 U.S. 249, 264 (1933).

[240] 300 U.S. 227, 240 (1937).

[241] 28 U.S.C.A. §§ 2201, 2202; 48 Stat. 955.

[242] 300 U.S. 227, 240-241 (1937). The Court distinguished between a justiciable controversy and a dispute of an abstract character, emphasized that the controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests, and reiterated the necessity of "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."

[243] Ashwander *v.* Tennessee Valley Authority, 297 U.S. 288, 324-325 (1936).

[244] 303 U.S. 419, 443 (1938).

[245] Alabama State Federation of Labor *v.* McAdory, 325 U.S. 450, 461 (1945), citing Nashville, C. & St. L.R. Co. *v.* Wallace, 288 U.S. 249 (1933); Aetna Life Insurance Co. *v.* Haworth, 300 U.S. 227 (1937); Maryland Casualty Co. *v.* Pacific Co., 312 U.S. 270, 273 (1941); Great Lakes Co. *v.* Huffman, 319 U.S. 293, 299, 300 (1943); and Coffman *v.* Breeze Corporation, 323 U.S. 316 (1945). Here, as in other cases, the Court refused to entertain hypothetical, or contingent questions, and the decision of constitutional issues prematurely. For this same rule *see also*, Altvater *v.* Freeman, 319 U.S. 359, 363 (1943).

[246] 306 U.S. 1 (1939).

[247] 307 U.S. 325 (1939).

[248] 312 U.S. 270 (1941).

[249] 300 U.S. 227 (1937).

[250] Maryland Casualty Co. *v.* Pacific Coal & Oil Co., 312 U.S. 270, 273, (1941).

[251] Brillhart *v.* Excess Insurance Co., 316 U.S. 491 (1942). This was a diversity of citizenship case which presented only local questions.

[252] Cohens *v.* Virginia, 6 Wheat. 264, 378 (1821).

[253] Stat. 73, 85-86.

[254] 1 Wheat. 304 (1816).

[255] 6 Wheat. 264 (1821).

[256] Ibid. 379.

[257] Ibid. 422-423. In Martin *v.* Hunter's Lessee, 1 Wheat. 304 (1816), Justice Story had traversed some of these same grounds. He, too, began with the general assumptions that the Constitution was established by the people of the United States and not by the States in their sovereign capacities, that the Constitution is to be construed liberally, and that the National Government is supreme in relation to its objects; and had concluded that the Supreme Court had authority to review State court decisions under the express provisions of articles III and VI, and also from the necessity that final decision must rest somewhere and from the importance and necessity of uniformity of decisions interpreting the Constitution. Many years later in Ableman *v.* Booth, 21 How. 506, 514-523 (1859), where the Wisconsin Supreme Court, like the Virginia Courts earlier, had declared an act of Congress invalid and disregarded a writ of error from the Supreme Court, Chief Justice Taney on grounds both of dual sovereignty and national supremacy was even more emphatic in his rebuke of State pretensions. His emphasis on the indispensability of the federal judicial power to maintain national supremacy, to protect the States from national encroachments, and to make the Constitution and laws of the United States uniform all combine to enhance the federal judicial power to a degree beyond that envisaged even by Marshall and Story. As late as 1880 the questions presented in the foregoing cases were before the Court in Williams *v.* Bruffy, 102 U.S. 248 (1880), which again involved the refusal of a Virginia court to enforce a mandate of the Supreme Court. By the act of December 23, 1914, 38 Stat. 790, the 25th section of the Judiciary Act of 1789 which was carried over with modifications into the Revised Statutes, § 690; 28 U.S.C. § 344 was amended so as to provide for review of State court decisions on certiorari whether the federal claim is sustained or denied. These provisions are now contained in 28 U.S.C.A. 1257 (1948).

The first case involving invalid State legislation arose under a treaty of the United States. Ware *v.* Hylton, 3 Dall. 199 (1797). In Calder *v.* Bull, 3 Dall.

386 (1798), the Court sustained a State statute as not being an *ex post facto* law. The first case in which a State statute was held invalid as a violation of the Constitution was Fletcher *v.* Peck, 6 Cr. 87 (1810), which came to the Supreme Court by appeal from a United States circuit court and not by a writ of error under section 25. Famous cases coming to the Court under section 25 were Sturges *v.* Crowninshield, 4 Wheat. 122, McCulloch *v.* Maryland, 4 Wheat. 316, and Dartmouth College *v.* Woodward, 4 Wheat. 518. All three were decided in 1819 and the State legislation involved in each was held void.

[258] That the great majority of the most influential members of the Convention of 1787 thought the Constitution secured to courts in the United States the right to pass on the validity of acts of Congress under it cannot be reasonably doubted. Confining ourselves simply to the available evidence that is strictly contemporaneous with the framing and ratifying of the Constitution, we find the following members of the Convention that framed the Constitution definitely asserting that this would be the case: Gerry and King of Massachusetts, Wilson and Gouverneur Morris of Pennsylvania, Martin of Maryland, Randolph, Madison, and Mason of Virginia, Dickinson of Delaware, Yates and Hamilton of New York, Rutledge and Charles Pinckney of South Carolina, Davie and Williamson of North Carolina, Sherman and Ellsworth of Connecticut. *See* Max Farrand, Records of the Federal Convention (Yale Univ. Press, 1913); I, 97 (Gerry), 109 (King); II, 73 (Wilson), 76 (Martin), 78 (Mason), 299 (Dickinson and Morris), 428 (Rutledge), 248 (Pinckney), 376 (Williamson), 28 (Sherman), 93 (Madison); III, 220 (Martin, in "Genuine Information"). The Federalist: Nos. 39 and 44 (Madison), Nos. 78 and 81 (Hamilton). Elliot's Debates (ed. of 1836), II, 1898-1899 (Ellsworth), 417 and 454 (Wilson), 336-337 (Hamilton); III, 197, 208, 431 (Randolph), 441 (Mason), 484-485 (Madison); IV, 165 (Davie). P.L. Ford, Pamphlets on the Constitution, 184 (Dickinson, in "Letters of Fabius"). Ford, Essays on the Constitution, 295 (Robert Yates, writing as "Brutus"). True these are only seventeen names out of a possible fifty-five, but they designate fully three-fourths of the leaders of the Convention, four of the five members of the Committee of Detail which drafted the Constitution (Gorham, Rutledge, Randolph, Ellsworth, and Wilson) and four of the five members of the Committee of Style which gave the Constitution final form (Johnson, Hamilton, Gouverneur Morris, Madison, and King). Against them are to be pitted, in reference to the question under discussion, only Mercer of Maryland, Bedford of Delaware, and Spaight of North Carolina, the record in each of whose cases is of doubtful implication.

It should be noted, however, that there was later some backsliding. Madison's record is characteristically erratic. His statement in The Federalist No. 39 written probably early in 1788, is very positive: The tribunal which is to ultimately decide, in controversies relating to the boundary between the two jurisdictions, is to be established under the general government. Yet a few months later (probably October, 1788) he seemed to repudiate judicial review altogether, writing: "In the State Constitutions and indeed in the Federal one also, no provision is made for the case of a disagreement in expounding them; and as the Courts are generally the last in making the decision, it results to them by refusing or not refusing to execute a law, to stamp it with its final character. This makes the Judiciary Department paramount in fact to the Legislature, which was never intended and can never be proper." 5 Writings (Hunt ed.), 294. Yet in June, 1789, we find him arguing as follows in support of the proposals to amend the Constitution which led to the Bill of Rights: "If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislature or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." Ibid. 385. Nine years later as author of the Virginia Resolutions of 1798, he committed himself to the proposition that the final power in construing the Constitution rested with the respective State legislatures, a position from the logical consequences of which he spent no little effort to disengage himself in the years of his retirement. Another recidivist was Charles Pinckney, who in 1799 denounced the idea of judicial review as follows: "On no subject am I more convinced, than that it is an unsafe and dangerous doctrine in a republic, ever to suppose that a judge ought to possess the right of questioning or deciding upon the constitutionality of treaties, laws, or any act of the legislature. It is placing the opinion of an individual, or of two or three, above that of both branches of Congress, a doctrine which is not warranted by the Constitution, and will not, I hope, long have many advocates in this country." Wharton, State Trials, 412. The great debate in Congress in the first session of the 7th Congress over the repeal of the Judiciary Act of 1801 speedily developed into a debate over whether judicial review of acts of Congress was contemplated by the Constitution. In the Senate Breckenridge of Kentucky, author of the Kentucky

Resolutions of 1799, contended for the equal right of the three departments to construe the Constitution for themselves within their respective spheres, and from it deduced the exclusive right of the legislature to interpret the Constitution in what regards the lawmaking power and the obligation of the judges to execute what laws they make. But the feeble disguise which this doctrine affords legislative sovereignty made it little attractive even to Republicans, who for the most part either plainly indicated their adherence to the juristic view of the Constitution, or following a hint by Giles of Virginia, kept silent on the subject. The Federalists on the other hand were unanimous on the main question, though of divergent opinions as to the grounds on which judicial review was to be legally based, some grounding it on the "arising" and "pursuant" clauses, some on the precedents of the Pension and Carriage cases, some on the nature of the Constitution and of the judicial office, some on the contemporary use of terms and the undisputed practice under the Constitution of all constitutional authorities. Moreover, said The Federalist orators, judicial review was expedient, since the judiciary had control of neither the purse nor the sword; it was the substitute offered by political wisdom for the destructive right of revolution; to have established this principle of constitutional security, a novelty in the history of nations, was the peculiar glory of the American people; the contrary doctrine was monstrous and unheard of. The year following Marshall concluded the debate, and rendered decision, in Marbury *v.* Madison. *See* Edward S. Corwin, The Doctrine of Judicial Review (Princeton University Press. 1914), 49-59; and Court Over Constitution (1938), Chap. 1. "The glory and ornament of our system which distinguishes it from every other government on the face of the earth is that there is a great and mighty power hovering over the Constitution of the land to which has been delegated the awful responsibility of restraining all the coordinate departments of government within the walls of the governmental fabric which our fathers built for our protection and immunity."—Chief Justice Edward Douglass White when Senator from Louisiana. Cong. Record, 52d Cong., 2d sess., p. 6516 (1894). "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States." Oliver Wendell Holmes, Collected Legal Papers (New York, 1920), 295-296.

[259] The Federalist No. 78.

[260] 3 Dall. 386, 399 (1798).

[261] 2 Dall. 409 (1792).

[262] 1 Stat. 243 (1792).

[263] 3 Dall. 171 (1796).

[264] 1 Cr. 137 (1803).

[265] 1 Stat. 73, 81.

[266] Cr. 137, 175-180.

[267] Ibid. 180. The opinion in Marbury *v.* Madison is subject to two valid criticisms. In the first place the construction of the 13th Section of the Judiciary Act, if not erroneous, was unnecessary since the section could have been interpreted, as it afterward was, merely to give the Court the power to issue mandamus and other writs when it had jurisdiction but not for the purpose of acquiring jurisdiction. The exclusive interpretation of the Court's original jurisdiction, sometimes made a subject of criticism, had been adopted by the Court in Wiscart *v.* Dauchy, 3 Dall. 321 (1796), and while couched in terms which had later to be qualified in Cohens *v.* Virginia, 6 Wheat. 264, 398-402 (1821), by Marshall himself, has remained the doctrine of the Court. Secondly, there was good ground for Jefferson's criticism, which did not touch the constitutional features of the decision, but did inveigh against the temerity of the Court in passing on the merits of a case of which, by its own admission, it had no jurisdiction.

[268] In this connection Justice Patterson's jury charge in Van Horne's Lessee *v.* Dorrance, 2 Dall. 304, 308 (1795), is of significance for its discussion of the relation of the Constitution, the legislature and the courts. A constitution, he said, "is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature, and can be revoked or altered only by the authority that made it." Legislatures are the creatures of the Constitution to which they owe their existence and powers, and in case of conflict between a legislative act and the Constitution it is the duty of the courts to hold it void. In accordance with

these doctrines fortified by natural law concepts, the circuit court invalidated a Pennsylvania statute as being in conflict with the federal and State Constitutions as a violation of the inalienable rights of property. In 1799 the federal circuit court in North Carolina, over which Chief Justice Marshall presided, invalidated an act of North Carolina as a violation of the contract clause and the separation of powers in Ogden *v.* Witherspoon, 18 Fed. Cas. No. 10,461 (1802). The reliance on general principles and natural rights continued in Fletcher *v.* Peck, 6 Cr. 87, 139 (1810) where the Supreme Court invalidated an act of the Georgia legislature revoking an earlier land grant as a violation either of the "general principles which are common to our free institutions," or of the contract clause.

[269] This phase of judicial review is described by Justice Sutherland as follows: "From the authority to ascertain and determine the law in a given case, there necessarily results, in case of conflict, the duty to declare and enforce the rule of the supreme law and reject that of an inferior act of legislation which, transcending the Constitution, is of no effect and binding on no one. This is not the exercise of a substantive power to review and nullify acts of Congress, for no such substantive power exists. It is simply a necessary concomitant of the power to hear and dispose of a case or controversy properly before the court, to the determination of which must be brought the test and measure of the law." Adkins *v.* Children's Hospital, 261 U.S. 525, 544 (1923). In United States *v.* Butler, 297 U.S. 1, 62 (1936), Justice Roberts for the Court reduced judicial review to very simple terms when he declared that when an act is challenged as being unconstitutional, "the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."

[270] Note, for example, the following statement of Chief Justice Marshall: "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing." Osborn *v.* Bank of United States, 9 Wheat. 738, 866 (1824). Note also the assertion of Justice Roberts: "All the court does, can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the Constitution; and, having done that, its duty ends." United States *v.* Butler, 297 U.S. 1, 62-63 (1936).

[271] Chicago & Grand Trunk R. Co. *v.* Wellman, 143 U.S. 339, 345 (1892).

[272] Ibid. *See also* Muskrat *v.* United States, 219 U.S. 346 (1911); Massachusetts *v.* Mellon, 262 U.S. 447 (1923); Alabama State Federation of Labor *v.* McAdory, 325 U.S. 450 (1945); United Public Workers of America *v.* Mitchell, 330 U.S. 75 (1947); Fleming *v.* Rhodes, 331 U.S. 100, 104 (1947)

[273] Rescue Army *v.* Municipal Court of Los Angeles, 331 U.S. 549, 568-575 (1947). *See also* Alma Motor Co. *v.* Timken-Detroit Axle Co., 329 U.S. 129 (1946); Spector Motor Service *v.* McLaughlin, 323 U.S. 101, 105 (1944); Coffman *v.* Breeze Corporations, 323 U.S. 316, 324-325 (1945); Carter *v.* Carter Coal Co., 298 U.S. 238, 325 (1936); Siler *v.* L. & N.R. Co., 213 U.S. 175, 191 (1909); Berea College *v.* Kentucky, 211 U.S. 45, 53 (1908); and the cases cited in the notes to the preceding paragraph.

[274] 331 U.S. 549, 571 (1947).

[275] *See* pp. 546-548. For the distinction between inherent and precautionary limitations to the exercise of judicial review and the operation of judicial review within them, *see* Edward S. Corwin, Judicial Review in Action, 74 Univ. of Pennsylvania L. Rev. 639 (1926). For the limitations generally *see also* the concurring opinion of Justice Brandeis in Ashwander *v.* Tennessee Valley Authority, 297 U.S. 288, 346-356 (1936), and the cases cited therein.

[276] One of the earliest formulations of this rule is that by Justice Iredell in Calder *v.* Bull, 3 Dall. 386, 399 (1798), and by Justice Chase in the same case, p. 394. On the other hand Justice Chase in this same case asserted that there were certain powers which "it cannot be presumed" have been entrusted to the legislature. *See also* Sinking-Fund Cases, 99 U.S. 700 (1879).

[277] Ogden *v.* Saunders, 12 Wheat. 213 (1827); Providence Bank *v.* Billings, 4 Pet. 514, 549 (1830) (argument of counsel); Legal Tender Cases, 12 Wall. 457 (1871); Madden *v.* Kentucky, 309 U.S. 83 (1940); Alabama State Federation of Labor *v.* McAdory, 325 U.S. 450 (1945). *See also* Justice Moody's dissenting opinion in Howard *v.* Illinois C.R. Co. (The Employers' Liability Cases), 207 U.S. 463, 509-511 (1908).

[278] Adkins *v.* Children's Hospital, 261 U.S. 525 (1923). "But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances." Ibid. 546.

[279] Kovacs *v.* Cooper, 336 U.S. 77, 88 (1949) opinion of Justice Reed. *See* Justice Frankfurter's concurring opinion for a criticism of this rule. For other cases imputing to freedom of religion and the press a preferred position so as to reverse the presumption of validity *see* Herndon *v.* Lowry, 301 U.S. 242, 258 (1937); United States *v.* Carolene Products Co., 304 U.S. 144, 152, n. 4 (1938); Thornhill *v.* Alabama, 310 U.S. 88, 95 (1940); Schneider *v.* State, 308 U.S. 147, 161 (1939); Bridges *v.* California, 314 U.S. 252, 262-263 (1941); Murdock *v.* Pennsylvania, 319 U.S. 105, 115 (1943); Prince *v.* Massachusetts, 321 U.S. 158, 164 (1944); Follett *v.* McCormick, 321 U.S. 573, 575 (1944); Marsh *v.* Alabama, 326 U.S. 501 (1946); Board of Education *v.* Barnette, 319 U.S. 624, 639 (1943); Thomas *v.* Collins, 323 U.S. 516, 530 (1945); Saia *v.* New York, 334 U.S. 558, 562 (1948). Justice Frankfurter has criticized the concept of "the preferred position" of these rights as a phrase that has "uncritically crept into some recent opinions" of the Court, Kovacs *v.* Cooper, 336 U.S. 77, 90 (1949); and Justice Jackson in a dissent has also opposed the idea that some constitutional rights have a preferred position. Brinegar *v.* United States, 338 U.S. 160, 180 (1949). "We cannot," he said, "give some constitutional rights a preferred position without relegating others to a deferred position; * * *"

[280] Watson *v.* Buck, 313 U.S. 387 (1941); Justice Iredell's opinion in Calder *v.* Bull, 3 Dall. 386 (1798); Jacobson *v.* Massachusetts, 197 U.S. 11 (1905). *See also* Cohen *v.* Beneficial Industrial Loan Corp., 337 U.S. 541 (1949); Daniel *v.* Family Security Life Ins. Co., 336 U.S. 220 (1949); Railway Express Agency *v.* New York, 336 U.S. 106 (1949); Wickard *v.* Filburn, 317 U.S. 111 (1942); United States *v.* Petrillo, 332 U.S. 1 (1947); American Power & Light Co. *v.* Securities & Exchange Commission, 329 U.S. 90 (1946); Sunshine Anthracite Coal Co. *v.* Adkins, 310 U.S. 381 (1940). *See also* Railroad Retirement Board *v.* Alton R. Co., 295 U.S. 330 (1935); Home Bldg. & Loan Assoc. *v.* Blaisdell, 290 U.S. 398 (1934); Arizona *v.* California, 283 U.S. 423 (1931); McCray *v.* United States, 195 U.S. 27 (1904); Hamilton *v.* Kentucky Distilleries & W. Co., 251 U.S. 146 (1919). Compare, however, Bailey *v.* Drexel Furniture Co. (Child Labor Tax Case), 259 U.S. 20 (1922), where the Court considered the motives of the legislation.

[281] 198 U.S. 45 (1905).

[282] 297 U.S. 1 (1936). The majority opinion evoked a protest from Justice Stone who said in dissenting: "The power of courts to declare ... [an act of Congress unconstitutional] is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government." Ibid. 78-79.

[283] United States *v.* Congress of Industrial Organizations, 335 U.S. 106 (1948); Miller *v.* United States, 11 Wall. 268 (1871).

[284] *See*, for example, Michaelson *v.* United States, 266 U.S. 42 (1924), where the Court narrowly construed those sections of the Clayton Act regulating the power of courts to punish contempt in order to avoid constitutional difficulties. *See also* United States *v.* Delaware & H.R. Co., 213 U.S. 366 (1909), where the Hepburn Act was narrowly construed. Judicial disallowance in the guise of statutory interpretation was foreseen by Hamilton, *see* Federalist No. 81.

[285] Pollock *v.* Farmers' L. & T. Co., 158 U.S. 429, 601, 635 (1895).

[286] In the first Guffey-Snyder (Bituminous Coal) Act of 1935 (49 Stat. 991), there was a section providing for separability of provisions, but the Court none the less held the price-fixing provisions inseparable from the labor provisions which it found void and thereby invalidated the whole statute. Carter *v.* Carter Coal Co., 298 U.S. 238, 312-316 (1936). On this point *see also* the dissent of Chief Justice Hughes. Ibid. 321-324.

[287] 157 U.S. 429, 574-579 (1895).

[288] Justice Brandeis dissenting in Burnet *v.* Coronado Oil & Gas Co., 285 U.S. 393, 405-411 (1932) states the rules governing the binding force of

precedents and collects the decisions overruling earlier decisions to 1932. In Helvering *v.* Griffiths, 318 U.S. 371, 401 (1948), Justice Jackson lists other cases overruled between 1932 and 1943. *Cf.* Smith *v.* Allwright, 321 U.S. 649 (1944) for similar list.

[289] 321 U.S. 649, 665 (1944).

[290] 295 U.S. 45 (1935).

[291] 321 U.S. 649, 669. Justice Roberts in a dissent, in which Justice Frankfurter joined, also protested against overruling "earlier considered opinions" in Mahnich *v.* Southern S.S. Co., 321 U.S. 96, 112-113 (1944). More recently in United States *v.* Rabinowitz, 339 U.S. 56 (1950), Justice Frankfurter has protested in a dissent against reversals of earlier decisions immediately following changes of the court's membership. "Especially ought the Court not reenforce needlessly the instabilities of our day by giving fair ground for the belief that Law is the expression of chance—for instance, of unexpected changes in the Court's composition and the contingencies in the choice of successors." Ibid. 80.

[292] *See* Corwin, Judicial Review in Action, 74 University of Pennsylvania Law Review 639 (1926).

[293] Levering & Garrigues Co. *v.* Morrin, 289 U.S. 103, 105 (1933), citing Mosher *v.* Phoenix, 287 U.S. 29, 30 (1932).

[294] Levering & Garrigues Co. *v.* Morrin, 289 U.S. 103, 105 (1933). *See also* Binderup *v.* Pathe Exchange, 263 U.S. 291, 305-308 (1923); South Covington & C. St. Ry. Co. *v.* Newport, 259 U.S. 97, 99 (1922); Hull *v.* Burr, 234 U.S. 712, 720 (1914); The Fair *v.* Kohler Die Co., 228 U.S. 22, 25 (1913); Montana Catholic Missions *v.* Missoula County, 200 U.S. 118, 130 (1906); Western Union Tel. Co. *v.* Ann Arbor R. Co., 178 U.S. 239 (1900).

[295] Newburyport Water Co. *v.* Newburyport, 193 U.S. 561, 576 (1904). For these issues, *see also* Bell *v.* Hood, 327 U.S. 678 (1946).

[296] Levering & Garrigues Co. *v.* Morrin, 289 U.S. 103, 105-106 (1933).

[297] 299 U.S. 109, 112-113 (1936).

[298] Whether the doctrine that the plaintiff must allege the constitutional question to make the case one arising under the Constitution rests on constitutional or statutory grounds is uncertain. *See* Tennessee *v.* Union and Planters' Bank, 152 U.S. 454 (1894); Oregon Short Line and Utah N. Ry. Co. *v.* Skottowe, 162 U.S. 490, 492 (1896); Galveston, H. & S.A. Ry. Co. *v.* Texas, 170 U.S. 226, 236 (1898); Sawyer *v.* Kochersperger, 170 U.S. 303 (1898); Board of Councilmen of Frankfort *v.* State National Bank, 184 U.S. 696 (1902); Boston and Montana Consolidated Copper & Silver Mining Co. *v.* Montana Ore Purchasing Co., 188 U.S. 632, 639 (1903). Some of these cases apply to the removal of cases from State courts where the plaintiff does not aver a federal question. On this point note the following statement of Chief Justice Fuller in Arkansas *v.* Kansas & T.C. Co. & S.F.R., 183 U.S. 185, 188 (1901): "Hence it has been settled that a case cannot be removed from a State court into the Circuit Court of the United States on the sole ground that it is one arising under the Constitution, laws or treaties of the United States, unless that appears by plaintiff's statement of his own claim; and if it does not so appear, the want of it cannot be supplied by any statement of the petition for removal or in the subsequent pleadings. And moreover that jurisdiction is not conferred by allegations that defendant intends to assert a defence based on the Constitution or a law or treaty of the United States, or under statutes of the United States, or of a State, in conflict with the Constitution."

[299] 5 Cr. 61 (1809).

[300] 9 Wheat. 738 (1824).

[301] 115 U.S. 1 (1885).

[302] 22 Stat. 162, § 4 (1882).

[303] 38 Stat. 803, § 5 (1915).

[304] 43 Stat. 936, 941 (1925); 28 U.S.C.A. § 1349.

[305] 3 Stat. 195, 198 (1815).

[306] 4 Stat. 632, 633, § 3 (1833).

[307] 12 Stat. 755, 756, § 5 (1863).

[308] 28 U.S.C.A. § 1442 (a) (1).

[309] 100 U.S. 257 (1880).

[310] 1 Wheat. 304 (1816).

[311] 6 Wheat. 264 (1821).

[312] 100 U.S. 257, 264. *See also* The Mayor of Nashville *v.* Cooper, 6 Wall. 247 (1868).

[313] Lovell *v.* City of Griffin, 303 U.S. 444 (1938).

[314] Stoll *v.* Gottlieb, 305 U.S. 165 (1938).

[315] Indiana ex rel. Anderson *v.* Brand, 303 U.S. 95 (1938).

[316] Southwestern Bell Telephone Co. *v.* Oklahoma, 303 U.S. 206 (1938).

[317] Adam *v.* Saenger, 303 U.S. 59, 164 (1938).

[318] United Gas Public Service Co. *v.* Texas, 303 U.S. 123, 143 (1938).

[319] 279 U.S. 159 (1929).

[320] Lane *v.* Wilson, 307 U.S. 268, 274 (1939). It is fairly obvious, of course, that whether State courts have exceeded their powers under the State Constitution is not a federal question. This rule was applied in Schuylkill Trust Co. *v.* Pennsylvania, 302 U.S. 506, 512 (1938), where it was contended that instead of construing a State statute, the courts had actually amended it by a species of judicial legislation prohibited by the State constitution.

[321] United States *v.* Ravara, 2 Dall. 297 (1793).

[322] Börs *v.* Preston, 111 U.S. 252 (1884).

[323] Ames *v.* Kansas ex rel. Johnston, 111 U.S. 449, 469 (1884).

[324] 280 U.S. 379, 383-384 (1930).

[325] 11 Wheat. 467 (1826).

[326] 135 U.S. 403, 432 (1890).

[327] Ex parte Gruber, 269 U.S. 302 (1925).

[328] 1 Stat. 73 (1789).

[329] *See* W.W. Willoughby, The Constitutional Law of the United States, III, 1339, 1347 (New York, 1929).

[330] Willoughby, *op. cit.*, III, 1339.

[331] 1 Stat. 73, § 9 (1789).

[332] Justice Washington in Davis *v.* Brig Seneca, 21 Fed. Cas. No. 12,670 (1829).

[333] The "Vengeance," 3 Dall. 297 (1796); The "Schooner Sally," 2 Cr. 406 (1805); The "Schooner Betsey," 4 Cr. 443 (1808); The "Samuel," 1 Wheat. 9 (1816); The "Octavia," 1 Wheat. 20 (1816).

[334] New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344, 386 (1848).

[335] Waring *v.* Clarke, 5 How. 441 (1847); Ex parte Easton, 95 U.S. 68 (1877); North Pacific S.S. Co. *v.* Hall Brothers M.R. & S. Co., 249 U.S. 119 (1919); Grant Smith-Porter Ship Co. *v.* Rohde, 257 U.S. 469 (1922).

[336] Sheppard *v.* Taylor, 5 Pet. 675, 710 (1831).

[337] New England M. Ins. Co. *v.* Dunham, 11 Wall. 1, 31 (1871).

[338] Knapp, Stout & Co. *v.* McCaffrey, 177 U.S. 638 (1900).

[339] Atlee *v.* Northwestern Union P. Co., 21 Wall. 389 (1875); Ex parte McNiel, 13 Wall. 236 (1872).

[340] O'Brien *v.* Miller, 168 U.S. 287 (1897); The "Grapeshot" *v.* Wallerstein, 9 Wall. 129 (1870).

[341] New Bedford Dry Dock Co. *v.* Purdy, 258 U.S. 95 (1922); North Pac. S.S. Co. *v.* Hall Bros. M.R. & S. Co., 249 U.S. 119 (1919); The General Smith, 4 Wheat. 438 (1819).

[342] New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344 (1848).

[343] Ex parte Easton, 95 U.S. 68 (1877).

[344] Andrews *v.* Wall, 3 How. 568 (1845).

[345] Janney *v.* Columbia Ins. Co., 10 Wheat. 411, 412, 415, 418 (1825), cited by

Justice Story in The "Tilton," 23 Fed. Cas. No. 14,054 (1830).

[346] 95 U.S. 68, 72 (1877).

[347] The "Belfast" *v.* Boon, 7 Wall. 624 (1869).

[348] Ex parte Garnett, 141 U.S. 1 (1891).

[349] The "City of Panama," 101 U.S. 453 (1880); *see also* Kenward *v.* "Admiral Peoples," 295 U.S. 649 (1935); The "Harrisburg," 119 U.S. 199 (1886). Although a suit for damages for wrongful death will not lie in the courts of the United States under the general maritime law, admiralty courts will enforce a State law creating liability for wrongful death. Just *v.* Chambers, 312 U.S. 383 (1941).

[350] The "Raithmoor," 241 U.S. 166 (1916); Erie R. Co. *v.* Erie & Western T. Co., 204 U.S. 220 (1907). *See also* Canadian Aviator *v.* United States, 324 U.S. 215 (1945).

[351] L'Invincible, 1 Wheat. 238 (1816). *See also* In re Fassett, 142 U.S. 479 (1892).

[352] Sherlock *v.* Alling, 93 U.S. 99, 104 (1876). *See also* Old Dominion S.S. Co. *v.* Gilmore (The "Hamilton"), 207 U.S. 398 (1907).

[353] Jennings *v.* Carson, 4 Cr. 2 (1807); Taylor *v.* Carryl, 20 How. 583 (1857).

[354] Thirty Hogsheads of Sugar *v.* Boyle, 9 Cr. 191 (1815); The Siren, 13 Wall. 389, 393 (1871).

[355] Hudson *v.* Guestier, 4 Cr. 293 (1808).

[356] La Vengeance, 3 Dall. 297 (1796); Church *v.* Hubbart, 2 Cr. 187 (1804); The Schooner Sally, 2 Cr. 406 (1805).

[357] The Brig. Ann, 9 Cr. 289 (1815); The Sarah, 8 Wheat. 391 (1823); Maul *v.* United States, 274 U.S. 501 (1927).

[358] Section 9 of the original Judiciary Act, since carried over in 28 U.S.C.A. § 1333, saves to suitors such a common law remedy.

[359] For example, the Court stated in The "Moses Taylor" *v.* Hammons, 4 Wall. 411, 431 (1867), that a proceeding *in rem* as used in the admiralty courts, is not a remedy afforded by the common law and that a proceeding *in rem* is essentially a proceeding possible only in admiralty.

[360] 318 U.S. 133 (1943). In the course of his opinion for the Court which contains a lengthy historical account of Admiralty jurisdiction in this country, Chief Justice Stone cited Smith *v.* Maryland, 18 How. 71 (1855), where the Court without discussion sustained the seizure and forfeiture of a vessel in a judgment *in rem* of a State court for violation of a Maryland fishing law within the navigable waters of the State.

[361] Judiciary Act of 1789, 1 Stat. 73, § 9; La Vengeance, 3 Dall. 297 (1796); United States *v.* The Schooner Sally, 2 Cr. 406 (1805); United States *v.* Schooner Betsey and Charlotte, 4 Cr. 443 (1808); Whelan *v.* United States, 7 Cr. 112 (1812); The Samuel, 1 Wheat. 9 (1816).

[362] Hendry *v.* Moore, 318 U.S. 133, 141 (1943).

[363] Charles Warren, The Supreme Court in United States History, II, 93-95 (Boston, 1922).

[364] 10 Wheat. 428 (1825).

[365] 5 How. 441 (1847). *See also* New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344 (1848). Aside from rejecting English rules, Waring *v.* Clarke did not affect the rule concerning the ebb and flow of the tide, inasmuch as the collision occurred within the ebb and flow of the tide, though within the body of a county. Citing Peyroux *v.* Howard, 7 Pet. 324 (1833); The "Orleans" *v.* Phoebus, 11 Pet. 175 (1837); The "Thomas Jefferson," 10 Wheat. 328 (1825); United States *v.* Coombs, 12 Pet. 72 (1838).

[366] 12 How. 443 (1852).

[367] Soon afterwards in Jackson *v.* Steamboat Magnolia, 20 How. 296 (1858), the Court rejected what was left of narrow doctrines of the extent of admiralty jurisdiction by holding that a collision on the Alabama river above tidal flow and wholly within the State of Alabama came within the grant of admiralty jurisdiction in the Judiciary Act of 1789 which extended it "to rivers navigable from the sea * * * as well as upon the high seas."

[368] *See* Warren, II, 512-513.

[369] 109 U.S. 629 (1884); *see also* Perry *v.* Haines, 191 U.S. 17 (1903) where the admiralty jurisdiction was extended to inland canals.

[370] 10 Wall. 557 (1871).

[371] Ibid. 563. *See also* The Montello, 20 Wall. 430 (1874), where this doctrine was applied to the Fox River in Wisconsin after it had been improved to become navigable.

[372] 141 U.S. 1, 12-15 (1891). This case contains a good review of admiralty cases to the time of its decision.

[373] 311 U.S. 377, 407-410 (1940).

[374] 316 U.S. 31, 41 (1942).

[375] 3 Wheat. 336 (1818). *See also* Manchester *v.* Massachusetts, 139 U.S. 240 (1891) which followed this rule and which seems to contain a rule analogous to the "silence of Congress" doctrine applied in cases involving State legislation which affect interstate commerce.

[376] Ibid. 389.

[377] The St. Lawrence, 1 Bl. 522, 527 (1862).

[378] The "Lottawanna," 21 Wall. 558, 576, (1875); *see also* Janney *v.* Columbian Ins. Co., 10 Wheat. 411, 418 (1825), where it was held that the admiralty jurisdiction rests on the grant in the Constitution and can only be exercised under the laws of the United States extending that grant to the respective courts of the United States.

[379] 4 Wall. 411, 431, (1867); The Hine *v.* Trevor, 4 Wall. 555 (1867).

[380] Knapp, Stout & Co. *v.* McCaffrey, 177 U.S. 638 (1900); Red Cross Line *v.* Atlantic Fruit Co., 264 U.S. 109 (1924).

[381] Chelentis *v.* Luckenbach S.S. Co., 247 U.S. 372 (1918).

[382] Rodd *v.* Heartt, 21 Wall. 558 (1875).

[383] Old Dominion S.S. Co. *v.* Gilmore, 207 U.S. 398 (1907).

[384] Ibid.

[385] 312 U.S. 383 (1941).

[386] 244 U.S. 205 (1917).

[387] Ibid. 202, 215-218. This was a five to four decision with Justices Holmes, Pitney, Brandeis, and Clarke dissenting. Justice Holmes' dissent is notable among other reasons for his epigrams that "Judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions," ibid. 221; and that "the common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or some quasi-sovereign that can be identified." Ibid. 222. Justice Pitney attacked the decision as unsupported by precedent and contended that article III speaks only of jurisdiction and does not prescribe the procedural or substantive law by which the exercise of admiralty jurisdiction is to be governed. Ibid. 225-229.

[388] 40 Stat. 395 (1917).

[389] 253 U.S. 149 (1920).

[390] Ibid. 160. For the discussion of the statute as an invalid delegation of power, *see* ibid. 163-166. Justice Holmes wrote a dissent in which Justices Pitney, Brandeis and Clarke concurred.

[391] 42 Stat. 634 (1922); overturned in Washington *v.* W.C. Dawson & Co., 264 U.S. 219 (1924).

[392] 44 Stat. 1424.

[393] Nogueira *v.* New York, N.H. & H.R. Co., 281 U.S. 128 (1930); Vancouver S.S. Co. *v.* Rice, 288 U.S. 445 (1933).

[394] 244 U.S. 205, 216.

[395] 317 U.S. 249 (1942).

[396] Ibid. 252.

[397] Ibid. 253. Citing Baizley Iron Works *v.* Span, 281 U.S. 222, 230 (1930).

[398] 317 U.S. 249 (1942). Cases cited as strengthening the claim were Sultan Ry.

& Timber Co. *v.* Dept. of Labor, 277 U.S. 135 (1928); Grant Smith-Porter Co. *v.* Rohde, 257 U.S. 469 (1922); Millers' Underwriters *v.* Braud, 270 U.S. 59 (1926); Ex parte Rosengrant, 213 Ala. 202 (104 So. 409), affirmed 273 U.S. 664 (1927); State Industrial Board of New York *v.* Terry & Tench Co., 273 U.S. 639 (1926); Alaska Packers Asso. *v.* Industrial Accident Commission, 276 U.S. 467 (1928). Cases cited against the claim were Baizley Iron Works *v.* Span, 281 U.S. 222 (1930); Gonsalves *v.* Morse Dry Dock Co., 266 U.S. 171 (1924); Nogueira *v.* N.Y., N.H. & H.R. Co., 281 U.S. 128 (1930); Northern Coal & Dock Co. *v.* Strand, 278 U.S. 142 (1928); Employers' Liability Assurance Co. *v.* Cook, 281 U.S. 233 (1930). Justice Black *also* cites Stanley Morrison, Workmen's Compensation and the Maritime Law, 38 Yale L.J. 472 (1929). In the Davis case the Court was not guilty of exaggeration when it declared that "the very closeness of the cases cited * * * has caused much serious confusion," and went on to picture rather vividly the jurisdictional dilemma of an injured employee who might suffer great financial loss as a result of the delay and expense if he guessed wrong, and might even discover that his claim was "barred by the statute of limitations in the proper forum while he was erroneously pursuing it elsewhere." 317 U.S. 249, 254. Likewise the dilemma affected employers who might not be protected by contributions to a State fund and at the same time be liable for substantial additional payments. The Court had harsh words for the Jensen rule but indicated that its reversal would not solve the problem. Ibid. 256. Justice Black also pointed to Parker *v.* Motor Boat Sales, 314 U.S. 244 (1941), where the Court, after stating that Congress by the Longshoremen's Act accepted the Jensen line of demarcation between State and federal jurisdiction, had proceeded to hold that, in shadowy cases where the claimant was in a twilight zone he was entitled to recover under the State statute in the absence of federal administrative action under the Longshoremen's Act on the ground of its constitutionality. In brief it would seem that in shadowy cases a claimant may elect either a federal court applying the Longshoremen's Act or a State forum applying the State compensation law.

[399] 317 U.S. 219, 259.

[400] 21 Wall. 558 (1875).

[401] Ibid. 572.

[402] Ibid. 574-575.

[403] The "Lottawanna," 21 Wall. 558, 577.

[404] In re Garnett, 141 U.S. 1, 12 (1891).

[405] Ibid. 14.

[406] 244 U.S. 205, 215 (1917), citing Butler *v.* Boston & Savannah S.S. Co., 130 U.S. 527 (1889), and In re Garnett, 141 U.S. 1 (1891).

[407] 253 U.S. 149, 160 (1920).

[408] 328 U.S. 1, 5 (1946), citing O'Donnell *v.* Great Lakes Dredge & Dock Co., 318 U.S. 36, 40 (1943), and the cases cited therein.

[409] Davis *v.* Department of Labor, 317 U.S. 249 (1942).

[410] 2 Commentaries (2d ed., Boston, 1851), § 1674.

[411] Dugan *v.* United States, 3 Wheat. 172 (1818).

[412] United States *v.* San Jacinto Tin Co., 125 U.S. 273 (1888); United States *v.* Beebe, 127 U.S. 338 (1888); United States *v.* American Bell Tel. Co., 128 U.S. 315 (1888).

[413] United States *v.* San Jacinto Tin Co., 125 U.S. 273 (1888).

[414] 28 U.S.C.A. §§ 1331-1332. The original jurisdiction of the Supreme Court does not extend to suits brought by the United States against persons or corporations alone. *See also* Revised Statutes, §§ 565, 629. United States *v.* West Virginia, 295 U.S. 463 (1935).

[415] 136 U.S. 211 (1890).

[416] United States *v.* Texas, 143 U.S. 621 (1892).

[417] Ibid. 642-646. This suit, it may be noted, was specifically authorized by the act of Congress of May 2, 1890, providing for a temporary government for the Oklahoma territory to determine the ownership of Greer County. 26 Stat. 81, 92, § 25.

[418] United States *v.* Minnesota, 270 U.S. 181 (1926). For an earlier suit against a State by the United States, *see* United States *v.* Michigan, 190 U.S. 379

(1903).

[419] 295 U.S. 463, 471-475 (1935).

[420] United States *v.* Utah, 283 U.S. 64 (1931).

[421] United States *v.* California, 332 U.S. 19 (1947).

[422] United States *v.* Louisiana, 339 U.S. 699 (1950); United States *v.* Texas, 339 U.S. 707 (1950).

[423] 2 Dall. 419, 478 (1793).

[424] 6 Wheat. 264, 412 (1821).

[425] 8 Pet. 436, 444 (1834).

[426] United States *v.* McLemore, 4 How. 286 (1846); Hill *v.* United States, 9 How. 386, 389 (1850); DeGroot *v.* United States, 5 Wall. 419, 431 (1867); United States *v.* Eckford, 6 Wall. 484, 488 (1868); The Siren, 7 Wall. 152, 154 (1869); Nichols *v.* United States, 7 Wall. 122, 126 (1869); The Davis, 10 Wall. 15, 20 (1870); Carr *v.* United States, 98 U.S. 433, 437-439 (1879). "It is also clear that the Federal Government, in the absence of its consent, is not liable in tort for the negligence of its agents or employees. Gibbons *v.* United States, 8 Wall. 269, 275 (1869); Peabody *v.* United States, 231 U.S. 530, 539 (1913); Keokuk & Hamilton Bridge Co. *v.* United States, 260 U.S. 125, 127 (1922). The reason for such immunity as stated by Mr. Justice Holmes in Kawananakoa *v.* Polyblank, 205 U.S. 349, 353 (1907), is because 'there can be no legal right as against the authority that makes the law on which the right depends.' *See also* The Western Maid, 257 U.S. 419, 433 (1922). As the Housing Act does not purport to authorize suits against the United States as such, the question is whether the Authority—which is clearly an agency of the United States—partakes of this sovereign immunity. The answer must be sought in the intention of the Congress. Sloan Shipyards case, 258 U.S. 549, 570 (1922); Federal Land Bank *v.* Priddy, 295 U.S. 229, 231 (1935). This involves a consideration of the extent to which other Government-owned corporations have been held liable for their wrongful acts." 39 Op. Atty. Gen. 559, 562 (1938).

[427] 106 U.S. 196 (1882).

[428] Lonergan *v.* United States, 303 U.S. 33 (1938).

[429] United States *v.* N.Y. Rayon Importing Co., 329 U.S. 654 (1947).

[430] United States *v.* Shaw, 309 U.S. 495 (1940). Here it was said that the reasons for sovereign immunity "partake somewhat of dignity and decorum, somewhat of practical administration, somewhat of the political desirability of an impregnable legal citadel where government, as distinct from its functionaries may operate undisturbed by the demands of litigants," ibid. 500-501. The Court went on to hold that when the United States took possession of the assets of Fleet Corporation and assumed its obligations, it did not waive its immunity from suit in a State court on a counterclaim based on the Corporation's breach of contract, ibid. 505. Any consent to be sued will not be held to embrace action in the federal courts unless the language giving consent is clear. Great Northern Life Ins. Co. *v.* Read, 322 U.S. 47 (1944).

[431] Minnesota *v.* United States, 305 U.S. 382 (1939). The United States was held here to be an indispensable party defendant in a condemnation proceeding brought by a State to acquire a right of way over lands owned by the United States and held in trust for Indian allottees.

[432] Brady *v.* Roosevelt S.S. Co., 317 U.S. 575 (1943).

[433] United States *v.* Lee, 106 U.S. 196, 207-208 (1882). The principle of sovereign immunity was further disparaged in a brief essay by Justice Miller on the subject of the rule of law, as follows: "Under our system the *people* * * * are sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right." Ibid. 208-209.

[434] 204 U.S. 331 (1907).

[435] Louisiana *v.* McAdoo, 234 U.S. 627, 628 (1914).

[436] 162 U.S. 255 (1896). At page 271 Justice Gray endeavors to distinguish between this and the Lee Case. It was Justice Gray who spoke for the dissenters in the Lee Case.

[437] Land *v.* Dollar, 330 U.S. 731, 737 (1947). Justice Douglas cites for this proposition Cunningham *v.* Macon & B.R. Co., 109 U.S. 446, 452 (1883); Tindal *v.* Wesley, 167 U.S. 204 (1897); Smith *v.* Reeves, 178 U.S. 436, 439 (1900); Scranton *v.* Wheeler, 179 U.S. 141, 152, 153 (1900); Philadelphia Co. *v.* Stimson, 223 U.S. 605, 619, 620 (1912); Goltra *v.* Weeks, 271 U.S. 536 (1926). This last case actually extended the rule of the Lee Case and was virtually overruled in Larson *v.* Domestic & Foreign Corp., 337 U.S. 682 (1949).

[438] Oregon *v.* Hitchcock, 202 U.S. 60 (1906); Louisiana *v.* Garfield, 211 U.S. 70 (1908); New Mexico *v.* Lane, 243 U.S. 52 (1917); Wells *v.* Roper, 246 U.S. 335 (1918); Morrison *v.* Work, 266 U.S. 481 (1925); Minnesota *v.* United States, 305 U.S. 382 (1939); Mine Safety Appliances Co. *v.* Forrestal, 326 U.S. 371 (1945). *See also* Minnesota *v.* Hitchcock, 185 U.S. 373 (1902). For a review of the cases dealing with sovereign immunity *see* Joseph D. Block, Suits Against Government Officers and the Sovereign Immunity Doctrine, 59 Harv. L. Rev. 1060 (1946).

[439] Cunningham *v.* Macon & B.R. Co., 109 U.S. 446, 451 (1883), quoted by Chief Justice Vinson in the opinion of the Court in Larson *v.* Domestic & Foreign Corp., 337 U.S. 682, 698 (1949).

[440] Larson *v.* Domestic & Foreign Corp., *supra*, 708. Justice Frankfurter's dissent also contains a useful classification of immunity cases and an appendix listing them.

[441] 330 U.S. 731, 735 (1947). The italics are added.

[442] 337 U.S. 682 (1949).

[443] Ibid. 689-697.

[444] Ibid. 701-702. This rule was applied in United States ex rel. Goldberg *v.* Daniels, 231 U.S. 218 (1914), which also involved a sale of government surplus property. After the Secretary of the Navy rejected the highest bid, plaintiff sought mandamus to compel delivery. The suit was held to be against the United States. *See also* Perkins, Secretary of Labor *v.* Lukens Steel Co., 310 U.S. 113 (1940), which held that prospective bidders for contracts derive no enforceable rights against a federal official for an alleged misinterpretation of his government's authority on the ground that an agent is answerable only to his principal for misconstruction of instructions, given for the sole benefit of the principal. In the Larson Case the Court not only refused to follow Goltra *v.* Weeks, 271 U.S. 536 (1926), but in effect overruled it. The Goltra Case involved an attempt of the Government to repossess barges which it had leased under a contract reserving the right to repossess in certain circumstances. A suit to enjoin repossession was held not to be a suit against the United States on the ground that the actions were personal and in the nature of a trespass.

[445] 337 U.S. 682, 703-704. Justice Frankfurter, dissenting, would have applied the rule of the Lee Case.

[446] Larson *v.* Domestic & Foreign Corp., 337 U.S. 682, 709-710 (1949).

[447] Oregon *v.* Hitchcock, 202 U.S. 60 (1906); Louisiana *v.* McAdoo, 224 U.S. 627 (1914); Wells *v.* Roper, 246 U.S. 335 (1918). *See also* Belknap *v.* Schild, 161 U.S. 10 (1896); and International Postal Supply Co. *v.* Bruce, 194 U.S. 601 (1904).

[448] Rickert Rice Mills *v.* Fontenot, 297 U.S. 110 (1936); and Tennessee Electric Power Co. *v.* Tennessee Valley Authority, 306 U.S. 118 (1939) which held that one threatened with direct and special injury by the act of an agent of the Government under a statute may challenge the constitutionality of the statute in a suit against the agent.

[449] Philadelphia Co. *v.* Stimson, 223 U.S. 605 (1912); Waite *v.* Macy, 246 U.S. 606 (1918).

[450] United States *v.* Lee, 106 U.S. 196 (1882); Goltra *v.* Weeks, 271 U.S. 536 (1926); Ickes *v.* Fox, 300 U.S. 82 (1937); Land *v.* Dollar, 330 U.S. 731 (1947).

[451] 306 U.S. 381 (1939).

[452] Federal Housing Authority *v.* Burr, 309 U.S. 242 (1940). Nonetheless, the Court held that a Congressional waiver of immunity in the case of a government corporation did not mean that funds or property of the United

States can be levied on to pay a judgment obtained against such a corporation as the result of waiver of immunity.

[453] United States *v.* United States Fidelity Co., 309 U.S. 506 (1940).

[454] Charles Warren, The Supreme Court and Disputes Between States, Bulletin of the College of William and Mary, Vol. 34, No. 5, pp. 7-11 (1940). For a more comprehensive treatment of backgrounds as well as the general subject, *see* Charles Warren, The Supreme Court and Sovereign States, (Princeton, 1924).

[455] Warren, The Supreme Court and Disputes Between States, p. 13. However, only three such suits were brought in this period, 1789-1849. During the next 90 years, 1849-1939, at least twenty-nine such suits were brought. Ibid. 13, 14.

[456] 2 Dall. 419 (1793).

[457] Rhode Island *v.* Massachusetts, 12 Pet. 657, 721 (1838).

[458] Ibid. 736-737.

[459] Ibid. 737. Chief Justice Taney dissented because of his belief that the issue was not one of property in the soil, but of sovereignty and jurisdiction, and hence political. Ibid. 752-753. For different reasons, it should be noted, a suit between private parties respecting soil or jurisdiction of two States, to which neither State is a party does not come within the original jurisdiction of the Supreme Court. Fowler *v.* Lindsay, 3 Dall. 411 (1799).

[460] 180 U.S. 208 (1901).

[461] Kansas *v.* Colorado, 206 U.S. 46 (1907).

[462] 283 U.S. 336 (1931).

[463] Ibid. 342. *See also* Nebraska *v.* Wyoming, 325 U.S. 589 (1945), for the restatement of the familiar principle that the power of apportionment among several States of waters of an interstate river where the demands of the users exceeds the supply is a matter of sufficient importance and dignity as to be justiciable in the Supreme Court.

[464] South Dakota *v.* North Carolina, 192 U.S. 286 (1904).

[465] Virginia *v.* West Virginia, 220 U.S. 1 (1911). This case is also significant for Justice Holmes' statement that, "The case is to be considered in the untechnical spirit proper for dealing with a quasi-international controversy, remembering that there is no municipal code governing the matter, and that this Court may be called on to adjust differences that cannot be dealt with by Congress or disposed of by the legislature of either State alone." Ibid. 27.

[466] Kentucky *v.* Indiana, 281 U.S. 163 (1930).

[467] Texas *v.* Florida et al., 306 U.S. 398 (1939).

[468] Pennsylvania and Ohio *v.* West Virginia, 262 U.S. 553 (1923).

[469] 12 Pet. 657 (1838).

[470] 6 Wheat. 264, 378 (1821).

[471] 291 U.S. 286 (1934).

[472] Massachusetts *v.* Missouri, 308 U.S. 1, 15-16 (1939), citing Florida *v.* Mellon, 273 U.S. 12 (1927).

[473] 306 U.S. 398 (1939).

[474] 308 U.S. 1, 17, citing Oklahoma *v.* Atchison, T. & S.F.R. Co., 220 U.S. 277, 286 (1911), and Oklahoma *v.* Cook, 304 U.S. 387, 394 (1938). *See also* New Hampshire *v.* Louisiana, 108 U.S. 76 (1883), which held that a State cannot bring a suit on behalf of its citizens to collect on bonds issued by another State, and Louisiana *v.* Texas, 176 U.S. 1 (1900), which held that a State cannot sue another to prevent maladministration of quarantine laws.

[475] 308 U.S. 1, 17.

[476] Ibid. 19.

[477] The various litigations of Virginia *v.* West Virginia are to be found in 206 U.S. 290 (1907); 209 U.S. 514 (1908); 220 U.S. 1 (1911); 222 U.S. 17 (1911); 231 U.S. 89 (1913); 234 U.S. 117 (1914); 238 U.S. 202 (1915); 241 U.S. 531 (1916); 246 U.S. 565 (1918).

[478] 246 U.S. 565, 591.

[479] Ibid. 600.

[480] Ibid. 601.

[481] Warren, The Supreme Court and Sovereign States, 79.

[482] 2 Dall. 419 (1793).

[483] Massachusetts *v.* Mellon, 262 U.S. 447 (1923); Florida *v.* Mellon, 273 U.S. 12 (1927); New Jersey *v.* Sargent, 269 U.S. 328 (1926).

[484] Pennsylvania *v.* Quicksilver Min. Co., 10 Wall. 553 (1871); California *v.* Southern Pacific Co., 157 U.S. 229 (1895); Minnesota *v.* Northern Securities Co., 184 U.S. 199 (1902).

[485] Wisconsin *v.* Pelican Ins. Co., 127 U.S. 265 (1888).

[486] 4 Wall. 475 (1867).

[487] 6 Wall. 50 (1868).

[488] 262 U.S. 447 (1923).

[489] 273 U.S. 12 (1927).

[490] Oklahoma *v.*. Atchison, T. & S.F.R. Co., 220 U.S. 277 (1911); Oklahoma *v.* Cook, 304 U.S. 387 (1938).

[491] 6 Wheat. 264, 398-399 (1821).

[492] Pennsylvania *v.* Quicksilver Min. Co., 10 Wall. 553 (1871).

[493] California *v.* Southern Pacific Co., 157 U.S. 229 (1895); Minnesota *v.* Northern Securities Co., 184 U.S. 199 (1902).

[494] 6 Wheat. 264, 398-399.

[495] 127 U.S. 265 (1888).

[496] 2 Dall. 419, 431-432 (1793).

[497] 127 U.S. 265, 289-300. This case also follows the general rule that a corporation chartered by the laws of a State, is a citizen of that State for purposes of federal jurisdiction.

[498] 304 U.S. 387 (1938).

[499] 220 U.S. 277, 286-289 (1911).

[500] 316 U.S. 159 (1942).

[501] 220 U.S. 277 (1911).

[502] 324 U.S. 439 (1945).

[503] 206 U.S. 230 (1907). Here the Court entertained a suit by Georgia and enjoined the Copper company from discharging noxious gases from their works in Tennessee over Georgia's territory.

[504] 324 U.S. 439, 447-448, citing and quoting Georgia *v.* Tennessee Copper Co., 206 U.S. 230, 237 (1907).

[505] 324 U.S. 439, 450, citing Missouri *v.* Illinois, 180 U.S. 208, 219-224, 241 (1901); Virginia *v.* West Virginia, 246 U.S. 565, 599 (1918); Georgia *v.* Tennessee Copper Co., 206 U.S. 230, 237 (1907).

[506] Ibid. 451, 468. Chief Justice Stone, joined by Justices Roberts, Frankfurter, and Jackson dissented on the ground that the suit actually was one for a district court, that a State is without standing to maintain suit for injuries sustained by its citizens and residents for which they may sue in their own behalf, and that as presented the suit was not one in which a court of equity could give effective relief.

[507] 2 Cr. 445, 452-453 (1805).

[508] Ibid. 453.

[509] New Orleans *v.* Winter et al., 1 Wheat. 91 (1816).

[510] 54 Stat. 143 (1940); 28 U.S.C.A. 1332.

[511] 337 U.S. 582 (1949).

[512] Ibid. 583-604.

[513] Ibid. 604-625.

[514] Ibid. 626-646.

[515] Ibid. 646-655.

[516] Ibid. 655.

[517] Knox *v.* Greenleaf, 4 Dall. 360 (1802).

[518] Shelton *v.* Tiffin, 6 How. 163 (1848).

[519] Williamson *v.* Osenton, 232 U.S. 619 (1014).

[520] Shelton *v.* Tiffin, 6 How. 163 (1848).

[521] Williamson *v.* Osenton, 232 U.S. 619 (1914).

[522] Jones *v.* League, 18 How. 76 (1855).

[523] Shelton *v.* Tiffin, 6 How. 163 (1848).

[524] 5 Cr. 61, 86 (1809).

[525] 14 Pet. 60 (1840).

[526] Strawbridge *v.* Curtiss, 3 Cr. 267 (1806). The Slocomb Case had to be dismissed because two members of the defendant corporation were citizens of the same State as the plaintiffs.

[527] 2 How. 497 (1844).

[528] Ibid. 558.

[529] Muller *v.* Dows, 94 U.S. 444, 445 (1877). This fiction had its beginning in Marshall *v.* Baltimore & Ohio R. Co., 16 How. 314, 329 (1854) and attained final approval in St. Louis & S.F. Ry. Co. *v.* James, 161 U.S. 545, 554 (1896).

[530] John Chipman Gray, The Nature and Sources of the Law, 2d ed. (New York, 1927), 34.

[531] Dodge *v.* Woolsey, 18 How. 331 (1856); Mechanics' & Traders' Bank *v.* Debolt, 18 How. 380 (1856).

[532] Gray, *op. cit.*, 185-186. Although Justice Wayne criticized the Strawbridge Case as going too far, later developments in determining the citizenship of corporations, have enabled the Court to restore it to its original status. Consequently the rule still requires that to maintain a diversity proceeding all the parties on one side must be citizens of different States from all the parties on the other side. Treinies *v.* Sunshine Mining Co., 308 U.S. 66 (1939); City of Indianapolis *v.* Chase National Bank, 314 U.S. 63 (1941).

[533] *See* Southern Realty Co. *v.* Walker, 211 U.S. 603 (1909), where two Georgians who conducted all of that business in Georgia created a sham corporation in South Dakota for the sole purpose of bringing suits in the federal courts which ordinarily would have been brought in the Georgia courts. Diversity jurisdiction was held not to exist because of collusion.

[534] Black and White Taxicab & T. Co. *v.* Brown & Yellow Taxicab & T. Co., 276 *v.* U.S. 518 (1928).

[535] 16 Pet. 1 (1842).

[536] 16 Pet. 1.

[537] Ibid. 19. Justice Story concluded this portion of the opinion as follows: "The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in Luke *v.* Lyde, 2 Burr. 883, 887, to be in great measure, not the law of a single country only, but of the commercial world. *Non erit alia lex Romae, alia Athenis; alia nunc, alia posthac, sed et apud omenes gentes, et omni tempore una eademque lex obtinebit.*" Ibid. 9.

[538] *See* Simeon E. Baldwin, The American Judiciary (New York, 1920), 169-170. *See also* Justice Catron's statement in Swift *v.* Tyson, 16 Pet. 1, 23.

[539] The Tyson doctrine was extended to wills in Lane *v.* Vick, 3 How. 464 (1845); to torts in Chicago City *v.* Robbins, 2 Bl. 418 (1862); to real estate titles and the rights of riparian owners in Yates *v.* Milwaukee, 10 Wall. 497 (1870); to mineral conveyances in Kuhn *v.* Fairmont Coal Co., 215 U.S. 349 (1910); to contracts in Rowan *v.* Runnels, 5 How. 134 (1847); and to the right to exemplary or punitive damages in Lake Shore & M.S.R. Co. *v.* Prentice, 147 U.S. 101 (1893). By 1888 there were 28 kinds of cases in which federal and State courts applied different rules of the common law. *See* George C. Holt, The Concurrent Jurisdiction of the Federal and State Courts (New York, 1888), 159-188.

[540] Rowan *v.* Runnels, 5 How. 134 (1847); Gelpcke *v.* Dubuque, 1 Wall. 175 (1864).

[541] Williamson *v.* Berry, 8 How. 495 (1850); Pease *v.* Peck, 18 How. 595 (1856); Watson *v.* Tarpley, 18 How. 517 (1856).

[542] Lane *v.* Vick, 3 How. 464 (1845); Williamson *v.* Berry, 8 How. 495 (1850); Gelpcke *v.* Dubuque, 1 Wall. 175 (1864).

[543] 149 U.S. 308, 401-404 (1893).

[544] 215 U.S. 349, 370 (1910).

[545] 276 U.S. 518 (1928).

[546] Ibid. 533. Justice Holmes was influenced in part by the article of Charles Warren, New Light On The History Of The Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 81-88 (1923), in which Mr. Warren produced evidence to show that Justice Story's interpretation in the Tyson Case was contrary to the intention of the framers of the act. Mr. Warren did not, however, contend that the Tyson rule was unconstitutional. Justice Holmes was joined in his dissent by Justices Brandeis and Stone. In addition to judicial dissatisfaction with the Tyson rule as manifested in dissents, disapproval in Congressional quarters resulted in bills by Senators Walsh and Norris in the 70th and 71st Congresses, S. 3151, 70th Cong., 1st. sess., S. Rept. 626 of Committee on the Judiciary, March 27, 1928; S. 4357, 70th Cong., 2d. sess., S. Rept. 691, Committee on the Judiciary, May 20, 1930; S. 4333, 70th Cong., 1st. sess.; S. 96, 71st Cong., 1st. sess.

[547] 293 U.S. 335 (1934).

[548] This concept was first used by Justice Bradley in Burgess *v.* Seligman, 107 U.S. 21 (1883).

[549] 293 U.S. 335, 339.

[550] 304 U.S. 64 (1938).

[551] 304 U.S. 64, 69-70, 77-78.

[552] Ibid. 79-80.

[553] 304 U.S. 64, 80-90.

[554] Ibid. 90, 91-92.

[555] 311 U.S. 223 (1940).

[556] 311 U.S. 169 (1940). This decision has been thoroughly criticized by Arthur L. Corbin in The Laws of the Several States, 50 Yale L.J. 762 (1941). *See also* Mitchell Wendell, Relations Between Federal and State Courts (New York, 1949), 209-223. This book contains a good account of the operation of the Tyson and Tompkins rules, pp. 113-247.

[557] 333 U.S. 153 (1948). For other cases applying the rule that decisions of State intermediate courts are binding unless there is convincing evidence that the State law is otherwise, *see* Six Companies of California *v.* Highway Dist., 311 U.S. 180 (1940); Stoner *v.* New York Life Ins. Co., 311 U.S. 464 (1940).

[558] Vandenbark *v.* Owens-Illinois Co., 311 U.S. 538 (1941).

[559] 28 U.S.C.A. § 1652; 62 Stat. 944 (1948). In 1938, the year of the Tompkins decision, the Conformity Act of 1872 (17 Stat. 196 § 5) was superseded; and from that time until the enactment of 62 Stat. 944, the federal courts were guided in diversity cases by the Federal Rules of Civil Procedure formulated by the Supreme Court by virtue of the authority delegated it, in 1934, by 48 Stat. 1064.

[560] Ruhlin *v.* New York Life Ins. Co., 304 U.S. 202 (1938).

[561] 326 U.S. 99 (1945).

[562] Ibid. 108-109.

[563] Ibid. 109. Justice Rutledge wrote a dissent in which Justice Murphy concurred. Justice Rutledge objected to the rigid application of a statute of limitations to suits in equity and to the implication that Congress could not authorize federal courts to administer equitable relief in accordance with the substantive rights of the parties, notwithstanding State statutes of limitations barring such suits in State courts. In his view, if any change were to be made, it was for Congress and not the Court to make it. In line with this ruling *see* Ragan *v.* Merchants Transfer & W. Co., 337 U.S. 530 (1949); *also* Cohen *v.* Beneficial Industrial Loan Corp., 337 U.S. 541, 555 (1949).

[564] 2 Story, Commentaries, 467 § 1696 (2d. ed., 1851).

[565] An interesting case which reached the Supreme Court under this clause was Pawlet *v.* Clark, 9 Cr. 292 (1815). In his opinion for the Court, Justice Story took occasion to assert that grants of land by a State to a town could not afterwards be repealed so as to divest the town of its rights under the grant. Ibid. 326; *cf.* Trenton *v.* New Jersey, 262 U.S. 182 (1923).

[566] The Exchange *v.* McFaddon, 7 Cr. 116 (1812); Berizzi Bros. Co. *v.* S.S. Pesaro, 271 U.S. 562 (1926); Compania Espanola *v.* The Navemar, 303 U.S. 68 (1938); Guaranty Trust Co. *v.* United States, 304 U.S. 126, 134 (1938).

[567] Principality of Monaco *v.* Mississippi, 292 U.S. 313, 330 (1934).

[568] Ibid.

[569] The "Sapphire," 11 Wall. 164, 167 (1871).

[570] Ibid. 167. This case also held that a change in the person of the sovereign does not affect the continuity or rights of national sovereignty, including the right to bring suit, or to continue one that has been brought.

[571] Guaranty Trust Co. *v.* United States, 304 U.S. 126, 137 (1938); citing Jones *v.* United States, 137 U.S. 202, 212 (1890); Matter of Lehigh Valley R. Co., 265 U.S. 573 (1924). Whether a government is to be regarded as the legal representative of a foreign State is, of course, a political question.

[572] Guaranty Trust Co. *v.* United States, 304 U.S. 126, 134 (1938); citing United States *v.* The Thekla, 266 U.S. 328, 340, 341 (1924); United States *v.* Stinson, 197 U.S. 200, 205 (1905); The Davis, 10 Wall. 15 (1870); The Siren, 7 Wall. 152, 159 (1869). *See also* Ex parte Republic of Colombia, 195 U.S. 604 (1904).

[573] Guaranty Trust Co. *v.* United States, 304 U.S. 126, 137 (1938). Among other benefits which the Court cites as not extending to foreign States as litigants include exemption from costs and from giving discovery. Decisions are also cited to the effect that a sovereign plaintiff "should so far as the thing can be done, be put in the same position as a body corporate." Ibid, note 2, pp. 134-135.

[574] 5 Pet. 1, 16-20 (1831).

[575] Hodgson & Thompson *v.* Bowerbank, 5 Cr. 303 (1809).

[576] Jackson *v.* Twentyman, 2 Pet. 136 (1829).

[577] Susquehanna & Wyoming V.R. & C. Co. *v.* Blatchford, 11 Wall. 172 (1871). *See*, however, Lacassagne *v.* Chapuis, 144 U.S. 119 (1892), which held that a lower federal court had jurisdiction over a proceeding to impeach its former decree, although the parties were new and were both aliens.

[578] Browne *v.* Strode, 5 Cr. 303 (1809).

[579] 2 Dall. 419 (1793). For an earlier case where the point of jurisdiction was not raised, *see* Georgia *v.* Brailsford, 2 Dall. 402 (1792). For subsequent cases prior to 1861, *see* Rhode Island *v.* Massachusetts, 12 Pet. 657 (1838); Florida *v.* Georgia, 17 How. 478 (1855).

[580] Kentucky *v.* Dennison, 24 How. 66, 98 (1861).

[581] 1 Cr. 137 (1803).

[582] Ibid. 174. *See also* Wiscart *v.* Dauchy, 3 Dall. 321 (1796). This exclusive interpretation of article III posed temporary difficulties for Marshall in Cohens *v.* Virginia, 6 Wheat. 264 (1821), where he gave a contrary interpretation to other provisions of the Article. The exclusive interpretation as applied to original jurisdiction of the Supreme Court has been followed in Ex parte Bollman, 4 Cr. 75 (1807); New Jersey *v.* New York, 5 Pet. 284 (1831); Ex parte Barry, 2 How. 65 (1844); Ex parte Vallandigham, 1 Wall. 243, 252 (1864); and Ex parte Yerger, 8 Wall. 85, 98 (1869). In the curious case of Ex parte Levitt, Petitioner, 302 U.S. 633 (1937), the Court was asked to purge itself of Justice Black on the ground that his appointment to it violated the second clause of section 6 of Article I. Although it rejected petitioner's application, it refrained from pointing out that it was being asked to assume original jurisdiction contrary to the holding in Marbury *v.* Madison.

[583] 252 U.S. 416 (1920).

[584] 262 U.S. 447 (1923).

[585] 157 U.S. 229, 261 (1895). Here the Court refused to take jurisdiction on the ground that the City of Oakland and the Oakland Water Company, a citizen of California, were so situated that they would have to be brought into the case, which would make it then a suit between a State and citizens of another State

and its own citizens. The same rule was followed in New Mexico *v.* Lane, 243 U.S. 52, 58 (1917); and in Louisiana *v.* Cummins, 314 U.S. 577 (1941). *See also* Texas *v.* Interstate Commerce Commission, 258 U.S. 158, 163 (1922). For the original jurisdiction of the Supreme Court in specific classes of cases *see* the discussion of suits affecting ambassadors and suits between States, *supra*, pp. 571, 591-593.

[586] Ames *v.* Kansas ex rel. Johnston, 111 U.S. 449 (1884).

[587] 127 U.S. 265 (1888).

[588] 1 Stat. 73, 80.

[589] 127 U.S. 265, 297. *Note also* the dictum in Cohens *v.* Virginia, 6 Wheat. 264, 398-399 (1821) to the effect that "* * * the original jurisdiction of the Supreme Court, in cases where a State is a party, refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised in consequence of the character of the party, and an original suit might be instituted in any of the federal courts; not to those cases in which an original suit might not be instituted in a federal court. Of the last description, is every case between a State and its citizens, and, perhaps every case in which a State is enforcing its penal laws. In such cases, therefore, the Supreme Court cannot take original jurisdiction."

[590] Ohio ex rel. Popovici *v.* Agler, 280 U.S. 379 (1930).

[591] 3 Dall. 321 (1796). Justice Wilson dissented from this holding and contended that the appellate jurisdiction, as being derived from the Constitution, could be exercised without an act of Congress or until Congress made exceptions to it.

[592] Durousseau *v.* United States, 6 Cr. 307 (1810).

[593] 6 Wall. 318 (1868); 7 Wall. 506 (1869).

[594] 15 Stat. 44 (1868).

[595] 7 Wall. 506, 514. The Court also took occasion to reiterate the rule that an affirmation of appellate jurisdiction is a negative of all other and stated that as a result acts of Congress providing for the exercise of jurisdiction had "come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to * * * it." It continued grandly: "* * * judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer." Ibid. 513, 515.

[596] *See* especially the parallel case of Ex parte Yerger, 8 Wall. 85 (1869). For cases following Ex parte McCardle, *see* Railroad Co. *v.* Grant, 98 U.S. 398, 491 (1878); Kurtz *v.* Moffitt, 115 U.S. 487, 497 (1885); Cross *v.* Burke, 146 U.S. 82, 86 (1892); Missouri *v.* Missouri Pacific R. Co., 292 U.S. 13, 15 (1934); Stephan *v.* United States, 319 U.S. 423, 426 (1943). *See also* United States *v.* Bitty, 208 U.S. 393, 399-400 (1908), where it was held that there is no right to appeal to the Supreme Court except as an act of Congress confers it.

[597] 105 U.S. 381 (1882).

[598] Ibid. 386. *See also* Barry *v.* Mercein, 5 How. 103, 119 (1847); National Exchange Bank *v.* Peters, 144 U.S. 570 (1892); American Construction Co. *v.* Jacksonville T. & K.W.R. Co., 148 U.S. 372 (1893); Colorado Central Consol. Min. Co. *v.* Turck, 150 U.S. 138 (1893); St. Louis, I.M. & S.R. Co. *v.* Taylor, 210 U.S. 281 (1908); Luckenbach S.S. Co. *v.* United States, 272 U.S. 533 (1926).

[599] 1 Wheat. 304 (1816).

[600] Ibid. 374.

[601] Ibid. 331. This recognition, however, is followed by the statement that "the whole judicial power of the United States should be at all times, vested either in an original or appellate form, in some courts created under its authority."

[602] 2 Commentaries, §§ 1590-1595.

[603] 1 Stat. 73, §§ 9-11.

[604] Ibid.

[605] Ibid. §§ 14, 15, 17, 18.

[606] Ibid. § 16.

[607] Dall. 8 (1799).

[608] Ibid. 9.

[609] Ex parte Bollman, 4 Cr. 75, 93 (1807). Two years later Chief Justice Marshall in Bank of United States *v.* Deveaux, 5 Cr. 61 (1809), held for the Court that the right to sue does not imply a right to sue in a federal court unless conferred expressly by an act of Congress.

[610] 7 Cr. 32 (1812).

[611] Ibid. 33.

[612] Ibid.

[613] 12 Pet. 657, 721-722 (1838).

[614] 3 How. 236 (1845).

[615] Ibid. 244-245. To these sweeping assertions of legislative supremacy Justices Story and McLean took vigorous exception. They denied the authority of Congress to deprive the courts of power and vest it in an executive official because "the right to construe the laws in all matters of controversy is of the very essence of judicial power." In their view the act as interpreted violated the principle of the separation of powers, impaired the independence of the judiciary, and merged the executive and judicial department. Dissent of Justice McLean, pp. 264 and following.

[616] 8 How. 441 (1850).

[617] Ibid. 449.

[618] Rice *v.* M. & N.W.R. Co., 1 Bl. 358, 374 (1862); Mayor of Nashville *v.* Cooper, 6 Wall. 247, 251-252 (1868); United States *v.* Eckford, 6 Wall. 484, 488 (1868); Ex parte Yerger, 8 Wall. 85, 104 (1868); case of the Sewing Machine Companies, 18 Wall. 553, 557-558 (1874); Morgan *v.* Gay, 19 Wall. 81, 83 (1874); Gaines *v.* Fuentes, 92 U.S. 10, 18 (1876); Jones *v.* United States, 137 U.S. 202, 211 (1890); Holmes *v.* Goldsmith, 147 U.S. 150, 158 (1893); Johnson Steel Street Rail Co. *v.* Wharton, 152 U.S. 252, 260 (1894); Plaquemines Tropical Fruit Co. *v.* Henderson, 170 U.S. 511, 513-521 (1898); Stevenson *v.* Fain, 195 U.S. 165, 167 (1904); Kentucky *v.* Powers, 201 U.S. 1, 24 (1906); Venner *v.* Great Northern R. Co., 209 U.S. 24, 35 (1908); Ladew *v.* Tennessee Copper Co., 218 U.S. 357, 358 (1910); Kline *v.* Burke Construction Co., 260 U.S. 226, 233, 234 (1922). *See also* Lauf *v.* E.G. Shinner & Co., 303 U.S. 323 (1938); Federal Power Commission *v.* Pacific Power & Light Co., 307 U.S. 156 (1939).

[619] Mayor of Nashville *v.* Cooper, 6 Wall. 247, 251-252 (1868). The rule of Cary *v.* Curtis and Sheldon *v.* Sill was restated with emphasis many years later in Kline *v.* Burke Construction Co., 260 U.S. 226, 233-234 (1922), where Justice Sutherland, speaking for the Court, proceeded to say to article III, §§ 1 and 2: "The effect of these provisions is not to vest jurisdiction in the inferior courts over the designated cases and controversies but to delimit those in respect of which Congress may confer jurisdiction upon such courts as it creates. Only the original jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. * * * The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. * * * And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall."

[620] 56 Stat. 23 (1942).

[621] 319 U.S. 182 (1943).

[622] 321 U.S. 414 (1944).

[623] Ibid. 468.

[624] *See infra*, pp. 515-528.

[625] 26 U.S.C.A. 3653.

[626] *See* for example Snyder *v.* Marks, 109 U.S. 189 (1883); Cheatham *v.* United States, 92 U.S. 85 (1875); Shelton *v.* Platt, 139 U.S. 591 (1891); Pacific Steam Whaling Co. *v.* United States, 187 U.S. 447 (1903); Dodge *v.* Osborn, 240 U.S. 118 (1916).

[627] Dodge *v.* Brady, 240 U.S. 122, 126 (1916).

[628] Hill *v.* Wallace, 259 U.S. 44 (1922); Lipke *v.* Lederer, 259 U.S. 557 (1922); Miller *v.* Standard Nut Margarine Co., 284 U.S. 498, 509 (1932).

[629] Enjoining the Assessment and Collection of Federal Taxes Despite Statutory Prohibition, 49 Harv. L. Rev. 109 (1935).

[630] Allen *v.* Regents of University System of Georgia, 304 U.S. 439, 445-449 (1938).

[631] 47 Stat. 70 (1932).

[632] Lauf *v.* E.G. Shinner & Co., 303 U.S. 323 (1938); New Negro Alliance *v.* Sanitary Grocery Co., 303 U.S. 552. 562-563 (1838); Milk Wagon Drivers' Union *v.* Lake Valley Farm Products Co., 311 U.S. 91, 100-103 (1940).

[633] 330 U.S. 258 (1947). Virginian R. Co. *v.* System Federation No. 40, 300 U.S. 515 (1937), in some ways constitutes an exception to section 9 of the statute by sustaining a mandatory injunction issued against an employer on the petition of employees on the ground that the prohibition of section 9 does not include mandatory injunctions, but "blanket injunctions which are usually prohibitory in form." For other acts of Congress limiting the power of the federal courts to issue injunctions *see infra*, pp. 523-525.

[634] 1 Wheat. 304 (1816).

[635] 18 How. 272 (1856).

[636] 285 U.S. 22 (1932).

[637] Ibid 56-57. *Cf.*, however, Shields *v.* Utah, Idaho R. Co., 305 U.S. 185 (1938).

[638] Mayor of Nashville *v.* Cooper, 6 Wall. 247, 252 (1868); Kline *v.* Burke Construction Co., 260 U.S. 226, 233, 234 (1922). *See also* Hodgson *v.* Bowerbank, 5 Cr. 303, 304 (1809) where Chief Justice Marshall disposed of the effort of British subjects to docket a case in a circuit court, saying, "turn to the article of the Constitution of the United States, for the statute cannot extend the jurisdiction beyond the limits of the Constitution."

[639] Hayburn's Case, 2 Dall. 409 (1792).

[640] United States *v.* Ferriera, 13 How. 40 (1852); Gordon *v.* United States, 117 U.S. 697 (1864); Muskrat *v.* United States, 219 U.S. 346 (1911).

[641] In addition to the cases cited in note 3, *see* Chicago & S. Air Lines *v.* Waterman S.S. Corp., 333 U.S. 103, 113-114 (1948).

[642] In addition to the cases cited in notes 2, 3, and 4 *see* Federal Radio Commission *v.* General Electric Co., 281 U.S. 464, 469 (1930); Postum Cereal Co. *v.* California Fig Nut Co., 272 U.S. 693 (1927); Keller *v.* Potomac Electric Power Co., 261 U.S. 428 (1923). *See also* the dissenting opinion of Justice Rutledge in Yakus *v.* United States, 321 U.S. 414, 468 (1944).

[643] Tutun *v.* United States, 270 U.S. 568 (1926), where the Court held that the United States is always a possible adverse party to a naturalization petition.

[644] Fong Yue Ting *v.* United States, 149 U.S. 698 (1893), where the Court sustained an act of Congress requiring the registration of Chinese and creating agencies for the expulsion of aliens unlawfully within the country and for the issuance of certificates to those entitled to remain. The act provided for special proceedings in such cases and prescribed the evidence the courts were to receive and the weight to be attached to it. The procedure was held to contain all the elements of a case—"a complainant, a defendant, and a judge—*actor*, *reus*, *et judex*." pp. 728-729.

[645] La Abra Silver Mining Co. *v.* United States, 175 U.S. 423 (1899). Here the Court sustained an act of Congress which directed the Attorney General to bring a suit on behalf of the United States against the appellants to determine whether an award made by an international claims commission was obtained by fraud. The Court of Claims was vested with full jurisdiction with appeal to the Supreme Court to hear the case, decide it, to issue all proper decrees therein, and to enforce them by injunction. The Court regarded the money received by the United States from Mexico as property of the United States. This together with the interest of Congress in national honor in dealing with Mexico was sufficient to enable it to authorize a suit for the decision of a question "peculiarly judicial in nature." pp. 458-459.

[646] Southern Pacific Co. *v.* Jensen, 244 U.S. 205 (1917).

[647] Taylor *v.* Carryl, 20 How. 583 (1858).

[648] 1 Wheat. 304 (1816).

[649] 6 Wheat. 264 (1821).

[650] 21 How. 506 (1859).

[651] For a full account of this episode *see* Warren, Supreme Court in United States History, II, 193-194. *See also* Baldwin, The American Judiciary, 163.

[652] 6 Pet. 515, 596 (1832). *See also* Warren, Supreme Court in United States History, II, 213; and Baldwin, *op. cit.*, 164. It was Worcester *v.* Georgia which allegedly provoked the probably apocryphal comment attributed to President Jackson, "'Well, John Marshall has made his decision, now let him enforce it.'" 2 Warren, Ibid. 219.

[653] Mast, Foos & Co. *v.* Stover Mfg. Co., 177 U.S. 485 (1900).

[654] Covell *v.* Heyman, 111 U.S. 176 (1884).

[655] Riehle *v.* Margolies, 279 U.S. 218 (1929); Harkin *v.* Brundage, 276 U.S. 36 (1928); Wabash R. Co. *v.* Adelbert College, 208 U.S. 38 (1908); Harkrader *v.* Wadley, 172 U.S. 148 (1898); Central National Bank *v.* Stevens, 169 U.S. 432 (1898); Shields *v.* Coleman, 157 U.S. 168 (1895); Moran *v.* Sturges, 154 U.S. 256 (1894); Krippendorf *v.* Hyde, 110 U.S. 276 (1884); Covell *v.* Heyman, 111 U.S. 176 (1884); Watson *v.* Jones, 13 Wall. 679 (1872); Buck *v.* Colbath, 3 Wall. 334 (1866); Freeman *v.* Howe, 24 How. 450 (1861); Orton *v.* Smith, 18 How. 263 (1856); Taylor *v.* Carryl, 20 How. 583 (1858); Peck *v.* Jenness, 7 How. 612 (1849). For later cases *see* Toucey *v.* New York Life Ins. Co., 314 U.S. 118 (1941). Princess Lida of Thurn & Taxis *v.* Thompson, 305 U.S. 456 (1939); Brillhart *v.* Excess Ins. Co., 316 U.S. 491 (1942); Mandeville *v.* Canterbury, 318 U.S. 47 (1943); Markham *v.* Allen, 326 U.S. 490 (1946); Propper *v.* Clark, 337 U.S. 472 (1949).

[656] McKim *v.* Voorhies, 7 Cr. 279 (1812); Duncan *v.* Darst, 1 How. 301 (1843); United States ex rel. Riggs *v.* Johnson County, 6 Wall. 166 (1868); Moran *v.* Sturges, 154 U.S. 256 (1894); Farmers' Loan & Trust Co. *v.* Lake St. Elev. R. Co., 177 U.S. 51 (1900)

[657] 6 Wall. 166 (1868).

[658] Princess Lida of Thurn & Taxis *v.* Thompson, 305 U.S. 456 (1939). This case rests on the principle of comity that where there are two suits *in rem* or *quasi in rem*, as they were held to be here, so that the Court has possession of property which is the subject of litigation or must have control of it in order to proceed with the cause and grant the relief sought, the jurisdiction of one court must yield to that of the other. The principle, applicable to both federal and State courts, that the Court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, was held not to be confined to cases where the property has actually been seized under judicial process, but applies as well to suits brought for marshalling assets, administering trusts, or liquidating estates and to suits of a similar nature, where to give effect to its jurisdiction the Court must control the property.

[659] 1 Stat. 335 (1793); 28 U.S.C.A. § 2283. In the judicial code an exception is made to proceedings in bankruptcy.

[660] Diggs *v.* Wolcott, 4 Cr. 179 (1807); Orton *v.* Smith, 18 How. 263 (1856); *see* especially Peck *v.* Jenness, 7 How. 612 (1849) where the Court held that the prohibition of the act of 1793 extended to injunction suits brought against the parties to a State court proceeding as well as to the State court itself.

[661] Freeman *v.* Howe, 24 How. 450 (1861); Julian *v.* Central Trust Co., 193 U.S. 93 (1904); Riverdale Cotton Mills *v.* Alabama & Georgia Mfg. Co., 198 U.S. 188 (1905); Looney *v.* Eastern Texas R. Co., 247 U.S. 214 (1918).

[662] Farmers' Loan & Trust Co. *v.* Lake St. Elev. R. Co., 177 U.S. 51 (1900); Riverdale Cotton Mills *v.* Alabama & Georgia Mfg. Co., 198 U.S. 188 (1905); Julian *v.* Central Trust Co., 193 U.S. 93 (1904); Kline *v.* Burke Construction Co., 260 U.S. 226 (1922). For a discussion of this rule *see* Toucey *v.* New York Life Ins. Co., 314 U.S. 118, 134-136 (1941).

[663] Ex parte Young, 209 U.S. 123 (1908), is the leading case.

[664] Arrowsmith *v.* Gleason, 129 U.S. 86 (1889); Marshall *v.* Holmes, 141 U.S. 589 (1891); Simon *v.* Southern R. Co., 236 U.S. 115 (1915).

[665] French *v.* Hay, 22 Wall. 231 (1875); Dietzsch *v.* Huidekoper, 103 U.S. 494 (1881); Madisonville Traction Co. *v.* St. Bernard Mining Co., 196 U.S. 239 (1905).

[666] The earlier cases are Root *v.* Woolworth, 150 U.S. 401 (1893); Prout *v.* Starr, 188 U.S. 537 (1903); Juilian *v.* Central Trust Co., 193 U.S. 93 (1904).

[667] 314 U.S. 118 (1941).

[668] Ibid. 133-141. Justice Reed, in a dissent in which Chief Justice Stone and Justice Roberts concurred, also reviewed the authorities.

[669] Southern Ry. Co. *v.* Painter, 314 U.S. 155 (1941).

[670] 9 Wheat. 738 (1824).

[671] 209 U.S. 123 (1908). *See also* Smyth *v.* Ames, 169 U.S. 466 (1898); Reagan *v.* Farmers' Loan & Trust Co., 154 U.S. 362 (1894).

[672] Harkrader *v.* Wadley, 172 U.S. 148 (1898); In re Sawyer, 124 U.S. 200 (1888).

[673] Ex parte Young, 209 U.S. 123, 163 (1908).

[674] Ibid. 174. The Young case evoked sharp criticism in Congress and led to the enactment of § 266 of the Judicial Code, prohibiting the issuance of injunctions to restrain enforcement of State laws by a single federal judge, providing for a three-judge court in such cases, limiting the effect of temporary injunctions, and expediting appeals in such cases to the Supreme Court. Act of June 18, 1910, 36 Stat. 539; 28 U.S.C.A. § 1253, 2281, 2284. A supplementary act in 1913 (37 Stat. 1013) amended § 266 of the Judicial Code providing for the stay of federal proceedings to enjoin State legislation if a suit has been brought in a State court to enforce the legislation until the State court has determined the issues. Section 266 was amended again in 1925 when the provisions concerning interlocutory injunctions were extended to include permanent injunctions. Act of February 13, 1925, 43 Stat. 938.

[675] Prentis *v.* Atlantic Coast Line R. Co., 211 U.S. 210 (1908); Gilchrist *v.* Interborough Rapid Transit Co., 279 U.S. 159 (1929); Grubb *v.* Public Utilities Commission, 281 U.S. 470 (1930); Beal *v.* Missouri Pacific R. Co., 312 U.S. 45 (1941).

[676] Phillips *v.* United States, 312 U.S. 246, 249 (1941), citing and quoting Ex parte Collins, 277 U.S. 565, 577 (1928).

[677] 312 U.S. 246, 251, citing Moore *v.* Fidelity & Deposit Co., 272 U.S. 317 (1926); Smith *v.* Wilson, 273 U.S. 388 (1927); Oklahoma Gas Co. *v.* Packing Co., 292 U.S. 386 (1934); Ex parte Williams, 277 U.S. 267 (1928); Ex parte Public National Bank, 278 U.S. 101 (1928); Rorick *v.* Commissioners, 307 U.S. 208 (1939); Ex parte Bransford, 310 U.S. 354 (1940).

[678] Warren, Federal and State Court Interference, 43 Harv. L. Rev. 345, 354 (1930).

[679] 21 How. 506 (1859).

[680] Ibid. 514-516, 523-524, 526.

[681] United States *v.* Tarble (Tarble's Case), 13 Wall. 397, 407-408 (1872).

[682] 1 Stat. 81, § 14.

[683] 4 Stat. 634, § 7 (1833).

[684] 5 Stat. 539 (1942).

[685] 14 Stat. 385 (1867).

[686] Rev. Stat., § 753; 28 U.S.C.A. § 2242.

[687] 100 U.S. 257 (1880).

[688] In re Neagle, 135 U.S. 1 (1890).

[689] In re Loney, 134 U.S. 372 (1890).

[690] Boske *v.* Comingore, 177 U.S. 459 (1900).

[691] Ohio *v.* Thomas, 173 U.S. 276 (1899).

[692] 209 U.S. 205 (1908).

[693] 117 U.S. 241 (1886).

[694] Ibid. 251.

[695] Harkrader *v.* Wadley, 172 U.S. 148 (1898); Whitten *v.* Tomlinson, 160 U.S. 231 (1895).

[696] Frank *v.* Mangum, 237 U.S. 309 (1915); Tinsley *v.* Anderson, 171 U.S. 101 (1898).

[697] Maryland *v.* Soper, 270 U.S. 9, 36, 44 (1926). In addition to the cases cited above *see* Ex parte Fonda, 117 U.S. 516 (1886); Duncan *v.* McCall, 139 U.S.

449 (1891); New York *v.* Eno, 155. U.S. 89 (1894); Baker *v.* Grice, 169 U.S. 284 (1898); Matter of Moran, 203 U.S. 96 (1906); Mooney *v.* Holohan, 294 U.S. 103 (1935); Ex parte Hawk, 321 U.S. 114 (1944). Compare, however, Wade *v.* Mayo, 334 U.S. 672 (1948), where it was held that failure of the petitioner to appeal to the Supreme Court from a conviction sustained by the Florida Supreme Court did not bar relief by *habeas corpus* because of denial of counsel. In Ex parte Hawk, 321 U.S. 114 (1944), the rule pertaining to the exhaustion of remedies was applied so as to include a certiorari petition in the Supreme Court. In adopting a new United States Code in 1948 (62 Stat. 967) Congress added a new section to existing *habeas corpus* provisions which stipulated that no application for a writ of *habeas corpus* by a person in custody pursuant to a judgment of a State court shall be granted until the applicant has exhausted the remedies available in the courts of the States and that an applicant shall not be deemed to have exhausted State remedies if he has the right under State law to raise, by any available procedure, the question presented, 28 U.S.C.A. § 2254. This section codified Ex parte Hawk.

[698] 334 U.S. 672 (1948).

[699] 258 U.S. 254 (1922).

[700] Ibid. 259.

[701] Houston *v.* Moore, 5 Wheat. 1, 27-28 (1820).

[702] Carriage Tax Act, 1 Stat. 373 (1794); License Tax on Wine and Spirits Act, 1 Stat. 376 (1794).

[703] 1 Stat. 302 (1793).

[704] 1 Stat. 414 (1795).

[705] 1 Stat. 577.

[706] 1 Stat. 727 (1799).

[707] 2 Stat. 453 (1808); 2 Stat. 473 (1808); 2 Stat. 499 (1808); 2 Stat. 506 (1809); 2 Stat. 528 (1809); 2 Stat. 550 (1809); 2 Stat. 605 (1810); 2 Stat. 707 (1812); 3 Stat. 88 (1813).

[708] 3 Stat. 244. For the trial of federal offenses in State courts *see* Charles Warren, Federal Criminal Laws and State Courts, 38 Harv. L. Rev. 545 (1925).

[709] Charles Warren, Federal Criminal Laws and State Courts, 38 Harv. L. Rev. 545, 577-581 (1925).

[710] Justice Story dissenting in Houston *v.* Moore, 5 Wheat. 1, 69 (1820); Justice McLean dissenting in United States *v.* Bailey, 9 Pet. 238, 259 (1835).

[711] 16 Pet. 539, 615 (1842).

[712] Robertson *v.* Baldwin, 165 U.S. 275 (1897); Dallemagne *v.* Moisan, 197 U.S. 169 (1905). *See also* Teal *v.* Felton, 12 How. 284 (1852); Claflin *v.* Houseman, 93 U.S. 130 (1876). This last case proceeds on the express assumption that the State and National Governments are part of a single nation and implicity repudiates the idea of separate sovereignties, as set out in Prigg *v.* Pennsylvania, 16 Pet. 539 (1842).

[713] Mitchell Wendell, Relations between the Federal and State Courts (New York, 1949), 278.

[714] 35 Stat. 65 (1908).

[715] Hoxie *v.* New York, N.H. & H.R. Co., 82 Conn. 352 (1909).

[716] 223 U.S. 1, 59 (1912).

[717] Brown *v.* Western Ry. Co. of Alabama, 338 U.S. 294 (1949). *See* Justice Frankfurter's dissent in this case for a summary of rulings to the contrary.

[718] 330 U.S. 386 (1947).

[719] 56 Stat. 23, 33-34, 205 (c).

[720] 330 U.S. 386, 389.

[721] Ibid. 390. Justice Black refers to Prigg *v.* Pennsylvania, 16 Pet. 539, 615 (1842), and other cases as broadly questioning the power and duty of State courts to enforce federal criminal law. The cases primarily relied upon in the opinion are Claflin *v.* Houseman, 93 U.S. 130 (1876); Mondou *v.* New York, N.H. & H.R. Co. (Second Employers' Liability Cases), 223 U.S. 1 (1912).

[722] *Cf.* Doyle *v.* Continental Ins. Co., 94 U.S. 535 (1877), (which upheld a similar

Wisconsin statute), and Security Mut. L. Ins. Co. *v.* Prewitt, 202 U.S. 246 (1906); with Home Ins. Co. *v.* Morse, 20 Wall. 445 (1874); Barron *v.* Burnside, 121 U.S. 186 (1887); Southern P. Co. *v.* Denton, 146 U.S. 202 (1892); Gerling *v.* Baltimore & O.R. Co., 151 U.S. 673, 684 (1894); Barrow S.S. Co. *v.* Kane, 170 U.S. 100, 111 (1898); Herndon *v.* Chicago, R.I. & P.R. Co., 218 U.S. 135 (1910); Harrison *v.* St. Louis & S.F.R. Co., 232 U.S. 318 (1914); Donald *v.* Philadelphia & R. Coal & I. Co., 241 U.S. 329 (1916).

[723] 257 U.S. 529, 532 (1922).

[724] 25 Edward III, Stat. 5, Ch. 2. *See also* Story's Commentaries On The Constitution Of The United States, Vol. 2, 529-540, (5th ed.).

[725] 4 Cr. 75 (1807).

[726] Ibid. 75, 126.

[727] Ibid. 126.

[728] Ibid. 127.

[729] United States *v.* Burr, 4 Cr. 470, Appx. (1807).

[730] There have been a number of lower court cases in some of which convictions were obtained. As a result of the Whiskey Rebellion convictions of treason were obtained on the basis of the ruling that forcible resistance to the enforcement of the revenue laws was a constructive levying of war. United States *v.* Vigol, 28 Fed. Cas. No. 16,621 (1795); United States *v.* Mitchell, 26 Fed. Cas. No. 15,788 (1795). After conviction, the defendants were pardoned. *See also* for the same ruling in a different situation the Case of Fries, 9 Fed. Cas. Nos. 5,126 (1799); 5,127 (1800). The defendant was again pardoned after conviction. About a half century later participation in forcible resistance to the Fugitive Slave Law was held not to be a constructive levying of war. United States *v.* Hanway, 26 Fed. Cas. No. 15,299 (1851). Although the United States Government regarded the activities of the Confederate States as a levying of war, the President by Amnesty Proclamation of December 25, 1868, pardoned all those who had participated on the southern side in the Civil War. In applying the Captured and Abandoned Property Act of 1863 (12 Stat. 820) in a civil proceeding, the Court declared that the foundation of the Confederacy was treason against the United States. Sprott *v.* United States, 20 Wall. 459 (1875). *See also* Hanauer *v.* Doane, 12 Wall. 342 (1871); Thorington *v.* Smith, 8 Wall. 1 (1869); Young *v.* United States, 97 U.S. 39 (1878). These four cases bring in the concept of adhering to the enemy and giving him aid and comfort, but these are not criminal cases and deal with attempts to recover property under the Captured and Abandoned Property Act by persons who claimed that they had given no aid or comfort to the enemy. These cases are not, therefore, an interpretation of the Constitution.

[731] 325 U.S. 1 (1945).

[732] 89 Law. Ed. 1443-1444 (Argument of Counsel).

[733] 325 U.S. 35.

[734] Ibid. 34-35. Earlier Justice Jackson had declared that this phase of treason consists of two elements: "adherence to the enemy; and rendering him aid and comfort." A citizen, it was said, may take actions "which do aid and comfort the enemy—* * *—but if there is no adherence to the enemy in this, if there is no intent to betray, there is no treason." Ibid. 29. Justice Jackson states erroneously that the requirement of two witnesses to the same overt act was an original invention of the Convention of 1787. Actually it comes from the British Treason Trials Act of 1696 (7 and 8 Wm. III, C. 3).

[735] 330 U.S. 631 (1947).

[736] Ibid. 635-636.

[737] 330 U.S. 631, 645-646. Justice Douglas cites no cases for these propositions. Justice Murphy in a solitary dissent stated: "But the act of providing shelter was of the type that might naturally arise out of petitioner's relationship to his son, as the Court recognizes. By its very nature, therefore, it is a non-treasonous act. That is true even when the act is viewed in light of all the surrounding circumstances. All that can be said is that the problem of whether it was motivated by treasonous or non-treasonous factors is left in doubt. It is therefore not an overt act of treason, regardless of how unlawful it might otherwise be." Ibid. 649. The following summary, taken from the Appendix to the Government's brief in Cramer *v.* United States, 325 U.S. 1 (1945), and incorporated as note 38 in the Court's opinion (pp. 25-26), contains all the cases in which, prior to Kawakita *v.* United States, which is dealt with immediately below, construction of the treason clause has been

involved except grand jury charges and cases to which interpretation of the clause was incidental: Whiskey Rebellion cases: United States *v.* Vigol, 28 Fed. Cas. No. 16,621 (1795), United States *v.* Mitchell, 26 Fed. Cas. No. 15,788 (1795) (constructive levying of war, based on forcible resistance to execution of a statute; defendants convicted and later pardoned). House tax case: Fries's Case, 9 Fed. Cas. Nos. 5,126, 5,127 (1799, 1800) (constructive levying of war, based on forcible resistance to execution of a statute; defendant convicted and later pardoned). The Burr Conspiracy: Ex parte Bollman, 4 Cr. 75 (1807); United States *v.* Burr, 25 Fed. Cas. Nos. 14,692a (1806); 14,693 (1807) (conspiracy to levy war held not an overt act of levying war). United States *v.* Lee, 26 Fed. Cas. No. 15,584 (1814) (sale of provisions a sufficient overt act; acquittal). United States *v.* Hodges, 26 Fed. Cas No. 15,374 (1815) (obtaining release of prisoners to the enemy is adhering to the enemy, the act showing the intent; acquittal). United States *v.* Hoxie, 26 Fed. Cas. No. 15,407 (1808) (attack of smugglers on troops enforcing embargo is riot and not levying of war). United States *v.* Pryor, 27 Fed. Cas. No. 16,096 (1814) (proceeding under flag of truce with enemy detachment to help buy provisions is too remote an act to establish adhering to the enemy). United States *v.* Hanway, 26 Fed. Cas. No. 15,299 (1851) (forcible resistance to execution of Fugitive Slave Law no levying of war). United States *v.* Greiner, 26 Fed. Cas. No. 15,262 (1861) (participation as members of state militia company in seizure of a federal fort is a levying of war). United States *v.* Greathouse, 26 Fed. Cas. No. 15,254 (1863) (fitting out and sailing a privateer is a levying of war; defendants convicted, later pardoned). Cases of confiscation of property or refusal to enforce obligations given in connection with sale of provisions to the Confederacy: Hanauer *v.* Doane, 12 Wall. 342 (1871); Carlisle *v.* United States, 16 Wall. 147 (1873); Sprott *v.* United States, 20 Wall. 459, 371[Transcriber's Note: "371" is incorrect—case occupies 20 Wall. 459-474 (1874)] (1874); United States *v.* Athens Armory, 24 Fed. Cas. No. 14,473 (1868) (mixed motive, involving commercial profit, does not bar finding of giving aid and comfort to the enemy). United States *v.* Cathcart and United States *v.* Parmenter, 25 Fed. Cas. No. 14,756 (1864). Chenoweth's Case (unreported: *see* Ex parte Vallandigham, 28 Fed. Cas. No. 16,816, at 888 (1863)) (indictment bad for alleging aiding and abetting rebels, instead of directly charging levying of war). Case of Jefferson Davis, 7 Fed. Cas. No. 3621a (1867-71) (argument that rebels whose government achieved status of a recognized belligerent could not be held for treason; Davis was not tried on the indictment); *see* 2 Warren, Supreme Court in United States History (1934 ed.) 485-487; Watson, Trial of Jefferson Davis (1915) 25 Yale L.J. 669. Philippine insurrections: United States *v.* Magtibay, 2 Phil. 703 (1903), United States *v.* De Los Reyes, 3 Phil. 349 (1904) (mere possession of rebel commissions insufficient overt acts; strict enforcement of two-witness requirement; convictions reversed); United States *v.* Lagnason, 3 Phil. 472 (1904) (armed effort to overthrow the government is levying war). United States *v.* Fricke, 259 F. 673 (1919) (acts "indifferent" on their face held sufficient overt acts). United States *v.* Robinson, 259 F. 685 (1919) (dictum, acts harmless on their face are insufficient overt acts). United States *v.* Werner, 247 F. 708 (1918), affirmed in 251 U.S. 466 (1920) (act indifferent on its face may be sufficient overt act). United States *v.* Haupt, 136 F. (2d) 661 (1943) (reversal of conviction on strict application of two-witness requirement and other grounds; inferentially approves acts harmless on their face as overt acts). Stephan *v.* United States, 133 F. (2d) 87 (1943) (acts harmless on their face may be sufficient overt acts; conviction affirmed but sentence commuted). United States *v.* Cramer, 137 F. (2d) 888 (1943).

[738] 343 U.S. 717.

[739] Ibid. 732. For citations on the subject of dual nationality, *see* ibid. 723 note 2. Three dissenters asserted that Kawakita's conduct in Japan clearly showed he was consistently demonstrating his allegiance to Japan. "As a matter of law, he expatriated himself as well as that can be done." Ibid. 746.

[740] Ex parte Bollman, 4 Cr. 75 (1807).

[741] United States *v.* Burr, 4 Cr. 470 (1807).

[742] Cramer *v.* United States, 325 U.S. 1 (1945).

[743] Haupt *v.* United States, 330 U.S. 631 (1947).

[744] Ex parte Bollman, 4 Cr. 75, 126, 127 (1807).

[745] 12 Stat. 589. This act incidentally did not designate rebellion as treason.

[746] Miller *v.* United States, 11 Wall. 268, 305 (1871).

[747] Wallach *v.* Van Riswick, 92 U.S. 202, 213 (1876).

[748] Lord de la Warre's Case, 11 Coke, 1 a. A number of cases dealt with the effect

of a full pardon by the President of owners of property confiscated under this act. They held that a full pardon relieved the owner of forfeiture as far as the Government was concerned, but did not divide the interest acquired by third persons from the Government during the lifetime of the offender. Illinois Central R. Co. *v.* Bosworth, 133 U.S. 92, 101 (1890); Knote *v.* United States, 95 U.S. 149 (1877); Wallach *v.* Van Riswick, 92 U.S. 202, 213 (1876); Armstrong's Foundry *v.* United States, 6 Wall. 766, 769 (1868). There is no direct ruling on the question of whether only citizens can commit treason. In Carlisle *v.* United States, 16 Wall. 147, 154-155 (1873), the Court declared that aliens while domiciled in this country owe a temporary allegiance to it and may be punished for treason equally with a native-born citizen in the absence of a treaty stipulation to the contrary. This case involved the attempt of certain British subjects to recover claims for property seized under the Captured and Abandoned Property Act, 12 Stat. 820 (1863) which provided for the recovery of property or its value in suits in the Court of Claims by persons who had not rendered aid and comfort to the enemy. Earlier in United States *v.* Wiltberger, 5 Wheat. 76, 97 (1820), which involved a conviction for manslaughter under an act punishing manslaughter and treason on the high seas, Chief Justice Marshall going beyond the necessities of the case stated that treason "is a breach of allegiance, and can be committed by him only who owes allegiance either perpetual or temporary."

ARTICLE IV

[Pg 647]

STATES' RELATIONS

STATE'S RELATIONS

[Pg 651]

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.

Sources and Effect of This Provision

PRIVATE INTERNATIONAL LAW

The historical background of the above section is furnished by that branch of private law which is variously termed "Private International Law," "Conflict of Laws," "Comity." This comprises a body of rules, based largely on the writings of jurists and judicial decisions, in accordance with which the courts of one country or "jurisdiction" will ordinarily, in the absence of a local policy to the contrary, extend recognition and enforcement to rights claimed by individuals by virtue of the laws or judicial decisions of another country or "jurisdiction." Most frequently applied examples of these rules include the following: the rule that a marriage which is good in the country where performed (*lex loci*) is good elsewhere; likewise the rule that contracts are to be interpreted in accordance with the laws of the country where entered into (*lex loci contractus*) unless the parties clearly intended otherwise; also the rule that immovables may be disposed of only in accordance with the law of the country where situated (*lex rei sitae*);[1] also the converse rule that chattels adhere to the person of their owner and hence are disposable by him, even when located elsewhere, in accordance with the law of his domicile (*lex domicilii*); also the rule that regardless of where the cause arose, the courts of any country where personal service can be got upon the defendant will take jurisdiction of certain types of personal actions, hence termed "transitory," and accord such remedy as the *lex fori* affords. Still other rules, of first importance in the present connection, determine the recognition which the judgments of the courts of one country shall receive from those of another country.

IMPORTANCE OF THE CONSTITUTIONAL PROVISION

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So even had the States of the Union remained in a mutual relationship of entire independence, still private claims originating in one would often have been assured recognition and enforcement

in the others. The framers of the Constitution felt, however, that the rules of private international law should not be left as among the States altogether on a basis of comity, and hence subject always to the overruling local policy of the *lex fori*, but ought to be in some measure at least placed on the higher plane of constitutional obligation. In fulfillment of this intent the section now under consideration was inserted, and Congress was empowered to enact supplementary and enforcing legislation.

THE ACTS OF 1790 AND 1804

Congressional legislation under the full faith and credit clause, so far as it is pertinent to adjudication thereunder, is today embraced in section 687 of Title 28 of the United States Code, which consolidates the acts of May 26, 1790 and of March 27, 1804.[2] "The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

FORCE AND EFFECT OF SAME

Several points clearly emerge: (1) the word "effect" is construed as referring to the effect of the records when authenticated, not to the effect of the authentication; (2) the faith and credit which is required by the rules of private international law is superseded as to "the records and judicial proceedings" of each State by a rule of complete obligation; as to these the local policy of the forum State can validly have no application. On the other hand, (3) while the act of 1790 lays down a rule for the authentication of the statutes of the several States, it says nothing regarding their extraterritorial operation; and (4) it is similarly silent regarding the common law of the several States. These silences, however, have been repealed, in part, by judicial decision. (*See* pp. 675-682.)

Judgments: The Primary Concern of the Provision [Pg 653]

TWO PRINCIPAL CLASSES OF JUDGMENTS

Article IV, section 1, has had its principal operation in relation to judgments. The cases fall into two groups: First, those in which the judgment involved was offered as a basis of proceedings for its own enforcement outside the State where rendered, as for example, when an action for debt is brought in the courts of State B on a judgment for money damages rendered in State A; secondly, those in which the judgment involved was offered, in conformance with the principle of *res judicata*, in defense in a new or "collateral" proceeding growing out of the same facts as the original suit, as for example, when a decree of divorce granted in State A is offered as barring a suit for divorce by the other party to the marriage in the courts of State B.

EFFECT TO BE GIVEN IN FORUM STATE

The English courts and the different State courts in the United States, while recognizing "foreign judgments *in personam*" which were reducible to money terms as affording a basis for actions in debt, originally accorded them generally only the status of *prima facie* evidence in support thereof, so that the merits of the original controversy could always be opened. When offered in defense, on the other hand, "foreign judgments *in personam*" were ordinarily treated as conclusive, as between parties, of the issues they purported to determine, provided they had been rendered by a court of competent jurisdiction and were not tainted with fraud. And judgments "*in rem*" rendered under the same conditions were regarded as conclusive upon everybody on the theory that, as stated by Chief Justice Marshall, "it is a proceeding *in rem*, to which all the world are parties."[3]

The pioneer case was Mills *v.* Duryee,[4] decided in 1813. In an action brought in the circuit court of the District of Columbia—the equivalent of a State court for this purpose—on a judgment from a New York court, the defendant endeavored to reopen the whole question of the merits of the original case by a plea of "*nil debet*." It was answered in the words of the act of 1790 itself, that such records and proceedings were entitled in each State to the same faith and credit as in the State of origin; and that inasmuch as they were records of a court in the State of origin, and so conclusive of the merits of the case there, they were equally so in the forum State. The Court adopted the latter view, saying that it had not been the intention of the Constitution merely to reenact the common law—that is, the principles of private international law—as to the reception of foreign judgments, but to amplify and fortify these.[5] And in Hampton *v.* McConnell[6] some years later, Chief Justice Marshall went even further, using language which seems to show that [Pg 654] he regarded the judgment of a State court as constitutionally entitled to be accorded in the courts of sister States not simply the faith and credit of conclusive evidence, but the validity of a final judgment.

When, however, the next important case arose, the Court has come under new influences. This was McElmoyle *v.* Cohen,[7] decided in 1839, in which the issue was whether a statute of limitations of the State of Georgia, which applied only to judgments obtained in courts other than those of Georgia, could constitutionally bar an action in Georgia on a judgment rendered by a court of record of South Carolina. Declining to follow Marshall's lead in Hampton *v.* McConnell, the Court held that the Constitution was not intended "materially to interfere with the essential attributes of the *lex fori*"; that the act of Congress only established a rule of evidence, of conclusive evidence to be sure, but still of evidence only; and that it was necessary, in order to carry into effect in a State the judgment of a court of a sister State, to institute a fresh action in the court of the former, in strict compliance with its laws; and that consequently, when remedies were sought in support of the rights accruing in another jurisdiction, they were governed by the *lex fori*. In accord with this holding it has been further held that foreign judgments enjoy, not the right of priority or privilege or lien which they have in the State where they are pronounced, but only that which the *lex fori* gives them by its own laws, in their character of foreign judgments.[8] A judgment of a State court, in a cause within its jurisdiction, and against a defendant lawfully summoned, or against lawfully attached property of an absent defendant, is entitled to as much force and effect against the person summoned or the property attached, when the question is presented for decision in a court in another State, as it has in the State in which it was rendered.[9]

A judgment enforceable in the State where rendered must be given effect in the other State, [Pg 655] although the modes of procedure to enforce its collection may not be the same in both States.[10] If the court has acquired jurisdiction, the judgment is entitled to full faith and credit though the court may not be able to enforce it by execution in the State in which it was rendered, as where the defendant left the State after service upon him and took all his property with him. While the want of power to enforce a judgment or decree may afford a reason against entertaining jurisdiction, it has nothing to do with the validity of a judgment or decree when made.[11] In the words of the Court in a recent case: "A cause of action on a judgment is different from that upon which the judgment was entered. In a suit upon a money judgment for a civil cause of action, the validity of the claim upon which it was founded is not open to inquiry, whatever its genesis. Regardless of the nature of the right which gave rise to it, the judgment is an obligation to pay money in the nature of a debt upon a specialty. Recovery upon it can be resisted only on the grounds that the court which rendered it was without jurisdiction, * * * or that it has ceased to be obligatory because of payment or other discharge * * * or that it is a cause of action for which the State of the forum has not provided a court * * *"[12]

On the other hand, the clause is not violated when a judgment is disregarded because it is not conclusive of the issues before a court of the forum. Conversely, no greater effect can be given than is given in the State where rendered. Thus an interlocutory judgment may not be given the effect of a final judgment.[13] Likewise when a federal court does not attempt to foreclose the State court from hearing all matters of personal defense which landowners might plead, a State court may refuse to accept the former's judgment as determinative of the landowners' liabilities.[14] Similarly, though a confession of judgment upon a note, with a warrant of attorney annexed, in favor of the holder, is in conformity with a State law and usage as declared by the highest court of the State in which the judgment is rendered, the judgment may be collaterally impeached upon the ground that the party in whose behalf it was rendered was not in fact the holder.[15] But a consent decree, which under the law of the State has the same force and effect as a decree *in invitum*, must be given the same effect in the courts of another State.[16]

One result produced by not following Hampton *v.* McConnell is that even nowadays the Court is [Pg 656] sometimes confronted with the contention that a State need not provide a forum for some particular type of judgment from a sister State, a claim which it has by no means met with clear-cut principles. Thus in one case it held that a New York statute forbidding foreign corporations doing a domestic business to sue on causes originating outside the State was constitutionally applicable to prevent such a corporation from suing on a judgment obtained in a sister State.[17] But in a later case it ruled that a Mississippi statute forbidding contracts in cotton futures could not validly close the courts of the State to an action on a judgment obtained in a sister State on such a contract, although the contract in question had been entered into in the forum State and between its citizens.[18] Following the later rather than the earlier precedent, subsequent cases[19] have held: (1) that a State may adopt such system of courts and form of remedy as it sees fit, but cannot, under the guise of merely affecting the remedy, deny enforcement of claims otherwise within the protection of the full faith and credit clause when its courts have general jurisdiction of the subject matter and the parties;[20] (2) that, accordingly, a forum State, which has a shorter period of limitations than the State in which a judgment was granted and later reviewed, erred in concluding that, whatever the effect of the revivor under the law of the State of origin, it could refuse enforcement of the revived judgment;[21] (3) that the courts of one State [Pg 657] have no jurisdiction to enjoin the enforcement of judgments at law obtained in another State, when the same reasons assigned for granting the restraining order were passed upon on a motion for new trial in the action at law and the motion denied;[22] (4) that the constitutional mandate requires credit to be given to a money judgment rendered in a civil cause of action in another State, even though the forum State would have been under no duty to entertain the suit on which the judgment was founded, inasmuch as a State cannot, by the adoption of a particular

rule of liability or of procedure, exclude from its courts a suit on a judgment;[23] and (5) that similarly, tort claimants in State A, who obtain a judgment against a foreign insurance company, notwithstanding that, prior to judgment, domiciliary State B appointed a liquidator for the company, vested company assets in him, and ordered suits against the company stayed, are entitled to have such judgment recognized in State B for purposes of determining the amount of their claim, although not for determination of what priority, if any, their claim should have.[24] Moreover, there is no apparent reason why Congress, acting on the implications of Marshall's words in Hampton *v.* McConnell, should not clothe extrastate judgments of any particular type with the full status of domestic judgments of the same type in the several States.[25]

The Jurisdictional Prerequisite

The second great class of cases to arise under the full faith and credit clause comprises those raising the question whether a judgment for which extrastate operation was being sought, either as a basis of an action or as a defense in one, has been rendered with jurisdiction. Records and proceedings of courts wanting jurisdiction are not entitled to credit.[26] The jurisdictional question arises both in connection with judgments *in personam* against nonresident defendants [Pg 658] upon whom it is alleged personal service was not obtained in the State of origin of the judgment, and in relation to judgments *in rem* against property or a status alleged not to have been within the jurisdiction of the Court which handed down the original decree.[27]

JUDGMENTS *IN PERSONAM*

The pioneer case is that of D'Arcy *v.* Ketchum,[28] decided in 1850. The question presented was whether a judgment rendered by a New York court under a statute which provided that, when joint debtors were sued and one of them was brought into court on a process, a judgment in favor of the plaintiff would entitle him to execute against all, and so must be accorded full faith and credit in Louisiana when offered as the basis of an action in debt against a resident of that State who had not been served by process in the New York action. Pressed with the argument that by "the immutable principles of justice" no man's rights should be impaired without his being given an opportunity to defend them, the Court ruled that, interpreted in the light of the principles of "international law and comity" as they existed in 1790, the act of Congress of that year did not reach the case.[29] The truth is that the decision virtually amended the act, for had the Louisiana defendant ventured to New York, he could, as the Constitution of the United States then stood, have been subjected to the judgment of the same extent as the New York defendant who had been personally served. Subsequently, this disparity between the operation of a personal judgment in the home State and a sister State has been eliminated, thanks to the adoption of the Fourteenth Amendment. In divorce cases, however, it still persists in some measure. (*See* pp. 662-670.)

In Pennoyer *v.* Neff,[30] decided in 1878, and so under the amendment, the Court held that a [Pg 659] judgment given in a case in which the State court had endeavored to acquire jurisdiction of a nonresident defendant by an attachment upon property of his within the State and constructive notice to him, had not been rendered with jurisdiction and hence could not afford the basis of an action in the court of another State against such defendant, although it bound him so far as the property attached was concerned, on account of the inherent right of a State to assist its own citizens in obtaining satisfaction of their just claims. Nor would such a judgment, the Court further indicated, be due process of law to any greater extent in the State where rendered. In the words of a later case, "an ordinary personal judgment for money, invalid for want of service amounting to due process of law, is as ineffective in the State as outside of it."[31]

THE JURISDICTIONAL QUESTION

In short, when the subject matter of a suit is merely the determination of the defendant's liability, it is necessary that it should appear from the record that the defendant had been brought within the jurisdiction of the court by personal service of process, or his voluntary appearance, or that he had in some manner authorized the proceeding.[32] The claim that a judgment was "not responsive to the pleadings" raises the jurisdictional question;[33] but the fact that a nonresident defendant was only temporarily in the State when he was served in the original action does not vitiate the judgment rendered as the basis of an action in his home State.[34] Also, a judgment rendered in the State of his domicile against a defendant who, pursuant to the statute thereof providing for the service of process on absent defendants, was personally served in another State is entitled to full faith and credit.[35] Also, when the matter of fact or law on which jurisdiction depends was not litigated in the original suit, it is a matter to be adjudicated in the suit founded upon the judgment.[36]

Inasmuch as the principle of *res judicata* applies only to proceedings between the same parties and privies, the plea by defendant in an action based on a judgment that he was no party or privy to the original action raises the question of jurisdiction; and while a judgment against a [Pg 660] corporation in one State may validly bind a stockholder in another State to the extent of the par value of his holdings,[37] an administrator acting under a grant of administration in one State stands in no sort of relation of priority to an administrator of the same estate in another State.[38]

But where a judgment of dismissal was entered in a federal court in an action against one of two joint tortfeasors, in a State in which such a judgment would constitute an estoppel in another action in the same State against the other tort-feasor, such judgment is not entitled to full faith and credit in an action brought against the other tortfeasor in another State.[39]

SERVICE ON FOREIGN CORPORATIONS

In 1856 the Court decided Lafayette Insurance Co. *v.* French et al.,[40] a pioneer case in its general class. Here it was held that "where a corporation chartered by the State of Indiana was allowed by a law of Ohio to transact business in the latter State upon the condition that service of process upon the agent of the corporation should be considered as service upon the corporation itself, a judgment obtained against the corporation by means of such process" ought to receive in Indiana the same faith and credit as it was entitled to in Ohio.[41] Later cases establish under both the Fourteenth Amendment and article IV, section 1, that the cause of action must have arisen within the State obtaining service in this way,[42] that service on an officer of a corporation, not its resident agent and not present in the State in an official capacity, will not confer jurisdiction over the corporation;[43] that the question whether the corporation was actually "doing business" in the State may be raised.[44] On the other hand, the fact that the business was interstate is no objection.[45]

SERVICE ON OUT-OF-STATE OWNERS OF MOTOR VEHICLES

By analogy to the above cases, it has been held that a State may require nonresident owners of motor vehicles to designate an official within the State as an agent upon whom process may be served in any legal proceedings growing out of their operation of a motor vehicle within the State;[46] and while these cases arose under the Fourteenth Amendment alone, unquestionably a [Pg 661] judgment validly obtained upon this species of service could be enforced upon the owner of a car through the courts of his home State.

JUDGMENTS *IN REM*

In sustaining the challenge to jurisdiction in cases involving judgments *in personam*, the Court was in the main making only a somewhat more extended application of recognized principles. In order to sustain the same kind of challenge in cases involving judgments *in rem* it has had to make law outright. The leading case is Thompson *v.* Whitman,[47] decided in 1874. Thompson, sheriff of Monmouth County, New Jersey, acting under a New Jersey statute, had seized a sloop belonging to Whitman, and by a proceeding *in rem* had obtained its condemnation and forfeiture in a local court. Later, Whitman, a citizen of New York, brought an action for trespass against Thompson in the United States Circuit Court for the Southern District of New York, and Thompson answered by producing a record of the proceedings before the New Jersey tribunal. Whitman thereupon set up the contention that the New Jersey court had acted without jurisdiction inasmuch as the sloop which was the subject matter of the proceedings had been seized outside the county to which, by the statute under which it had acted, its jurisdiction was confined.

Thompson *v.* Whitman

As previously explained, the plea of lack of privity cannot be set up in defense in a sister State against a judgment *in rem*. It is, on the other hand, required of a proceeding *in rem* that the *res* be within the court's jurisdiction, and this, it was urged, had not been the case in Thompson *v.* Whitman. Could, then, the Court consider this challenge with respect to a judgment which was offered not as the basis for an action for enforcement through the courts of a sister State, but merely as a defense in a collateral action? As the law stood in 1873, it apparently could not.[48] All difficulties, nevertheless, to its consideration of the challenge to jurisdiction in the case were brushed aside by the Court. Whenever, it said, the record of a judgment rendered in a State court is offered "in evidence" by either of the parties to an action in another State, it may be contradicted as to the facts necessary to sustain the former court's jurisdiction; "and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding the claim that they did exist."[49]

Divorce Decrees [Pg 662]

THE JURISDICTIONAL PREREQUISITE: DOMICILE

This however, was only the beginning of the court's lawmaking in cases *in rem*. The most important class of such cases is that in which the respondent to a suit for divorce offers in defense an earlier decree from the courts of a sister State. By the almost universally accepted view prior to 1906 a proceeding in divorce was one against the marriage status, i.e., *in rem*, and hence might be validly brought by either party in any State where he or she was *bona fide* domiciled;[50] and, conversely, when the plaintiff did not have a *bona fide* domicile in the State, a court could not render a decree binding in other States even if the nonresident defendant entered a personal appearance.[51] But in 1906 the Court discovered, by a vote of five-to-four, a

situation in which a divorce proceeding is one *in personam*.

Haddock *v.* Haddock

The case referred to is Haddock *v.* Haddock,[52] while the earlier rule is illustrated by Atherton *v.* Atherton,[53] decided five years previously. In the latter it was held, in the former denied, that a divorce granted a husband without personal service upon the wife, who at the time was residing in another State, was entitled to recognition under the full faith and credit clause and the acts of Congress; the difference between the cases consisting solely in the fact that in the Atherton case the husband had driven the wife from their joint home by his conduct, while in the Haddock case he had deserted her. The Court which granted the divorce in Atherton *v.* Atherton was held to have had jurisdiction of the marriage status, with the result that the proceeding was one *in rem* and hence required only service by publication upon the respondent. Haddock's suit, on the contrary, was held to be as to the wife *in personam*, and so to require personal service upon her, or her voluntary appearance, neither of which had been had; although, notwithstanding this, the decree in the latter case was held to be valid as to the State where obtained on account of the State's inherent power to determine the status of its own citizens. The upshot was a situation in which a man and a woman, when both were in Connecticut, were divorced; when both were in New York, were married; and when the one was in Connecticut and the other in New York, the former was divorced and the latter married. In Atherton *v.* Atherton the Court had earlier acknowledged that "a husband without a wife, or a wife without a husband, is unknown to the law."

[Pg 663]

EMERGENCE OF THE DOMICILE QUESTION

The practical difficulties and distresses likely to result from such anomalies were pointed out by critics of the decision at the time. In point of fact, they have been largely avoided, because most of the State courts have continued to give judicial recognition and full faith and credit to one another's divorce proceedings on the basis of the older idea that a divorce proceeding is one *in rem*, and that if the applicant is *bona fide* domiciled in the State the court has jurisdiction in this respect. Moreover, until the second of the Williams *v.* North Carolina cases[54] was decided in 1945, there had not been manifested the slightest disposition to challenge judicially the power of the States to determine what shall constitute domicile for divorce purposes. Shortly prior thereto, in 1938, the Court in Davis *v.* Davis[55] rejected contentions adverse to the validity of a Virginia decree of which enforcement was sought in the District of Columbia. In this case, a husband, after having obtained in the District a decree of separation subject to payment of alimony, established years later a residence in Virginia, and sued there for a divorce. Personally served in the District, where she continued to reside, the wife filed a plea denying that her husband was a resident of Virginia and averred that he was guilty of a fraud on the court in seeking to establish a residence for purposes of jurisdiction. In ruling that the Virginia decree, granting to the husband an absolute divorce minus any alimony payment, was enforceable in the District, the Court stated that in view of the wife's failure, while in Virginia litigating her husband's status to sue, to answer the husband's charges of wilful desertion, it would be unreasonable to hold that the husband's domicile in Virginia was not sufficient to entitle him to a divorce effective in the District. The finding of the Virginia court on domicile and jurisdiction was declared to bind the wife. Davis *v.* Davis is distinguishable from the Williams *v.* North Carolina decisions in that in the former, determination of the jurisdictional prerequisite of domicile was made in a contested proceeding, while in the Williams cases it was not.

Williams I and II

[Pg 664]

In the Williams I and Williams II cases, the husband of one marriage and the wife of another left North Carolina, obtained six-week divorce decrees in Nevada, married there, and resumed their residence in North Carolina where both previously had been married and domiciled. Prosecuted for bigamy, the defendants relied upon their Nevada decrees; and won the preliminary round of this litigation; that is, Williams I,[56] when a majority of the justices, overruling Haddock *v.* Haddock, declared that in this case, the Court must assume that the petitioners for divorce had a *bona fide* domicile in Nevada, and not that their Nevada domicile was a sham. "* * * each State, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent. There is no constitutional barrier if the form and nature of substituted service meet the requirements of due process." Accordingly, a decree granted by Nevada to one, who, it is assumed, is at the time *bona fide* domiciled therein, is binding upon the courts of other States, including North Carolina in which the marriage was performed and where the other party to the marriage is still domiciled when the divorce was decreed. In view of its assumptions, which it justified on the basis of an inadequate record, the Court did not here pass upon the question whether North Carolina had the power to refuse full faith and credit to a Nevada decree because it was based on residence rather than domicile; or because, contrary to the findings of the Nevada court, North Carolina found that no *bona fide* domicile had been acquired in Nevada.[57]

Presaging what ruling the Court would make when it did get around to passing upon the latter question, Justice Jackson, dissenting in Williams I, protested that "this decision repeals the divorce laws of all the States and substitutes the law of Nevada as to all marriages one of the parties to which can afford a short trip there. * * * While a State can no doubt set up its own

standards of domicile as to its internal concerns, I do not think it can require us to accept and in the name of the Constitution impose them on other States. * * * The effect of the Court's decision today—that we must give extraterritorial effect to any judgment that a state honors for its own purposes—is to deprive this Court of control over the operation of the full faith and credit and the due process clauses of the Federal Constitution in cases of contested jurisdiction and to vest it in the first State to pass on the facts necessary to jurisdiction."[58]

Notwithstanding that one of the deserted spouses had died since the initial trial and that another had remarried, North Carolina, without calling into question the status of the latter marriage began a new prosecution for bigamy; and when the defendants appealed the conviction resulting therefrom, the Supreme Court, in Williams II,[59] sustained the adjudication of guilt as not denying full faith and credit to the Nevada divorce decree. Reiterating the doctrine that jurisdiction to grant divorce is founded on domicile,[60] a majority of the Court held that a decree of divorce rendered in one State may be collaterally impeached in another by proof that the court which rendered the decree lacked jurisdiction (the parties not having been domiciled therein), even though the record of proceedings in that court purports to show jurisdiction.[61] [Pg 665]

CASES INVOLVING CLAIMS FOR ALIMONY OR PROPERTY ARISING IN FORUM STATE [Pg 666]

In Esenwein *v.* Commonwealth,[62] decided on the same day as the second Williams Case, the Supreme Court also sustained a Pennsylvania court in its refusal to recognize an *ex parte* Nevada decree on the ground that the husband who obtained it never acquired a *bona fide* domicile in the latter State. In this instance, the husband and wife had separated in Pennsylvania, where the wife was granted a support order; and after two unsuccessful attempts to win a divorce in that State, the husband departed for Nevada. Upon the receipt of a Nevada decree, the husband thereafter established a residence in Ohio, and filed an action in Pennsylvania for total relief from the support order. In a concurring opinion, in which he was joined by Justices Black and Rutledge, Justice Douglas stressed the "basic difference between the problem of marital capacity [Pg 667] and the problem of support," and stated that it was "not apparent that the spouse who obtained the decree can defeat an action for maintenance or support in another State by showing that he was domiciled in the State which awarded him the divorce decree," unless the other spouse appeared or was personally served. "The State where the deserted wife is domiciled has a deep concern in the welfare of the family deserted by the head of the household. If he is required to support his former wife, he is not made a bigamist and the offspring of his second marriage are not bastardized." Or as succinctly stated by Justice Rutledge, "the jurisdictional foundation for a decree in one State capable of foreclosing an action for maintenance or support in another may be different from that required to alter the marital status with extraterritorial effect."[63]

Three years later, but on this occasion as spokesman for a majority of the Court, Justice Douglas reiterated these views in the case of Estin *v.* Estin.[64] Even though it acknowledged the validity of an *ex parte* Nevada decree obtained by a husband, New York was held not to have denied full faith and credit to said decree when, subsequently thereto, it granted the wife a judgment for arrears in alimony founded upon a decree of separation previously awarded to her when both she and her husband were domiciled in New York. The Nevada decree, issued to the husband after he had resided there a year and upon constructive notice to the wife in New York who entered no appearance, was held to be effective only to change the marital status of both parties in all States of the Union but ineffective on the issue of alimony. Divorce, in other words, was viewed as being divisible; and Nevada, in the absence of acquiring jurisdiction over the wife, was held incapable of adjudicating the rights of the wife in the prior New York judgment awarding her alimony. Accordingly, the Nevada decree could not prevent New York from applying its own rule of law which, unlike that of Pennsylvania,[65] does permit a support order to survive a divorce decree.[66] Such a result was justified as accommodating the interests of both New York and Nevada in the broken marriage by restricting each State to matters of her dominant concern, the concern of New York being that of protecting the abandoned wife against impoverishment.

RECENT CASES [Pg 668]

Fears registered by the dissenters in the second Williams Case that the stability of all divorces might be undermined thereby and that thereafter the court of each forum State, by its own independent determination of domicile, might refuse recognition of foreign decrees were temporarily set at rest by the holding in Sherrer *v.* Sherrer,[67] wherein Massachusetts, a state of domiciliary origin, was required to accord full faith and credit to a 90-day Florida decree which had been contested by the husband. The latter, upon receiving notice by mail, retained Florida counsel who entered a general appearance and denied all allegations in the complaint, including the wife's residence. At the hearing the husband, though present in person and by counsel, did not offer evidence in rebuttal of the wife's proof of her Florida residence; and when the Florida court ruled that she was a *bona fide* resident, the husband did not appeal. Inasmuch as the findings of the requisite jurisdictional facts, unlike those in the Second Williams Case, were made in proceedings in which the defendant appeared and participated, the requirements of full faith and credit were held to bar him from collaterally attacking such findings in a suit instituted by him in his home State of Massachusetts, particularly in the absence of proof that the divorce decree was subject to such collateral attack in a Florida court. Having failed to take advantage of the opportunities afforded him by his appearance in the Florida proceeding, the husband was

thereafter precluded from re-litigating in another State the issue of his wife's domicile already passed upon by the Florida court.

In Coe *v.* Coe,[68] embracing a similar set of facts, the Court applied like reasoning to reach a similar result. Massachusetts again was compelled to recognize the validity of a six-week Nevada decree obtained by a husband who had left Massachusetts after a court of that State had refused him a divorce and had granted his wife separate support. In the Nevada proceeding, the wife appeared personally and by counsel filed a cross-complaint for divorce, admitted the husband's residence, and participated personally in the proceedings. After finding that it had jurisdiction of the plaintiff, defendant, and the subject matter involved, the Nevada court granted the wife a divorce, which was valid, final, and not subject to collateral attack under Nevada law. The [Pg 669] husband married again, and on his return to Massachusetts, his ex-wife petitioned the Massachusetts court to adjudge him in contempt for failing to make payments for her separate support under the earlier Massachusetts decree. Inasmuch as there was no intimation that under Massachusetts law a decree of separate support would survive a divorce, recognition of the Nevada decree as valid accordingly necessitated a rejection of the ex-wife's contention.

Appearing to revive Williams II, and significant for the social consequences produced by the result decreed therein, is the recent case of Rice *v.* Rice.[69] To determine the widowhood status of the party litigants in relation to inheritance of property of a husband who had deserted his first wife in Connecticut, had obtained an *ex parte* divorce in Nevada, and after remarriage, had died without ever returning to Connecticut, the first wife, joining the second wife and the administrator of his estate as defendants, petitioned a Connecticut court for a declaratory judgment. After having placed upon the first wife the burden of proving that the decedent had not acquired a *bona fide* domicile in Nevada, and after giving proper weight to the claims of power by the Nevada court, the Connecticut court concluded that the evidence sustained the contentions of the first wife; and in so doing, it was upheld by the Supreme Court. The cases of Sherrer *v.* Sherrer, 334 U.S. 343 (1948) and Coe *v.* Coe, 334 U.S. 378 (1948), previously discussed, were declared not to be in point; inasmuch as no personal service was made upon the first wife, nor did she in any way participate in the Nevada proceedings. She was not, therefore, precluded from challenging the finding of the Nevada court that the decedent was, at the time of the divorce, domiciled in that State.[70]

STATE OF THE LAW TODAY: QUAERE [Pg 670]

Upon summation one may speculate as to whether the doctrine of divisible divorce, as developed by Justice Douglas in Estin *v.* Estin, 334 U.S. 541 (1948), has not become the prevailing standard for determining the enforceability of foreign divorce decrees. If such be the case, it may be tenable to assert that an *ex parte* divorce, founded upon acquisition of domicile by one spouse in the State which granted it, is effective to destroy the marital status of both parties in the State of domiciliary origin and probably in all other States and therefore to preclude subsequent prosecutions for bigamy, but not to alter rights as to property, alimony, or custody of children in the State of domiciliary origin of a spouse who was neither served nor personally appeared.

DECREES AWARDING ALIMONY, CUSTODY OF CHILDREN

Resulting as a by-product of divorce litigation are decrees for the payment of alimony, judgments for accrued and unpaid instalments of alimony, and judicial awards of the custody of children, all of which necessitate application of the full faith and credit clause when extrastate enforcement is sought for them. Thus a judgment in State A for alimony in arrears and payable under a prior judgment of separation which is not by its terms conditional, nor subject by the law of State A to modification or recall, and on which execution was directed to issue, is entitled to recognition in the forum State. Although an obligation for accrued alimony could have been modified or set aside in State A prior to its merger in the judgment, such a judgment, by the law of State A, is not lacking in finality.[71] As to the finality of alimony decrees in general, the Court had previously ruled that where such a decree is rendered, payable in future instalments, the right to such instalments becomes absolute and vested on becoming due, provided no modification of the decree has been made prior to the maturity of the instalments.[72] However, a judicial order requiring the payment of arrearages in alimony, which exceeded the alimony previously decreed, is invalid for want of due process, the respondent having been given no opportunity to contest it.[73] "A judgment obtained in violation of procedural due process," said Chief Justice Stone, "is not [Pg 671] entitled to full faith and credit when sued upon in another jurisdiction."[74]

A recent example of a custody case was one involving a Florida divorce decree which was granted *ex parte* to a wife who had left her husband in New York, where he was served by publication. The decree carried with it an award of the exclusive custody of the child, whom the day before the husband had secretly seized and brought back to New York. The Court ruled that the decree was adequately honored by a New York court when, in *habeas corpus* proceedings, it gave the father rights of visitation and custody of the child during stated periods, and exacted a surety bond of the wife conditioned on her delivery of the child to the father at the proper times,[75] it having not been "shown that the New York court in modifying the Florida decree exceeded the limits permitted under Florida law. There is therefore a failure of proof that the Florida decree received less credit in New York than it had in Florida."

COLLATERAL ATTACK BY CHILD

A Florida divorce decree was also at the bottom of another recent case in which the daughter of a divorced man by his first wife, and his legatee under his will, sought to attack his divorce in the New York courts, and thereby indirectly his third marriage. The Court held that inasmuch as the attack would not have been permitted in Florida under the doctrine of *res judicata*, it was not permissible under the full faith and credit clause in New York.[76] On the whole, it appears that the principle of *res judicata* is slowly winning out against the principle of domicile.

Decrees of Other Types

[Pg 672]

PROBATE DECREES

Many judgments, enforcement of which has given rise to litigation, embrace decrees of courts of probate respecting the distribution of estates. In order that a court have jurisdiction of such a proceeding, the decedent must have been domiciled in the State, and the question whether he was so domiciled at the time of his death may be raised in the court of a sister State.[77] Thus, when a court of State A, in probating a will and issuing letters, in a proceeding to which all distributees were parties, expressly found that the testator's domicile at the time of death was in State A, such adjudication of domicile was held not to bind one subsequently appointed as domiciliary administrator c.t.a. in State B, in which he was liable to be called upon to deal with claims of local creditors and that of the State itself for taxes, he having not been a party to the proceeding in State A. In this situation, it was held, a court of State C, when disposing of local assets claimed by both personal representatives, was free to determine domicile in accordance with the law of State C.[78] Similarly, there is no such relation of privity between an executor appointed in one State and an administrator c.t.a. appointed in another State as will make a decree against the latter binding upon the former.[79] On the other hand, judicial proceedings in one State, under which inheritance taxes have been paid and the administration upon the estate has been closed, are denied full faith and credit by the action of a probate court in another State in assuming jurisdiction and assessing inheritance taxes against the beneficiaries of the estate, when under the law of the former State the order of the probate court barring all creditors who had failed to bring in their demand from any further claim against the executors was binding upon all.[80]

What is more important, however, is that the *res* in such a proceeding, that is, the estate, in order to entitle the judgment to recognition under article IV, section 1, must have been located in the State or legally attached to the person of the decedent. Such a judgment is accordingly valid, [Pg 673] generally speaking, to distribute the intangible property of the decedent, though the evidences thereof were actually located elsewhere.[81] This is not so, on the other hand, as to tangibles and realty. In order that the judgment of a probate court distributing these be entitled to recognition under the Constitution, they must have been located in the State; as to tangibles and realty outside the State, the decree of the probate court is entirely at the mercy of the *lex rei sitae*.[82] So, the probate of a will in one State, while conclusive therein, does not displace legal provisions necessary to its validity as a will of real property in other States.[83]

ADOPTION DECREES

That a statute legitimizing children born out of wedlock does not entitle them by the aid of the full faith and credit clause to share in the property located in another State is not surprising, in view of the general principle—to which, however, there are exceptions (*see* pp. 675-682)—that statutes do not have extraterritorial operation.[84] For the same reason adoption proceedings in one State are not denied full faith and credit by the law of the sister State which excludes children adopted by proceedings in other States from the right to inherit land therein.[85]

GARNISHMENT DECREES

A proceeding which combines some of the elements of both an *in rem* and an *in personam* action is the proceeding in garnishment cases. Suppose that A owes B and B owes C, and that the two former live in a different State than C. A, while on a brief visit to C's State, is presented with a writ attaching his debt to B and also a summons to appear in court on a named day. The result of the proceedings thus instituted is that a judgment is entered in C's favor against A to the amount of his indebtedness to B. Subsequently A is sued by B in their home State, and offers the judgment, which he has in the meantime paid, in defense. It was argued in behalf of B that A's debt to him had a *situs* in their home State, and furthermore that C could not have sued B in this [Pg 674] same State without formally acquiring a domicile there. Both propositions were, however, rejected by the Court, which held that the judgment in the garnishment proceedings was entitled to full faith and credit as against C's action.[86]

FRAUD AS A DEFENSE TO SUITS ON FOREIGN JUDGMENTS

As to whether recognition of a State judgment can be refused by the forum State on other than jurisdictional grounds, there are *dicta* to the effect that judgments, for which extraterritorial operation is demanded under article IV, section I and acts of Congress, are "impeachable for

manifest fraud." But unless the fraud affected the jurisdiction of the court, the vast weight of authority is against the proposition. Also it is universally agreed that a judgment may not be impeached for alleged error or irregularity,[87] or as contrary to the public policy of the State where recognition is sought for it under the full faith and credit clause.[88] Previously listed cases indicate, however, that the Court has in fact permitted local policy to determine the merits of a judgment under the pretext of regulating jurisdiction.[89] Thus in one case, Cole *v.* Cunningham, [90] the Court sustained a Massachusetts court in enjoining, in connection with insolvency proceedings instituted in that State, a Massachusetts creditor from continuing in New York courts an action which had been commenced there before the insolvency suit was brought. This was done on the theory that a party within the jurisdiction of a court may be restrained from doing something in another jurisdiction opposed to principles of equity, it having been shown that the creditor was aware of the debtor's embarrassed condition when the New York action was instituted. The injunction unquestionably denied full faith and credit and commanded the assent of only five Justices.

PENAL JUDGMENTS: TYPES ENTITLED TO RECOGNITION

Finally, the clause has been interpreted in the light of the "incontrovertible maxim" that "the courts of no country execute the penal laws of another."[91] In the leading case of Huntington *v.* Attrill,[92] however, the Court so narrowly defined "penal" in this connection as to make it substantially synonymous with "criminal," and on this basis held a judgment which had been [Pg 675] recovered under a State statute making the officers of a corporation who signed and recorded a false certificate of the amount of its capital stock liable for all of its debts, to be entitled under article IV, section 1, to recognition and enforcement in the courts of sister States. Nor, in general, is a judgment for taxes to be denied full faith and credit in State and federal courts merely because it is for taxes.[93]

Recognition of Rights Based Upon Constitutions, Statutes, Common Law

THE EARLY RULE

As to the extrastate protection of rights which have not matured into final judgments, the full faith and credit clause has never abolished the general principle of the dominance of local policy over the rules of comity.[94] This was stated by Justice Nelson in the Dred Scott case, as follows: "No State, * * *, can enact laws to operate beyond its own dominions, * * * Nations, from convenience and comity, * * *, recognizes [sic] and administer the laws of other countries. But, of the nature, extent, and utility, of them, respecting property, or the state and condition of persons within her territories, each nation judges for itself; * * *" He added that it was the same with the States of the Union in relation to another. It followed that even though Dred had become a free man in consequence of his having resided in the "free" State of Illinois, he had nevertheless upon his return to Missouri, which had the same power as Illinois to determine its local policy respecting rights acquired extraterritorially, reverted to servitude under the laws and judicial decisions of that State.[95]

DEVELOPMENT OF THE MODERN RULE

In a case decided in 1887, however, the Court remarked: "Without doubt the constitutional requirement, Art. IV, § I, that 'full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State,' implies that the public acts of every State shall be given the same effect by the courts of another State that they have by law and usage at home."[96] And this proposition was later held to extend to State constitutional provisions.[97] [Pg 676] More recently this doctrine has been stated in a very mitigated form, the Court saying that where statute or policy of the forum State is set up as a defense to a suit brought under the statute of another State or territory, or where a foreign statute is set up as a defense to a suit or proceedings under a local statute, the conflict is to be resolved, not by giving automatic effect to the full faith and credit clause and thus compelling courts of each State to subordinate its own statutes to those of others, but by appraising the governmental interest of each jurisdiction and deciding accordingly.[98] Obviously this doctrine endows the Court with something akin to an arbitral function in the decision of cases to which it is applied.

TRANSITORY ACTIONS: DEATH STATUTES

The initial effort in this direction was made in connection with transitory actions based on statute. Earlier, such actions had rested upon the common law, which was fairly uniform throughout the States, so that there was usually little discrepancy between the law under which the plaintiff from another jurisdiction brought his action (*lex loci*) and the law under which the defendant responded (*lex fori*). In the late seventies, however, the States, abandoning the common law rule on the subject, began passing laws which authorized the representatives of a decedent whose death had resulted from injury to bring an action for damages.[99] The question at once presented itself whether, if such an action was brought in a State other than that in which the injury occurred, it was governed by the statute under which it arose or by the law of the forum State, which might be less favorable to the defendant. Nor was it long before the same

question presented itself with respect to transitory action *ex contractu*, where the contract involved had been made under laws peculiar to the State where made, and with those laws in view.

ACTIONS UPON CONTRACT: WHEN GOVERNED BY LAW OF PLACE OF MAKING

[Pg 677]

In Chicago and Alton R.R. *v.* Wiggins,[100] referred to above, the Court, confronted with the latter form of the question, indicated its clear opinion that in such situations it was the law under which the contract was made, not the law of the forum State, which should govern. Its utterance on the point was, however, not merely *obiter*; it was based on an error, namely, the false supposition that the Constitution gives "acts" the same extraterritorial operation as the act of 1790 does "judicial records and proceedings." Notwithstanding which, this dictum is today the basis of "the settled rule" that the defendant in a transitory action is entitled to all the benefits resulting from whatever material restrictions the statute under which plaintiff's right of action originated sets thereto, except that courts of sister States cannot be thus prevented from taking jurisdiction in such cases.[101] However, a State court does not violate the full faith and credit clause by mere error in construing the law upon which a transitory action from another state depends;[102] nor is a court of the forum State guilty of a disregard thereof when it entertains a suit based on a statute of another State, albeit the statute in terms limits actions thereunder to courts of the enacting State.[103] Moreover, in actions on contracts made in other States, a State constitutionally may decline to enforce in its courts, as contrary to its own policy, the laws of such States relating to the right to add interest to the recovery as an incidental item of damages.[104]

STOCKHOLDER—CORPORATION RELATIONSHIP

Nor is it alone to defendants in transitory actions that the full faith and credit clause is today a shield and a buckler. Some legal relationships are so complex, the Court holds, that the law under which they were formed ought always to govern them as long as they persist.[105] One such relationship is that of a stockholder and his corporation. Hence, if a question arises as to the [Pg 678] liability of the stockholders of a corporation, the courts of the forum State are required by the full faith and credit clause to determine the question in accordance with the Constitution, laws and judicial decisions of the corporation's home State.[106] Illustrative applications of the latter rule are to be found in the following cases. A New Jersey statute forbidding an action at law to enforce a stockholder's liability arising under the laws of another State, and providing that such liability may be enforced only in equity, and that in such a case the corporation, its legal representatives, all its creditors, and stockholders, should be necessary parties, was held not to preclude an action at law in New Jersey by the New York State superintendent of banks against 557 New Jersey stockholders in an insolvent New York bank to recover assessments made under the laws of New York.[107] Also, in a suit to enforce double liability, brought in Rhode Island against a stockholder in a Kansas trust company, the courts of Rhode Island were held to be obligated to extend recognition to the statutes and court decisions of Kansas whereunder it is established that a Kansas judgment recovered by a creditor against the trust company is not only conclusive as to the liability of the corporation but also an adjudication binding each stockholder therein. The only defenses available to the stockholder are those which he could make in a suit in Kansas.[108]

FRATERNAL BENEFIT SOCIETY—MEMBER RELATIONSHIP

And the same principle applies to the relationship which is formed when one takes out a policy in a "fraternal benefit society." Thus in Royal Arcanum v. Green,[109] in which a fraternal insurance association chartered under the laws of Massachusetts was being sued in the courts of New York by a citizen of the latter State on a contract of insurance made in that State, the Court held that the defendant company was entitled under the full faith and credit clause to have the case determined in accordance with the laws of Massachusetts and its own constitution and by-laws as these had been construed by the Massachusetts courts.

Nor has the Court manifested lately any disposition to depart from this rule. In Sovereign Camp *v.* Bolin[110] it declared that a State in which a certificate of life membership of a foreign fraternal benefit association is issued, which construes and enforces said certificate according to [Pg 679] its own law rather than according to the law of the State in which the association is domiciled denies full faith and credit to the association's charter embodied in the statutes of the domiciliary State as interpreted by the latter's court. "The beneficiary certificate was not a mere contract to be construed and enforced according to the laws of the State where it was delivered. Entry into membership of an incorporated beneficiary society is more than a contract; it is entering into a complex and abiding relation and the rights of membership are governed by the law of the State of incorporation. [Hence] another State, wherein the certificate of membership was issued, cannot attach to membership rights against the society which are refused by the law of domicile." Consistently therewith, the Court also held, in Order of Travelers *v.* Wolfe,[111] that South Dakota, in a suit brought therein by an Ohio citizen against an Ohio benefit society, must give effect to a provision of the constitution of the society prohibiting the bringing of an action on a claim more than six months after disallowance by the society, notwithstanding that South Dakota's period of limitation was six years and that its own statutes voided contract stipulations

limiting the time within which rights may be enforced. Objecting to these results, Justice Black dissented on the ground that fraternal insurance companies are not entitled, either by the language of the Constitution, or by the nature of their enterprise, to such unique constitutional protection.

INSURANCE COMPANY, BUILDING AND LOAN ASSOCIATION—CONTRACTUAL RELATIONSHIPS

Whether or not distinguishable by nature of their enterprise, stock and mutual insurance companies and mutual building and loan associations, unlike fraternal benefit societies, have not been accorded the same unique constitutional protection; and, with few exceptions,[112] have had controversies arising out of their business relationships settled by application of the law of the forum State. In National Mutual B. & L. Asso. *v.* Brahan,[113] the principle applicable to these three forms of business organization was stated as follows: Where a corporation has become localized in a State and has accepted the laws of the State as a condition of doing business there, it cannot abrogate those laws by attempting to make contract stipulations, and there is no violation of the full faith and credit clause in instructing a jury to find according to local law notwithstanding a clause in a contract that it should be construed according to the laws of another State.

Thus, when a Mississippi borrower, having repaid a mortgage loan to a New York building and [Pg 680] loan association, sued in a Mississippi court to recover, as usurious, certain charges collected by the association, the usury law of Mississippi rather than that of New York was held to control. In this case, the loan contract, which was negotiated in Mississippi subject to approval by the New York office, did not expressly state that it was governed by New York law.[114] Similarly, when the New York Life Insurance Company, which had expressly stated in its application and policy forms that they would be controlled by New York law, was sued in Missouri on a policy sold to a resident thereof, the court of that State was sustained in its application of Missouri rather than New York law.[115] Also, in an action in a federal court in Texas to collect the amount of a life insurance policy which had been made in New York and later changed by instruments assigning beneficial interest, it was held that questions: (1) whether the contract remained one governed by the law of New York with respect to rights of assignees, rather than by the law of Texas, (2) whether the public policy of Texas permits recovery by one named beneficiary who has no beneficial interest in the life of the insured, and (3) whether lack of insurable interest becomes material when the insurer acknowledges liability and pays the money into court, were questions of Texas law, to be decided according to Texas decisions.[116]

Consistent with the latter holdings are the following two involving mutual insurance companies. In Pink *v.* A.A.A. Highway Express,[117] the New York insurance commissioner, as a statutory liquidator of an insolvent auto mutual company organized in New York sued resident Georgia policyholders in a Georgia court to recover assessments alleged to be due by virtue of their membership in it. The Supreme Court held that, although by the law of the State of incorporation, policyholders of a mutual insurance company become members thereof and as such liable to pay assessments adjudged to be required in liquidation proceedings in that State, the courts of another State are not required to enforce such liability against local resident policyholders who did not appear and were not personally served in the foreign liquidation proceedings; but are free to decide according to local law the question whether, by entering into the policies, residents became members of the company. Again, in State Farm Ins. *v.* Duel,[118] the Court ruled that an insurance company chartered in State A, which does not treat membership fees as part of premiums, cannot plead denial of full faith and credit when State B, as a condition of entry, requires the company to maintain a reserve computed by including membership fees as well as premiums received in all States. Were the company's contention [Pg 681] accepted, "no State," the Court observed, "could impose stricter financial standards for foreign corporations doing business within its borders than were imposed by the State of incorporation." It is not apparent, the Court added, that State A has an interest superior to that of State B in the financial soundness and stability of insurance companies doing business in State B,—which is obviously more the language of arbitration than of adjudication, as conventionally regarded.

WORKMEN'S COMPENSATION STATUTES

Finally, the relationship of employer and employee, so far as the obligations of the one and the rights of the other under workmen's compensation acts are concerned, has been the subject of similar treatment. In an earlier case,[119] the cause of action was an injury in New Hampshire, resulting in death to a workman who had entered the defendant company's employment in Vermont, the home State of both parties. The Court held that the case was governed under the full faith and credit clause by the Vermont workmen's compensation act, not that of New Hampshire. The relationship, it said, "was created by the law of Vermont, and so long as that relationship persisted its incidents were properly subject to regulation there."[120]

However, in an unacknowledged departure from this ruling the Court has subsequently held that the full faith and credit clause did not preclude California from disregarding a Massachusetts workmen's compensation statute and applying its own conflicting act in the case of an injury suffered by a Massachusetts employee of a Massachusetts employer while in California in the course of his employment.[121] The earlier case was distinguished as not having decided more

than that a State statute, applicable to employer and employee within the State, which provides compensation if the employee is injured while temporarily in another State, will be given full faith and credit in the latter when not obnoxious to its policy. Inasmuch as the Court in the older decision is reputed to have observed that reliance on the Vermont statute, as a defense to the New Hampshire suit, was not obnoxious to the policy of New Hampshire, it may be possible to reconcile these two cases by stating that a foreign workmen's compensation statute will be recognized when it is invoked as a defense but need not be applied when the plaintiff endeavors to found his suit thereon. [Pg 682]

Later decisions involving the recognition of a foreign workmen's compensation act include the following. In Magnolia Petroleum Co. *v.* Hunt[122] the Court ruled that a Louisiana employee of a Louisiana employer, who is injured on the job in Texas and who receives an award under the Texas Act, which does not grant further recovery to an employee who receives compensation under the laws of another State, cannot obtain additional compensation under the Louisiana Act. However, a compensation award by State A to a resident employee of a resident employer injured on the job in State B will not preclude State B from awarding added compensation under its own laws, when the compensation statute of State A does not expressly exclude recovery under a law of the State in which the injury occurred and when the State A award incorporated a private settlement contract wherein the employee reserved his rights in State B.[123] Also, the District of Columbia workmen's compensation act, which expressly covers an employee of the District employer, "irrespective of the place where the injury occurs," constitutionally may be applied, in the case of injury resulting in death, to a District resident, employed by a District employer, who was assigned to a job at Quantico, Virginia, and who, for three years prior to his death in Virginia, has commuted to the job site from his house in the District.[124]

Development of Section to Date and Possibilities

EVALUATION OF RESULTS

Thus the Court, from according an extrastate operation to statutes and judicial decisions in favor of defendants in transitory actions, proceeded next to confer the same protection upon certain classes of defendants in local actions in which the plaintiff's claim was the outgrowth of a relationship formed extraterritorially. But can the Court stop at this point? If it is true, as Chief Justice Marshall once remarked, that "the Constitution was not made for the benefit of plaintiffs alone," so also it is true that it was not made for the benefit of defendants alone. The day may come when the Court will approach the question of the relation of the full faith and credit clause to the extrastate operation of laws from the same angle as it today views the broader question of the scope of State legislative power. When and if this day arrives, State statutes and judicial decisions will be given such extraterritorial operation as seems reasonable to the Court to give them. In short, the rule of the dominance of local policy of the forum State will be superseded by that of judicial review.[125] [Pg 683]

The question arises whether the application to date, not by the Court alone but by Congress and the Court, of article IV, section 1, can be said to have met the expectations of its framers. In the light of some things said at the time of the framing of the clause this may be doubted. The protest was raised against the clause that in vesting Congress with power to declare the effect State laws should have outside the enacting State, it enabled the new government to usurp the powers of the States; but the objection went unheeded. The main concern of the Convention, undoubtedly, was to render the judgments of the State courts in civil cases effective throughout the Union. Yet even this object has been by no means completely realized, owing to the doctrine of the Court that before a judgment of a State court can be enforced in a sister State, a new suit must be brought on it in the courts of the latter; and the further doctrine that with respect to such a suit, the judgment sued on is only evidence; the logical deduction from which proposition is that the sister State is under no constitutional compulsion to give it a forum. These doctrines were first clearly stated in the McElmoyle Case and flowed directly from the new States' rights premises of the Court; but they are no longer in harmony with the prevailing spirit of constitutional construction nor with the needs of the times. Also, the clause seems always to have been interpreted on the basis of the assumption that the term "judicial proceedings" refers only to final judgments and does not include intermediate processes and writs; but the assumption would seem to be groundless, and if it is, then Congress has the power under the clause to provide for the service and execution throughout the United States of the judicial processes of the several States.

SCOPE OF POWERS OF CONGRESS UNDER SECTION

Under the present system, suit has ordinarily to be brought where the defendant, the alleged wrongdoer, resides, which means generally where no part of the transaction giving rise to the action took place. What could be more irrational? "Granted that no state can of its own volition make its process run beyond its borders * * * is it unreasonable that the United States should by federal action be made a unit in the manner suggested?"[126] [Pg 684]

Indeed, there are few clauses of the Constitution, the merely literal possibilities of which have been so little developed as the full faith and credit clause. Congress has the power under the clause to decree the effect that the statutes of one State shall have in other States. This being so,

it does not seem extravagant to argue that Congress may under the clause describe a certain type of divorce and say that it shall be granted recognition throughout the Union, and that no other kind shall. Or to speak in more general terms, Congress has under the clause power to enact standards whereby uniformity of State legislation may be secured as to almost any matter in connection with which interstate recognition of private rights would be useful and valuable.

FULL FAITH AND CREDIT IN THE FEDERAL COURTS

As we saw earlier, the legislation of Congress comprised in section 905 of the Revised Statutes lays down a rule not merely for the recognition of the records and judicial proceedings of State courts in the courts of sister States, but for their recognition in "every court of the United States," and it further lays down a like rule for the records and proceedings of the courts "of any territory or any country subject to the jurisdiction of the United States." Thus the courts of the United States are bound to give to the judgments of the State courts the same faith and credit that the courts of one State are bound to give to the judgments of the courts of her sister States.[127] So, where suits to enforce the laws of one State are entertained in courts of another on principles of comity, federal district courts sitting in that State may entertain them, and should, if they do not infringe federal law or policy.[128] However, the refusal of a territorial court in Hawaii, having jurisdiction of the action, which was on a policy issued by a New York insurance company, to admit evidence that an administrator had been appointed and a suit brought by him on a bond in the federal court in New York wherein no judgment had been entered, did not violate this clause.[129]

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The power to prescribe what effect shall be given to the judicial proceedings of the courts of the United States is conferred by other provisions of the Constitution, such as those which declare the extent of the judicial power of the United States, which authorize all legislation necessary and proper for executing the powers vested by the Constitution in the Government of the United States, and which declare the supremacy of the authority of the National Government within the limits of the Constitution. As part of its general authority, the power to give effect to the judgment of its courts is coextensive with its territorial jurisdiction.[130]

JUDGMENTS OF FOREIGN STATES

Doubtless Congress might also by virtue of its powers in the field of foreign relations lay down a mandatory rule regarding recognition of foreign judgments in every court of the United States. At present the duty to recognize judgments even in national courts rests only on comity and is qualified, in the judgment of the Supreme Court, by a strict rule of parity.[131]

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> SECTION 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

The Comity Clause

SOURCES

The community of rights among the citizens of the several States guaranteed by this article is traceable to colonial days. It had its origin in the fact that the colonists were all subjects of the same monarch.[132] After the Declaration of Independence was signed, the question arose as to how to reconcile the advantages of a common citizenship with a dispersed sovereignty. One element of the solution is to be seen in the Fourth of the Articles of Confederation, which read as follows: "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 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 * * *" Madison, writing in *The Federalist*,[133] adverted to the confusion engendered by use of the different terms "free inhabitants, free citizens," and "people" and by "superadding to 'all privileges and immunities of free citizens—all the privileges of trade and commerce,' * * *" The more concise phraseology of article IV, however, did little to dispel the uncertainty. In the Slaughter-House Cases,[134] Justice Miller suggested that it was to be regarded as the compendious equivalent of the earlier version: "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 Articles of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general ideal of the class of civil rights meant by the phrase."[135]

THEORIES AS TO ITS PURPOSE

First and last, at least four theories have been proffered regarding the purpose of this clause. The first is that the clause is a guaranty to the citizens of the different States of equal treatment by Congress—is, in other words, a species of equal protection clause binding on the National

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Government. The second is that the clause is a guaranty to the citizens of each State of all the privileges and immunities of citizenship that are enjoyed in any State by the citizens thereof,—a view which, if it had been accepted at the outset, might well have endowed the Supreme Court with a reviewing power over restrictive State legislation as broad as that which it later came to exercise under the Fourteenth Amendment. The third theory of the clause is that it guarantees to the citizen of any State the rights which he enjoys as such even when sojourning in another State, that is to say, enables him to carry with him his rights of State citizenship throughout the Union, without embarrassment by State lines. Finally, the clause is interpreted as merely forbidding any State to discriminate against citizens of other States in favor of its own. Though the first theory received some recognition in the Dred Scott Case,[136] particularly in the opinion of Justice Catron,[137] it is today obsolete. The second was specifically rejected in McKane *v.* Durston;[138] the third, in Detroit *v.* Osborne.[139] The fourth has become a settled doctrine of Constitutional Law.[140] In the words of Justice Miller in the Slaughter-House Cases,[141] the sole purpose of the comity clause was "to declare to the several States, that whatever these 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."[142] It follows that this section has no application in controversies between a State and its own citizens.[143] It is deemed to be infringed by a hostile discrimination against all nonresidents[144] but not by such differences of treatment between residents and nonresidents as the nature of the subject matter makes reasonable.[145]

HOW IMPLEMENTED

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This clause is self-executory, that is to say, its enforcement is dependent upon the judicial process. It does not authorize penal legislation by Congress. Federal statutes prohibiting conspiracies to deprive any person of rights or privileges secured by State laws,[146] or punishing infractions by individuals of the right of citizens to reside peacefully in the several States, and to have free ingress into and egress from such States,[147] have been held void.

CITIZENS OF EACH STATE

A question much mooted before the Civil War was whether the term could be held to include free Negroes. In the Dred Scott Case,[148] the Court answered it in the negative. "Citizens of each State," Chief Justice Taney argued, meant citizens of the United States as understood at the time the Constitution was adopted, and Negroes were not then regarded as capable of citizenship. The only category of national citizenship added under the Constitution comprised aliens, naturalized in accordance with acts of Congress.[149] In dissent, Justice Curtis not only denied the Chief Justice's assertion that there were no Negro citizens of States in 1789, but further argued that while Congress alone could determine what classes of aliens should be naturalized, the several States retained the right to extend citizenship to classes of persons born within their borders who had not previously enjoyed citizenship, and that one upon whom State citizenship was thus conferred became a citizen of the State in the full sense of the Constitution.[150] So far as persons born in the United States, and subject to the jurisdiction thereof are concerned, the question was put at rest by the Fourteenth Amendment.

CORPORATIONS

At a comparatively early date the claim was made that a corporation chartered by a State and consisting of its citizens was entitled to the benefits of the comity clause in the transaction of business in other States. It was argued that the Court was bound to look beyond the act of incorporation and see who were the incorporators. If it found these to consist solely of citizens of the incorporating State, it was bound to permit them through the agency of the corporation, to exercise in other States such privileges and immunities as the citizens thereof enjoyed. In Bank of Augusta *v.* Earle[151] this view was rejected. The Supreme Court held that the comity clause was never intended "to give to the citizens of each State the privileges of citizens in the several States, and at the same time to exempt them from the liabilities which the exercise of such privileges would bring upon individuals who were citizens of the State. This would be to give the citizens of other States far higher and greater privileges than are enjoyed by the citizens of the State itself."[152] A similar result was reached in Paul *v.* Virginia,[153] but by a different course of reasoning. The Court there held that a corporation—in this instance, an insurance company—was "the mere creation of local law" and could "have no legal existence beyond the limits of the sovereignty"[154] which created it; even recognition of its existence by other States rested exclusively in their discretion. More recent cases have held that this discretion is qualified by other provisions of the Constitution, notably the commerce clause and the Fourteenth Amendment.[155] By reason of its similarity to the corporate form of organization, a Massachusetts trust has been denied the protection of this clause.[156]

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ALL PRIVILEGES AND IMMUNITIES OF CITIZENS IN THE SEVERAL STATES

The classical judicial exposition of the meaning of this phrase is that of Justice Washington in Corfield *v.* Coryell,[157] which was decided by him on circuit in 1823. The question at issue was

the validity of a New Jersey statute which prohibited "any person who is not, at the time, an actual inhabitant and resident in this State" from raking or gathering "clams, oysters or shells" in any of the waters of the State, on board any vessel "not wholly owned by some person, inhabitant of and actually residing in this State. * * * The inquiry is," wrote Justice Washington, "what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several States which compose this Union, * * *"[158] He specified the following rights as answering this description: "Protection by the Government; the enjoyment of life and liberty, 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 justly prescribe for the general good of the whole. The right of a citizen of one State to pass through, or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of *habeas corpus*; to institute and maintain actions of any kind in the courts of the State; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State; * * *"[159]

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After thus defining broadly the private and personal rights which were protected, Justice Washington went on to distinguish them from the right to a share in the public patrimony of the State. "* * * we cannot accede" the opinion proceeds, "to the proposition * * * that, under this provision of the Constitution, the citizens of the several States are permitted to participate in all the rights which belong exclusively to the citizens of any particular State, merely upon the ground that they are enjoyed by those citizens; much less, that in regulating the use of the common property of the citizens of such State, the legislature is bound to extend to the citizens of all other States the same advantages as are secured to their own citizens."[160] The right of a State to the fisheries within its borders he then held to be in the nature of a property right, held by the State "for the use of the citizens thereof;" the State was under no obligation to grant "co-tenancy in the common property of the State, to the citizens of all the other States."[161] The precise holding of this case was confirmed in McCready *v.* Virginia;[162] the logic of Geer *v.* Connecticut[163] extended the same rule to wild game, and Hudson County Water Co. *v.* McCarter[164] applied it to the running water of a State. In Toomer *v.* Witsell,[165] however, the Court refused to apply this rule to free-swimming fish caught in the three-mile belt off the coast of South Carolina. It held instead that "commercial shrimping in the marginal sea, like other common callings, is within the purview of the privileges and immunities clause" and that a heavily discriminatory license fee exacted from nonresidents was unconstitutional.[166] Universal practice has also established another exception to which the Court gave approval by a dictum in Blake *v.* McClung:[167] "A State may, by rule uniform in its operation as to citizens of the several States, require residence within its limits for a given time before a citizen of another State who becomes a resident thereof shall exercise the right of suffrage or become eligible to office."[168]

DISCRIMINATION IN PRIVATE RIGHTS

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Not only has judicial construction of the comity clause excluded some privileges of a public nature from its protection; the courts have also established the proposition that the purely private and personal rights to which the clause admittedly extends are not in all cases beyond the reach of State legislation which differentiates citizens and noncitizens. Broadly speaking, these rights are held subject to the reasonable exercise by a State of its police power, and the Court has recognized that there are cases in which discrimination against nonresidents may be reasonably resorted to by a State in aid of its own public health, safety and welfare. To that end a State may restrict the right to sell insurance to persons who have resided within the State for a prescribed period of time.[169] It may require a nonresident who does business within the State[170] or who uses the highways of the State[171] to consent, expressly or by implication, to service of process on an agent within the State. Without violating this section, a State may limit the dower rights of a nonresident to lands of which the husband died seized while giving a resident dower in all lands held during the marriage,[172] or may leave the rights of nonresident married persons in respect of property within the State to be governed by the laws of their domicile, rather than by the laws it promulgates for its own residents.[173] But a State may not give a preference to resident creditors in the administration of the property of an insolvent foreign corporation.[174] An act of the Confederate Government, enforced by a State, to sequester a debt owed by one of its residents to a citizen of another State was held to be a flagrant violation of this clause.[175]

ACCESS TO COURTS

The right to sue and defend in the courts is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the same extent that it is allowed to its own citizens.[176] The constitutional requirement is satisfied if the nonresident is given access to the courts of the State upon terms which, in themselves, are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically the same as those accorded to resident citizens.[177] The Supreme Court upheld a

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State statute of limitations which prevented a nonresident from suing in the State's courts after expiration of the time for suit in the place where the cause of action arose,[178] and another such statute which suspended its operation as to resident plaintiff, but not as to nonresidents, during the period of the defendant's absence from the State.[179] A State law making it discretionary with the courts to entertain an action by a nonresident of the State against a foreign corporation doing business in the State, was sustained since it was applicable alike to citizens and noncitizens residing out of the State.[180] A statute permitting a suit in the courts of the State for wrongful death occurring outside the State, only if the decedent was a resident of the State, was sustained, because it operated equally upon representatives of the deceased whether citizens or noncitizens.[181]

TAXATION

A State may not, in the exercise of its taxing power, substantially discriminate between residents and nonresidents. A leading case is Ward *v.* Maryland,[182] in which the Court set aside a State law which imposed special taxes upon nonresidents for the privilege of selling within the State goods which were produced outside it. Likewise, a Tennessee statute which made the amount of the annual license tax exacted for the privilege of doing railway construction work dependent upon whether the person taxed had his chief office within or without the State, was found to be incompatible with the comity clause.[183] In Travis *v.* Yale and Towne Mfg. Co.,[184] the Court, while sustaining the right of a State to tax income accruing within its borders to nonresidents, [185] held the particular tax void because it denied to nonresidents exemptions which were allowed to residents. The "terms 'resident' and 'citizen' are not synonymous," wrote Justice Pitney, "* * * but a general taxing scheme * * * if it discriminates against all nonresidents, has the necessary effect of including in the discrimination those who are citizens of other States; * * *" [186] Where there was no discrimination between citizens and noncitizens, a State statute taxing the business of hiring persons within the State for labor outside the State, was sustained.[187] This section of the Constitution does not prevent a territorial government, exercising powers delegated by Congress, from imposing a discriminatory license tax on nonresident fishermen operating within its waters.[188]

However, what at first glance may appear to be a discrimination may turn out not to be when the [Pg 693] entire system of taxation prevailing in the enacting State is considered. On the basis of over-all fairness, the Court sustained a Connecticut statute which required nonresident stockholders to pay a State tax measured by the full market value of their stock, while resident stockholders were subject to local taxation on the market value of that stock reduced by the value of the real estate owned by the corporation.[189] Occasional or accidental inequality to a nonresident taxpayer are not sufficient to defeat a scheme of taxation whose operation is generally equitable.[190] In an early case the Court brushed aside as frivolous the contention that a State violated this clause by subjecting one of its own citizens to a property tax on a debt due from a nonresident secured by real estate situated where the debtor resided.[191]

> Clause 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.

Fugitives From Justice

DUTY TO SURRENDER

Although this provision is not in its nature self-executing, and there is no express grant to Congress of power to carry it into effect, that body passed a law shortly after the Constitution was adopted, imposing upon the Governor of each State the duty to deliver up fugitives from justice found in such State.[192] The Supreme Court has accepted this contemporaneous construction as establishing the validity of this legislation.[193] The duty to surrender is not [Pg 694] absolute and unqualified; if the laws of the State to which the fugitive has fled have been put in force against him, and he is imprisoned there, the demands of those laws may be satisfied before the duty of obedience to the requisition arises.[194] In Kentucky *v.* Dennison[195] the Court held, moreover, that this statute was merely declaratory of a moral duty; that the Federal Government "has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; * * *"[196] and consequently that a federal court could not issue a mandamus to compel the governor of one State to surrender a fugitive to another. In 1934 Congress plugged the loophole exposed by this decision by making it unlawful for any person to flee from one State to another for the purpose of avoiding prosecution in certain cases.[197]

FUGITIVE FROM JUSTICE

To be a fugitive from justice within the meaning of this clause, it is not necessary that the party charged should have left the State after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun. It is sufficient that the accused, having committed a crime

within one State and having left the jurisdiction before being subjected to criminal process, is found within another State.[198] The motive which induced the departure is immaterial.[199] Even if he were brought involuntarily into the State where found by requisition from another State, he may be surrendered to a third State upon an extradition warrant.[200] A person indicted a second time for the same offense is nonetheless a fugitive from justice by reason of the fact that after dismissal of the first indictment, on which he was originally indicted, he left the State with the knowledge of, or without objection by, State authorities.[201] But a defendant cannot be extradited if he was only constructively present in the demanding State at the time of the commission of the crime charged.[202] For the purpose of determining who is a fugitive from justice, the words "treason, felony or other crime" embrace every act forbidden and made punishable by a law of a State,[203] including misdemeanors.[204]

PROCEDURE FOR REMOVAL [Pg 695]

Only after a person has been charged with crime in the regular course of judicial proceedings is the governor of a State entitled to make demand for his return from another State.[205] The person demanded has no constitutional right to be heard before the governor of the State in which he is found on the question whether he has been substantially charged with crime and is a fugitive from justice.[206] The constitutionally required surrender is not to be interfered with by *habeas corpus* upon speculations as to what ought to be the result of a trial.[207] Nor is it proper thereby to inquire into the motives controlling the actions of the governors of the demanding and surrendering States.[208] Matters of defense, such as the running of the statute of limitations, cannot be heard on *habeas corpus*, but must be determined at the trial.[209] A defendant will, however, be discharged on *habeas corpus* if he shows by clear and satisfactory evidence that he was outside the demanding State at the time of the crime.[210] If, however, the evidence is conflicting, *habeas corpus* is not a proper proceeding to try the question of alibi.[211]

TRIAL OF FUGITIVE AFTER REMOVAL

There is nothing in the Constitution or laws of the United States which exempts an offender, brought before the courts of a State for an offense against its laws, from trial and punishment, even though he was brought from another State by unlawful violence,[212] or by abuse of legal process,[213] and a fugitive lawfully extradited from another State may be tried for an offense [Pg 696] other than that for which he was surrendered.[214] The rule is different, however, with respect to fugitives surrendered by a foreign government pursuant to treaty. In that case the offender may be tried only "for the offence with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings."[215]

> Clause 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.

This clause contemplated the existence of a positive unqualified right on the part of the owner of a slave which no State law could in any way regulate, control or restrain. Consequently the owner of a slave had the same right to seize and repossess him in another State, as the local laws of his own State conferred upon him, and a State law which penalized such seizure was held unconstitutional.[216] Congress had the power and the duty, which it exercised by the act of February 12, 1793,[217] to carry into effect the rights given by this Section,[218] and the States had no concurrent power to legislate on the subject.[219] However, a State statute providing a penalty for harboring a fugitive slave was held not to conflict with this clause since it did not affect the right or remedy either of the master or the slave; by it the State simply prescribed a rule of conduct for its own citizens in the exercise of its police power.[220]

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> Section 3. 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.

Doctrine of the Equality of the States

"Equality of constitutional right and power is the condition of all the States of the Union, old and new."[221] This doctrine, now a truism of Constitutional Law, did not find favor in the Constitutional Convention. That body struck out from this section, as reported by the Committee on Detail, two sections to the effect that "... new States shall be admitted on the same terms with the original States. But the Legislature may make conditions with the new States concerning the

public debt which shall be subsisting."[222] Opposing this action, Madison insisted that "the Western States neither would nor ought to submit to a union which degraded them from an equal rank with the other States."[223] Nonetheless, after further expressions of opinion *pro* and *con*, the Convention voted nine States to two to delete the requirement of equality.[224] Prior to this time, however, Georgia and Virginia had ceded to the United States large territories held by them, upon condition that new States should be formed therefrom, and admitted to the Union on an equal footing with the original States.[225] With the admission of Louisiana in 1812, the principle of equality was extended to States created out of territory purchased from a foreign power.[226] By the Joint Resolution of December 29, 1845, Texas "was admitted into the Union on an equal footing with the original States in all respects whatever."[227] Again and again, in adjudicating the rights and duties of States admitted after 1789, the Supreme Court has referred to the condition of equality as if it were an inherent attribute of the Federal Union.[228] Finally, in 1911, it invalidated a restriction on the change of location of the State capital, which Congress had imposed as a condition for the admission of Oklahoma, on the ground that Congress may not embrace in an enabling act conditions relating wholly to matters under State control.[229] In an opinion, from which Justices Holmes and McKenna dissented, Justice Lurton argued: "The power is to admit 'new States into *this* Union.' 'This Union' was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal [Pg 698] in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission."[230]

EARLIER SCOPE OF THE DOCTRINE

Until recently, however, the requirement of equality has applied primarily to political standing and sovereignty rather than to economic or property rights.[231] Broadly speaking, every new State is entitled to exercise all the powers of government which belong to the original States of the Union.[232] It acquires general jurisdiction, civil and criminal, for the preservation of public order, and the protection of persons and property throughout its limits except where it has ceded exclusive jurisdiction to the United States.[233] The legislative authority of a newly admitted State extends over federally owned land within the State, to the same extent as over similar property held by private owners, save that the State can enact no law which would conflict with the constitutional powers of the United States. Consequently it has jurisdiction to tax private activities carried on within the public domain, if the tax does not constitute an unconstitutional burden on the Federal Government.[234] Statutes applicable to territories, e.g., the Northwest Territory Ordinance of 1787, cease to have any operative force when the territory, or any part thereof, is admitted to the Union, except as adopted by State law.[235] When the enabling act contains no exclusion of jurisdiction as to crimes committed on Indian reservations by persons other than Indians, State courts are vested with jurisdiction.[236] But the constitutional authority of Congress to regulate commerce with Indian tribes is not inconsistent with the equality of new States,[237] and conditions inserted in the New Mexico Enabling Act forbidding the introduction of liquor into Indian territory were therefore valid.[238]

CITIZENSHIP OF INHABITANTS [Pg 699]

Admission of a State on an equal footing with the original States involves the adoption as citizens of the United States of those whom Congress makes members of the political community, and who are recognized as such in the formation of the new State.[239]

JUDICIAL PROCEEDINGS

Whenever a territory is admitted into the Union, the cases pending in the territorial court which are of exclusive federal cognizance are transferred to the federal court having jurisdiction over the area; cases not cognizable in the federal courts are transferred to the tribunals of the new State, and those over which federal and State courts have concurrent jurisdiction may be transferred either to the State or federal courts by the party possessing that option under existing law.[240] Where Congress neglected to make provision for disposition of certain pending cases in an Enabling Act for the admission of a State to the Union, a subsequent act supplying the omission was held valid.[241] After a case, begun in a United States court of a territory, is transferred to a State court under the operation of the enabling act and the State constitution, the appellate procedure is governed by the State statutes and procedure.[242] The new State cannot, without the express or implied assent of Congress, enact that the records of the former territorial court of appeals should become records of its own courts, or provide by law for proceedings based thereon.[243]

PROPERTY RIGHTS: UNITED STATES *v.* TEXAS [Pg 700]

Holding that a "mere agreement in reference to property" involved "no question of equality of

status," the Supreme Court upheld, in Stearns *v.* Minnesota,[244] a promise exacted from Minnesota upon its admission to the Union which was interpreted to limit its right to tax lands held by the United States at the time of admission and subsequently granted to a railroad. The "equal footing" doctrine has had an important effect, however, on the property rights of new States to soil under navigable waters. In Pollard *v.* Hagan,[245] the Court held that the original States had reserved to themselves the ownership of the shores of navigable waters and the soils under them, and that under the principle of equality the title to the soils of navigable waters passes to a new State upon admission. After refusing to extend the inland-water rule of this case to the three mile marginal belt under the ocean along the coast,[246] the Court applied the principle of the Pollard Case in reverse in United States *v.* Texas.[247] Since the original States had been found not to own the soil under the three mile belt, Texas, which concededly did own this soil before its annexation to the United States, was held to have surrendered its dominion and sovereignty over it, upon entering the Union on terms of equality with the existing States. To this extent, the earlier rule that unless otherwise declared by Congress the title to every species of property owned by a territory passes to the State upon admission[248] has been qualified.

RIGHTS CONVEYED TO PRIVATE PERSONS BEFORE ADMISSION OF A STATE

While the territorial status continues, the United States has power to convey property rights, such as rights in soil below high-water mark along navigable waters,[249] or the right to fish in designated waters,[250] which will be binding on the State. But a treaty with an Indian tribe which gave hunting rights on unoccupied lands of the United States, which rights should cease when the United States parted with its title to any of the land, was held to be repealed by the admission to the Union of the territory in which the hunting lands were situated.[251]

> Clause 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.

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Property of the United States

METHODS OF DISPOSING THEREOF

The Constitution is silent as to the methods of disposing of property of the United States. In United States *v.* Gratiot,[252] in which the validity of a lease of lead mines on government lands was put in issue, the contention was advanced that "disposal is not letting or leasing," and that Congress has no power "to give or authorize leases." The Court sustained the leases, saying "the disposal must be left to the discretion of Congress."[253] Nearly a century later this power to dispose of public property was relied upon to uphold the generation and sale of electricity by the Tennessee Valley Authority. The reasoning of the Court ran thus: the potential electrical energy made available by the construction of a dam in the exercise of its constitutional powers is property which the United States is entitled to reduce to possession; to that end it may install the equipment necessary to generate such energy. In order to widen the market and make a more advantageous disposition of the product, it may construct transmission lines, and may enter into a contract with a private company for the interchange of electric energy.[254]

PUBLIC LANDS

No appropriation of public lands may be made for any purpose except by authority of Congress.[255] However, the long-continued practice of withdrawing land from the public domain by Executive Orders for the purpose of creating Indian reservations has raised an implied delegation of authority from Congress to take such action.[256] The comprehensive authority of Congress over public lands includes the power to prescribe the times, conditions and mode of transfer thereof, and to designate the persons to whom the transfer shall be made;[257] to declare the dignity and effect of titles emanating from the United States;[258] to determine the validity of grants which antedate the government's acquisition of the property;[259] to exempt lands acquired under the homestead laws from previously contracted debts;[260] to withdraw land from settlement and to prohibit grazing thereon;[261] to prevent unlawful occupation of public property and to declare what are nuisances, as affecting such property, and provide for their abatement;[262] and to prohibit the introduction of liquor on lands purchased and used for an Indian colony.[263] Congress may limit the disposition of the public domain to a manner consistent with its views of public policy. A restriction inserted in a grant of public lands to a municipality which prohibited the grantee from selling or leasing to a private corporation the right to sell or sublet water or electric energy supplied by the facilities constructed on such land was held valid.[264]

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THE POWER OF THE STATE

No State can tax public lands of the United States within its borders;[265] nor can State legislation interfere with the power of Congress under this clause or embarrass its exercise.[266]

The question whether title to land which has once been the property of the United States has passed from it must be resolved by the laws of the United States; after title has passed, "that property, like all other property in the State, is subject to State legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."[267] In construing a conveyance by the United States of land within a State, the settled and reasonable rule of construction of the State affords a guide in determining what impliedly passes to the grantee as an incident to land expressly granted.[268] But a State statute [Pg 703] enacted subsequently to a federal grant cannot be given effect to vest in the State rights which either remained in the United States or passed to its grantee.[269]

POWER OF CONGRESS OVER THE TERRITORIES

In the territories, Congress has the entire dominion and sovereignty, national and local, and has full legislative power over all subjects upon which a State legislature might act.[270] It may legislate directly with respect to the local affairs of a territory or it may transfer that function to a legislature elected by the citizens thereof,[271] which will then be invested with all legislative power except as limited by the Constitution of the United States and acts of Congress.[272] In 1886, Congress prohibited the enactment by territorial legislatures of local or special laws on enumerated subjects.[273] The constitutional guarantees of private rights are applicable in territories which have been made a part of the United States by Congressional action,[274] but not to unincorporated territories.[275] Alaska is of the former description,[276] while the status of Hawaii appears to be doubtful.[277] Congress may establish, or may authorize the territorial legislature to create, legislative courts whose jurisdiction is derived from statutes enacted pursuant to this section rather than from article IV.[278] Such courts may exercise admiralty jurisdiction despite the fact that such jurisdiction may be exercised in the States only by constitutional courts.[279]

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> 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.

A Republican Form of Government

It was established in the pioneer case of Luther *v.* Borden,[280] that questions arising under this section are political, not judicial, in character, and that "it rests with Congress to decide what government is the established one in a State * * * as well as its republican character."[281] Upon Congress also rested the duty to restore republican governments to the States which seceded from the Union at the time of the Civil War. In Texas *v.* White[282] the Supreme Court declared that the action of the President in setting up provisional governments at the end of the war was justified, if at all, only as an exercise of his powers as Commander in Chief and that such governments were to be regarded merely as provisional regimes to perform the functions of government pending action by Congress. On the ground that the questions were not justiciable in character, the Supreme Court has refused to consider whether the adoption of the initiative and referendum,[283] or the delegation of legislative power to other departments of government[284] is compatible with a republican form of government. This guarantee does not give the Supreme Court jurisdiction to review a decision of a State court sustaining a determination of an election contest for the office of governor made by a State legislature under the authority of a State constitution.[285] Inasmuch as women were denied the right to vote in most, if not all, of the original thirteen States, it was held, prior to the adoption of Amendment XIX, that a State government could be challenged under this clause by reason of the fact that it did not permit women to vote.[286]

Protection Against Domestic Violence

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The Supreme Court also held in Luther *v.* Borden[287] that it rested with Congress to determine upon the means proper to fulfill the constitutional guarantee of protection to the States against domestic violence. Chief Justice Taney declared that Congress might have placed it in the power of a court to decide when the contingency had happened which required the Federal Government to interfere. Instead, Congress had, by the act of February 28, 1795,[288] authorized the President to call out the militia in case of insurrection against the government of any State. It followed, said Taney, that 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"[289] and that his determination was not subject to review by the courts.

DECLINE IN IMPORTANCE OF THIS GUARANTY

With the recognition in the Debs Case[290] of the power and duty of the Federal Government to use "the entire strength of the Nation * * * to enforce in any part of the land the full and free

exercise of all national powers and the security of all rights entrusted by the Constitution to its care,"[291] this clause has declined in importance. When that Government finds it necessary or desirable to use force to quell domestic violence, its power to protect the property of the United States, to remove obstructions to the United States mails, or to protect interstate commerce from interruption by labor disputes or otherwise, usually will furnish legal warrant for its action, without reference to this provision.[292]

Notes

[1] Clark *v.* Graham, 6 Wheat. 577 (1821), is an early case in which the Supreme Court enforced this rule.

[2] Stat. 122 (1790); 2 Stat. 299 (1804), R.S. § 905 28 U.S.C. § 687.

[3] Mankin *v.* Chandler & Co., 2 Brock. 125, 127 (1823).

[4] 7 Cr. 481 (1813). *See* also Everett *v.* Everett, 215 U.S. 203 (1909); Mutual L. Ins. Co. *v.* Harris, 97 U.S. 331 (1878).

[5] On the same basis, a judgment cannot be impeached either in or out of the State by showing that it was based on a mistake of law. American Exp. Co. *v.* Mullins, 212 U.S. 311, 312 (1909); Fauntleroy *v.* Lum, 210 U.S. 230 (1908); Hartford L. Ins. Co. *v.* Barber, 245 U.S. 146 (1917); Hartford L. Ins. Co. *v.* Ibs, 237 U.S. 662 (1915).

[6] 3 Wheat. 234 (1818).

[7] 13 Pet. 312 (1839). *See also* Bacon *v.* Howard, 20 How. 22, 25 (1858); Bank of Ala. *v.* Dalton, 9 How. 522, 528 (1850); Great Western Telegraph Co. *v.* Purdy, 162 U.S. 329 (1896); Christmas *v.* Russell, 5 Wall. 290, 301 (1866); Wisconsin *v.* Pelican Insurance Co., 127 U.S. 265, 292 (1888).

[8] Cole *v.* Cunningham, 133 U.S. 107, 112 (1890). *See also* Stacy *v.* Thrasher, use of Sellers, 6 How. 44, 61 (1848); Milwaukee County *v.* White (M.E.) Co., 296 U.S. 268 (1935).

[9] Chicago & A.R. Co. *v.* Wiggins Ferry Co., 119 U.S. 615, 622 (1887); Hanley *v.* Donoghue, 116 U.S. 1, 3 (1885). *See also* Bigelow *v.* Old Dominion Copper Min. & S. Co., 225 U.S. 111 (1912); Green *v.* Van Buskirk, 7 Wall. 139, 140 (1869); Roche *v.* McDonald, 275 U.S. 449 (1928); Ohio *v.* Chattanooga Boiler & Tank Co., 289 U.S. 439 (1933).

[10] Sistare *v.* Sistare, 218 U.S. 1 (1910).

[11] Michigan Trust Co. *v.* Ferry, 228 U.S. 346 (1913). *See also* Fall *v.* Eastin, 215 U.S. 1 (1909).

[12] Milwaukee County *v.* White (M.E.) Co., 296 U.S. 268, 275-276 (1935).

[13] Board of Public Works *v.* Columbia College, 17 Wall. 521 (1873); Robertson *v.* Pickrell, 109 U.S. 608, 610 (1883).

[14] Kersh Lake Drainage Dist. *v.* Johnson, 309 U.S. 485 (1940). *See also* Texas & P.R. Co. *v.* Southern P. Co., 137 U.S. 48 (1890).

[15] National Exchange Bank *v.* Wiley, 195 U.S. 257, 265 (1904). *See also* Grover & B. Sewing-Mach. Co. *v.* Radcliffe, 137 U.S. 287 (1890).

[16] Harding *v.* Harding, 198 U.S. 317 (1905). The following cases further illustrate the application of the clause when its protection is sought by a defendant. Such claim must be specific, Wabash R. Co. *v.* Flannigan, 192 U.S. 29, 37 (1904). *See also* American Exp. Co. *v.* Mullins, 212 U.S. 311 (1909). The burden is upon the party making it to establish the failure of a court to give to decrees of a federal court and the court of another State the due effect to which they are entitled. Commercial Pub. Co. *v.* Beckwith, 188 U.S. 567, 573 (1903). However, by defending on the merits, after pleading and relying upon a foreign judgment, a party does not waive the benefits of an alleged estoppel arising from the foreign judgment. Harding *v.* Harding, 198 U.S. 317, 330 (1905). Nor is a decree of dismissal, not on the merits, a bar to suit in another jurisdiction. Swift *v.* McPherson, 232 U.S. 51 (1914). Nor is an entry of discontinuance. In allowing the plaintiff to show that such entry of discontinuance was not intended by the parties as a release and satisfaction of the cause of action, but was the result of a promissory agreement by the defendant which was never complied with, the Court in the forum State was not refusing full faith and credit to the judgment. Such evidence was properly allowed, not to contradict the legal import of said judgment, but to show the true meaning of the parties to the suit in agreeing upon its discontinuance. Jacobs *v.* Marks, 182 U.S. 583, 593 (1901).

[17] Anglo-American Provision Co. *v.* Davis Provision Co., 191 U.S. 373 (1903).

[18] Fauntleroy *v.* Lum, 210 U.S. 230 (1908). Justice Holmes, who spoke for the Court in both cases, asserted in his opinion in the latter that the New York statute was "directed to jurisdiction," the Mississippi statute to "merits," but four Justices could not grasp the distinction.

[19] Kenney *v.* Supreme Lodge, 252 U.S. 411 (1920), and cases there cited. Holmes again spoke for the Court. *See also* Cook, The Powers of Congress Under the Full Faith and Credit Clause, 28 Yale L.J. 421, 434 (1919).

[20] Broderick *v.* Rosner, 294 U.S. 629 (1935), affirmed in Hughes *v.* Fetter, 341 U.S. 609 (1951).

[21] Union National Bank *v.* Lamb, 337 U.S. 38 (1949); *see also* Roche *v.* McDonald, 275 U.S. 449 (1928).

[22] Embry *v.* Palmer, 107 U.S. 3, 13 (1883).

[23] Titus *v.* Wallick, 306 U.S. 282, 291-292 (1939).

[24] Morris *v.* Jones, 329 U.S. 545 (1947).

[25] Thus why should not a judgment for alimony be made directly enforceable in sister States instead of merely furnishing the basis of an action in debt? *See* Thompson *v.* Thompson, 226 U.S. 551 (1913).

[26] Board of Public Works *v.* Columbia College, 17 Wall. 521, 528 (1873). *See also* Spokane & I.E.R. Co. *v.* Whitley, 237 U.S. 487 (1915); Bigelow *v.* Old Dominion Copper Min. & S. Co., 225 U.S. 111 (1912); Brown *v.* Fletcher, 210 U.S. 82 (1908); Wisconsin *v.* Pelican Ins. Co., 127 U.S. 265, 291 (1888); Huntington *v.* Attrill, 146 U.S. 657, 685 (1892). However a denial of credit, founded upon a mere suggestion of want of jurisdiction and unsupported by evidence, violates the clause. *See also* Rogers *v.* Alabama, 192 U.S. 226, 231 (1904); Wells Fargo & Co. *v.* Ford, 238 U.S. 503 (1915).

[27] *See* Cooper *v.* Reynolds, 10 Wall. 308 (1870).

[28] 11 How. 165 (1850).

[29] Justice Johnson, dissenting in Mills *v.* Duryee, 7 Cr. 481 (1813), had said: "There are certain eternal principles of justice which never ought to be dispensed with, and which Courts of justice never can dispense with but when compelled by positive statute. One of those is, that jurisdiction cannot be justly exercised by a State over property not within the reach of its process, or over persons not owing them allegiance or not subjected to their jurisdiction, by being found within their limits." Ibid. 486.

[30] 95 U.S. 714 (1878).

[31] McDonald *v.* Mabee, 243 U.S. 90, 92 (1917). *See also* Wetmore *v.* Karrick, 205 U.S. 141 (1907).

[32] Grover & B. Sewing-Mach. Co. *v.* Radcliffe, 137 U.S. 287 (1890). *See also* Brown *v.* Fletcher, 210 U.S. 82 (1908); Galpin *v.* Page, 18 Wall. 350 (1874); Old Wayne Mutual Life Asso. Co. *v.* McDonough, 204 U.S. 8 (1907).

[33] Reynolds *v.* Stockton, 140 U.S. 254 (1891).

[34] Renaud *v.* Abbott, 116 U.S. 277 (1886); Jaster *v.* Currie, 198 U.S. 144 (1905).

[35] Milliken *v.* Meyer, 311 U.S. 457, 463 (1940).

[36] Adam *v.* Saenger, 303 U.S. 59, 62 (1938).

[37] Hancock National Bank *v.* Farnum, 176 U.S. 640 (1900).

[38] Stacy *v.* Thrasher, use of Sellers, 6 How. 44, 58 (1848).

[39] Bigelow *v.* Old Dominion Copper Min. & S. Co., 225 U.S. 111 (1912).

[40] 18 How. 404 (1856).

[41] To the same effect is Connecticut Mut. Ins. Co. *v.* Spratley, 172 U.S. 602 (1899).

[42] Simon *v.* Southern Ky., 236 U.S. 115 (1915).

[43] Goldey *v.* Morning News, 156 U.S. 518 (1895); Riverside Mills *v.* Menefee, 237 U.S. 189 (1915).

[44] International Harvester Co. *v.* Kentucky, 234 U.S. 579 (1914); Riverside Mills *v.* Menefee, 237 U.S. 189 (1915).

[45] International Harvester Co. *v.* Kentucky, 234 U.S. 579 (1914).

[46] Kane *v.* New Jersey, 242 U.S. 160 (1916); Hess *v.* Pawloski, 274 U.S. 352

(1927). Limited in Wuchter *v.* Pizzutti, 276 U.S. 13 (1928).

[47] 18 Wall. 457 (1874).

[48] *See* 1 Black, Judgments § 246 (1891).

[49] *See also* Simmons *v.* Saul, 138 U.S. 439, 448 (1891). In other words, the challenge to jurisdiction is treated as equivalent to the plea *nul tiel record*, a plea which was recognized even in Mills *v.* Duryee as always available against an attempted invocation of the full faith and credit clause. What is not pointed out by the Court, is that it was also assumed in the earlier case that such a plea could always be rebutted by producing a transcript, properly authenticated in accordance with the act of Congress, of the judgment in the original case. *See also* Brown *v.* Fletcher, 210 U.S. 82 (1908); German Savings Society *v.* Dormitzer, 192 U.S. 125, 128 (1904); Grover & Sewing-Mach. Co. *v.* Radcliffe, 137 U.S. 287, 294 (1890).

[50] Cheever *v.* Wilson, 9 Wall. 108 (1870).

[51] Andrews *v.* Andrews, 188 U.S. 14 (1903). *See also* German Savings Society *v.* Dormitzer, 192 U.S. 125 (1904).

[52] 201 U.S. 562 (1906). *See also* Thompson *v.* Thompson, 226 U.S. 551 (1913).

[53] 181 U.S. 155, 162 (1901).

[54] 317 U.S. 287 (1942); 325 U.S. 226 (1945).

[55] 305 U.S. 32 (1938).

[56] 317 U.S. 287, 298-299 (1942).

[57] Ibid. at p. 302.

[58] 317 U.S. 287, 312, 315, 321 (1942).

[59] 325 U.S. 226, 229 (1945).

[60] Bell *v.* Bell, 181 U.S. 175 (1901); Andrews *v.* Andrews, 188 U.S. 14 (1903).

[61] Strong dissents were filed which have influenced subsequent holdings. Among these was that of Justice Rutledge which attacked both the consequences of the decision as well as the concept of jurisdictional domicile on which it was founded.

"Unless 'matrimonial domicil,' banished in *Williams* I [by the overruling of Haddock *v.* Haddock], has returned renamed ['domicil of origin'] in *Williams* II, every decree becomes vulnerable in every State. Every divorce, wherever granted, * * *, may now be reexamined by every other State, upon the same or different evidence, to redetermine the 'jurisdictional fact,' always the ultimate conclusion of 'domicil.' * * *

"The Constitution does not mention domicil. Nowhere does it posit the powers of the states or the nation upon that amorphous, highly variable common-law conception. * * * No legal conception, save possibly 'jurisdiction,' * * *, affords such possibilities for uncertain application. * * * Apart from the necessity for travel, [to effect a change of domicile, the latter], criterion comes down to a purely subjective mental state, related to remaining for a length of time never yet defined with clarity. * * * When what must be proved is a variable, the proof and the conclusion which follows upon it inevitably take on that character. * * * [The majority have not held] that denial of credit will be allowed, only if the evidence [as to the place of domicile] is different or depending in any way upon the character or the weight of the difference. The test is not different evidence. It is evidence, whether the same or different and, if different, without regard to the quality of the difference, from which an opposing set of inferences can be drawn by the trier of fact 'not unreasonably.' * * * But * * * [the Court] does not define 'not unreasonably.' It vaguely suggests a supervisory function, to be exercised when the denial [of credit] strikes its sensibilities as wrong, by some not stated standard. * * * There will be no 'weighing' [of evidence], * * * only examination for sufficiency."—(325 U.S. 226, 248, 251, 255, 258-259 (1945)).

No less disposed to prophesy undesirable results from this decision was Justice Black in whose dissenting opinion Justice Douglas concurred.

"The full faith and credit clause, as now interpreted, has become a disrupting influence. The Court in effect states that the clause does not apply to divorce actions, and that States alone have the right to determine what effect shall be given to the decrees of other States. If the Court is abandoning the principle that a marriage [valid where made is valid everywhere], a consequence is to subject people to bigamy or adultery prosecutions because they exercise their constitutional right to pass from a State in which they were validly married on

to another which refuses to recognize their marriage. Such a consequence violates basic guarantees."

North Carolina's interest was to preserve a bare marital status as to two persons who sought a divorce and two others who had not objected to it. "It is an extraordinary thing for a State to procure a retroactive invalidation of a divorce decree, and then punish one of its citizens for conduct authorized by that decree, when it had never been challenged by either of the people most immediately interested in it." The State here did not sue to protect any North Carolina property rights nor to obtain support for deserted families. "I would not permit such an attenuated state interest to override the Full Faith and Credit Clause * * *" (325 U.S. 226, 262-267 (1945)).

The unsettling effect of this decision was expressed statistically by Justice Black as follows: "Statistics indicate that approximately five million divorced persons are scattered throughout the forty-eight States. More than 85% of these divorces were granted in uncontested proceedings. Not one of this latter group can now retain any feeling of security in his divorce decree. Ever present will be the danger of criminal prosecution and harassment." Ibid. 262-263.

As to the conclusion that the Supreme Court as well as the State courts should reach in like situations, Justice Black asserted that "until Congress has commanded a different 'effect' for divorces granted on a short sojourn within a State, we should stay our hands. * * * If we follow that course, North Carolina cannot be permitted to disregard the Nevada decrees without passing upon the 'faith and credit' which Nevada itself would give to them under its own 'law or usage.' * * * For in Nevada, even its Attorney General could not have obtained a cancellation of the decree * * *." Ibid. 267, 268.

The reader should take note of the effect in some of the above opinions to weigh competing interests against one another and the implication that the court's relation to the full faith and credit clause is that of an arbitral tribunal rather than of a court in the conventional sense of a body whose duty is to maintain an established rule of law.

[62] 325 U.S. 279 (1945).

[63] Ibid. 281-283.

[64] 334 U.S. 541 (1948). *See also* the companion case of Kreiger *v.* Kreiger, 334 U.S. 555 (1948).

[65] Esenwein *v.* Commonwealth, 325 U.S. 279, 280 (1945).

[66] Because the record, in his opinion, did not make it clear whether New York "law" held that no "*ex parte*" divorce decree could terminate a prior New York separate maintenance decree, or merely that no "*ex parte*" decree of divorce of *another State* could, Justice Frankfurter dissented and recommended that the case be remanded for clarification. Justice Jackson dissented on the ground that under New York law, a New York divorce would terminate the wife's right to alimony; and if the Nevada decree is good, it is entitled to no less effect in New York than a local decree. However, for reasons stated in his dissent in the First Williams Case, 317 U.S. 287, he would prefer not to give standing to constructive service divorces obtained on short residence. 334 U.S. 541, 549-554 (1948). These two Justices filed similar dissents in the companion case of Kreiger *v.* Kreiger, 334 U.S. 555, 557 (1948).

[67] 334 U.S. 343 (1948).

[68] 334 U.S. 378 (1948).—In a dissenting opinion filed in the case of Sherrer *v.* Sherrer, but applicable also to the case of Coe *v.* Coe, Justice Frankfurter, with Justice Murphy concurring, asserted his inability to accept the proposition advanced by the majority that "regardless of how overwhelming the evidence may have been that the asserted domicile in the State offering bargain-counter divorces was a sham, the home State of the parties is not permitted to question the matter if the form of a controversy had been gone through."—334 U.S. 343, 377 (1948).

[69] 336 U.S. 674 (1949).—Of four Justices dissenting (Black, Douglas, Rutledge, Jackson), Justice Jackson alone filed a written opinion. To him the decision is "an example of the manner in which, in the law of domestic relations, 'confusion now hath made his masterpiece,'" but for the first Williams case and its progeny, the judgment of the Connecticut court might properly have held that the Rice divorce decree was void for every purpose because it was rendered by a State court which never obtained jurisdiction of the nonresident defendant. "But if we adhere to the holdings that the Nevada court had power over her for the purpose of blasting her marriage and opening the way to a successor, I do not see the justice of inventing a

compensating confusion in the device of divisible divorce by which the parties are half-bound and half-free and which permits Rice to have a wife who cannot become his widow and to leave a widow who was no longer his wife." Ibid. 676, 679, 680.

[70] Vermont violated the clause in sustaining a collateral attack on a Florida divorce decree, the presumption of Florida's jurisdiction over the cause and the parties not having been overcome by extrinsic evidence or the record of the case. Cook *v.* Cook, 342 U.S. 126 (1951). The Sherrer and Coe cases were relied upon. There seems, therefore, to be no doubt of their continued vitality.

[71] Barber *v.* Barber, 323 U.S. 77, 84 (1944).

[72] Sistare *v.* Sistare, 218 U.S. 1, 11 (1910). *See also* Barber *v.* Barber, 21 How. 582 (1859); Lynde *v.* Lynde, 181 U.S. 183, 186-187 (1901); Bates *v.* Bodie, 245 U.S. 520 (1918); Audubon *v.* Shufeldt, 181 U.S. 575, 577 (1901); Yarbrough *v.* Yarbrough, 290 U.S. 202 (1933); Loughran *v.* Loughran, 292 U.S. 216 (1934).

[73] Griffin *v.* Griffin, 327 U.S. 220 (1946).

[74] Ibid. 228. An alimony case of a quite extraordinary pattern was that of Sutton *v.* Leib. On account of the diverse citizenship of the parties, who had once been husband and wife, the case was brought by the latter in a federal court in Illinois. Her suit was to recover unpaid alimony which was to continue until her remarriage. To be sure, she had, as she confessed, remarried in Nevada, but the marriage had been annulled in New York on the ground that the man was already married, inasmuch as his divorce from his previous wife was null and void, she having neither entered a personal appearance nor been personally served. The Court, speaking by Justice Reed, held that the New York annulment of the Nevada marriage must be given full faith and credit in Illinois, but left Illinois to decide for itself the effect of the annulment upon the obligations of petitioner's first husband. Sutton *v.* Leib, 342 U.S. 402 (1952).

[75] Halvey *v.* Halvey, 330 U.S. 610, 615 (1947).

[76] Johnson *v.* Muelberger, 341 U.S. 581 (1951).

[77] Tilt *v.* Kelsey, 207 U.S. 43 (1907); Burbank *v.* Ernst, 232 U.S. 162 (1914).

[78] Riley *v.* New York Trust Company, 315 U.S. 343 (1942).

[79] Brown *v.* Fletcher, 210 U.S. 82, 90 (1908). *See also* Stacy *v.* Thrasher, Use of Sellers, 6 How. 44, 58 (1848); McLean *v.* Meek, 18 How. 16, 18, (1856).

[80] Tilt *v.* Kelsey, 207 U.S. 43 (1907). In the case of Borer *v.* Chapman, 119 U.S. 587, 599 (1887) involving a complicated set of facts, it was held, in 1887, that a judgment in a probate proceeding, which was merely ancillary to proceedings in another State and which ordered the residue of the estate to be assigned to the legatee and discharged the executor from further liability, did not prevent a creditor, who was not a resident of the State in which the ancillary judgment was rendered, from setting up his claim in the State probate court which had the primary administration of the estate.

[81] Blodgett *v.* Silberman, 277 U.S. 1 (1928).

[82] Kerr *v.* Devisees of Moon, 9 Wheat. 565 (1824); McCormick *v.* Sullivant, 10 Wheat. 192 (1825); Clarke *v.* Clarke, 178 U.S. 186 (1900). The controlling principle of these cases is not confined to proceedings in probate. A court of equity "not having jurisdiction of the *res* cannot affect it by its decree nor by a deed made by a master in accordance with the decree." *See* Fall *v.* Eastin, 215 U.S. 1, 11 (1909).

[83] Robertson *v.* Pickrell, 109 U.S. 608, 611 (1883). *See also* Darby *v.* Mayer, 10 Wheat. 465 (1825); Gasquet *v.* Fenner, 247 U.S. 16 (1918).

[84] Olmsted *v.* Olmsted, 216 U.S. 386 (1910).

[85] Hood *v.* McGehee, 237 U.S. 611 (1915).

[86] Harris *v.* Balk, 198 U.S. 215 (1905). *See also* Chicago, R.I. & Pac. Ry *v.* Sturm, 174 U.S. 710 (1899); King *v.* Cross, 175 U.S. 396, 399 (1899); Louisville & N.R. Co. *v.* Deer, 200 U.S. 176 (1906); Baltimore & O.R. Co. *v.* Hostetter, 240 U.S. 620 (1916).

[87] Christmas *v.* Russell, 5 Wall. 290 (1866); Maxwell *v.* Stewart, 21 Wall. 71 (1875); Hanley *v.* Donoghue, 116 U.S. 1 (1885); Wisconsin *v.* Pelican Ins. Co., 127 U.S. 265 (1888); Simmons *v.* Saul, 138 U.S. 439 (1891); American Express Co. *v.* Mullins, 212 U.S. 311 (1909).

[88] Fauntleroy *v.* Lum, 210 U.S. 230 (1908).

[89] Anglo-American Provision Co. *v.* Davis Provision Co., 191 U.S. 373 (1903).

[90] 133 U.S. 107 (1890).

[91] The Antelope, 10 Wheat. 66, 123 (1825). *See also* Wisconsin *v.* Pelican Ins. Co., 127 U.S. 265 (1888).

[92] 146 U.S. 657 (1892). *See also* Dennick *v.* R.R. 103 U.S. 11 (1881).

[93] Milwaukee County *v.* White (N.E.) Co., 296 U.S. 268 (1935). *See also* Moore *v.* Mitchell, 281 U.S. 18 (1930).

[94] Bank of Augusta *v.* Earle, 13 Pet. 519, 589-596 (1839). *See* Kryger *v.* Wilson, 242 U.S. 171 (1916); Bond *v.* Hume, 243 U.S. 15 (1917).

[95] 19 How. 393, 460 (1857); Bonaparte *v.* Tax Court, 104 U.S. 592 (1882), where it was held that a law exempting from taxation certain bonds of the enacting State did not operate extraterritorially by virtue of the full faith and credit clause.

[96] Chicago & Alton R. Co. *v.* Wiggins Ferry, 119 U.S. 615, 622 (1887).

[97] Smithsonian Institution *v.* St. John, 214 U.S. 19 (1909). When, in a State court, the validity of an act of the legislature of another State is not in question, and the controversy turns merely upon its interpretation or construction, no question arises under the full faith and credit clause. *See also* Western Life Indemnity Co. *v.* Rupp, 235 U.S. 261 (1914), citing Glenn *v.* Garth, 147 U.S. 360 (1893); Lloyd *v.* Matthews, 155 U.S. 222, 227 (1894); Banholzer *v.* New York L. Ins. Co., 178 U.S. 402 (1900); Allen *v.* Alleghany Co., 196 U.S. 458, 465 (1905); Texas & N.O.R. Co. *v.* Miller, 221 U.S. 408 (1911). *See also* National Mut. Bldg. & Loan Asso. *v.* Brahan, 193 U.S. 635 (1904); Johnson *v.* New York Life Ins. Co., 187 U.S. 491, 495 (1903); Pennsylvania F. Ins. Co. *v.* Gold Issue Min. & Mill. Co., 243 U.S. 93 (1917).

[98] Alaska Packers Asso. *v.* Industrial Acci. Commission, 294 U.S. 532 (1935); Bradford Electric Light Co. *v.* Clapper, 286 U.S. 145 (1932).

[99] Dennick *v.* R.R., 103 U.S. 11 (1881) was the first of the so-called "Death Act" cases to reach the Supreme Court. *See also* Stewart *v.* B.& O.R. Co., 168 U.S. 445 (1897). Even today the obligation of a State to furnish a forum for the determination of death claims arising in another State under the laws thereof appears to rest on a rather precarious basis. In Hughes *v.* Fetter, 341 U.S. 609 (1951), the Court, by a narrow majority, held invalid under the full faith and credit clause a statute of Wisconsin which, as locally interpreted, forbade its courts to entertain suits of this nature; and in First National Bank *v.* United Air Lines, 342 U.S. 396 (1952), a like result was reached as to an Illinois statute. In both cases the same four Justices dissented.

[100] 119 U.S. 615 (1887).

[101] Northern Pac. R.R. *v.* Babcock, 154 U.S. 190 (1894); Atchison, T. & S.F.R. Co. *v.* Sowers, 213 U.S. 55, 67 (1909).

[102] Glenn *v.* Garth, 147 U.S. 360 (1893).

[103] Tennessee Coal Co. *v.* George, 233 U.S. 354 (1914).

[104] Klaxon Co. *v.* Stentor, 313 U.S. 487 (1941); John Hancock Mut. Life Ins. Co. *v.* Yates, 299 U.S. 178 (1936) distinguished.

[105] Modern Woodmen of Am. *v.* Mixer, 267 U.S. 544 (1925).

[106] Converse *v.* Hamilton, 224 U.S. 243 (1912); Selig *v.* Hamilton, 234 U.S. 652 (1914); Marin *v.* Augedahl, 247 U.S. 142 (1918).

[107] Broderick *v.* Rosner, 294 U.S. 629 (1935). *See also* Thormann *v.* Frame, 176 U.S. 350, 356 (1900); Reynolds *v.* Stockton, 140 U.S. 254, 264 (1891).

[108] Hancock Nat. Bank. *v.* Farnum, 176 U.S. 640 (1900).

[109] 237 U.S. 531 (1916); followed in Modern Woodmen of Am. *v.* Mixer, 267 U.S. 544 (1925).

[110] 305 U.S. 66, 75, 79 (1938).

[111] 331 U.S. 586, 588-589, 637 (1947).

[112] New York Life Ins. Co. *v.* Head, 234 U.S. 149 (1914); Aetna Life Ins. Co. *v.* Dunken, 266 U.S. 389 (1924).

[113] 193 U.S. 635 (1904).

[114] National Mutual B. & L. Asso. *v.* Brahan, 193 U.S. 635 (1904).

[115] New York Life Ins. Co. *v.* Cravens, 178 U.S. 389 (1900). *See also* American Fire Ins. Co. *v.* King Lumber Co., 250 U.S. 2 (1919).

[116] Griffin *v.* McCoach, 313 U.S. 498 (1941).

[117] 314 U.S. 201, 206-208 (1941). However, a decree of a Montana Supreme Court, insofar as it permitted judgment creditors of a dissolved Iowa surety company to levy execution against local assets to satisfy judgment, as against title to such assets of the Iowa insurance commissioner as statutory liquidator and successor to the dissolved company, was held to deny full faith and credit to the statutes of Iowa.—Clark *v.* Willard, 292 U.S. 112 (1934).

[118] 324 U.S. 154, 159-160 (1945).

[119] Bradford Electric Co. *v.* Clapper, 286 U.S. 145, 158 (1932).

[120] The Court had earlier remarked that "workmen's compensation legislation rests upon the idea of status, not upon that of implied contract." Cudahy Packing Co. *v.* Parramore, 263 U.S. 418, 423 (1923). In contrast to the above cases, *see* Kryger *v.* Wilson, 242 U.S. 171 (1916), where it was held that the question whether the cancellation of a land contract was governed by the *lex rei sitae* or the *lex loci contractus* was purely a question of local common law; *also* Bond *v.* Hume, 243 U.S. 15 (1917).

[121] Pacific Ins. Co. *v.* Comm'n., 306 U.S. 493, 497, 503-504 (1939).

[122] 320 U.S. 430 (1943).

[123] Industrial Comm'n. *v.* McCartin, 330 U.S. 622 (1947).

[124] Cardillo *v.* Liberty Mutual Co., 330 U.S. 469 (1947).

[125] Reviewing some of the cases treated in this section, a writer in 1925 said: "It appears, then, that the Supreme Court has quite definitely committed itself to a program of making itself, to some extent, a tribunal for bringing about uniformity in the field of conflicts * * * although the precise circumstances under which it will regard itself as having jurisdiction for this purpose are far from clear." E.M. Dodd, The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws (1926), 39 Harv. L. Rev. 533-562. It can hardly be said that the law has been subsequently clarified on this point.

[126] Walter W. Cook, The Power of Congress Under the Full Faith and Credit Clause (1919), 28 Yale L.J. 430.

[127] Cooper *v.* Newell, 173 U.S. 555, 567 (1899). *See also* Wisconsin *v.* Pelican Ins. Co., 127 U.S. 265, 291 (1888); Swift *v.* McPherson, 232 U.S. 51 (1914); Pennington *v.* Gibson, 16 How. 65, 81 (1854); Cheever *v.* Wilson, 9 Wall. 108, 123 (1870); Baldwin *v.* Iowa State Traveling Men's Asso., 283 U.S. 522 (1931); American Surety Co. *v.* Baldwin, 287 U.S. 156 (1932); Sanders *v.* Armour Fertilizer Works, 292 U.S. 190 (1934).

[128] Milwaukee County *v.* White (M.E.) Co., 296 U.S. 268 (1935).

[129] Equitable L. Assur. Soc. *v.* Brown, 187 U.S. 308 (1902). *See also* Gibson *v.* Lyon, 115 U.S. 439 (1885).

[130] Embry *v.* Palmer, 107 U.S. 3, 9 (1883). *See also* Northern Assur. Co. *v.* Grand View Bldg. Asso., 203 U.S. 106 (1906); Atchison, T. & S.F.R. Co. *v.* Sowers, 213 U.S. 55 (1909); Knights of Pythias *v.* Meyer, 265 U.S. 30, 33 (1924); Louisville & N.R. Co. *v.* Central Stockyards Co., 212 U.S. 132 (1909); West Side Belt R. Co. *v.* Pittsburgh Constr. Co., 219 U.S. 92 (1911).

[131] No right, privilege, or immunity is conferred by the Constitution in respect to judgments of foreign states and nations.—Aetna Life Ins. Co. *v.* Tremblay, 223 U.S. 185 (1912). In Hilton *v.* Guyot, 159 U.S. 113, 234 (1895) where a French judgment offered in defense was held not a bar to the suit. Four Justices dissented on the ground that "the application of the doctrine of *res judicata* does not rest in discretion; and it is for the Government, and not for its courts, to adopt the principle of retorsion, if deemed under any circumstances desirable or necessary." At the same sitting of the Court, an action in a United States circuit court on a Canadian judgment was sustained on the same ground of reciprocity. Ritchie *v.* McMullen, 159 U.S. 235 (1895). *See also* Ingenohl *v.* Olsen, 273 U.S. 541 (1927), where a decision of the Supreme Court of the Philippine Islands was reversed for refusal to enforce a judgment of the Supreme Court of the British colony of Hongkong, which was rendered "after a fair trial by a court having jurisdiction of the parties." In 1897 Foreign Relations of the United States 7-8, will be found a three-cornered correspondence between the State Department, the Austro-Hungarian Legation, and the Governor of Pennsylvania, in which the last named asserts that "under the laws of Pennsylvania the judgment of a court of competent

jurisdiction in Croatia would be respected to the extent of permitting such judgment to be sued upon in the courts of Pennsylvania." Stowell, *op. cit. supra* note I, at 254-255. Another instance of international cooperation in the judicial field is furnished by letters rogatory. "When letters rogatory are addressed from any court of a foreign country to any district court of the United States, a commissioner of such district court designated by said court to make the examination of the witnesses mentioned in said letters, shall have power to compel the witnesses to appear and depose in the same manner as witnesses may be compelled to appear and testify in courts," 28 U.S.C.A., *supra* note II, § 653. Some of the States have similar laws. *See* 2 Moore, Digest of International Law (1906) 108-109.

[132] David K. Watson, The Constitution of the United States, vol. II, 1206 (1910).

[133] The Federalist No. 42.

[134] 16 Wall. 36 (1873).

[135] Ibid. 75.

[136] Scott *v.* Sandford, 19 How. 393 (1857).

[137] Ibid. 518, 527-529.

[138] 153 U.S. 684, 687 (1894).

[139] 135 U.S. 492 (1890).

[140] Slaughter-House Case, 15 Fed. Cas. No. 8408 (1870); Chambers *v.* Baltimore & O.R. Co., 207 U.S. 142 (1907); Whitfield *v.* Ohio, 297 U.S. 431 (1936).

[141] 16 Wall. 36 (1873).

[142] Ibid. 77.

[143] Bradwell *v.* Illinois, 16 Wall. 130, 138 (1873). *See also* Cole *v.* Cunningham, 133 U.S. 107 (1890).

[144] Blake *v.* McClung, 172 U.S. 239, 246 (1898); Travis *v.* Yale & Towne Mfg. Co., 252 U.S. 60 (1920).

[145] La Tourette *v.* McMaster, 248 U.S. 465 (1919); Douglas *v.* New York, N.H. & H.R. Co., 279 U.S. 377 (1929); *cf.* Maxwell *v.* Bugbee, 250 U.S. 525 (1919).

[146] United States *v.* Harris, 106 U.S. 629, 643 (1883). *See also* Baldwin *v.* Franks, 120 U.S. 678 (1887).

[147] United States *v.* Wheeler, 254 U.S. 281 (1920).

[148] Scott *v.* Sandford, 19 How. 393 (1857)

[149] Ibid. 403-411.

[150] Ibid. 572-590.

[151] 13 Pet. 519 (1939).

[152] Ibid. 586.

[153] 8 Wall. 168 (1869).

[154] Ibid. 181.

[155] Crutcher *v.* Kentucky, 141 U.S. 47 (1891). *See also* pp. 193-198, 1049-1056.

[156] Hemphill *v.* Orloff, 277 U.S. 537 (1928).

[157] 6 Fed. Cas. No. 3,230, 546, 550 (1823).

[158] Ibid. 551-522.

[159] Ibid. 552.

[160] Corfield *v.* Coryell, 6 Fed. Cas. No. 3230, 546, 552 (1823).

[161] Ibid. 552.

[162] 94 U.S. 391 (1877).

[163] 161 U.S. 519 (1896).

[164] 209 U.S. 349 (1908).

[165] 334 U.S. 385 (1948).

[166] Ibid. 403. In Mullaney *v.* Anderson, 342 U.S. 415 (1952) an Alaska statute providing for the licensing of commercial fishermen in territorial waters and

levying a license fee of $50.00 on nonresident and only $5.00 on resident fishermen was held void under Art. IV, § 2 on the authority of Toomer *v.* Witsell, cited above.

[167] 172 U.S. 239 (1898).

[168] Ibid. 256.

[169] La Tourette *v.* McMaster, 248 U.S. 465 (1919).

[170] Doherty and Co. *v.* Goodman, 294 U.S. 623 (1935).

[171] Hess *v.* Pawloski, 274 U.S. 352, 356 (1927).

[172] Ferry *v.* Spokane P. & S.R. Co., 258 U.S. 314 (1922), followed in Ferry *v.* Corbett, 258 U.S. 609 (1922).

[173] Conner *v.* Elliott, 18 How. 591, 593 (1856).

[174] Blake *v.* McClung, 172 U.S. 230, 248 (1898).

[175] Williams *v.* Bruffy, 96 U.S. 176, 184 (1878).

[176] Chambers *v.* Baltimore & O.R. Co., 207 U.S. 142, 148 (1907); McKnett *v.* St. Louis & S.F.R. Co., 292 U.S. 230, 233 (1934); Miles *v.* Illinois C.R. Co., 315 U.S. 698, 704 (1942).

[177] Canadian N.R. Co. *v.* Eggen, 252 U.S. 553 (1920).

[178] Ibid. 563.

[179] Chemung Canal Bank *v.* Lowery, 93 U.S. 72, 76 (1876).

[180] Douglas *v.* New York, N.H. & H.R. Co., 279 U.S. 377 (1929).

[181] Chambers *v.* Baltimore & O.R. Co., 207 U.S. 142 (1907).

[182] 12 Wall. 418, 424 (1871). *See also* Downham *v.* Alexandria, 10 Wall. 173, 175 (1870).

[183] Chalker *v.* Birmingham & M.W.R. Co., 249 U.S. 522 (1919).

[184] 252 U.S. 60 (1920).

[185] Ibid. 62-64. *See also* Shaffer *v.* Carter, 252 U.S. 37 (1920).

[186] 252 U.S. 60, 79-80 (1920).

[187] Williams *v.* Fears, 179 U.S. 270, 274 (1900).

[188] Haavik *v.* Alaska Packers' Asso., 263 U.S. 510 (1924).

[189] Travelers' Ins. Co. *v.* Connecticut, 185 U.S. 364, 371 (1902).

[190] Maxwell *v.* Bugbee, 250 U.S. 525 (1919).

[191] Kirtland *v.* Hotchkiss, 100 U.S. 491, 499 (1879). *Cf.* Colgate *v.* Harvey, 296 U.S. 404 (1935) in which discriminatory taxation of bank deposits outside the State owned by a citizen of the State was held to infringe a privilege of national citizenship, in contravention of the Fourteenth Amendment. The decision in Colgate *v.* Harvey was overruled in Madden *v.* Kentucky, 309 U.S. 83, 93 (1940).

[192] 1 Stat. 302 (1793).

[193] Roberts *v.* Reilly, 116 U.S. 80, 94 (1885). *See also* Innes *v.* Tobin, 240 U.S. 127 (1916). Said Justice Story: "... the natural, if not the necessary conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution"; [and again] "... it has, on various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly given, and duties expressly enjoined thereby." Prigg *v.* Pennsylvania, 16 Pet. 539, 616, 618-619 (1842).

[194] Taylor *v.* Taintor, 16 Wall. 366, 371 (1873).

[195] 24 How. 66 (1861); *Cf.* Prigg *v.* Pennsylvania, 16 Pet. 539, 612 (1842).

[196] 24 How. 66, 107 (1861).

[197] 48 Stat. 782 (1934).

[198] Roberts *v.* Reilly, 116 U.S. 80 (1885). *See also* Strassheim *v.* Daily, 221 U.S. 280 (1911); Appleyard *v.* Massachusetts, 203 U.S. 222 (1906); Ex parte Reggel, 114 U.S. 642, 650 (1885).

[199] Drew *v.* Thaw, 235 U.S. 432, 439 (1914).

[200] Innes *v.* Tobin, 240 U.S. 127 (1916).

[201] Bassing *v.* Cady, 208 U.S. 386 (1908).

[202] Hyatt *v.* New York ex rel. Corkran, 188 U.S. 691 (1903).

[203] Kentucky *v.* Dennison, 24 How. 66, 103 (1861).

[204] Taylor *v.* Taintor, 16 Wall. 366, 375 (1873).

[205] Kentucky *v.* Dennison, 24 How. 66, 104 (1861); Pierce *v.* Creecy, 210 U.S. 387 (1908). *See also* Marbles *v.* Creecy, 215 U.S. 63 (1909); Strassheim *v.* Daily, 221 U.S. 280 (1911); Re Strauss, 197 U.S. 324, 325 (1905).

[206] Munsey *v.* Clough, 196 U.S. 364 (1905); Pettibone *v.* Nichols, 203 U.S. 192 (1906).

[207] Drew *v.* Thaw, 235 U.S. 432 (1914).

[208] Pettibone *v.* Nichols, 203 U.S. 192, 216 (1906).

[209] Biddinger *v.* Police Comr., 245 U.S. 128 (1917). *See also* Rodman *v.* Pothier, 264 U.S. 399 (1924).

[210] Hyatt *v.* New York ex rel. Corkran, 188 U.S. 691 (1903). *See also* South Carolina *v.* Bailey, 289 U.S. 412 (1933).

[211] Munsey *v.* Clough, 196 U.S. 364, 375 (1905).

[212] Ker *v.* Illinois, 119 U.S. 436, 444 (1886); Mahon *v.* Justice, 127 U.S. 700, 707, 712, 714 (1888).

[213] Cook *v.* Hart, 146 U.S. 183, 193 (1892); Pettibone *v.* Nichols, 203 U.S. 192, 215 (1906).

[214] Lascelles *v.* Georgia, 148 U.S. 537, 543 (1893).

[215] United States *v.* Rauscher, 119 U.S. 407, 430 (1886).

[216] Prigg *v.* Pennsylvania, 16 Pet. 539, 612 (1842).

[217] 1 Stat. 302 (1793).

[218] Jones *v.* Van Zandt, 5 How. 215, 229 (1847); Ableman *v.* Booth, 21 How. 506 (1859).

[219] Prigg *v.* Pennsylvania, 16 Pet. 539, 625 (1842).

[220] Moore *v.* Illinois, 14 How. 13, 17 (1853).

[221] Escanaba & L.M. Transp. Co. *v.* Chicago, 107 U.S. 678, 689 (1883).

[222] Madison, Journal of the Debates in the Convention which Framed the Constitution, 89 (Hunt's ed., 1908).

[223] Ibid. 274.

[224] Ibid. 275.

[225] Pollard *v.* Hagan, 3 How. 212, 221 (1845).

[226] 2 Stat. 701, 703 (1812).

[227] Justice Harlan, speaking for the Court in United States *v.* Texas, 143 U.S. 621, 634 (1892); 9 Stat. 108.

[228] Permoli *v.* New Orleans, 3 How. 589, 609 (1845); McCabe *v.* Atchison, T. & S.F.R. Co., 235 U.S. 151 (1914); Illinois Central R. Co. *v.* Illinois, 146 U.S. 387, 434 (1892); Knight *v.* United Land Asso., 142 U.S. 161, 183 (1891); Weber *v.* State Harbor Comrs., 18 Wall. 57, 65 (1873).

[229] Coyle *v.* Smith, 221 U.S. 559 (1911).

[230] Ibid. 567.

[231] United States *v.* Texas, 339 U.S. 707, 716 (1950); Stearns *v.* Minnesota, 179 U.S. 223, 245 (1900).

[232] Pollard *v.* Hagan, 3 How. 212, 223 (1845); McCabe *v.* Atchison, T. & S.F.R. Co., 235 U.S. 151 (1914).

[233] Van Brocklin *v.* Tennessee, 117 U.S. 151, 167 (1886).

[234] Wilson *v.* Cook, 327 U.S. 474 (1946).

[235] Permoli *v.* New Orleans, 3 How. 589, 609 (1845); Sands *v.* Manistee River

Imp. Co., 123 U.S. 288, 296 (1887); *see also* Withers *v.* Buckley, 20 How. 84, 92 (1858); Willamette Iron Bridge Co. *v.* Hatch, 125 U.S. 1, 9 (1888); Cincinnati *v.* Louisville & N.R. Co., 223 U.S. 390 (1912); Huse *v.* Glover, 119 U.S. 543,(1886).

[236] Draper *v.* United States, 164 U.S. 240 (1896) following United States *v.* McBratney, 104 U.S. 621 (1882).

[237] Dick *v.* United States, 208 U.S. 340 (1908); Ex parte Webb, 225 U.S. 663 (1912).

[238] United States *v.* Sandoval, 231 U.S. 28 (1914).

[239] Boyd *v.* Nebraska, 143 U.S. 135, 170 (1892).

[240] Baker *v.* Morton, 12 Wall. 150, 153 (1871).

[241] Freeborn *v.* Smith, 2 Wall. 160 (1865).

[242] John *v.* Paullin, 231 U.S. 583 (1913).

[243] Hunt *v.* Palao, 4 How. 589 (1846). *Cf.* Benner *v.* Porter, 9 How. 235, 246 (1850).

[244] 179 U.S. 223, 245 (1900).

[245] How. 212, 223 (1845). *See also* Martin *v.* Waddell, 16 Pet. 367, 410 (1842).

[246] United States *v.* California, 332 U.S. 19, 38 (1947); United States *v.* Louisiana, 339 U.S. 699 (1950).

[247] 339 U.S. 707, 716 (1950).

[248] Brown *v.* Grant, 116 U.S. 207, 212 (1886).

[249] Shively *v.* Bowlby, 152 U.S. 1, 47 (1894). *See also* Joy *v.* St. Louis, 201 U.S. 332 (1906).

[250] United States *v.* Winans, 198 U.S. 371, 378 (1905); Seufert Bros. Co. *v.* United States, 249 U.S. 194 (1919). A fishing right granted by treaty to Indians does not necessarily preclude the application to Indians of State game laws regulating the time and manner of taking fish. Kennedy *v.* Becker, 241 U.S. 556 (1916). But it has been held to be violated by the exaction of a license fee which is both regulatory and revenue-producing. Tulee *v.* Washington, 315 U.S. 681 (1942).

[251] Ward *v.* Race Horse, 163 U.S. 504, 510, 514 (1896).

[252] 14 Pet. 526 (1840).

[253] Ibid. 533, 538.

[254] Ashwander *v.* Tennessee Valley Authority, 297 U.S. 288, 335-340 (1936). *See also* Alabama Power Co. *v.* Ickes, 302 U.S. 464 (1938).

[255] United States *v.* Fitzgerald, 15 Pet. 407, 521 (1841). *See also* California *v.* Deseret Water, Oil & Irrig. Co., 243 U.S. 415 (1917); Utah Power & Light Co. *v.* United States, 243 U.S. 389 (1917).

[256] Sioux Tribe *v.* United States, 316 U.S. 317 (1942); United States *v.* Midwest Oil Co., 236 U.S. 459, 469 (1915).

[257] Gibson *v.* Chouteau, 13 Wall. 92, 99 (1872); *see also* Irvine *v.* Marshall, 20 How. 558 (1858); Emblem *v.* Lincoln Land Co., 184 U.S. 660, 664 (1902).

[258] Bagnell *v.* Broderick, 13 Pet. 436, 450 (1839). *See also* Field *v.* Seabury, 19 How. 323, 332 (1857).

[259] Tameling *v.* United States Freehold & Emigration Co., 93 U.S. 644, 663 (1877). *See also* United States *v.* Maxwell Land-Grant and R. Co., 121 U.S. 325, 366 (1887).

[260] Ruddy *v.* Rossi, 248 U.S. 104 (1918).

[261] Light *v.* United States, 220 U.S. 523 (1911). *See also* Hutchings *v.* Low, 15 Wall. 77 (1873).

[262] Camfield *v.* United States, 167 U.S. 518, 525 (1897). *See also* Jourdan *v.* Barrett, 4 How. 169 (1846); United States *v.* Waddell, 112 U.S. 76 (1884).

[263] United States *v.* McGowan, 302 U.S. 535 (1938).

[264] United States *v.* San Francisco, 310 U.S. 16 (1940).

[265] Van Brocklin *v.* Tennessee, 117 U.S. 151 (1886); *cf.* Wilson *v.* Cook, 327 U.S. 474 (1946).

[266] Gibson *v.* Chouteau, 13 Wall 92, 99 (1872). *See also* Irvine *v.* Marshall, 20 How. 558 (1858); Emblem *v.* Lincoln Land Co., 184 U.S. 660, 664 (1902).

[267] Wilcox *v.* Jackson ex dem. M'Connel, 13 Pet. 498, 517 (1839).

[268] Oklahoma *v.* Texas, 258 U.S. 574, 595 (1922).

[269] United States *v.* Oregon, 295 U.S. 1, 28 (1935).

[270] Simms *v.* Simms, 175 U.S. 162, 168 (1899). *See also* United States *v.* McMillan, 165 U.S. 504, 510 (1897); El Paso & N.E.R. Co. *v.* Gutierrez, 215 U.S. 87 (1909); First Nat. Bank *v.* Yankton County, 101 U.S. 129, 133 (1880).

[271] Binns *v.* United States, 194 U.S. 486, 491 (1904). *See also* Serè *v.* Pitot, 6 Cr. 332, 336 (1810); Murphy *v.* Ramsey, 114 U.S. 15, 44 (1885).

[272] Walker *v.* New Mexico & S.P.R. Co., 165 U.S. 593, 604 (1897); Simms *v.* Simms, 175 U.S. 162, 163 (1899); Wagoner *v.* Evans, 170 U.S. 588, 591 (1898).

[273] 24 Stat. 170 (1886).

[274] Downes *v.* Bidwell, 182 U.S. 244, 271 (1901). *See also* Interstate Commerce Commission *v.* United States ex rel. Humboldt S.S. Co., 224 U.S. 474 (1912); Church of Jesus Christ of L.D.S. *v.* United States, 136 U.S. 1, 44 (1890).

[275] Dorr *v.* United States, 195 U.S. 138, 149 (1904). *See also* Balzac *v.* Porto Rico, 258 U.S. 298 (1922).

[276] Rassmussen *v.* United States, 197 U.S. 516 (1905).

[277] Hawaii *v.* Mankichi, 190 U.S. 197 (1903); R.M.C. Littler, The Governance of Hawaii, Chap. III (1929).

[278] American Ins. Co. *v.* Canter, 1 Pet. 511, 546 (1828). *See also* Romeu *v.* Todd, 206 U.S. 358, 368 (1907); United States *v.* McMillan, 165 U.S. 504, 510 (1897); McAllister *v.* United States, 141 U.S. 174, 180 (1891); The "City of Panama" *v.* Phelps, 101 U.S. 453, 460 (1880); Reynolds *v.* United States, 98 U.S. 145, 154 (1879); Hornbuckle *v.* Toombs, 18 Wall. 648, 655 (1874); Clinton *v.* Englebrecht, 13 Wall. 434, 447 (1872).

[279] American Ins. Co. *v.* Canter, 1 Pet. 511, 545 (1828).

[280] 7 How. 1 (1849).

[281] Ibid. 42. *See also* Ohio ex rel. Bryant *v.* Akron Metropolitan Park District, 281 U.S. 74, 80 (1930); Mountain Timber Co. *v.* Washington, 243 U.S. 219, 234 (1917).

[282] 7 Wall. 700, 729 (1869).

[283] Pacific States Teleph. & Teleg. Co. *v.* Oregon, 223 U.S. 118 (1912); Kiernan *v.* Portland, 223 U.S. 151 (1912); Ohio ex rel. Davis *v.* Hildebrant, 241 U.S. 565 (1916).

[284] Ohio ex rel. Bryant *v.* Akron Metropolitan Park District, 281 U.S. 74, 80 (1930); O'Neill *v.* Leamer, 239 U.S. 244 (1915); Highland Farms Dairy Inc. *v.* Agnew, 300 U.S. 608, 612 (1937); Forsyth *v.* Hammond, 166 U.S. 506, 519 (1897).

[285] Taylor *v.* Beckham, 178 U.S. 548 (1900). *See also* Marshall *v.* Dye, 231 U.S. 250 (1914).

[286] Minor *v.* Happersett, 21 Wall. 162, 175 (1875).

[287] 7 How. 1 (1849).

[288] 1 Stat. 424 (1795).

[289] 7 How. 1, 43 (1849).

[290] 158 U.S. 564 (1895).

[291] Ibid. 582.

[292] On the decline in observance of the formalities required by the provision both before and during World War I, *see* Corwin, The President, Office and Powers (3d ed., 1948), 164-166.

ARTICLE V

MODE OF AMENDMENT

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.

Amendment of the Constitution

SCOPE OF AMENDING POWER

When this Article was before the Constitutional Convention, a motion to insert a provision that "no State shall without its consent be affected in its internal policy" was made and rejected.[1] A further attempt to impose a substantive limitation on the amending power was made in 1861, when Congress submitted to the States a proposal to bar any future amendments which would authorize Congress to "interfere, within any State, with the domestic institutions thereof, * * *."[2] Three States ratified this article before the outbreak of the Civil War made it academic.[3] Many years later the validity of both the Eighteenth and Nineteenth Amendments was challenged because of their content. The arguments against the former took a wide range. Counsel urged that the power of amendment is limited to the correction of errors in the framing of the Constitution; that it does not comprehend the adoption of additional or supplementary provisions. They contended further that ordinary legislation cannot be embodied in a constitutional amendment and that Congress cannot constitutionally propose any amendment which involves the exercise or relinquishment of the sovereign powers of a State.[4] The Nineteenth Amendment was attacked on the narrower ground that a State which had not ratified the amendment would be deprived of its equal suffrage in the Senate because its representatives in that body would be persons not of its choosing, i.e., persons chosen by voters whom the State itself had not authorized to vote for Senators.[5] Brushing aside these arguments as unworthy of serious attention, the Supreme Court held both amendments valid.

PROCEDURE OF ADOPTION

Submission of Amendment

When Madison submitted to the House of Representatives the proposals from which the Bill of Rights evolved, he contemplated that they should be incorporated in the text of the original instrument.[6] Instead the House decided to propose them as supplementary.[7] It ignored a suggestion that the two Houses should first resolve that amendments are necessary before considering specific proposals.[8] In the National Prohibition Cases[9] the Supreme Court ruled that in proposing an amendment the two Houses of Congress thereby indicated that they deemed it necessary. That same case also established the proposition that the vote required to propose an amendment was a vote of two thirds of the members present—assuming the presence of a quorum—and not a vote of two thirds of the entire membership present and absent.[10] The approval of the President is not necessary for a proposed amendment.[11]

Ratification

Congress may, in proposing an amendment, set a reasonable time limit for its ratification. Two amendments proposed in 1789, one submitted in 1810 and one in 1861, were never ratified. In Dillon *v.* Gloss[12] the Court intimated that proposals which were clearly out of date were no

longer open for ratification. However, in Coleman *v.* Miller,[13] it refused to pass upon the question whether the proposed child labor amendment, submitted to the States in 1924, was open to ratification thirteen years later. It held this to be a political question which would have to be resolved by Congress in the event three fourths of the States ever gave their assent to the proposal. With respect to the Eighteenth, Twentieth, Twenty-first and Twenty-second Amendments, Congress included in the text of these proposed amendments a section stating that the article should be inoperative unless ratified within seven years. In Dillon *v.* Gloss the Court sustained this limitation on the ground that it gave effect to the implication of article V that ratification "must be within some reasonable time after the proposal."[14] Congress has complete freedom of choice between the two methods of ratification recognized by article V—by the legislatures of the States, or conventions in the States. In United States *v.* Sprague[15] counsel advanced the contention that the Tenth Amendment recognized a distinction between powers reserved to the States and powers reserved to the people, and that State legislatures were competent to delegate only the former to the National Government; delegation of the latter required action of the people through conventions in the several States. The Eighteenth Amendment being of the latter character, the ratification by State legislatures, so the argument ran, was invalid. The Supreme Court rejected the argument. It found the language of article V too clear to admit of reading any exceptions into it by implication. [Pg 713]

The term "legislatures" as used in article V means deliberative, representative bodies of the type which in 1789 exercised the legislative power in the several States. It does not comprehend the popular referendum which has subsequently become a part of the legislative process in many of the States, nor may a State validly condition ratification of a proposed constitutional amendment on its approval by such a referendum.[16] In the words of the Court: "* * * the function of a State legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State."[17]

Authentication and Proclamation

Formerly official notice from a State legislature, duly authenticated, that it had ratified a proposed amendment went to the Secretary of State, upon whom it was binding, "being certified by his proclamation, [was] conclusive upon the courts" as against any objection which might be subsequently raised as to the regularity of the legislative procedure by which ratification was brought about.[18] This function of the Secretary, purely ministerial in character, was, however, derived from an act of Congress, and was recently transferred to a functionary called Administrator of General Services.[19] In Dillon *v.* Gloss,[20] the Supreme Court held that the Eighteenth Amendment became operative on the date of ratification by the thirty-sixth State, rather than on the later date of the proclamation issued by the Secretary of State, and doubtless the same rule holds as to a similar proclamation by the Administrator. [Pg 714]

JUDICIAL REVIEW UNDER ARTICLE V

Prior to 1939, the Supreme Court had taken cognizance of a number of diverse objections to the validity of specific amendments. Apart from holding that official notice of ratification by the several States was conclusive upon the courts,[21] it had treated these questions as justiciable, although it had uniformly rejected them on the merits. In that year, however, the whole subject was thrown into confusion by the inconclusive decision in Coleman *v.* Miller.[22] This case came up on a writ of certiorari to the Supreme Court of Kansas to review the denial of a writ of mandamus to compel the Secretary of the Kansas Senate to erase an endorsement on a resolution ratifying the proposed child labor amendment to the Constitution to the effect that it had been adopted by the Kansas Senate. The attempted ratification was assailed on three grounds: (1) that the amendment had been previously rejected by the State legislature; (2) that it was no longer open to ratification because an unreasonable period of time, thirteen years, had elapsed since its submission to the States, and (3) that the lieutenant governor had no right to cast the deciding vote in the Senate in favor of ratification. Four opinions were written in the Supreme Court, no one of which commanded the support of more than four members of the Court. The majority ruled that the plaintiffs, members of the Kansas State Senate, had a sufficient interest in the controversy to give the federal courts jurisdiction to review the case. Without agreement as to the grounds for their decision, a different majority affirmed the judgment of the Kansas court denying the relief sought. Four members who concurred in the result had voted to dismiss the writ on the ground that the amending process "is 'political' in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point."[23] Whether the contention that the lieutenant governor should have been permitted to cast the deciding vote in favor of ratification presented a justiciable controversy was left undecided, the Court being equally divided on the point.[24] In an opinion reported as "the opinion of the Court," but in which it appears that only three Justices concurred, Chief Justice Hughes declared that the writ of mandamus was properly denied because the question as to the effect of the previous rejection of the amendment and the lapse of time since it was submitted to the States were political questions which should be left to Congress.[25] On the same day, the Court dismissed a writ of certiorari to review a decision of the Kentucky Court of Appeals declaring the action of the Kentucky General Assembly purporting to ratify the child labor amendment illegal and void. Inasmuch as the [Pg 715]

governor had forwarded the certified copy of the resolution to the Secretary of State before being served with a copy of the restraining order issued by the State court, the Supreme Court found that there was no longer a controversy susceptible of judicial determination.[26]

Notes

[1] II Madison, Journal of Debates in the Constitutional Convention, 385-386 (Hunt's ed., 1908).

[2] Cong. Globe, 1263 (1861).

[3] Ames, Herman V., Proposed Amendments to the Constitution, 363 (1896).

[4] Rhode Island *v.* Palmer, 253 U.S. 350, 386 (1920).

[5] Leser *v.* Garnett, 258 U.S. 130 (1922).

[6] Annals of Congress 433-436 (1789).

[7] Ibid. 717.

[8] Ibid. 430.

[9] Rhode Island *v.* Palmer, 253 U.S. 350, 386 (1920).

[10] Ibid.

[11] Hollingsworth *v.* Virginia, 3 Dall. 378 (1798).

[12] 256 U.S. 368, 375 (1921).

[13] 307 U.S. 433 (1939).

[14] 256 U.S. 368, 375 (1921).

[15] 282 U.S. 716 (1931).

[16] Hawke *v.* Smith, 253 U.S. 221, 231 (1920).

[17] Leser *v.* Garnett, 258 U.S. 130, 137 (1922).

[18] Leser *v.* Garnett, 258 U.S. 130, 137 (1922).

[19] 64 Stat. 979 (1950).

[20] 256 U.S. 368, 376 (1921).

[21] Leser *v.* Garnett, 258 U.S. 130 (1922).

[22] 307 U.S. 433 (1939). *Cf.* Fairchild *v.* Hughes, 258 U.S. 126 (1922), wherein the Court held that a private citizen could not sue in the federal courts to secure an indirect determination of the validity of a constitutional amendment about to be adopted.

[23] 307 U.S. 433, 459 (1939).

[24] Ibid. 446, 447.

[25] Ibid. 450, 456.

[26] Chandler *v.* Wise, 307 U.S. 474 (1939).

ARTICLE VI

[Pg 717]

MISCELLANEOUS PROVISIONS

[Pg 719]

MISCELLANEOUS PROVISIONS

[Pg 721]

ARTICLE VI

Clause 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.

Clause 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.

National Supremacy

MARSHALL'S INTERPRETATION OF THE CLAUSE

Although the Supreme Court had held prior to Marshall's appointment to the Bench, that the supremacy clause rendered null and void a State constitutional or statutory provision which was inconsistent with a treaty executed by the Federal Government,[1] it was left for him to develop the full significance of the clause as applied to acts of Congress. By his vigorous opinions in McCulloch *v.* Maryland[2] and Gibbons *v.* Ogden[3] he gave the principle a vitality which survived a century of vacillation under the doctrine of dual federalism. In the former case, he asserted broadly 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."[4] From this he concluded that a State tax upon notes issued by a branch of the Bank of the United States was void. In Gibbons *v.* Ogden, the Court held that certain statutes of New York granting an exclusive right to use steam navigation on the waters of the State were null and void insofar as they applied to [Pg 722] vessels licensed by the United States to engage in coastwise trade. Said the Chief Justice: "In argument, however, it has been contended, that if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject, and each other, like equal opposing powers. But the framers of our Constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of an act, inconsistent with the Constitution, is produced by the declaration, that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State legislatures as do not transcend their powers, but though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."[5]

SUPREMACY CLAUSE VERSUS TENTH AMENDMENT

The logic of the supremacy clause would seem to require that the powers of Congress be determined by the fair reading of the express and implied grants contained in the Constitution itself, without reference to the powers of the States. For a century after Marshall's death, however, the Court proceeded on the theory that the Tenth Amendment had the effect of withdrawing various matters of internal police from the reach of power expressly committed to Congress. This point of view was originally put forward in New York *v.* Miln,[6] which was first argued, but not decided, before Marshall's death. The Miln Case involved a New York statute which required the captains of vessels entering New York Harbor with aliens aboard to make a [Pg 723] report in writing to the Mayor of the City, giving certain prescribed information. It might have been distinguished from Gibbons *v.* Ogden on the ground that the statute involved in the earlier

case conflicted with an act of Congress, whereas the Court found that no such conflict existed in this case. But the Court was unwilling to rest its decision on that distinction. Speaking for the majority, Justice Barbour seized the opportunity to proclaim a new doctrine. He wrote: "But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a State has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive."[7] Justice Story, in dissent, stated that Marshall had heard the previous argument and reached the conclusion that the New York statute was unconstitutional.[8]

Status of the Issue Today

The conception of a "complete, unqualified and exclusive" police power residing in the States and limiting the powers of the National Government was endorsed by Chief Justice Taney ten years later in the License Cases.[9] In upholding State laws requiring licenses for the sale of alcoholic beverages, including those imported from other States or from foreign countries, he set up the Supreme Court as the final arbiter in drawing the line between the mutually exclusive, reciprocally limiting fields of power occupied by the National and State Governments.[10] This view has, in effect, and it would seem in theory also, been repudiated in recent cases upholding labor relations,[11] social security,[12] and fair labor standards acts[13] passed by Congress.

TASK OF THE SUPREME COURT UNDER THE CLAUSE [Pg 724]

In applying the supremacy clause to subjects which have been regulated by Congress, the primary task of the Court is to ascertain whether a challenged State law is compatible with the policy expressed in the federal statute. When Congress condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation are federal questions, the answers to which are to be derived from the statute and the policy which it has adopted. To the federal statute and policy, conflicting State law and policy must yield.[14] But Congress in enacting legislation within its constitutional authority will not be deemed to have intended to strike down a State statute to protect the health and safety of the public unless its purpose to do so is clearly manifested.[15]

When the United States performs its functions directly, through its own officers and employees, State police regulations clearly are inapplicable. In reversing the conviction of the governor of a national soldiers' home for serving oleomargarine in disregard of State law, the Court said that the federal officer was not "subject to the jurisdiction of the State in regard to those very matters of administration which are thus approved by Federal authority."[16] An employee of the Post Office Department is not required to submit to examination by State authorities concerning his competence and to pay a license fee before performing his official duty in driving a motor truck for transporting the mail.[17] To Arizona's complaint, in a suit to enjoin the construction of Boulder Dam, that her quasi-sovereignty would be invaded by the building of the dam without first securing approval of the State engineer as required by its laws, Justice Brandeis replied that, "if Congress has power to authorize the construction of the dam and reservoir, Wilbur [Secretary of the Interior] is under no obligation to submit the plans and specifications to the State Engineer for approval."[18]

FEDERAL INSTRUMENTALITIES AND THE STATE POLICE POWER [Pg 725]

Federal instrumentalities and agencies have never enjoyed the same degree of immunity from State police regulation as from State taxation. The Court has looked to the nature of each regulation to determine whether it is compatible with the functions committed by Congress to the federal agency. This problem has arisen most often with reference to the applicability of State laws to the operation of national banks. Two correlative propositions have governed the decisions in these cases. The first was stated by Justice Miller in First National Bank *v.* Kentucky:[19] "[National banks are] subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the Nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional."[20] In Davis *v.* Elmira Savings Bank,[21] the Court stated the second proposition thus: "National banks are instrumentalities of the Federal Government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the

efficiency of these agencies of the Federal Government to discharge the duties, for the performance of which they were created."[22] Instructive, too, is a comparison of two other decisions. In the first,[23] the Court held that the fact that the Texas and Pacific Railway Company was a corporation organized under a statute of the United States did not remove it from the control of the Texas railroad commission as to business done wholly within the State. In the second,[24] the Court vetoed the attempt of Maryland to require a post office employee to cease driving a United States motor truck in the transportation of mail over a post road until he should obtain a license by submitting to examination before a State official and paying a fee. "Of course," said Justice Holmes, "an employee of the United States does not secure a general immunity from State law while acting in the course of his employment"; but this time the State went too far.

The extent to which States may go in regulating contractors who furnish goods or services to the [Pg 726] Federal Government is not as clearly established as is their right to tax such dealers. In 1943, a closely divided Court sustained the refusal of the Pennsylvania Milk Control Commission to renew the license of a milk dealer who, in violation of State law, had sold milk to the United States for consumption by troops at an army camp located on land belonging to the State, at prices below the minima established by the Commission.[25] The majority was unable to find in Congressional legislation, or in the Constitution, unaided by Congressional enactment, any immunity from such price-fixing regulations. On the same day, a different majority held that California could not penalize a milk dealer for selling milk to the War Department at less than the minimum price fixed by State law where the sales and deliveries were made in a territory which had been ceded to the Federal Government by the State and were subject to the exclusive jurisdiction of the former.[26]

OBLIGATION OF STATE COURTS UNDER THE SUPREMACY CLAUSE

The Constitution, laws and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution. Their obligation "is imperative upon the State judges, in their official and not merely in their private capacities. From the very nature of their judicial duties, they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or Constitution of the State, but according to the laws and treaties of the United States—'the supreme law of the land.'"[27] State courts have both the power and the duty to enforce obligations arising under federal law, unless Congress gives the federal courts exclusive jurisdiction. The power of State courts to entertain such suits was affirmed in Claflin *v.* Houseman[28] in 1876, thus setting at rest the doubts which had been raised by an early dictum of Justice Story.[29] In the Claflin case Justice Bradley asserted on behalf of a unanimous court that: "If an Act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court. The fact that a State court derives its existence and functions from the State laws is no reason why it should not afford relief, because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws."[30] When the Supreme Court of Connecticut held that rights created by the Federal Employer's Liability Acts could not be enforced in the courts of that State because the act was contrary to State policy, the Supreme Court unanimously reversed that decision. Said [Pg 727] Justice Van Devanter: "The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State."[31] Even if a federal statute is penal in character, a State may not refuse to enforce it if Congress allows it to take concurrent jurisdiction. In Testa *v.* Katt,[32] the Supreme Court reversed a holding of Rhode Island's highest court that, inasmuch as a State need not enforce the penal laws of another jurisdiction, a suit for treble damages for violation of OPA regulations could not be maintained in the courts of the State. Without determining the nature of the statute, it affirmed once more without dissent that "the policy of the federal Act is the prevailing policy in every state."[33]

IMMUNITY OF THE FEDERAL JUDICIAL PROCESS

It would seem self-evident that a State court cannot interfere with the functioning of a federal tribunal. But this proposition has not always gone unchallenged. Shortly before the Civil War, the Supreme Court of Wisconsin, holding the federal fugitive slave law invalid, ordered a United States marshal to release a prisoner who had been convicted of aiding and abetting the escape of a fugitive slave. In a further act of defiance, the State court instructed its clerk to disregard and refuse obedience to the writ of error issued by the United States Supreme Court. Strongly denouncing this interference with federal authority, Chief Justice Taney held that when a State court is advised, on the return of a writ of *habeas corpus*, that the prisoner is in custody on authority of the United States, it can proceed no further.[34] To protect the performance of its functions against interference by State tribunals, Congress may constitutionally authorize the

removal to a federal court of a criminal prosecution commenced in a State court against a revenue officer of the United States on account of any act done under color of his office.[35] In the celebrated case of Cunningham *v.* Neagle,[36] a United States marshal who, while assigned to [Pg 728] protect Justice Field, killed the man who had been threatening the life of the latter, was charged with murder by the State of California. Invoking the supremacy clause, the Supreme Court held that a person could not be guilty of a crime under State law for doing what it was his duty to do as an officer of the United States.

EFFECT OF LAWS PASSED BY STATES IN INSURRECTION

Since the efforts of States to depart from the Union, if successful, would have been *pro tanto* a destruction of the Constitution,[37] the ordinances of secession adopted by the Confederate States,[38] and all acts of legislation intended to give effect to such ordinances,[39] were treated as absolute nullities. The obligation of every State, as a member of the Union, and the obligation of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired.[40] But acts necessary to peace and good order among citizens, such, for example, as acts sanctioning and protecting marriage and domestic relations, governing the course of descents, regulating the conveyance of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, were regarded in general as valid when proceeding from an actual, though unlawful government.[41]

The Doctrine of Tax Exemption

McCULLOCH *v.* MARYLAND

Five years after the decision in McCulloch *v.* Maryland that a State may not tax an instrumentality of the Federal Government, the Court was asked to and did reexamine the entire question in Osborn *v.* Bank of the United States.[42] In that case counsel for the State of Ohio, whose attempt to tax the Bank was challenged, put forward two arguments of great importance. In the first place it was "contended, that, admitting Congress to possess the power, this [Pg 729] exemption ought to have been expressly asserted in the act of incorporation; and, not being expressed, ought not to be implied by the Court."[43] To which Marshall replied that: "It is no unusual thing for an act of Congress to imply, without expressing, this very exemption from state control, which is said to be so objectionable in this instance."[44] Secondly the appellants relied "greatly on the distinction between the bank and the public institutions, such as the mint or the post-office. The agents in those offices are, it is said, officers of government, * * * Not so the directors of the bank. The connection of the government with the bank, is likened to that with contractors."[45] Marshall accepted this analogy, but not to the advantage of the appellants. He simply indicated that all contractors who dealt with the Government were entitled to immunity from taxation upon such transactions.[46] Thus not only was the decision of McCulloch *v.* Maryland reaffirmed but the foundation was laid for the vast expansion of the principle of immunity that was to follow in the succeeding decades.

APPLICABILITY OF DOCTRINE *IN RE* FEDERAL SECURITIES, ETC.

The first significant extension of the doctrine of the immunity of federal instrumentalities from State taxation came in Weston *v.* Charleston,[47] where Chief Justice Marshall also found in the supremacy clause a bar to State taxation of obligations of the United States. During the Civil War, when Congress authorized the issuance of legal tender notes, it explicitly declared that such notes, as well as United States bonds and other securities, should be exempt from State taxation.[48] A modified version of this section remains on the statute books today.[49] The right of Congress to exempt legal tender notes to the same extent as bonds was sustained in People *v.* Board of Supervisors[50] over the objection that such notes circulated as money and should be taxable in the same way as coin. But a State tax on checks issued by the Treasurer of the United States for interest accrued upon government bonds was sustained since it did not in any wise affect the credit of the National Government.[51] Similarly, the assessment for an *ad valorem* property tax of an open account for money due under a federal contract,[52] and the inclusion of the value of United States bonds owned by a decedent, in measuring an inheritance tax,[53] were held valid, since neither tax would substantially embarrass the power of the United States to secure credit.

Income from federal securities is also beyond the reach of the State taxing power as the cases [Pg 730] now stand.[54] Nor can such a tax be imposed indirectly upon the stockholders on such part of the corporate dividends as corresponds to the part of the corporation's income which is not assessed, i.e., income from tax exempt bonds.[55] A State may constitutionally levy an excise tax on corporations for the privilege of doing business, and measure the tax by the property or net income of the corporation, including tax exempt United States securities or the income derived therefrom.[56] The designation of a tax is not controlling.[57] Where a so-called "license tax" upon insurance companies, measured by gross income, including interest on government bonds, was, in effect, a commutation tax levied in lieu of other taxation upon the personal property of the

taxpayer, it was still held to amount to an unconstitutional tax on the bonds themselves.[58]

TAXATION OF GOVERNMENT CONTRACTORS

In the course of his opinion in Osborn *v.* Bank of the United States,[59] Chief Justice Marshall posed the question: "Can a contractor for supplying a military post with provisions, be restrained from making purchases within any state, or from transporting the provisions to the place at which the troops were stationed? or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative."[60] One hundred and thirteen years later, the Court did answer the last part of his inquiry in the affirmative. In James *v.* Dravo Contracting Company[61] it held that a State may impose an occupation tax upon an independent contractor, measured by his gross receipts under contracts with the United States. Previously it had sustained a gross receipts tax levied in lieu of a property tax upon the operator of an automobile stage line, who was engaged in carrying the mails as an independent contractor,[62] and an excise tax on gasoline sold to a contractor with the Federal Government and used to operate machinery in the construction of levees in the Mississippi River.[63] Subsequently it has approved State taxes on the net income of a government contractor,[64] income[65] and social security[66] [Pg 731] taxes on the operators of bath houses maintained in a National Park under a lease from the United States; sales and use taxes on sales of beverages by a concessionaire in a National Park,[67] and on purchases of materials used by a contractor in the performance of a cost-plus contract with the United States,[68] and a severance tax imposed on a contractor who severed and purchased timber from lands owned by the United States.[69]

STATUS OF DOCTRINE TODAY

Of a piece with James *v.* Dravo Contracting Co. was the decision in Graves *v.* O'Keefe,[70] handed down two years later. Repudiating the theory "that a tax on income is legally or economically a tax on its source," the Court held that a State could levy a nondiscriminatory income tax upon the salary of an employee of a government corporation. In the opinion of the Court, Justice Stone intimated that Congress could not validly confer such an immunity upon federal employees. He wrote: "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."[71] Chief Justice Hughes concurred in the result without opinion. Justices Butler and McReynolds dissented and Justice Frankfurter wrote a concurring opinion in which he reserved judgment as to "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...."[72]

AD VALOREM TAXES UNDER THE DOCTRINE [Pg 732]

Property owned by a federally chartered corporation engaged in private business is subject to State and local *ad valorem* taxes. This was conceded in McCulloch *v.* Maryland,[73] and confirmed a half century later with respect to railroads incorporated by Congress.[74] Similarly, a property tax may be levied against the lands under water which are owned by a person holding a license under the Federal Water Power Act.[75] Land conveyed by the United States to a corporation for dry dock purposes was subject to a general property tax, despite a reservation in the conveyance of a right to free use of the dry dock and a provision for forfeiture in case of the continued unfitness of the dry dock for use, or the use of the land for other purposes.[76] Where equitable title has passed to the purchaser of land from the Government, a State may tax the equitable owner on the full value thereof, despite the retention of legal title by the Government,[77] but the equitable title passes otherwise.[78] Recently a divided Court held that where the Government purchased movable machinery and leased it to a private contractor, the lessee could not be taxed on the full value of the equipment.[79] In the pioneer case of Van Brocklin *v.* Tennessee,[80] the State was denied the right to sell for taxes lands which the United States owned at the time the taxes were levied, but in which it had ceased to have any interest at the time of sale. Nor can a State assess land in the hands of private owners for benefits from a road improvement completed while it was owned by the United States.[81]

PUBLIC PROPERTY AND FUNCTIONS

Property owned by the United States is, of course, wholly immune to State taxation.[82] No State can regulate, by the imposition of an inspection fee, any activity carried on by the United States directly through its own agents and employees.[83] An early case whose authority is now uncertain held invalid a flat rate tax on telegraphic messages, as applied to messages sent by public officers on official business.[84]

FISCAL INSTITUTIONS; LEGISLATIVE EXEMPTIONS [Pg 733]

Fiscal institutions chartered by Congress, their shares and their property, are taxable only with the consent of Congress and only in conformity with the restrictions it has attached to its consent.[85] Immediately after the Supreme Court construed the statute authorizing the States to tax national bank shares as allowing a tax on the preferred shares of such a bank held by the Reconstruction Finance Corporation,[86] Congress passed a law exempting such shares from taxation. The Court upheld this measure saying, "when Congress authorized the States to impose such taxation, it did no more than gratuitously grant them political power which they theretofore lacked. Its sovereign power to revoke the grant remained unimpaired, the grant of the privilege being only a declaration of legislative policy changeable at will."[87] In Pittman *v.* Home Owners' Loan Corporation[88] the Court sustained the power of Congress under the necessary and proper clause to immunize the activities of the Corporation from state taxation; and in Federal Land Bank *v.* Bismarck Lumber Co.,[89] the like result was reached with respect to an attempt by the State to impose a retail sales tax on a sale of lumber and other building materials to the bank for use in repairing and improving property that had been acquired by foreclosure of mortgages. The State's principal argument proceeded thus: "Congress has authority to extend immunity only to the governmental functions of the federal land banks; the only governmental functions of the land banks are those performed by acting as depositaries and fiscal agents for the federal government and providing a market for governmental bonds; all other functions of the land banks are private; petitioner here was engaged in an activity incidental to its business of lending money, an essentially private function; therefore § 26 cannot operate to strike down a sales tax upon purchases made in furtherance of petitioner's lending functions."[90] The Court rejected this argument and invalidated the tax saying: "The argument that the lending functions of the federal land banks are proprietary rather than governmental misconceives the nature of the federal government with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental. * * * It also follows that, when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental."[91] However, in the absence of federal legislation, a state law laying a percentage tax on the users of safety deposit services, measured by the banks' charges [Pg 734] therefor, was held valid as applied to national banks. The tax, being on the user, did not, the Court held, impose an intrinsically unconstitutional burden on a federal instrumentality.[92]

THE ATOMIC ENERGY COMMISSION; "ACTIVITIES" OF

In the recent case of Carson *v.* Roane-Anderson Co.,[93] the Court was confronted with an attempt on the part of Tennessee to apply its tax on the use within the State of goods purchased elsewhere to a private contractor for the Atomic Energy Commission and to vendors of such contractors. This, the Court held, could not be done under Section 9 b of the Atomic Energy Commission Act, which provides in part that: "The Commission, and the property, activities, and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof."[94] The power of exemption, said the Court, "stems from the power to preserve and protect functions validly authorized—the power to make all laws necessary and proper for carrying into execution the powers vested in Congress."[95] The term, "activities," as used in the Act described, was held to be nothing less "than all of the functions of the Commission."[96]

ROYALTIES; A JUDICIAL ANTICLIMAX

In 1928 the Court went so far as to hold that a State could not tax as income royalties for the use of a patent issued by the United States.[97] This proposition was soon overruled in Fox Film Corp. *v.* Doyal,[98] where a privilege tax based on gross income and applicable to royalties from copyrights was upheld. Likewise a State may lay a franchise tax on corporations, measured by the net income from all sources, and applicable to income from copyright royalties.[99]

IMMUNITY OF LESSEES OF INDIAN LANDS [Pg 735]

Another line of anomalous decisions conferring tax immunity upon lessees of restricted Indian lands was overruled in 1949. The first of these cases, Choctaw O. & G.R. Co. *v.* Harrison,[100] held that a gross production tax on oil, gas and other minerals was an occupational tax, and, as applied to a lessee of restricted Indian lands, was an unconstitutional burden on such lessee, who was deemed to be an instrumentality of the United States. Next the Court held the lease itself a federal instrumentality immune from taxation.[101] A modified gross production tax imposed in lieu of all *ad valorem* taxes was invalidated in two *per curiam* decisions.[102] In Gillespie *v.* Oklahoma[103] a tax upon the net income of the lessee derived from sales of his share of oil produced from restricted lands also was condemned. Finally a petroleum excise tax upon every barrel of oil produced in the State was held inapplicable to oil produced on restricted Indian lands.[104] In harmony with the trend to restricting immunity implied from the Constitution to activities of the Government itself, the Court overruled all these decisions in Oklahoma Tax Comm'n *v.* Texas Co. and held that a lessee of mineral rights in restricted Indian lands was

subject to nondiscriminatory gross production and excise taxes, so long as Congress did not affirmatively grant them immunity.[105]

SUMMATION AND EVALUATION

Although McCulloch *v.* Maryland and Gibbons *v.* Ogden were expressions of a single thesis—the supremacy of the National Government—their development after Marshall's death has been sharply divergent. During the period when Gibbons *v.* Ogden was eclipsed by the theory of dual federalism, the doctrine of McCulloch *v.* Maryland was not merely followed but greatly extended as a restraint on State interference with federal instrumentalities. Conversely, the Court's recent return to Marshall's conception of the powers of Congress has coincided with a retreat from the [Pg 736] more extreme positions taken in reliance upon McCulloch *v.* Maryland. Today the application of the supremacy clause is becoming, to an ever increasing degree, a matter of statutory interpretation—a determination of whether State regulations can be reconciled with the language and policy of federal enactments. In the field of taxation, the Court has all but wiped out the private immunities previously implied from the Constitution without explicit legislative command. Broadly speaking, the immunity which remains is limited to activities of the Government itself, and to that which is explicitly created by statute, e.g., that granted to federal securities and to fiscal institutions chartered by Congress. But the term, activities, will be broadly construed.

> Clause 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.

Oath of Office

POWER OF CONGRESS IN RESPECT TO OATHS

Congress may require no other oath of fidelity to the Constitution, but it may superadd to this oath such other oath of office as its wisdom may require.[106] It may not, however, prescribe a test oath as a qualification for holding office, such an act being in effect an *ex post facto* law;[107] and the same rule holds in the case of the States.[108]

NATIONAL DUTIES OF STATE OFFICERS

Commenting in The Federalist No. 27 on the requirement that State officers, as well as members of the State legislatures, shall be bound by oath or affirmation to support this Constitution, Hamilton wrote: "Thus the legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government *as far as its just and constitutional authority extends*; and it will be rendered auxiliary to the enforcement of its laws." The younger Pinckney had expressed the same idea on the floor of the Philadelphia Convention: "They [the States] are the instruments upon which the Union must frequently depend for the support and execution of their powers, * * *"[109] Indeed, the Constitution itself lays many duties, [Pg 737] both positive and negative, upon the different organs of State government,[110] and Congress may frequently add others, provided it does not require the State authorities to act outside their normal jurisdiction. Early Congressional legislation contains many illustrations of such action by Congress.

The Judiciary Act of 1789[111] left the State courts in sole possession of a large part of the jurisdiction over controversies between citizens of different States and in concurrent possession of the rest. By other sections of the same act State courts were authorized to entertain proceedings by the United States itself to enforce penalties and forfeitures under the revenue laws, while any justice of the peace or other magistrate of any of the States was authorized to cause any offender against the United States to be arrested and imprisoned or bailed under the usual mode of process. Even as late as 1839, Congress authorized all pecuniary penalties and forfeitures under the laws of the United States to be sued for before any court of competent jurisdiction in the State where the cause of action arose or where the offender might be found.[112] Pursuant also of the same idea of treating State governmental organs as available to the National Government for administrative purposes, the act of 1793 entrusted the rendition of fugitive slaves in part to national officials and in part of State officials and the rendition of fugitives from justice from one State to another exclusively to the State executives.[113] Certain later acts empowered State courts to entertain criminal prosecutions for forging paper of the Bank of the United States and for counterfeiting coin of the United States,[114] while still others conferred on State judges authority to admit aliens to national citizenship and provided penalties in case such judges should utter false certificates of naturalization—provisions which are still on the statute books.[115]

With the rise of the doctrine of States Rights and of the equal sovereignty of the States with the National Government, the availability of the former as instruments of the latter in the execution

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of its power, came to be questioned.[116] In Prigg *v.* Pennsylvania,[117] decided in 1842, the constitutionality of the provision of the act of 1793 making it the duty of State magistrates to act in the return of fugitive slaves was challenged; and in Kentucky *v.* Dennison,[118] decided on the eve of the Civil War, similar objection was leveled against the provision of the same act which made it "the duty" of the Chief Executive of a State to render up a fugitive from justice upon the demand of the Chief Executive of the State from which the fugitive had fled. The Court sustained both provisions, but upon the theory that the cooperation of the State authorities was purely voluntary. In the Prigg Case the Court, speaking by Justice Story, said: "* * * state magistrates may, if they choose, exercise the authority, [conferred by the act] unless prohibited by state legislation."[119] In the Dennison Case, "the duty" of State executives in the rendition of fugitives from justice was construed to be declaratory of a "moral duty." Said Chief Justice Taney for the Court: "The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the Government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. And we think it clear, that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State. It is true," the Chief Justice conceded, "that in the early days of the Government, Congress relied with confidence upon the co-operation and support of the States, when exercising the legitimate powers of the General Government, and were accustomed to receive it, [but this, he explained, was] upon principles of comity, and from a sense of mutual and common interest, where no such duty was imposed by the Constitution."[120]

Eighteen years later, in Ex parte Siebold[121] the Court sustained the right of Congress, under article I, section 4, paragraph 1 of the Constitution, to impose duties upon State election officials in connection with a Congressional election and to prescribe additional penalties for the violation by such officials of their duties under State law. While the doctrine of the holding is expressly [Pg 739] confined to cases in which the National Government and the States enjoy "a concurrent power over the same subject matter," no attempt is made to catalogue such cases. Moreover, the outlook of Justice Bradley's opinion for the Court is decidedly nationalistic rather than dualistic, as is shown by the answer made to the contention of counsel "that the nature of sovereignty is such as to preclude the joint cooperation of two sovereigns, even in a matter in which they are mutually concerned." To this Justice Bradley replied: "As a general rule, it is no doubt expedient and wise that the operations of the State and national governments should, as far as practicable, be conducted separately, in order to avoid undue jealousies and jars and conflicts of jurisdiction and power. But there is no reason for laying this down as a rule of universal application. It should never be made to override the plain and manifest dictates of the Constitution itself. We cannot yield to such a transcendental view of state sovereignty. The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity."[122] Three years earlier the Court, speaking also by Justice Bradley, sustained a provision of the Bankruptcy Act of 1867 giving assignees a right to sue in State courts to recover the assets of a bankrupt. Said the Court: The statutes of the United States are as much the law of the land in any State as are those of the State; and although exclusive jurisdiction for their enforcement may be given to the federal courts, yet where it is not given, either expressly or by necessary implication, the State courts having competent jurisdiction in other respects, may be resorted to.[123]

The Selective Service Act of 1917[124] was enforced to a great extent through State "employees who functioned under State supervision";[125] and State officials were frequently employed by the National Government in the enforcement of National Prohibition.[126] Nowadays, there is constant cooperation, both in peacetime and in wartime, in many fields between National and State Officers and official bodies.[127] This relationship obviously calls for the active fidelity of both categories of officialdom to the Constitution.

Notes

[1] On the supremacy of treaties over conflicting State law, *see* pp. 414-418. The supremacy due to treaties has, within recent years, been extended to certain executive agreements. *See* Justice Douglas in United States *v.* Pink, 315 U.S. 203 (1942). As to the supremacy of Congressional legislation implementing the national judicial power, *see* Tennessee *v.* Davis, 100 U.S. 257, 266-267 (1880); and Ex parte Siebold, 100 U.S. 404 (1880).

[2] 4. Wheat. 316 (1819). Marshall had anticipated his argument in this case in 1805, in United States *v.* Fisher, 2 Cr. 358 (1805), in which he upheld the act of 1797 asserting for the United States a priority of its claims over those of the States. *See* Chief Justice Taft's opinion in Spokane County *v.* United States, 279 U.S. 80, 87 (1929), where United States *v.* Fisher is followed; *also* 1 Warren, Supreme Court in United States History, 372, 538 ff.

[3] 9 Wheat. 1 (1824).

[4] 4 Wheat. 316, 436 (1819).

[5] 9 Wheat. 1, 210-211 (1824).

[6] 11 Pet. 102 (1837).

[7] Ibid. 139.

[8] Ibid. 161.

[9] 5 How. 504 (1847).

[10] Ibid. 573-574.

[11] National Labor Relations Board *v.* Jones & Laughlin Steel Corporation, 301 U.S. 1 (1937).

[12] Steward Machine Co. *v.* Davis, 301 U.S. 548 (1937); Helvering *v.* Davis, 301 U.S. 619 (1937).

[13] United States *v.* Darby, 312 U.S. 100 (1941); *see* especially ibid. 113-124.

[14] Sola Electric Co. *v.* Jefferson Electric Co., 317 U.S. 173, 170 (1942); Hill *v.* Florida, 325 U.S. 538 (1945); *see also* Testa *v.* Katt, 330 U.S. 380, 391 (1947); Francis *v.* Southern Pacific Co. 333 U.S. 445 (1918); and Bus Employers *v.* Wisconsin Board, 340 U.S. 383 (1951).

[15] Southern Pacific Co. *v.* Arizona, 825 U.S. 761 (1945); Rice *v.* Santa Fe Elevator Co., 331 U.S. 218, 230 (1947); Auto Workers *v.* Wis. Board, 336 U.S. 245, 253 (1949); United States *v.* Burnison, 339 U.S. 87, 91-92 (1950).

[16] Ohio *v.* Thomas, 173 U.S. 276, 283 (1899).

[17] Johnson *v.* Maryland, 254 U.S. 51 (1920).

[18] Arizona *v.* California, 283 U.S. 423, 451 (1931).

[19] 9 Wall. 353 (1870).

[20] Ibid. 362.

[21] 161 U.S. 275 (1896).

[22] Ibid. 283.

[23] Reagan *v.* Mercantile Trust Co., 154 U.S. 413 (1894).

[24] Johnson *v.* Maryland, 254 U.S. 51, 56 (1920).

[25] Penn Dairies *v.* Milk Control Comm'n., 318 U.S. 261 (1943).

[26] Pacific Coast Dairy *v.* Dept. of Agriculture, 318 U.S. 285 (1943).

[27] Martin *v.* Hunter's Lessee, 1 Wheat. 304, 335 (1816).

[28] 93 U.S. 130 (1876).

[29] Martin *v.* Hunter's Lessee, 1 Wheat. 304, 335 (1816).

[30] 93 U.S. 130, 137 (1876).

[31] Mondou *v.* New York, N.H. & H.R. Co., 223 U.S. 1, 57 (1912).

[32] 330 U.S. 386 (1947).

[33] Ibid. 393.

[34] Ableman *v.* Booth, 21 How. 506, 523 (1859), followed in United States *v.* Tarble, 13 Wall. 397 (1872).

[35] Tennessee *v.* Davis, 100 U.S. 257 (1880); *see also* Maryland *v.* Soper, 270 U.S. 36 (1926).

[36] 135 U.S. 1 (1890).

[37] Keith *v.* Clark, 97 U.S. 454, 461 (1878).

[38] White *v.* Cannon, 6 Wall. 443, 450 (1868). *See also* Hickman *v.* Jones, 9 Wall. 197 (1870); Dewing *v.* Perdicaries, 96 U.S. 193, 195 (1878).

[39] Ford *v.* Surget, 97 U.S. 594, 604 (1878); United States *v.* Keehler, 9 Wall. 83, 86 (1870).

[40] Texas *v.* White, 7 Wall. 700, 726 (1869).

[41] Ibid. 733. *See also* Horn *v.* Lockhart, 17 Wall. 570, 580 (1873); Thomas *v.* Richmond, 12 Wall. 349, 357 (1871); White *v.* Hart, 13 Wall. 646 (1872);

United States *v.* Home Ins. Co., 22 Wall. 99 (1875); Taylor *v.* Thomas, 22 Wall. 479 (1875); and Huntington *v.* Texas, 16 Wall. 402 (1873).

[42] 9 Wheat. 788 (1924).

[43] Ibid. 865.

[44] Ibid.

[45] Ibid. 866.

[46] Ibid. 867.

[47] 2 Pet. 449 (1829), followed in New York ex rel. Bank of Commerce *v.* Comrs. of Taxes and Assessments, 2 Bl. 620 (1863).

[48] 12 Stat. 710 (1863).

[49] 31 U.S.C. § 742 (1946).

[50] 7 Wall. 26 (1869).

[51] Hibernia Sav. & L. Soc. *v.* San Francisco, 200 U.S. 310, 315 (1906).

[52] Smith *v.* Davis, 323 U.S. 111 (1944).

[53] Plummer *v.* Coler, 178 U.S. 115 (1900); Blodgett *v.* Silberman, 277 U.S. 1, 12 (1928).

[54] Northwestern Mutual L. Ins. Co. *v.* Wisconsin, 275 U.S. 136, 140 (1927).

[55] Miller *v.* Milwaukee, 272 U.S. 713 (1927).

[56] Provident Inst. for Savings *v.* Massachusetts, 6 Wall. 611 (1868); Society for Savings *v.* Coite, 6 Wall. 594 (1868); Hamilton Mfg. Co. *v.* Massachusetts, 6 Wall. 632 (1868); Home Ins. Co. *v.* New York, 134 U.S. 594 (1890).

[57] Macallen *v.* Massachusetts, 279 U.S. 620, 625 (1929).

[58] Northwestern Mutual L. Ins. Co. *v.* Wisconsin, 275 U.S. 136 (1927).

[59] 9 Wheat. 738 (1824).

[60] Ibid. 867.

[61] 302 U.S. 134 (1937).

[62] Alward *v.* Johnson, 282 U.S. 509 (1931).

[63] Trinityfarm Const. Co. *v.* Grosjean, 291 U.S. 466 (1934).

[64] Atkinson *v.* Tax Commission, 303 U.S. 20 (1938).

[65] Superior Bath House Co. *v.* McCarroll, 312 U.S. 176 (1941).

[66] Buckstaff Bath House *v.* McKinley, 308 U.S. 358 (1939).

[67] Collins *v.* Yosemite Park & Curry Co., 304 U.S. 518 (1938).

[68] Alabama *v.* King & Boozer, 314 U.S. 1 (1941), overruling Panhandle Oil Co. *v.* Knox, 277 U.S. 218 (1928) and Graves *v.* Texas Co., 298 U.S. 393 (1936). *See also* Curry *v.* United States, 314 U.S. 14 (1941).

[69] Wilson *v.* Cook, 327 U.S. 474 (1946).

[70] 306 U.S. 466 (1939), followed in State Tax Comm'n. *v.* Van Cott, 306 U.S. 511 (1939). This case overruled by implication Dobbins *v.* Erie County, 16 Pet. 435 (1842) and New York ex rel. Rogers *v.* Graves, 299 U.S. 401 (1937), which held the income of federal employees to be immune from State taxation.

[71] 306 U.S. 466, 487 (1939).

[72] Ibid. 492.

[73] 4 Wheat. 316, 426 (1819).

[74] Thompson *v.* Union P.R. Co., 9 Wall. 579, 588 (1870); Railroad Co. *v.* Peniston, 18 Wall. 5, 31 (1873).

[75] Susquehanna Power Co. *v.* State Tax Comm'n., 283 U.S. 291 (1931).

[76] Baltimore Shipbuilding & Dry Dock Co. *v.* Baltimore, 195 U.S. 375 (1904).

[77] Northern P.R. Co. *v.* Myers, 172 U.S. 589 (1899); New Brunswick *v.* United States, 276 U.S. 547 (1928).

[78] Irwin *v.* Wright, 258 U.S. 219 (1922).

[79] United States *v.* Allegheny County, 322 U.S. 174 (1944).

[80] 117 U.S. 151 (1886).

[81] Lee *v.* Osceola & L. River Road Improv. Dist, 268 U.S. 643 (1925).

[82] Clallam County *v.* United States, 263 U.S. 341 (1923). *See also* Cleveland *v.* United States, 323 U.S. 329, 333 (1945).

[83] Mayo *v.* United States, 319 U.S. 441 (1943).

[84] Western U. Teleg. Co. *v.* Texas, 105 U.S. 460, 464 (1882).

[85] Des Moines Nat. Bank *v.* Fairweather, 263 U.S. 103, 106 (1923); Owensboro Nat. Bank *v.* Owensboro, 173 U.S. 664, 669 (1899); First Nat. Bank *v.* Adams, 258 U.S. 362 (1922).

[86] Baltimore Nat. Bank *v.* State Tax Comm'n., 297 U.S. 209 (1936).

[87] Maricopa County *v.* Valley National Bank, 318 U.S. 357, 362 (1943).

[88] 308 U.S. 21 (1939).

[89] 314 U.S. 95 (1941).

[90] Ibid. 101.

[91] Ibid. 102; *cf.* 9 Wheat. 738, 864-865 (1824).

[92] Colorado Nat. Bank *v.* Bedford, 310 U.S. 41 (1940).

[93] 342 U.S. 232 (1952).

[94] 60 Stat. 765; 42 U.S.C. § 1809 (b).

[95] 342 U.S. 232, 234.

[96] Ibid. 236.

[97] Long *v.* Rockwood, 277 U.S. 142 (1928).

[98] 286 U.S. 123 (1932).

[99] Educational Films Corp. *v.* Ward, 282 U.S. 379 (1931).

[100] 235 U.S. 292 (1944).

[101] Indian Territory Illuminating Oil Co. *v.* Oklahoma, 240 U.S. 522 (1916).

[102] Howard *v.* Gipsy Oil Co., 247 U.S. 503 (1918); Large Oil Co. *v.* Howard, 248 U.S. 549 (1919).

[103] 257 U.S. 501 (1922).

[104] Oklahoma Tax Comm'n *v.* Barnsdall Refiners, 296 U.S. 521 (1936).

[105] 330 U.S. 342 (1949). Justice Rutledge, speaking for the Court, sketched the history of the immunity of lessees of Indian lands from State taxation, which he found to stem from early rulings that tribal lands are themselves immune (The Kansas Indians, 5 Wall. 737 (1867); The New York Indians, 5 Wall. 761 (1867)). One of the first steps taken to curtail the scope of the immunity was Shaw *v.* Gibson-Zahniser Oil Corp., 276 U.S. 575 (1928), which held that lands outside a reservation, though purchased with restricted Indian funds, were subject to State taxation. Congress soon upset the decision, however, and its act was sustained in Board of County Comm'rs *v.* Seber, 318 U.S. 705 (1943).

[106] McCulloch *v.* Maryland, 4 Wheat. 316, 416 (1819).

[107] Ex parte Garland, 4 Wall. 333, 337 (1867).

[108] Cummings *v.* Missouri, 4 Wall. 277, 323 (1867).

[109] The Federalist No. 27, p. 123; I Farrand Records, 404.

[110] *See* Article I, Section III, Paragraph 1; Section IV, Paragraph 1; Section X; Article II, Section I, Paragraph 2; Article III, Section II, Paragraph 2; Article IV, Sections I and II; Article V; Amendments XIII, XIV, XV, XVII, and XIX.

[111] 1 Stat. 73 (1789).

[112] 5 Stat. 322 (1839).

[113] 1 Stat. 302 (1793).

[114] 2 Stat. 404 (1806).

[115] *See* 2 Kent's Commentaries, 64-65 (1826); 34 Stat. 590, 602 (1906); 8 U.S.C.

§§ 357, 379; 18 ibid. § 135 (1934); *also* Holmgren *v.* United States, 217 U.S. 509 (1910).

[116] For the development of opinion especially on the part of State courts, adverse to the validity of the above mentioned legislation, *see* 1 Kent's Commentaries, 396-404 (1826).

[117] 16 Pet. 539 (1842).

[118] 24 How. 66 (1861).

[119] 16 Pet. at 622.

[120] 24 How. at 107-108.

[121] 100 U.S. 371 (1880).

[122] Ibid. 392.

[123] Claflin *v.* Houseman, 93 U.S. 130, 136, 137 (1876); followed in Second Employers' Liability Cases, 223 U.S. 1, 55-59 (1912).

[124] 40 Stat. 76 (1917).

[125] Jane Perry Clark, The Rise of a New Federalism, 91 (Columbia University Press, 1938).

[126] *See* James Hart in 13 Virginia Law Review, 86-107 (1926) discussing President Coolidge's order of May 8, 1926, for Prohibition enforcement.

[127] Clark, New Federalism, cited in note 2 above; Corwin, Court Over Constitution, 148-168 (Princeton University Press, 1938).

ARTICLE VII

[Pg 741]

RATIFICATION

ARTICLE VII [Pg 743]

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

IN GENERAL

In Owings *v.* Speed,[1] the question at issue was whether the Constitution of the United States operated upon an act of Virginia passed in 1788. The Court held it did not, stating in part:

"The Conventions of nine States having adopted the Constitution, Congress, in September or October, 1788, passed a resolution in conformity with the opinions expressed by the Convention, and appointed the first Wednesday in March of the ensuing year as the day, and the then seat of Congress as the place, 'for commencing proceedings under the Constitution.'

"Both Governments could not be understood to exist at the same time. The new Government did not commence until the old Government expired. It is apparent that the Government did not commence on the Constitution being ratified by the ninth State; for these ratifications were to be reported to Congress, whose continuing existence was recognized by the Convention, and who were requested to continue to exercise their powers for the purpose of bringing the new Government into operation. In fact, Congress did continue to act as a Government until it dissolved on the 1st of November, by the successive disappearance of its Members. It existed potentially until the 2d of March, the day preceding that on which the Members of the new Congress were directed to assemble.

"The resolution of the Convention might originally have suggested a doubt, whether the Government could be in operation for every purpose before the choice of a President; but this doubt has been long solved, and were it otherwise, its discussion would be useless, since it is apparent that its operation did not commence before the first Wednesday in March 1789 * * *"

Notes

[1] 5 Wheat. 420, 422-423 (1820).

AMENDMENTS TO THE CONSTITUTION

[Pg 745]

AMENDMENTS NOS. 1-10

Bill of Rights

[Pg 747]

AMENDMENTS TO THE CONSTITUTION

[Pg 749]

AMENDMENTS NOS. 1-10

Bill of Rights

HISTORY: THE ORDINANCE OF 1787

While the Constitutional Convention was engaged in drafting the Constitution, the Congress of the Confederation included in the Ordinance for the government of the Northwest Territory, adopted July 13, 1787, the following provisions:

"It is hereby ordained and declared by the authority aforesaid, that the following articles shall be considered as articles of compact between the original States and the people and States in the said territory and forever remain unalterable, unless by common consent, to wit:

"ART. 1. No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments, in the said territory.

"ART. 2. The inhabitants of the said territory shall always be entitled to the benefits of the writ of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature; and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land; and, should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, *bona fide*, and without fraud, previously formed.

"ART. 3. Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

"ART. 6. There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted: * * *"[1]

FORMULATION AND ADOPTION OF THE BILL OF RIGHTS

[Pg 750]

Two months later, at the very end of its labors, the Constitutional Convention rejected, with scant consideration, a proposal by Gerry and Mason, to prepare a bill of rights.[2] This omission furnished the principal argument urged against ratification of the Constitution. Hamilton replied with the following ingenious argument: "* * * bills of rights are in their origin, stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, reservations of rights not surrendered to the prince. * * * It is evident, therefore, that according to their primitive signification, they have no application to the constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain everything, they have no need of particular reservations."[3]

The people did not find this line of reasoning persuasive. Several States ratified only after Washington put forward the suggestion that the desired guarantees could be added by amendment.[4] No less than 124 amendments were proposed by the States.[5] Shortly after the First Congress convened, Madison introduced a series of amendments,[6] designed "to quiet the apprehension of many, that without some such declaration of rights the government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable * * *"[7] After prolonged debate seventeen proposals were accepted by the House two of which were rejected by the Senate. The remainder were reduced to twelve in number, all but two of which were

ratified by the requisite number of States.[8]

THE BILL OF RIGHTS AND THE STATES: BARRON *v.* BALTIMORE

One of the amendments which the Senate refused to accept—the one which Madison declared to be "the most valuable of the whole list"[9]—read as follows: "The equal rights of conscience, the freedom of speech or of the press, and the right of trial by jury in criminal cases, shall not be infringed by any State."[10] The demand for assurance of these rights against encroachment by the States would not die. In spite of the deliberate rejection of Madison's proposal the contention [Pg 751] that the first Ten Amendments were applicable to the States was repeatedly pressed upon the Supreme Court. By a long series of decisions, beginning with the opinion of Chief Justice Marshall in Barron *v.* Baltimore[11] in 1833, the argument was consistently rejected. Nevertheless the enduring vitality of natural law concepts encouraged renewed appeals for judicial protection. Expression such as the statement of Justice Miller in Citizens Savings and Loan Association *v.* Topeka that: "It must be conceded that there are * * * rights in every free government beyond the control of the States"[12] probably account for the fact, reported by Charles Warren that: "In at least twenty cases between 1877 and 1907, the Court was required to rule upon this point and to reaffirm Marshall's decision of 1833, * * *"[13]

THE BILL OF RIGHTS AND AMENDMENT XIV

After the adoption of the Fourteenth Amendment, a fresh attack was launched on that front. The rights assured against encroachment by the Federal Government were claimed as privileges and immunities which no State may deny to any citizen.[14] As early as 1884 the further contention was made that the procedural safeguards prescribed by these articles are essential ingredients of due process of law.[15] For many years, the Court continued to reject these arguments also, over the vigorous and prophetic dissents of Justice Harlan. With respect to the due process clause it held that these words have the same meaning in the Fourteenth Amendment as in the Fifth, and hence do not embrace the other rights more specifically enumerated in the latter, there being no superfluous language in the Constitution.[16] In 1897, however, it retreated from this position to the extent of holding that the Fifth Amendment's explicit guarantee against the taking of private property without just compensation is included in the due process clause of the Fourteenth.[17] Later cases have established that the terms, "liberty" and "due process of law" as used in Amendment XIV, render available against the States certain fundamental rights guaranteed accused persons in the Bill of Rights[18] and the substantive rights which are protected against Congress by Amendment I.[19]

Notes

[1] 1 Stat. 51 n.

[2] Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution, V, 538 (1836).

[3] The Federalist No. 84.

[4] McLaughlin, A Constitutional History of the United States, 203 (1936).

[5] Ames, The Proposed Amendments to the Constitution, 19 (1896).

[6] Annals of Congress, I, 424, 433.

[7] Monongahela Navigation Co. *v.* United States, 148 U.S. 312, 324 (1893).

[8] Ames, *op. cit.*, 184, 185 (1896).

[9] Annals of Congress, 1, 755.

[10] Ibid.

[11] 7 Pet. 243 (1833); Lessee of Livingston *v.* Moore, 7 Pet. 469 (1833); Permoli *v.* New Orleans, 3 How. 589, 609 (1845); Fox *v.* Ohio, 5 How. 410 (1847); Smith *v.* Maryland, 18 How. 71 (1855); Withers *v.* Buckley, 20 How. 84 (1858); Pervear *v.* Massachusetts, 5 Wall. 475 (1867); Twitchell *v.* Pennsylvania, 7 Wall. 321 (1869).

[12] 20 Wall. 655, 669 (1875).

[13] Warren, The New "Liberty" Under the Fourteenth Amendment, 39 Harv. L. Rev., 431, 436 (1926).

[14] Slaughter-House Cases, 16 Wall. 36 (1873); Spies *v.* Illinois, 123 U.S. 131 (1887); O'Neil *v.* Vermont, 144 U.S. 323 (1892); Maxwell *v.* Dow, 176 U.S. 581 (1900); Patterson *v.* Colorado, 205 U.S. 454 (1907); Twining *v.* New Jersey, 211 U.S. 78 (1908).

[15] Hurtado *v.* California, 110 U.S. 516 (1884).

[16] Ibid. 534, 535.

[17] Chicago, B. & Q.R. Co. *v.* Chicago, 166 U.S. 226 (1897).

[18] *See* Twining *v.* New Jersey, 211 U.S. 78 (1908); Adamson *v.* California, 332 U.S. 46 (1947).

[19] *See* Gitlow *v.* New York, 268 U.S. 652 (1925); Beauharnais *v.* Illinois, 343 U.S. 250, 288 (1952).

AMENDMENT 1

[Pg 753]

RELIGION, FREE SPEECH, ETC.

RELIGION, FREE SPEECH, ETC.

[Pg 757]

AMENDMENT 1

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.

Absorption of Amendment I Into the Fourteenth Amendment

Eventually the long sought protection for certain substantive personal rights was obtained by identifying them with the "liberty" which States cannot take away without due process of law. The shift in the Court's point of view was made known quite casually in Gitlow *v.* New York,[1] where, although affirming a conviction for violation of a State statute prohibiting the advocacy of criminal anarchy, it declared that: "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."[2] This dictum became, two years later, accepted doctrine when the Court invalidated a State law on the ground that it abridged freedom of speech contrary to the due process clause of Amendment XIV.[3] Subsequent decisions have brought the other rights safeguarded by the First Amendment, freedom of religion,[4] freedom of the press,[5] and the right of peaceable assembly,[6] within the protection of the Fourteenth. In consequence of this development the cases dealing with the safeguarding of these rights against infringement by the States are included in the ensuing discussion of the First Amendment.

An Establishment of Religion [Pg 758]

THE "NO PREFERENCE" DOCTRINE

The original proposal leading to the First Amendment was introduced into the House of Representatives by James Madison, and read as follows: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretence, infringed." [7] This was altered in the House to read: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."[8] In the Senate the above formula was replaced by the following; "Congress shall make no law establishing articles of religion."[9] The conference committee of the two houses adopted the House proposal, but with the neutral term "respecting an establishment," etc., taking the place of the original sweeping ban against any law "establishing religion."[10] Explaining this phraseology, in his Commentaries, Story asserted that the purpose of the amendment was not to discredit the then existing State establishments of religion, but rather "to exclude from the National Government all power to act on the subject." He wrote: "The situation, * * *, of the different States equally proclaimed the policy as well as the necessity of such an exclusion. In some of the States, episcopalians constituted the predominant sect; in others, presbyterians; in others, congregationalists; in others, quakers; and in others again, there was a close numerical rivalry among contending sects. It was impossible that there should not arise perpetual strife and perpetual jealousy on the subject of ecclesiastical ascendency, if the national government were left free to create a religious establishment. The only security was in extirpating the power. But this alone would have been an imperfect security, if it had not been followed up by a declaration of the right of the free exercise of religion, and a prohibition (as we have seen) of all religious tests. Thus, the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions; and the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils without any inquisition into their faith or mode of worship."[11]

For the rest, Story contended, the no establishment clause, while it inhibited Congress from giving preference to any denomination of the Christian faith, was not intended to withdraw the [Pg 759] Christian religion as a whole from the protection of Congress. He said: "Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration, the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation."[12] As late as 1898 Cooley expounded the no establishment clause as follows: "By establishment of religion is meant the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others (citing 1 Tuck. Bl. Com. App. 296; 2 *id.*, App. Note G.). It was never intended by the Constitution that the government should be prohibited from recognizing religion, * * * where it might be done without drawing any invidious distinctions between different religious beliefs, organizations, or sects."[13]

THE "WALL OF SEPARATION" DOCTRINE

In 1802 President Jefferson wrote a letter to a group of Baptists in Danbury, Connecticut in which he declared that it was the purpose of the First Amendment to build "a wall of separation between Church and State,"[14] and in Reynolds *v.* United States,[15] the first Anti-Mormon Case, Chief Justice Waite, speaking for the unanimous Court, characterized this as "almost an authoritative declaration of the scope and effect of the amendment," one which left Congress "free to reach actions which were in violation of social duties or subversive of good order."[16]

Recently the Court has given Jefferson's "almost authoritative" pronouncement a greatly enlarged application. Speaking by Justice Black, a sharply divided Court sustained in 1947 the right of local authorities in New Jersey to provide free transportation for children attending parochial schools,[17] but accompanied its holding with these warning words, which appear to have had the approval of most of the Justices: "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever [Pg 760] they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations of groups and *vice versa*."[18] And a year later a nearly unanimous Court overturned on the above grounds a "released time" arrangement under which the Champaign, Illinois Board of Education agreed that religious instruction should be given in the local schools to pupils whose parents signed "request cards." The classes were to be conducted during regular school hours in the school building by outside teachers furnished by a religious council representing the various faiths, subject to the approval or supervision of the superintendent of schools. Attendance records were kept and reported to the school authorities in the same way as for other classes; and pupils not attending the religious-instruction classes were required to continue their regular secular studies.[19] Said Justice Black, speaking for the Court: "Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State."[20]

Justice Frankfurter presented a concurring opinion for himself and Justices Jackson, Rutledge and Burton. "We are all agreed," it begins, "that the First and Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an 'established church.'"[21] What ensues is a well documented account of the elimination of sectarianism from the American school system which is reinterpreted as a fight for the secularization of public supported education.[22] Facing then the emergence of the "released time" expedient,[23] Justice Frankfurter characterizes it as a "conscientious attempt to accommodate the allowable functions of Government and the special concerns of the Church within the framework of our Constitution."[24] Elsewhere in his opinion he states: "Of course, 'released time' as a generalized conception, undefined by differentiating particularities, is not an [Pg 761] issue for Constitutional adjudication. * * * The substantial differences among arrangements lumped together as 'released time' emphasize the importance of detailed analysis of the facts to which the Constitutional test of Separation is to be applied. How does 'released time' operate in Champaign?"[25] And again: "We do not consider, as indeed we could not, school programs not before us which, though colloquially characterized as 'released time,' present situations differing in aspects that may well be constitutionally crucial. Different forms which 'released time' has taken during more than thirty years of growth include programs which, like that before us, could not withstand the test of the Constitution; others may be found unexceptionable."[26] Justice Jackson added further reservations of his own as follows: "We should place some bounds on the demands for interference with local schools that we are empowered or willing to entertain. * * * It is important that we circumscribe our decision with some care."[27]

In a dissenting opinion Justice Reed took exception to the extended meaning given to the words "an establishment of religion." "The phrase 'an establishment of religion,'" said he, "may have been intended by Congress to be aimed only at a state church. When the First Amendment was pending in Congress in substantially its present form, 'Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal [Pg 762] observation of it by law, nor compel men to worship God in any manner contrary to their conscience.' Passing years, however, have brought about the acceptance of a broader meaning, although never until today, I believe, has this Court widened its interpretation to any such degree as holding that recognition of the interest of our nation in religion, through the granting, to qualified representatives of the principal faiths, of opportunity to present religion as an optional, extracurricular subject during released school time in public school buildings, was equivalent to an establishment of religion."[28] He further pointed out that "the Congress of the United States has a chaplain for each House who daily invokes divine blessings and guidance for the proceedings. The armed forces have commissioned chaplains from early days. They conduct the public services in accordance with the liturgical requirements of their respective faiths, ashore and afloat, employing for the purpose property belonging to the United States and dedicated to the services of religion. Under the Servicemen's Readjustment Act of 1944, eligible veterans may receive training at government expense for the ministry in denominational schools. The schools of the District of Columbia have opening exercises which 'include a reading from the Bible without note or comment, and the Lord's Prayer.'"[29]

THE ZORACH CASE; THE McCOLLUM CASE LIMITED

In a decision handed down July 11, 1951 the New York Court of Appeals, one Judge dissenting,

sustained the "released time" program of that State, distinguishing it from the one condemned in the McCollum Case as follows: "In the New York City program there is neither supervision nor approval of religious teachers and no solicitation of pupils or distribution of cards. The religious instruction must be outside the school building and grounds. There must be no announcement of any kind in the public schools relative to the program and no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction. All that the school does besides excusing the pupil is to keep a record—which is not available for any other purpose—in order to see that the excuses are not taken advantage of and the school deceived, which is, of course, the same procedure the school would take in respect of absence for any other reason."[30] On appeal this decision was sustained by the Supreme Court, six Justices to three.[31] Said Justice Douglas, speaking for the majority: "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When [Pg 763] the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here."[32]

A few weeks earlier, moreover, the Court had indicated an intention to scrutinize more closely the basis of its jurisdiction in this class of cases. This occurred in a case in which the question involved was the validity of a New Jersey statute which requires the reading at the opening of each public school day of five verses of the Old Testament.[33] The Court held that appellant's interest as taxpayers was insufficient to constitute a justiciable case or controversy, while as to the alleged rights of the child involved the case had become moot with her graduation from school.[34]

PERMISSIBLE MONETARY AIDS TO RELIGION

In 1899 the Court held that an agreement between the District of Columbia and the directors of a hospital chartered by Congress for erection of a building and treatment of poor patients at the expense of the District was valid despite the fact that the members of the Corporation belonged [Pg 764] to a monastic order or sisterhood of a particular church.[35] It has also sustained a contract made at the request of Indians to whom money was due as a matter of right, under a treaty, for the payment of such money by the Commissioner of Indian Affairs for the support of Indian Catholic schools.[36] In 1930 the use of public funds to furnish nonsectarian textbooks to pupils in parochial schools of Louisiana was sustained,[37] and in 1947, as we have seen, the case of public funds for the transportation of pupils attending such schools in New Jersey.[38] In the former of these cases the Court cited the State's interest in secular education even when conducted in religious schools; in the latter its concern for the safety of school children on the highways; and the National School Lunch Act,[39] which aids all school children attending tax-exempt schools can be similarly justified. The most notable financial concession to religion, however, is not to be explained in this way, the universal practice of exempting religious property from taxation. This unquestionably traces back to the idea expressed in the Northwest Ordnance that Government has an interest in religion as such.

FREE EXERCISE OF RELIGION: DIMENSIONS

The First Amendment "was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. The oppressive measures adopted, and the cruelties and punishments inflicted, by the governments of Europe for many ages, to compel parties to conform, in their religious beliefs and modes of worship, to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons, and enforce an outward conformity to a prescribed standard, led to the adoption of (this) amendment."[40] "The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose

cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be."[41] [Pg 765]

PAROCHIAL SCHOOLS

The Society of Sisters, an Oregon corporation, was empowered by its charter to care for orphans and to establish and maintain schools and academies for the education of the youth. Systematic instruction and moral training according to the tenets of the Roman Catholic Church was given in its establishments along with education in the secular branches. By an Oregon statute, effective September 1, 1926, it was required that every parent, or other person having control or charge or custody of a child between eight and sixteen years send him "to a public school for the period of time a public school shall be held during the current year" in the district where the child resides; and failure so to do was declared a misdemeanor. The District Court of The United States for Oregon enjoined the enforcement of the statute and the Supreme Court unanimously sustained its action,[42] holding that the measure unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of children under their control—a liberty protected by the Fourteenth Amendment. While the First Amendment was not mentioned in the Court's opinion, the subsequent absorption of its religious clauses into the Fourteenth Amendment seems to make the case relevant to the question of their proper interpretation.

FREE EXERCISE OF RELIGION: FEDERAL RESTRAINTS

Religious belief cannot be pleaded as a justification for an overt act made criminal by the law of the land. "Laws are made for the government of action, and while they cannot interfere with mere religious belief and opinions, they may with practices."[43] To permit a man to excuse conduct in violation of law on the ground of religious belief "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[44] It does not follow that "because no mode of worship can be established or religious tenets enforced in this country, therefore any tenets, however destructive of society, may be held and advocated, if asserted, to be a part of the religious doctrine of those advocating and practicing them * * * Whilst legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so-called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as religion."[45] Accordingly acts of Congress directed against either the practice of the advocacy of polygamy by members of a religious sect which sanctioned the practice, were held valid.[46] But when, in the Ballard Case,[47] decided in 1944, the promoters of a religious sect, whose founder had at different times identified himself as Saint Germain, Jesus, George Washington, and Godfre Ray King, were convicted of using the mails to defraud by obtaining money on the strength of having supernaturally healed hundreds of persons, they found the Court in a softened frame of mind. Although the trial judge, carefully discriminating between the question of the truth of defendants' pretensions and that of their good faith in advancing them, had charged the jury that it could pass on the latter but not the former, this caution did not avail with the Court, which contrived on another ground ultimately to upset the verdict of "guilty." The late Chief Justice Stone, speaking for himself and Justices Roberts and Frankfurter, dissented: "I cannot say that freedom of thought and worship includes freedom to procure money by making knowingly false statements about one's religious experiences."[48] [Pg 766]

FREE EXERCISE OF RELIGION: STATE AND LOCAL RESTRAINTS

The Mormon Church cases were decided prior to the emergence of the clear and present danger doctrine dealt with below. In its consideration of cases stemming from State and local legislation the Court has endeavored at times to take account of this doctrine, with the result that its decisions have followed a somewhat erratic course. The leading case is Cantwell *v.* Connecticut.[49] Here three members of the sect calling itself Jehovah's Witnesses were convicted under a statute which forbade the unlicensed soliciting of funds on the representation that they were for religious or charitable purposes, and also on a general charge of breach of the peace by accosting in a strongly Catholic neighborhood two communicants of that faith and playing to them a phonograph record which grossly insulted the Christian religion in general and the Catholic church in particular. Both convictions were held to violate the constitutional guarantees of speech and religion, the clear and present danger rule being invoked in partial justification of the holding, although it is reasonably inferable from the Court's own recital of the facts that the listeners to the phonograph record exhibited a degree of self-restraint rather unusual under the circumstances. Two weeks later the Court, as if to "compensate" for its zeal in the Cantwell Case, went to the other extreme, and urging the maxim that legislative acts must be presumed to be constitutional, sustained the State of Pennsylvania in excluding from its schools children of the Jehovah's Witnesses, who in the name of their beliefs refused to salute the flag.[50] The subsequent record of the Court's holdings in this field is somewhat variable. A decision in June, 1942, sustaining the application to vendors of religious books and pamphlets of a nondiscriminatory license fee[51] was eleven months later vacated and formally reversed;[52] shortly thereafter a like fate overtook the decision in the "Flag Salute" Case.[53] In May, 1943, the Court found that an ordinance of the city of Struthers, Ohio, which made it unlawful for [Pg 767]

anyone distributing literature to ring a doorbell or otherwise summon the dwellers of a residence to the door to receive such literature, was violative of the Constitution when applied to distributors of leaflets advertising a religious meeting.[54] But eight months later it sustained the application of Massachusetts' child labor laws in the case of a nine year old girl who was permitted by her legal custodian to engage in "preaching work" and the sale of religious publications after hours.[55] However, in Saia *v.* New York[56] decided in 1948, the Court held, by a vote of five Justices to four, that an ordinance of the city of Lockport, New York, which forbade the use of sound amplification devices except with the permission of the Chief of Police was unconstitutional as applied in the case of a Jehovah's Witness who used sound equipment to amplify lectures in a public park on Sunday, on religious subjects. But a few months later the same Court, again dividing five-to-four, sustained a Trenton, New Jersey ordinance which banned from that city's streets all loud speakers and other devices which emit "loud and raucous noises."[57] The latest state of the doctrine on this particular topic is represented by three cases, all decided the same day. In one the conviction of a Baptist minister for conducting religious services in the streets of New York City without first obtaining a permit from the city police commissioner was overturned,[58] a permit having been refused him on the ground that he had in the past ridiculed other religious beliefs thereby stirring strife and threatening violence. Justice Jackson dissented, quoting Mr. Bertrand Russell to prove that "too little liberty brings stagnation, and too much brings chaos. The fever of our times," he suggested, "inclines the Court today to favor chaos."[59] In the second, the Court upset the conviction of a group of Jehovah's Witnesses in Maryland for using a public park without first obtaining a permit.[60] The third case,[61] which had nothing to do with religion, affords an interesting foil to the other two. It is dealt with in another connection.[62]

FREE EXERCISE OF RELIGION: OBLIGATIONS OF CITIZENSHIP [Pg 768]

In 1918 the Court rejected as too unsound to require more than a mere statement the argument that the Selective Service Act was repugnant to the First Amendment as establishing or interfering with religion, by reason of the exemptions granted ministers of religion, theological students and members of sects whose tenets exclude the moral right to engage in war.[63] The opposite aspect of this problem was presented in Hamilton *v.* Regents.[64] There a California statute requiring all male students at the State university to take a course in military science and tactics was assailed by students who claimed that military training was contrary to the precepts of their religion. This act did not require military service, nor did it peremptorily command submission to military training. The obligation to take such training was imposed only as a condition of attendance at the university. In these circumstances, all members of the Court concurred in the judgment sustaining the statute. No such unanimity of opinion prevailed in In re Summers,[65] where the Court upheld the action of a State Supreme Court in denying a license to practice law to an applicant who entertained conscientious scruples against participation in war. The license was withheld on the premise that a conscientious belief in nonviolence to the extent that the believer would not use force to prevent wrong, no matter how aggravated, made it impossible for him to swear in good faith to support the State Constitution. The Supreme Court held that the State's insistence that an officer charged with the administration of justice take such an oath and its interpretation of that oath to require a willingness to perform military service, did not abridge religious freedom. In a dissenting opinion in which Justices Douglas, Murphy and Rutledge concurred, Justice Black said, "I cannot agree that a State can lawfully bar from a semipublic position a well-qualified man of good character solely because he entertains a religious belief which might prompt him at some time in the future to violate a law which has not yet been and may never be enacted."[66]

Freedom of Speech and Press [Pg 769]

THE BLACKSTONIAN BACKGROUND

"The liberty of the press," says Blackstone, "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 from 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. 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. Neither is any restraint hereby laid upon freedom of thought or inquiry: liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive to the ends of society, is the crime which society corrects."[67]

EFFECT OF AMENDMENT I ON THE COMMON LAW

Blackstone was declaring the Common Law of his day, and it was no intention of the framers of Amendment I to change that law. "The historic antecedents of the First Amendment preclude the notion that its purpose was to give unqualified immunity to every expression that touched on matters within the range of political interest. The Massachusetts Constitution of 1780 guaranteed free speech; yet there are records of at least three convictions for political libels obtained between 1799 and 1803. The Pennsylvania Constitution of 1790 and the Delaware Constitution of 1792 expressly imposed liability for abuse of the right of free speech. Madison's own State put on its books in 1792 a statute confining the abusive exercise of the right of utterance. And it deserves to be noted that in writing to John Adams' wife, Jefferson did not rest his condemnation of the Sedition Act of 1798 on his belief in unrestrained utterance as to political matter. The First [Pg 770] Amendment, he argued, reflected a limitation upon Federal power, leaving the right to enforce restrictions on speech to the States.[68] * * * 'The law is perfectly well settled,' this Court said over fifty years ago, 'that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed.'[69] That this represents the authentic view of the Bill of Rights and the spirit in which it must be construed has been recognized again and again in cases that have come here within the last fifty years."[70]

AMENDMENT XIV AND BLACKSTONE [Pg 771]

Nor was the adoption of Amendment XIV thought to alter the above described situation until a comparatively recent date. Said Justice Holmes, speaking for the Court in 1907: "We leave undecided the question whether there is to be found in the Fourteenth Amendment a prohibition similar to that in the First. But even if we were to assume that freedom of speech and freedom of the press were protected from abridgment on the part not only of the United States but also of the States, still we should be far from the conclusion that the plaintiff in error would have us reach. In the first place, the main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. Commonwealth *v.* Blanding, 3 Pick. 304, 313, 314; Respublica *v.* Oswald, 1 Dallas 319, 325. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all. Commonwealth *v.* Blanding, *ubi sup.*; 4 Bl. Comm. 150."[71] This appears to be an unqualified endorsement of Blackstone. But, as Justice Holmes remarks in the same opinion, "There is no constitutional right to have all general propositions of law once adopted remain unchanged."[72] As late as 1922 Justice Pitney, speaking for the Court, said: "Neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restriction about 'freedom of speech' or the 'liberty of silence' * * *"[73]

THE CLEAR AND PRESENT DANGER RULE, MEANING [Pg 772]

The rule requires that before an utterance can be penalized by government it must, ordinarily, have occurred "in such circumstances or have been of such a nature as to create a clear and present danger" that it would bring about "substantive evils" within the power of government to prevent.[74] The question whether these conditions exist is one of law for the courts, and ultimately for the Supreme Court, in enforcement of the First and/or the Fourteenth Amendment; [75] and in exercise of its power of review in these premises the Court is entitled to review broadly findings of facts of lower courts, whether State or federal.[76]

CONTRASTING OPERATION OF THE COMMON LAW RULE

In Davis *v.* Beason,[77] decided in 1890, the question at issue was the constitutionality of a statute of the Territory of Idaho, providing that "no person who is a bigamist or polygamist, or who teaches, advices, counsels or encourages any person or persons to become bigamists or polygamists or to commit any other crime defined by law, or to enter into what is known as plural or celestial marriage, or who is a member of any order, organization or association which teaches, advises, counsels or encourages its members or devotees or any other persons to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of such order, organization or association, or otherwise, is permitted to vote at any election, or to hold any position or office of honor, trust or profit within this Territory." A unanimous court held this enactment to be within the legislative powers which Congress had conferred on the Territory and not to be open to any constitutional objection. Said Justice Field for the Court: "Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call

their advocacy a tenet of religion is to offend the common sense of mankind. If they are crimes, then to teach, advise, and counsel their practice is to aid in their commission, and such teaching and counselling are themselves criminal and proper subjects of punishment, as aiding and abetting crime are in all other cases."[78] No talk here about the necessity for showing that the prohibited teaching, counselling, advising, etc., must be shown to have occurred in circumstances creating a clear and present danger of its being followed. [Pg 773]

In Fox *v.* Washington,[79] decided in 1915, the question at issue was the constitutionality of a Washington statute denouncing "the wilful printing, circulation, etc., of matter advocating or encouraging the commission of any crime or breach of the peace or which shall tend to encourage or advocate disrespect for law or any court or courts of justice." The State Supreme Court had assumed that the case was governed by the guarantees of the United States Constitution of freedom of speech, and especially by the Fourteenth Amendment, and its decision sustaining the statute was upheld by the Supreme Court on the same assumption, in the case of a person indicted for publishing an article encouraging and inciting what the jury had found to be a breach of State laws against indecent exposure. Again, one notes the total absence of any reference to the clear and present danger rule. But not all State enactments survived judicial review prior to the adoption of the clear and present danger test. In 1927 the Court disallowed a Kansas statute which, as interpreted by the highest State court, made punishable the joining of an organization teaching the inevitability of "the class struggle";[80] three years later it upset a California statute which forbade in all circumstances the carrying of a red flag as a symbol of opposition to government;[81] and 6 years after that it upset a conviction under an Oregon statute for participating in a meeting held under the auspices of an organization which was charged with advocating violence as a political method, although the meeting itself was orderly and did not advocate violence.[82] In none of these cases was the clear and present danger test mentioned.

EMERGENCE OF THE CLEAR AND PRESENT TEST

In Schenck *v.* United States[83] appellants had been convicted of conspiracy to violate the Espionage Act of June 15, 1917[84] "by causing and attempting to cause insubordination, etc., in the military and naval forces of the United States, and to obstruct the recruiting and enlistment service of the United States, when the United States was at war with the German Empire, to-wit, that the defendants willfully conspired to have printed and circulated to men who had been called and accepted for military service under the Act of May 18, 1917, a document set forth and alleged to be calculated to cause such insubordination and obstruction." Affirming the conviction, the Court, speaking by Justice Holmes said: "It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in Patterson *v.* Colorado.[85] * * * 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 most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that have all the effect of force. * * * 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."[86] One week later two other convictions under the same act were affirmed, with Justice Holmes again speaking for the unanimous Court. In Frohwerk *v.* United States[87] he said: "With regard to the argument [on the constitutional question] we think it necessary to add to what has been said in Schenck *v.* United States, * * *, only that the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language. Robertson *v.* Baldwin, 165 U.S. 275, 281. We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech."[88] In Debs *v.* United States[89] he referred to "the natural and intended effect" and "probable effect"[90] of the condemned speech (straight common law). When, moreover, a case arose in which the dictum in the Schenck case might have influenced the result, the Court, seven Justices to two, declined to follow it. This was in Abrams *v.* United States,[91] in which the Court affirmed a conviction for spreading propaganda "obviously intended to provoke and to encourage resistance to the United States in the war." Justices Holmes and Brandeis dissented on the ground that the utterances did not create a clear and imminent danger[92] of substantive evils. And the same result was reached in Schaefer *v.* United States,[93] again over the dissent of Justices Holmes and Brandeis, the Court saying that: "The tendency of the articles and their efficacy were enough for the offense * * *."[94] [Pg 774]

THE GITLOW AND WHITNEY CASES [Pg 775]

Gitlow was convicted under a New York statute making it criminal to advocate, advise or teach the duty, necessity or propriety of overturning organized government by force or violence.[95] Since there was no evidence as to the effect resulting from the circulation of the manifesto for which he was convicted and no contention that it created any immediate threat to the security of

the State, the Court was obliged to reach a clear cut choice between the common law test of dangerous tendency and the clear and present danger test. It adopted the former and sustained the conviction, saying "By enacting the present statute the state has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence, and unlawful means, are so inimical to the general welfare, and involve such danger of substantive evil, that they may be penalized in the exercise of its police power. That determination must be given great weight * * * That utterances inciting to the overthrow of organized government by unlawful means present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the state. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less and substantial because the effect of a given utterance cannot be accurately foreseen. The state cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale."[96] Justice Sanford distinguished the Schenck Case by asserting that its "general statement" was intended to apply only to cases where the statute "merely prohibits certain acts involving the danger of substantive evil without any reference to language itself,"[97] and has no application "where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character."[98]

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Two years later, in Whitney *v.* California,[99] upon evidence which tended to establish the existence of a conspiracy to commit certain serious crimes, the conviction was sustained unanimously. In a concurring opinion in which Justice Holmes joined, Justice Brandeis restated the test of clear and present danger to include the intent to create such danger: "But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral. That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent has been settled. *See* Schenck *v.* United States, 249 U.S. 47, 52. * * *, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[100]

ACCEPTANCE OF THE CLEAR AND PRESENT DANGER TEST

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Ten years later, in Herndon *v.* Lowry,[101] a narrowly divided Court drew a distinction between the prohibition by law of specific utterances which the legislators have determined have a "dangerous tendency" to produce substantive evil and the finding by a jury to that effect, and on this basis reversed the conviction of a communist organizer under a State criminal syndicalism statute, with the intimation that where it is left to a jury to determine whether particular utterances are unlawful, the test of clear and present danger must be applied.[102] Finally, in Thornhill *v.* Alabama,[103] the Court went the full length in invalidating a State law against picketing because[104] "* * * no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter." The same term, again invoking the clear and present danger formula, it reversed a conviction for the common law offense of inciting a breach of the peace by playing, on a public street, a phonograph record attacking a religious sect.[105]

THE POLICE POWER AND CLEAR AND PRESENT DANGER

Public Order

Prior to the Court's ratification of the clear and present danger test it had held that while on the one hand, peaceful and orderly opposition to government by legal means may not be inhibited, and that the Constitution insures 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,"[106] yet on the other hand, the State may punish those who abuse their freedom of speech by utterances tending to incite to crime,[107] or to endanger the foundations of organized government or to threaten its overthrow by unlawful means.[108] The impact of the clear and present danger test upon these principles is well illustrated by a holding in 1949 by a sharply divided Court, that a Chicago ordinance which, as judicially interpreted, was held to permit punishment for breach of the peace for speech which "stirs the public to anger, invites disputes, (or) brings about a condition of unrest" was an undue and unlawful restriction on the right of free speech.[109] Reversing a conviction under the ordinance, Justice Douglas wrote: "A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute * * *

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is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[110] Finding that the ordinance as thus construed was unconstitutional, the majority did not enter into a consideration of the facts of the particular case. Dissenting, Justice Jackson dwelt at length upon the evidence which showed that a riot had actually occurred and that the speech in question had in fact provoked a hostile mob, incited a friendly one, and threatened violence between the two. Conceding the premises of the majority opinion, he argued nevertheless that: "Because a subject is legally arguable, however, does not mean that public sentiment will be patient of its advocacy at all times and in all manners. * * * A great number of people do not agree that introduction to America of communism or fascism is even debatable. Hence many speeches, such as that of Terminiello, may be legally permissible but may nevertheless in some surroundings be a menace to peace and order. When conditions show the speaker that this is the case, as it did here, there certainly comes a point beyond which he cannot indulge in provocations to violence without being answerable to society."[111] Early in 1951 the Court itself endorsed this position in Feiner *v.* New York.[112] Here was sustained the conviction of a speaker who in addressing a crowd including a number of Negroes, through a public address system set up on the sidewalk, asserted that the Negroes "should rise up in arms and fight for their rights," called a number of public officials, including the President, "bums," and ignored two police requests to stop speaking. The Court took cognizance of the findings by the trial court and two reviewing State courts that danger to public order was clearly threatened.[113]

Public Morals

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But the police power extends also to the public morals. In Winters *v.* New York[114] the question at issue was the constitutionality of a State statute making it an offense "to print, publish, or distribute, or to possess with intent to distribute, any printed matter principally made up of criminal views, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime," and construed by the State courts "as prohibiting such massing of accounts of deeds of bloodshed and lust as to incite to crimes against the person." A divided Court, 6 Justices to 3, following the third argument of the case before it, set the act aside on the ground that, as construed, it did not define the prohibited acts in such a way as to exclude those which are a legitimate exercise of the constitutional freedom of the press; and further, that it failed to set up an ascertainable standard of guilt.[115] A few weeks earlier the Court had vacated a judgment of the Supreme Court of Utah affirming convictions on a charge of conspiring to "commit acts injurious to public morals" by counseling, advising and practicing plural marriage.[116] Four members of the Court thought that the cause should be remanded in order to give the State Supreme Court opportunity to construe that statute and a fifth agreed with this result without opinion. Justice Rutledge, speaking for himself and Justices Douglas and Murphy, dissented on the ground that the Utah Court had already construed the statute to authorize punishment for exercising the right of free speech. He said: "The Utah statute was construed to proscribe any agreement to advocate the practice of polygamy. Thus the line was drawn between discussion and advocacy. The Constitution requires that the statute be limited more narrowly. At the very least the line must be drawn between advocacy and incitement, and even the state's power to punish incitement may vary with the nature of the speech, whether persuasive or coercive, the nature of the wrong induced, whether violent or merely offensive to the mores, and the degree of probability that the substantive evil actually will result."[117]

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PICKETING AND CLEAR AND PRESENT DANGER

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Closely allied to the problem of dangerous utterances is the resort to picketing as a means of communication and persuasion in labor disputes. In such cases, the evils feared by the legislature usually arise, not out of the substance of the communications, but from the manner in which they are made. Applying the test of clear and present danger in Thornhill *v.* Alabama[118] and Carlson v. California,[119] the Court invalidated laws against peaceful picketing, including the carrying of signs and banners. It held that: "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution" and may be abridged only where "the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."[120] Shortly thereafter a divided Court ruled that peaceful picketing may be enjoined where the labor dispute has been attended by violence on a serious scale.[121] Speaking for the majority on this occasion, Justice Frankfurter asserted that "utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force * * * (and) was not meant to be sheltered by the Constitution."[122]

For a brief period strangers to the employer were accorded an almost equal freedom of communication by means of picketing.[123] Subsequent cases, however, have recognized that "while picketing has an ingredient of communication it cannot dogmatically be equated with the constitutionally protected freedom of speech."[124] Without dissent the Court has held that a State may enjoin picketing designed to coerce the employer to violate State law by refusing to sell ice to nonunion peddlers,[125] by interfering with the right of his employees to decide whether or not to join a union,[126] or by choosing a specified proportion of his employees from

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one race, irrespective of merit.[127] By close divisions, it also sustained the right of a State to forbid the "conscription of neutrals" by the picketing of a restaurant solely because the owner had contracted for the erection of a building (not connected with the restaurant and located some distance away) by a contractor who employed nonunion men;[128] or the picketing of a shop operated by the owner without employees to induce him to observe certain closing hours.[129] In this last case Justice Black distinguished Thornhill *v.* Alabama and other prior cases by saying, "No opinions relied on by petitioners assert a constitutional right in picketers to take advantage of speech or press to violate valid laws designed to protect important interests of society * * * it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. * * * Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society."[130] By the same token, a State anti-closed shop law does not infringe freedom of speech, of assembly or of petition;[131] neither does a "cease and desist" order of a State Labor Relations Board directed against work stoppages caused by the calling of special union meetings during working hours.[132] But, by a vote of five Justices to four —the five, however, being unable to agree altogether among themselves—a State may not require labor organizers to register,[133] although, as Justice Roberts pointed out for the dissenters, "other paid organizers, whether for business or for charity could be required thus to identify themselves."[134]

CONTEMPT OF COURT AND CLEAR AND PRESENT DANGER

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One area in which the clear and present danger rule has undoubtedly enlarged freedom of utterance beyond common law limits is that of discussion of judicial proceedings. In 1907 the Supreme Court speaking by Justice Holmes refused to review the conviction of an editor for contempt of court in publishing articles and cartoons criticizing the action of the court in a pending case.[135] It took the position that even if freedom of the press was protected against abridgment by the State, a publication tending to obstruct the administration of justice was punishable, irrespective of its truth. In recent years the Court not only has taken jurisdiction of cases of this order but has scrutinized the facts with great care and has not hesitated to reverse the action of State courts. Bridges *v.* California[136] is the leading case. Enlarging upon the idea that clear and present danger is an appropriate guide in determining whether comment on pending cases can be punished, Justice Black said: "We cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials, and that to preserve judicial impartiality, it is necessary for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases. We must therefore turn to the particular utterances here in question and the circumstances of their publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify summary punishment."[137] Speaking on behalf of four dissenting members, Justice Frankfurter objected: "A trial is not a 'free trade in ideas,' nor is the best test of truth in a courtroom 'the power of the thought to get itself accepted in the competition of the market.' * * * 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. The Fourteenth Amendment does not forbid a state to continue the historic process of prohibiting expressions calculated to subvert a specific exercise of judicial power. So to assure the impartial accomplishment of justice is not an abridgment of freedom of speech or freedom of the press, as these phases of liberty have heretofore been conceived even by the stoutest libertarians. In act, these liberties themselves depend upon an untrammeled judiciary whose passions are not even unconsciously aroused and [Pg 784] whose minds are not distorted by extrajudicial considerations."[138] In Pennekamp *v.* Florida,[139] a unanimous Court held that criticism of judicial action already taken, although the cases were still pending on other points, did not create a danger to fair judicial administration of the "clearness and immediacy necessary to close the doors of permissible public comment"[140] even though the State court held and the Supreme Court assumed that "the petitioners deliberately distorted the facts to abase and destroy the efficiency of the court."[141] And in Craig *v.* Harney,[142] a divided Court held that publication, while a motion for a new trial was pending, of an unfair report of the facts of a civil case, accompanied by intemperate criticism of the judge's conduct was protected by the Constitution. Said Justice Douglas, speaking for the majority: "The vehemence of the language used is not alone the measure of the power to publish for contempt. The fires which it kindles must constitute an imminent, and not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."[143]

FREEDOM OF SPEECH AND PRESS IN PUBLIC PARKS AND STREETS

Notable also is the protection which the Court has erected in recent years for those who desire to use the streets and the public parks as theatres of discussion, agitation, and propaganda dissemination. In 1897 the Court unanimously sustained an ordinance of the city of Boston which

provided that "no person shall, in or upon any of the public grounds, make any public address," etc., "except in accordance with a permit of the Mayor,"[144] quoting with approval the following language from the decision of the Massachusetts Supreme Judicial Court in the same case. "For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in the house. When no proprietary right interferes the legislature may end the [Pg 785] right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the less step of limiting the public use to certain purposes."[145] Forty-two years later this case was distinguished in Hague *v.* C.I.O.[146] (*See* p. 808.) And in 1948 in Saia *v.* New York[147] an ordinance forbidding the use of sound amplification devices by which sound is cast directly upon the streets and public places, except with permission of the chief of police, for the exercise of whose discretion no standards were prescribed, was held unconstitutional as applied to one seeking leave to amplify religious lectures in a public park. The decision was a five-to-four holding; and eight months later a majority, comprising the former dissenters and the Chief Justice, held it to be a permissible exercise of legislative discretion to bar sound trucks, with broadcasts of public interest, amplified to a loud and raucous volume, from the public ways of a municipality.[148] Conversely, it was within the power of the Public Utilities Commission of the District of Columbia, following a hearing and investigation, to issue an order permitting the Capital Transit Company, despite the protest of some of its patrons, to receive and amplify on its street cars and buses radio programs consisting generally of 90% music, 5% announcements, and 5% commercial advertising. Neither operation of the radio service nor the action of the Commission permitting it was precluded by the First and Fifth Amendments.[149]

Under still unoverruled decisions an ordinance forbidding any distribution of circulars, handbills, [Pg 786] advertising, or literature of any kind within the city limits without permission of the City Manager is an unlawful abridgment of freedom of the press.[150] So also are ordinances which forbid, without exception, any distributions of handbills upon the streets.[151] Even where such distribution involves a trespass upon private property in a company owned town,[152] or upon Government property in a defense housing development,[153] it cannot be stopped. The passing out of handbills containing commercial advertising may, however, be prohibited; this is true even where such handbills may contain some matter which, standing alone would be immune from the restriction.[154] A municipal ordinance forbidding any person to ring door bells, or otherwise summon to the door the occupants of any residence, for the purpose of distributing to them circulars or handbills was held to infringe freedom of speech and of the press as applied to a person distributing advertisements of a religious meeting.[155] But an ordinance forbidding door to door peddling or canvassing unless it is invited or requested by the occupant of a private residence is valid.[156]

CENSORSHIP

Freedom from previous restraints has never been regarded as absolute. The principle that words having the quality of verbal acts might be enjoined by court order was established in Gompers *v.* Bucks Stove and Range Co.;[157] and in Near *v.* Minnesota[158] the Court, speaking through Chief Justice Hughes, even while extending Blackstone's condemnation of censorship to a statute which authorized the enjoining of publications alleged to be persistently defamatory, criticized it as being in some respects too sweeping. Indeed, the distinction between prevention and punishment appears to have played little or no part in determining when picketing may be forbidden in labor disputes.[159] In Chaplinsky *v.* New Hampshire[160] and Board of Education *v.* Barnette,[161] the opinions indicated that the power of Government is measured by the same principles in both situations. In the former Justice Murphy asserted: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to [Pg 787] incite an immediate breach of the peace. It has been well observed that such are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[162] To like effect, in Board of Education *v.* Barnette, Justice Jackson set it down as "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."[163]

It is significant that the cases which have sanctioned previous restraints upon the utterances of particular persons have involved restraint by judicial, not administrative action. The prime objective of the ban on previous restraints was to outlaw censorship accomplished by licensing. "The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing.' And the liberty of the press became initially a right to publish '*without* a license what formerly could be published only *with one*'."[164] Even today, a licensing requirement will bring judicial condemnation more surely than any other form of restriction. Except where the authority of the licensing officer is so closely limited as to leave no room for discrimination against utterances he does not approve,[165] the Supreme Court has struck down

licensing ordinances, even in respect of a form of communication which may be prohibited entirely.[166] In the case of radio broadcasting, however, where physical limitations make it impossible for everyone to utilize the medium of communication, the Court has thus far sanctioned a power of selective licensing;[167] while with respect to moving pictures it has until very recently held the States' power to license, and hence to censor, films intended for local exhibition to be substantially unrestricted, this being "a business pure and simple, originated and conducted for profit," and "not to be regarded, ... as part of the press of the country or as organs of public opinion."[168] This doctrine was laid down in 1915, but in 1948, in speaking for the Court, in United States *v.* Paramount Pictures,[169] Justice Douglas indicated a very different position, saying: "We have no doubt that moving pictures, like newspapers and radio, are [Pg 788] included in the press whose freedom is guaranteed by the First Amendment."[170] In the so-called "Miracle Case,"[171] in which it was held that under the First and Fourteenth Amendments, a State may not place a prior restraint on the showing of a motion picture film on the basis of the censor's finding that it is "sacrilegious," a word of uncertain connotation, this point of view becomes the doctrine of the Court and the Mutual Films Case is pronounced "overruled" so far as it is out of harmony with the instant holding.[172]

THE CLEAR AND PRESENT DANGER TEST: JUDICIAL DIVERSITIES

In the course of decisions enforcing this test of state action with respect to freedom of speech and press, diversity of opinion has appeared among the Justices upon three closely related topics: first, as to the restrictive force of the test; second, as to the constitutional status of freedom of speech and press; third, as to the kind of speech which the Constitution is concerned to protect. On the first point the following passage from Justice Black's opinion in Bridges *v.* California[173] is pertinent: "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."[174] With this should be compared the following words from [Pg 789] Justice Frankfurter's concurring opinion in Pennekamp *v.* Florida,[175] which involved a closely similar issue to the one dealt with in the Bridges Case: "'Clear and present danger' was never used by Mr. Justice Holmes to express a technical legal doctrine or to convey a formula for adjudicating cases. It was a literary phrase not to be distorted by being taken from its context. In its setting it served to indicate the importance of freedom of speech to a free society but also to emphasize that its exercise must be compatible with the preservation of other freedoms essential to a democracy and guaranteed by our Constitution. When those other attributes of a democracy are threatened by speech, the Constitution does not deny power to the states to curb it."[176]

The second question, in more definite terms, is whether freedom of speech and press occupies a "preferred position" in the constitutional hierarchy of values so that legislation restrictive of it is presumptively unconstitutional. An important contribution to the affirmative view on this point is the following passage from an opinion of Justice Cardozo written in 1937: "One may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. * * * So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action. The extension became, indeed, a logical imperative when once it was recognized, as long ago it was, that liberty is something more than exemption from physical restraint, and that even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be overridden by the courts."[177] Touching on the same subject a few months later, Chief Justice Stone suggested that: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." And again: "It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."[178] But the strongest assertion of this position occurs in Justice Rutledge's opinion for a sharply divided Court in Thomas *v.* Collins.[179] He says: "The case confronts us again with the duty our system places on this Court to say where the [Pg 790] individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. * * * That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. * * * For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion

would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights."[180] This was 1945. Four years later the controlling wing of the Court, in sustaining a local ordinance, endorsed a considerably less enthusiastic appraisal of freedom of speech and press. Thus while alluding to "the preferred position of freedom of speech in a society that cherishes liberty for all," Justice Reed went on to say, that this "does not require legislators to be insensible to claims by citizens to comfort and convenience. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself."[181] And Justice Frankfurter denied flatly the propriety of the phrase "preferred position," saying: "This is a phrase that has uncritically crept into some recent opinions of this Court. I deem it a mischievous phrase, if it carries the thought, which it may subtly imply, that any law touching communication is infected with presumptive invalidity. It is not the first time in the history of constitutional adjudication that such a doctrinaire attitude has disregarded the admonition most to be observed in exercising the Court's reviewing power over legislation, 'that it is a constitution we are expounding,' M'Culloch *v.* Maryland, 4 Wheat. 316, 407. I say the phrase is mischievous because it radiates a constitutional doctrine without avowing it. Clarity and candor in these matters, so as to avoid gliding unwittingly into error, make it appropriate to trace the history of the phrase 'preferred position.'"[182] which Justice Frankfurter [Pg 791] then proceeded to do. Justice Jackson also protested: "We cannot," he said, "give some constitutional rights a preferred position without relegating others to a deferred position."[183]

The third question concerns the quality and purpose of the speech which the Constitution aims to protect. In 1949, Justice Douglas speaking for a divided Court returned the following robustious answer to this question: "* * * a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, Chaplinsky *v.* New Hampshire, supra, pp. 571-572, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[184] But early in 1951 Justice Jackson, in a dissenting opinion, urges the Court to review its entire position in the light of the proposition that "the purpose of constitutional protection of freedom of speech is to foster peaceful interchange of all manner of thoughts, information and ideas," that "its policy is rooted in faith of the force of reason."[185] He considers that the Court has been striking "rather blindly at permit systems which indirectly may affect First Amendment freedom." He says: "Cities throughout the country have adopted the permit requirement to control private activities on public streets and for other purposes. The universality of this type of regulation demonstrates a need and indicates widespread opinion in the profession that it is not necessarily incompatible with our constitutional freedoms. Is everybody out of step but this Court? * * * It seems hypercritical to strike down local laws on their faces for want of standards when we have no standards. And I do not find it required by existing authority. I think that where speech is outside of constitutional immunity the local community or the State is left a large measure of discretion as to the means for dealing with it."[186] This diversity of viewpoint on the Court touching the above questions became of importance when, recently, the Court was faced with the problem of the relation of freedom of speech to the enumerated powers of the National [Pg 792] Government, in contrast to the indefinite residual powers of the States.

TAXATION

The Supreme Court, citing the fact that the American Revolution "really began when * * * that government (of England) sent stamps for newspaper duties to the American colonies" has been alert to the possible uses of taxation as a method of suppressing objectionable publications.[187] Persons engaged in the dissemination of ideas are, to be sure, subject to ordinary forms of taxation in like manner as other persons.[188] With respect to license or privilege taxes, however, they stand on a different footing. Their privilege is granted by the Constitution and cannot be withheld by either State or Federal Government. Hence a license tax measured by gross receipts for the privilege of engaging in the business of publishing advertising in any newspaper or other publication was held invalid[189] and flat license fees levied and collected as a pre-condition to the sale of religious books and pamphlets have also been set side.[190]

FEDERAL RESTRAINTS ON FREEDOM OF SPEECH AND PRESS

Regulations of Business and Labor Activities

The application to newspapers of the Anti-Trust Laws,[191] the National Labor Relations Act,[192] or the Fair Labor Standards Act,[193] does not abridge the freedom of the press. In Gompers *v.*

Bucks Stove and Range Co.,[194] the Supreme Court unanimously held that a court of equity may enjoin continuance of a boycott, despite the fact that spoken or written speech was used as an instrumentality by which the boycott was made effective. "In the case of an unlawful conspiracy, the agreement to act in concert when the signal is published gives the words 'Unfair,' 'We Don't [Pg 793] Patronize,' or similar expressions, a force not inhering in the words themselves, and therefore exceeding any possible right of speech which a single individual might have. Under such circumstances they become what have been called 'verbal acts,' and as much subject to injunction as the use of any other force whereby property is unlawfully damaged."[195] A cognate test has been applied in determining when communications by an employer constitute an unfair labor practice which may be forbidden or penalized under the National Labor Relations Act without infringing freedom of speech. In Labor Board *v.* Virginia Power Co.,[196] the Court held that the sanctions of the act might be imposed upon an employer for the protection of his employees, where his conduct "though evidenced in part by speech, * * * (amounted) to coercion within the meaning of the act."[197] In the opinion of the Court, Justice Murphy stated, "The mere fact that language merges into a course of conduct does not put that whole course without the range of otherwise applicable administrative power. In determining whether the Company actually interfered with, restrained, and coerced its employees, the Board has a right to look at what the Company has said, as well as what it has done."[198] But the constitutionality of legislation prohibiting the publication by corporations and unions in the regular course of conducting their affairs of periodicals advising their members, stockholders or customers of danger or advantage to their interest from the adoption of measures or the election to office of men espousing such measures has been declared by the Court to be open to gravest doubt.[199]

REGULATION OF POLITICAL ACTIVITIES OF FEDERAL EMPLOYEES

The leading case touching this subject is Ex parte Curtis, decided seventy years ago.[200] Here was sustained an act of Congress which prohibited, under penalties, certain categories of officers of the United States from requesting, giving to, or receiving from, any other officer, money or property or other thing of value for political purposes.[201] Two generations later was enacted the [Pg 794] so-called Hatch Act[202] which, while making some concessions to freedom of expression on matters political by employees of the government, forbids their active participation in political management and political campaigns. The act was sustained against objections based on the Bill of Rights;[203] while an amendment to it the effect of which is to diminish the amount of a federal grant-in-aid of the construction of highways in a State which fails to remove from office "one found by the United States Civil Service Commission to have taken active part in political management or in political campaigns while a member of the state highway commission," was held not to violate Amendment X.[204]

LEGISLATION PROTECTIVE OF THE ARMED FORCES AND OF THE WAR POWER

The Federal Government may punish utterances which obstruct its recruiting or enlistment service, cause insubordination in the armed forces, encourage resistance to government in the prosecution of war, or impede the production of munitions and other essential war material.[205] The only issue which has divided the Court with regard to such speech has been the degree of danger which must exist before it may be punished. The recent decision in Dennis *v.* United States diminishes, if it does not eliminate, this issue.[206]

LOYALTY REGULATIONS: THE DOUDS CASES

"Section 9 (h) of the Labor Management Relations Act requires, as a condition of a union's utilizing the opportunities afforded by the act, each of its officers to file an affidavit with the National Labor Relations Board (1) that he is not a member of the Communist Party or affiliated with such party, and (2) that he does not believe in, and is not a member of or supports any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods." The statute also makes it a criminal offense to make willfully or knowingly any false statement in such an affidavit.[207] In American Communications Association, C.I.O. et al. *v.* Douds[208] five of the six Justices participating sustained the requirement (1) and three Justices sustained the requirement (2) against the [Pg 795] objection that the act exceeded Congress's power over interstate commerce and infringed freedom of speech and the rights of petition and assembly; and in Osman *v.* Douds[209] the same result was reached by a Court in which only Justice Clark did not participate. In the end only Justice Black condemned requirement (1), while the Court was evenly divided as to requirement (2). In the course of his opinion for the controlling wing of the Court, Chief Justice Vinson said: "The attempt to apply the term, 'clear and present danger,' as a mechanical test in every case touching First Amendment freedoms, without regard to the context of its application, mistakes the form in which an idea was cast for the substance of the idea * * * the question with which we are here faced is not the same one that Justices Holmes and Brandeis found convenient to consider in terms of clear and present danger. Government's interest here is not in preventing the dissemination of Communist doctrine or the holding of particular beliefs because it is feared that unlawful action will result therefrom if free speech is practiced. Its interest is in protecting the free flow of commerce from what Congress considers to be substantial evils of conduct that

are not the products of speech at all. * * * The contention of petitioner * * * that this Court must find that political strikes create a clear and present danger to the security of the Nation or of widespread industrial strife in order to sustain § 9 (h) similarly misconceives the purpose that phrase was intended to serve. In that view, not the relative certainty that evil conduct will result from speech in the immediate future, but the extent and gravity of the substantive evil must be measured by the 'test' laid down in the *Schenck Case*."[210] In thus balancing the gravity of the interest protected by legislation from harmful speech against the demands of the clear and present danger rule the Court paved the way for its decision a year later in Dennis *v.* United States.

THE CASE OF THE ELEVEN COMMUNISTS

Dennis *v.* United States[211] involves the following legislation:

"SECTION 2. (a) It shall be unlawful for any person—

"(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government;

"(2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence; [Pg 796]

"(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.

"(b) For the purposes of this section, the term 'government in the United States' means the Government of the United States, the government of any State, Territory, or possession of the United States, the government of the District of Columbia, or the government of any political subdivision of any of them."[212]

The trial court had ruled that clause (2) of the act qualified both the other clauses; and this construction was endorsed by the Supreme Court. The judgment of the Court sustaining the convictions against objections raised under Amendment I was supported by three different opinions. Chief Justice Vinson, speaking also for Justices Reed, Burton and Minton emphasized the substantial character of the Government's interest in preventing its own overthrow by force. "Indeed," said he, "this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected."[213] The opinion continues: "If, then, this interest may be protected, the literal problem which is presented is what has been meant by the use of the phrase 'clear and present danger' of the utterances bringing about the evil within the power of Congress to punish. Obviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required. The argument that there is no need for Government to concern itself, for Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not the question. Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success or the immediacy of a successful attempt."[214] The Chief Justice concluded this part of his opinion by quoting from Chief Judge Learned Hand's opinion for the Circuit Court of Appeals in the same case, as follows: "'In each case [courts] must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'"[215] In short, if the evil legislated against is serious enough, advocacy of it in order to be punishable does not have to be attended by a clear and present danger of success. [Pg 797]

But at this point the Chief Justice appears to recoil from this abrupt dismissal of the clear and present danger formula for the more serious cases, and he makes a last moment effort to rescue the babe that he has tossed out with the bathwater. He says: "As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words. Likewise, we are in accord with the court below, which affirmed the trial court's finding that the requisite danger existed. The mere fact that from the period 1945 to 1948 petitioners' activities did not result in an attempt to overthrow the Government by force and violence is of course no answer to the fact that there was a group that was ready to make the attempt. The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom

petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score. And this analysis disposes of the contention that a conspiracy to advocate, as distinguished from the advocacy itself, cannot be constitutionally restrained, because it comprises only the preparation. It is the existence of the conspiracy which creates the danger." [216] His final position seems to be that, after all, the question is one for judicial discretion. "When facts are found that establish the violation of a statute, the protection against conviction afforded by the First Amendment is a matter of law. The doctrine that there must be a clear and present danger of a substantive evil that Congress has a right to prevent is a judicial rule to be applied as a matter of law by the courts."[217]

Justice Frankfurter's lengthy concurring opinion premises "the right of a government to maintain its existence—self preservation." This, he says, is "the most pervasive aspect of sovereignty," citing The Federalist No. 41, and certain cases.[218] A little later he raises the question, "But how are competing interests to be assessed?" and answers: "Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures. Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress. The nature of the power to be exercised by this Court has been delineated in decisions not charged with the emotional appeal of situations such as that now before us. We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it."[219] But a difficulty exists, to wit, in the clear and present danger doctrine. He says: "In all fairness, the argument [of defendants] cannot be met by reinterpreting the Court's frequent use of 'clear' and 'present' to mean an entertainable 'probability.' In giving this meaning to the phrase 'clear and present danger,' the Court of Appeals was fastidiously confining the rhetoric of opinions to the exact scope of what was decided by them. We have greater responsibility for having given constitutional support, over repeated protests, to uncritical libertarian generalities. Nor is the argument of the defendants adequately met by citing isolated cases. * * * The case for the defendants requires that their conviction be tested against the entire body of our relevant decisions."[220] [Pg 798]

Turning then to the cases Justice Frankfurter exclaims at last: "I must leave to others the ungrateful task of trying to reconcile all these decisions."[221] The nearest precedent was Gitlow *v.* New York.[222] Here "we put our respect for the legislative judgment in terms which, if they were accepted here, would make decision easy. * * * But it would be disingenuous to deny that the dissent in *Gitlow* has been treated with the respect usually accorded a decision."[223] But the case at bar was a horse of a different color. "In contrast, there is ample justification for a legislative judgment that the conspiracy now before us is a substantial threat to national order and security,"[224] which seems to be in essential agreement with the position of the Chief Justice and his three associates. Justice Frankfurter concludes with a homily on the limitations which the nature of judicial power imposes, on the power of judicial review. He says: "Can we then say that the judgment Congress exercised was denied it by the Constitution? Can we establish a constitutional doctrine which forbids the elected representatives of the people to make this choice? Can we hold that the First Amendment deprives Congress of what it deemed necessary for the Government's protection? To make validity of legislation depend on judicial reading of events still in the womb of time—a forecast, that is, of the outcome of forces at best appreciated only with knowledge of the topmost secrets of nations—is to charge the judiciary with duties beyond its equipment. We do not expect courts to pronounce historic verdicts on bygone events. Even historians have conflicting views to this day on the origin and conduct of the French Revolution. It is as absurd to be confident that we can measure the present clash of forces and their outcome as to ask us to read history still enveloped in clouds of controversy. * * * The distinction which the Founders drew between the Court's duty to pass on the power of Congress and its complementary duty not to enter directly the domain of policy is fundamental. But in its actual operation it is rather subtle, certainly to the common understanding. Our duty to abstain from confounding policy with constitutionality demands preceptive humility as well as self-restraint in not declaring unconstitutional what in a judge's private judgment is unwise and even dangerous."[225] [Pg 799]

Justice Jackson's opinion emphasizes the conspiratorial element of the case, and is flatfooted in rejecting the 'clear and present danger' test for this type of case. He writes: "The 'clear and present danger' test was an innovation by Mr. Justice Holmes in the *Schenck Case*, reiterated and refined by him and Mr. Justice Brandeis in later cases, all arising before the era of World War II revealed the subtlety and efficacy of modernized revolutionary techniques used by totalitarian parties. In those cases, they were faced with convictions under so-called criminal syndicalism statutes aimed at anarchists but which, loosely construed, had been applied to punish socialism, pacifism, and left-wing ideologies, the charges often resting on far-fetched inferences which, if true, would establish only technical or trivial violations. They proposed 'clear and present danger' as a test for the sufficiency of evidence in particular cases. I would save it, unmodified, for application as a 'rule of reason' in the kind of case for which it was devised. When the issue is criminality of a hot-headed speech on a street corner, or circulation of a few incendiary pamphlets or parading by some zealots behind a red flag, or refusal of a handful of school children to salute our flag, it is not beyond the capacity of the judicial process to gather, [Pg 800]

comprehend, and weigh the necessary materials for decision whether it is a clear and present danger of substantive evil or a harmless letting off of steam. It is not a prophecy, for the danger in such cases has matured by the time of trial or it was never present. The test applies and had meaning where a conviction is sought to be based on a speech or writing which does not directly or explicitly advocate a crime but to which such tendency is sought to be attributed by construction or by implication from external circumstances. The formula in such cases favors freedoms that are vital to our society, and, even if sometimes applied too generously, the consequences cannot be grave. But its recent expansion has extended, in particular to Communists, unprecedented immunities. Unless we are to hold our Government captive in a judge-made verbal trap, we must approach the problem of a well-organized, nation-wide conspiracy, such as I have described, as realistically as our predecessors faced the trivialities that were being prosecuted until they were checked with a rule of reason. I think reason is lacking for applying that test to this case."[226] And again, "What really is under review here is a conviction of conspiracy, after a trial for conspiracy, on an indictment charging conspiracy, brought under a statute outlawing conspiracy. With due respect to my colleagues, they seem to me to discuss anything under the sun except the law of conspiracy. One of the dissenting opinions even appears to chide me for 'invoking the law of conspiracy.' As that is the case before us, it may be more amazing that its reversal can be proposed without even considering the law of conspiracy. The Constitution does not make conspiracy a civil right. The Court has never before done so and I think it should not do so now. Conspiracies of labor unions, trade associations, and news agencies have been condemned, although accomplished, evidenced and carried out, like the conspiracy here, chiefly by letter-writing, meetings, speeches and organization. Indeed, this Court seems, particularly in cases where the conspiracy has economic ends, to be applying its doctrines with increasing severity. While I consider criminal conspiracy a dragnet device capable of perversion into an instrument of injustice in the hands of a partisan or complacent judiciary, it has an established place in our system of law, and no reason appears for applying it only to concerted action claimed to disturb interstate commerce and withholding it from those claimed to undermine our whole Government. * * *"[227]

The dissenters were Justices Black and Douglas. The former reiterated his position in Bridges *v.* California; the latter italicized Justice Brandeis' dictum in the Whitney Case: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of [Pg 801] education, the remedy to be applied is more speech, not enforced silence."[228] The answer would seem to be that education had not in fact prevented the formation of the conspiracy for entering into which the eleven defendants were convicted. If that be deemed a danger at all, it was certainly a clear and present one. Both dissenters, in fact, ignore the conspiracy element.

SUBVERSIVE ORGANIZATIONS

In a series of cases[229] in which certain organizations sued the Attorney General for declaratory or injunctive relief looking to the deletion of their names from a list of organizations designated by him to be subversive, the Court reversed holdings of the courts below which had denied relief. Two Justices thought the order not within the President's Executive Order No. 9835, which lays down a procedure for the determination of the loyalty of federal employees or would-be-employees. Justice Black thought the Attorney General had violated Amendment I and that the President's order constituted a Bill of Attainder. He and Justices Frankfurter and Jackson also held that the Attorney General had violated due process of law in having failed to give the petitioners notice and hearing. Justice Reed, with the concurrence of the Chief Justice and Justice Minton, dissented, asserting that the action of the Court constituted an interference with the discretion of the executive in the premises.

RECENT STATE LEGISLATION

Loyalty Tests

The decision in Dennis *v.* United States,[230] taken in conjunction with those in the two Douds[231] Cases, put the clear and present danger rule on the defensive in the field of federal legislation. Substantially contemporaneous holdings in the field of state action may reflect a similar trend. In Garner *v.* Los Angeles Board,[232] the Court sustained the right of a municipality to bar from employment persons who advise, advocate, or teach the violent overthrow of the government, or who are members of, or become affiliated with any group doing so, and to exact a loyalty oath of its employees. In Adler *v.* Board of Education[233] the Court sustained the Civil Service Law of New York as implemented by the so-called Feinberg Law of 1949.[234] The former makes ineligible in any public school any member of an organization advocating the overthrow of government by force, violence, or any unlawful means. The Feinberg Law requires the Board of Regents of the State (1) to adopt and enforce rules for the removal of ineligible persons; (2) to promulgate a list of banned organizations; (3) to make membership in any such organization [Pg 802] prima facie evidence of disqualification for employment in the public schools. Referring to the Garner Case above, Justice Minton, for the Court, said: "We adhere to that case. A teacher works in a sensitive area in the schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of

ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate."[235]

Group Libel

In 1952 in Beauharnais *v.* Illinois[236] the Court sustained an Illinois statute which makes it a crime to exhibit in a public place any publication which "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion" or which "exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy." The act was treated by the State Supreme Court as a form of criminal libel, with the result that [Pg 803] defense by truth of the utterance was not under Illinois law available unless the publication was also shown to have been made "with good motives and with justifiable ends." So construed, the Court held, the Act did not violate liberty of speech and press as guaranteed to the States by Amendment XIV. Said Justice Frankfurter:

"If an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this is a wilful and purposeless restriction unrelated to the peace and well-being of the State."[237] Pointing then to Illinois' bad record in the matter of race riots, he continued: "In the face of this history and its frequent obligato of extreme racial and religious propaganda, we would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented. 'There are limits to the exercise of these liberties [of speech and of the press]. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the States appropriately may punish.' * * * It is not within our competence to confirm or deny claims of social scientists as to the dependence of the individual on the position of his racial or religious group in the community. It would, however, be arrant dogmatism, quite outside the scope of our authority in passing on the powers of a State, for us to deny that the Illinois legislature may warrantably believe that a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits. This being so, we are precluded from saying that speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society the affiliated individual may be inextricably involved."[238]

CENSORSHIP OF THE MAILS: FRAUD ORDER [Pg 804]

By legislation adopted in 1879 and 1934 Congress has specified certain conditions upon which a publication shall be admitted to the valuable second-class mailing privilege, one of which provides as follows: Except as otherwise provided by law, the conditions upon which a publication shall be admitted to the second-class are as follows: "* * * *Fourth.* It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers; * * * nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."[239] In Hannegan *v.* Esquire, Inc.,[240] the Court sustained an injunction against an order of the Postmaster General which suspended a permit to Esquire Magazine on the ground that it did not "contribute to the public good and the public welfare." Said Justice Douglas for the Court: "* * * a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system. The basic values implicit in the requirements of the Fourth condition can be served only by uncensored distribution of literature. From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values. But to withdraw the second-class rate from this publication today because its contents seemed to one official not good for the public would sanction withdrawal of the second-class rate tomorrow from another [Pg 805] periodical whose social or economic views seemed harmful to another official. The validity of the obscenity laws is recognized that the mails may not be used to satisfy all tastes, no matter how perverted. But Congress has left the Postmaster General with no power to prescribe standards for the literature or the art which a mailable periodical disseminates."[241] In Donaldson *v.* Read Magazine,[242] however, the Court sustained a Court order forbidding the delivery of mail and money orders to a magazine conducting a puzzle contest which the Postmaster-General had found to be fraudulent. Freedom of the press, said the Court, does not include the right to raise money by deception of the public.

The Rights of Assembly and Petition

The right of petition took its rise from the modest provision made for it in chapter 61 of Magna Carta (1215).[243] To this meagre beginning Parliament itself and its procedures in the enactment of legislation, the equity jurisdiction of the Lord Chancellor, and proceedings against the Crown by "petition of right" are all in some measure traceable. Thus, while the King summoned Parliament for the purpose of supply, the latter—but especially the House of Commons—petitioned the King for a redress of grievances as its price for meeting the financial needs of the Monarch; and as it increased in importance it came to claim the right to dictate the form of the King's reply, until in 1414 Commons boldly declared themselves to be "as well assenters as petitioners." Two hundred and fifty years later, in 1669, Commons further resolved that every commoner in England possessed "the inherent right to prepare and present petitions" to it "in case of grievance," and of Commons "to receive the same" and to judge whether they were "fit" to be received. Finally Chapter 5 of the Bill of Rights of 1689 asserted the right of the subjects to petition the King and "all commitments and prosecutions for such petitioning to be illegal."[244]

Historically, therefore, the right of petition is the primary right, the right peaceably to assemble a subordinate and instrumental right, as if Amendment I read; "the right of the people peaceably to assemble" *in order to* "petition the government."[245] Today, however, the right of peaceable assembly is, in the language of the Court, "cognate to those of free speech and free press and is equally fundamental * * * [It] is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions,—principles which the Fourteenth Amendment embodies in the general terms of its due process clause. * * * The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question * * * is not as to the auspices under which the meeting is held but as to its purposes; not as to the relation of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects."[246] Furthermore, the right of petition has expanded. It is no longer confined to demands for "a redress of grievances," in any accurate meaning of these words, but comprehends demands for an exercise by the government of its powers in furtherance of the interests and prosperity of the petitioners, and of their views on politically contentious matters. [Pg 806]

RESTRAINTS ON THE RIGHT OF PETITION

The right of petition recognized by Amendment I first came into prominence in the early 1830's, when petitions against slavery in the District of Columbia began flowing into Congress in a constantly increasing stream, which reached its climax in the winter of 1835. Finally on January 28, 1840, the House adopted as a standing rule: "That no petition, memorial, resolution, or other paper praying the abolition of slavery in the District of Columbia, or any State or Territories of the United States in which it now exists, shall be received by this House, or entertained in any way whatever." Thanks to the efforts of John Quincy Adams this rule was repealed five years later, after Adams' death.[247] For many years now the rules of the House of Representatives have provided that members having petitions to present may deliver them to the Clerk and the petitions, except such as, in the judgment of the Speaker, are of an obscene or insulting character, shall be entered on the Journal and the Clerk shall furnish a transcript of such record to the official reporters of debates for publication in the Record.[248] Even so petitions for the repeal of the espionage and sedition laws and against military measures for recruiting resulted, in World War I, in imprisonment.[249] Processions for the presentation of petitions in the United States have not been particularly successful. In 1894 General Coxey of Ohio organized armies of unemployed to march on Washington and present petitions, only to see their leaders arrested for unlawfully walking on the grass of the capitol. The march of the veterans on Washington in 1932 demanding bonus legislation was defended as an exercise of the right of petition. The administration, however, regarded it as a threat against the constitution and called out the army to expel the bonus marchers and burn their camps. For legal regulation of lobbying activities, *see* below. [Pg 807]

THE CRUIKSHANK CASE

The right of assembly was first passed upon by the Supreme Court in 1876 in the famous case of United States *v.* Cruikshank et al.[250] The case arose on indictments under section 6 of the so-called Enforcement Act of May 30, 1870,[251] which read as follows: "That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, etc." The indictments charged the defendants with having deprived certain citizens of their right to assemble together peaceably with other citizens "for a peaceful and lawful purpose." The court held that this language was insufficient inasmuch as it did not specify that the attempted assembly was for a purpose connected with the National Government. As to the right of assembly the Court, speaking by Chief Justice Waite, went on to declare: "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States.

The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of [Pg 808] grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States. Such, however, is not the case. The offence, as stated in the indictment, will be made out, if it be shown that the object of the conspiracy was to prevent a meeting for any lawful purpose whatever."[252]

HAGUE *v.* COMMITTEE OF INDUSTRIAL ORGANIZATION

In this case[253] the question at issue was the validity of a Jersey City ordinance requiring the obtaining of a permit for a public assembly in or upon the public streets, highways, public parks, or public buildings of the city and authorizing the director of public safety, for the purpose of preventing riots, disturbances, or disorderly assemblage, to refuse to issue a permit when after investigation of all the facts and circumstances pertinent to the application he believes it to be proper to refuse to issue a permit. Two Justices held that in the circumstances of the case the ordinance violated the right of certain citizens of the United States to assemble to discuss certain privileges which they enjoyed as such, to wit, their rights and privileges under the National Labor Relations Act.[254] Said Justice Roberts, expressing this point of view: "The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied. We think the court below was right in holding the ordinance quoted in Note 1 void upon its face. It does not make comfort or convenience in the use of streets or parks the standard of official action. It enables the Director of Safety to refuse a permit on his mere opinion that such refusal will prevent 'riots, disturbances or disorderly assemblage.' It can thus, as the record discloses, be [Pg 809] made the instrument of arbitrary suppression of free expression of views on national affairs for the prohibition of all speaking will undoubtedly 'prevent' such eventualities. But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right."[255] Two other Justices invoked also the due process clause of Amendment XIV, thereby claiming the right of assembly for aliens as well as citizens. Said Justice Stone, who expressed this view: "I think respondents' right to maintain it does not depend on their citizenship and cannot rightly be made to turn on the existence or non-existence of a purpose to disseminate information about the National Labor Relations Act. It is enough that petitioners have prevented respondents from holding meetings and disseminating information whether for the organization of labor unions or for any other lawful purpose."[256] Both Justices were in agreement that freedom of speech and freedom of assembly were claimable only by natural persons, and not by corporations.[257] Two Justices dissented on the basis of Davis *v.* Massachusetts.[258]

RECENT CASES

In Bridges *v.* California[259] it was held that a telegram addressed to the Secretary of Labor strongly criticizing the action of a State court in a pending case was privileged under this amendment as an exercise of the right of petition. In Thomas *v.* Collins[260] a statute requiring registration before solicitation of union membership was found to violate the right of peaceable assembly. But a closely divided Court subsequently sustained an order of a State Employment Relations Board forbidding work stoppages by the calling of special union meetings during working hours.[261] Finally, a divided Court held June 4, 1951, that a combination to break up by force and threats of force of a meeting called for the purpose of adopting a resolution against the Marshall Plan did not afford a right of action against the conspirators under the Ku Klux Act of April 20, 1871.[262] While the complaint alleged that the conspiracy was entered into for the purpose of depriving the plaintiffs as citizens of the United States of their right "peaceably to assemble for the purpose of discussing and communicating upon national public issues," the Ku Klux Act was found not to extend to violations of that right except by State acts depriving persons [Pg 810] of their rights under the Fourteenth Amendment. But the Court, perhaps significantly, left open the question whether Congress can protect such rights against private action. "It is not for this Court," remarked Justice Jackson sententiously, "to compete with Congress or attempt to replace it as the Nation's law-making body."[263]

LOBBYING AND THE RIGHT OF PETITION

Today lobbying is frequently regarded as the most important expression of the right of petition. During the last half century lobbying has reached tremendous proportions; and there have been four Congressional investigations of such activities, the latest by a Committee of the House of Representatives. Meantime, in 1946 Congress passed the Federal Regulation of Lobbying Act, under which more than 2,000 lobbyists have registered and 495 organizations report lobbying contributions and expenditures.[264] Recently doubts have been cast upon the constitutionality of this statute by two decisions of lower federal courts sitting in the District of Columbia. According to the District Court therein, to subject a person, whose "principal purpose * * * is to aid" in the defeat or passage of legislation and who violates this Act by failing to file a detailed accounting,

to a penalty entailing a three-year prohibition from lobbying is to deprive such person of his constitutional rights of freedom of speech and petition.[265] Insofar as Congress legitimately may regulate lobbying, its powers in relation thereto have been declared not to extend to "indirect lobbying by the pressure of public opinion on the Congress." The latter was deemed to be "the healthy essence of the democratic process."[266]

Notes

[1] 268 U.S. 652 (1925).

[2] Ibid. 666.

[3] Fiske *v.* Kansas, 274 U.S. 380 (1927).

[4] Cantwell *v.* Connecticut, 310 U.S. 296 (1940).

[5] Near *v.* Minnesota, 283 U.S. 697 (1931).

[6] De Jonge *v.* Oregon, 299 U.S. 353 (1937).

[7] Annals of Congress, 434 (1789-1791).

[8] Records of the United States Senate, Sept. 9, 1789, United States Archives, cited in Appellees Brief in McCollum *v.* Board of Education, 333 U.S. 203 (1948).

[9] Ibid.

[10] Ibid.

[11] Joseph Story, Commentaries on the Constitution, § 1879 (1833).

[12] Ibid. § 1874.

[13] Principles of Constitutional Law, 224-225, 3d ed. (1898).

[14] Saul K. Padover, The Complete Jefferson, 518-519 (1943).

[15] 98 U.S. 145 (1879).

[16] Ibid. 164. In his 2d Inaugural Address Jefferson expressed a very different, and presumably more carefully considered, opinion upon the purpose of Amendment I: "In matters of religion, I have considered that its free exercise is placed by the Constitution independent of the powers of of the general government." This was said three years after the Danbury letter. 1 Messages and Papers of the Presidents, 379 (Richardson ed. 1896).

[17] Everson *v.* Board of Education, 330 U.S. 1 (1947).

[18] Ibid. 15, 16.

[19] McCollum *v.* Board of Education, 333 U.S. 203 (1948).

[20] Ibid. 212.

[21] 333 U.S. 203, 213 (1948).

[22] Ibid. 216-218. Justice Frankfurter's principal figure in the fight against sectarianism is Horace Mann, who was secretary of the Massachusetts Board of Education, 1837-1848. Mann, however, strongly resented the charge that he was opposed to religious instruction in the public schools. "It is true that Mr. Mann stood strongly for a 'type of school with instruction adapted to democratic and national ends.' But it is not quite just to him to contrast this type of school with the school adapted to religious ends, without defining terms. Horace Mann was opposed to sectarian doctrinal instruction in the schools, but he repeatedly urged the teaching of the elements of religion common to all of the Christian sects. He took a firm stand against the idea of a purely secular education, and on one occasion said he was in favor of religious instruction 'to the extremest verge to which it can be carried without invading those rights of conscience which are established by the laws of God, and guaranteed to us by the Constitution of the State.' At another time he said that he regarded hostility to religion in the schools as the greatest crime he could commit. Lest his name should go down in history as that of one who had attempted to drive religious instruction from the schools, he devoted several pages in his final Report—the twelfth—to a statement in which he denied the charges of his enemies." Raymond B. Culver, Horace Mann on Religion in the Massachusetts Public Schools, 235 (1929).

[23] 333 U.S. 203, 222 ff. (1948).

[24] Ibid. 213.

[25] Ibid. 225-226.

[26] Ibid. 231.

[27] Ibid. 232, 234.

[28] 333 U.S. 244.

[29] Ibid., 253, 254.

[30] Zorach *v.* Clauson, 303 N.Y. 161, 168-169; 100 N.E. 2d 403 (1951).

[31] Zorach *v.* Clauson, 343 U.S. 306 (1952).

[32] Ibid., pp. 313-314. Justices Black, Frankfurter, and Jackson dissented.

[33] Doremus *v.* Board of Education, 342 U.S. 429 (1952).

[34] Three dissenters, speaking through Justice Douglas, argued that, since the New Jersey Supreme Court had taken the case and decided it on its merits, the United States Supreme Court was bound to do the same. Ibid. 435-436.

[35] Bradfield *v.* Roberts, 175 U.S. 291 (1899).

[36] Quick Bear *v.* Leupp, 210 U.S. 50 (1908).

[37] Cochran *v.* Louisiana State Board of Education, 281 U.S. 370 (1930).

[38] Everson *v.* Board of Education, 330 U.S. 1 (1947).

[39] 42 U.S.C.A. §§ 1751-1760; 60 Stat. 230 (1940).

[40] Davis *v.* Benson, 133 U.S. 333, 342 (1890).

[41] Cantwell *v.* Connecticut, 310 U.S. 296, 303, 304 (1940).

[42] Pierce *v.* Society of Sisters of Holy Names, 268 U.S. 510 (1925).

[43] Reynolds *v.* United States, 98 U.S. 145, 166 (1879).

[44] Ibid. 167.

[45] Davis *v.* Beason, 133 U.S. 333, 345 (1890).

[46] Reynolds *v.* United States 98 U.S. 145 (1879); Davis *v.* Beason, 133 U.S. 333 (1890).

[47] 322 U.S. 78 (1944).

[48] Ibid. 89.

[49] 310 U.S. 296 (1940).

[50] Minersville School Dist. *v.* Gobitis, 310 U.S. 586 (1940).

[51] Jones *v.* Opelika, 316 U.S. 584 (1942).

[52] Jones *v.* Opelika, 319 U.S. 103 (1943); Murdock *v.* Pennsylvania, 319 U.S. 105 (1943).

[53] Board of Education *v.* Barnette, 319 U.S. 624 (1943). On the same day the Court held that a State may not forbid the distribution of literature urging and advising, on religious grounds, that citizens refrain from saluting the flag. Taylor *v.* Mississippi, 319 U.S. 583 (1943).

[54] Martin *v.* Struthers, 319 U.S. 141 (1943).

[55] Prince *v.* Massachusetts, 321 U.S. 158 (1944).

[56] 334 U.S. 558 (1948).

[57] Kovacs *v.* Cooper, 336 U.S. 77 (1949).

[58] Kunz *v.* New York, 340 U.S. 290 (1951).

[59] Ibid. 314.

[60] Niemotko *v.* Maryland, 340 U.S. 268 (1951).

[61] Feiner *v.* New York, 340 U.S. 315 (1951).

[62] *See* p. 1285. [Transcriber's Note: There is no mention of the Feiner case on p. 1285.]

[63] Arver *v.* United States, 245 U.S. 366 (1918).

[64] 293 U.S. 245 (1934).

[65] 325 U.S. 561 (1945). *cf.* Girouard *v.* United States, 328 U.S. 61 (1946) holding "an alien who is willing to take the oath of allegiance and to serve in the army as a non-combatant but who, because of religious scruples, is unwilling to

bear arms in defense of this country may be admitted to citizenship * * *", overruling United States *v.* Schwimmer, 279 U.S. 644 (1929) and United States *v.* Macintosh, 283 U.S. 605 (1931).

[66] 325 U.S. 561, 578 (1945).

[67] Commentaries, Vol. IV, 151-152.

[68] Justice Frankfurter in Dennis *v.* United States, 341 U.S. 494, 521-522 (1951).

[69] Ibid. 524; citing Robertson *v.* Baldwin, 165 U.S. 275, 281 (1897).

[70] Ibid. 524; citing Gompers *v.* United States, 233 U.S. 604, 610 (1914).

"While the courts have from an early date taken a hand in crystallizing American conceptions of freedom of speech and press into law, it is scarcely in the manner or to the extent which they are frequently assumed to have done. The great initial problem in this realm of constitutional liberty was to get rid of the common law of 'seditious libel' which operated to put persons in authority beyond the reach of public criticism. The first step in this direction was taken in the famous, or infamous, Sedition Act of 1798, which admitted the defense of truth in prosecution brought under it, and submitted the general issue of defendant's guilt to the jury. But the substantive doctrine of 'seditious libel' the Act of 1798 still retained, a circumstance which put several critics of President Adams in jail, and thereby considerably aided Jefferson's election as President in 1800. Once in office, nevertheless, Jefferson himself appealed to the discredited principle against partisan critics. Writing his friend Governor McKean of Pennsylvania in 1803 anent such critics, Jefferson said: 'The federalists having failed in destroying freedom of the press by their gag-law, seem to have attacked in an opposite direction; that is by pushing its licentiousness and its lying to such a degree of prostitution as to deprive it of all credit. * * * This is a dangerous state of things, and the press ought to be restored to its credibility if possible. The restraints provided by the laws of the States are sufficient for this, if applied. And I have, therefore, long thought that a few prosecutions of the most prominent offenders would have a wholesome effect in restoring the integrity of the presses. Not a general prosecution, for that would look like persecution; but a selected one.' Works (Ford ed., 1905), IX 451-52.

"In the *Memorial Edition* of Jefferson's works this letter is not included; nor apparently was it known to the Honorable Josephus Daniels, whose enthusiastic introduction to one of these volumes makes Jefferson out to have been the father of freedom of speech and press in this country, if not throughout the world. The sober truth is that it was that archenemy of Jefferson and of democracy, Alexander Hamilton, who made the greatest single contribution toward rescuing this particular freedom as a political weapon from the coils and toils of the common law, and that in connection with one of Jefferson's 'selected prosecutions.' I refer to Hamilton's many-times quoted formula in the Croswell case in 1804: 'The liberty of the press is the right to publish with impunity, truth, with good motives, for justifiable ends though reflecting on government, magistracy, or individuals.' People *v.* Croswell, 3 Johns (NY) 337. Equipped with this brocard our State courts working in co-operation with juries, whose attitude usually reflected the robustiousness of American political discussion before the Civil War, gradually wrote into the common law of the States the principle of 'qualified privilege,' which is a notification to plaintiffs in libel suits that if they are unlucky enough to be officeholders or office seekers, they must be prepared to shoulder the almost impossible burden of showing defendant's 'special malice.' Cooley, *Constitutional Limitations*, Chap. XII: Samuel A. Dawson, *Freedom of the Press, A Study of the Doctrine of 'Qualified Privilege'* (Columbia Univ. Press, 1924)." Edward S. Corwin, *Liberty Against Government*. 157-159 fn. (L.S.U. Press, 1948).

[71] Patterson *v.* Colorado, 205 U.S. 454, 462 (1907).

[72] Ibid. 461

[73] Prudential Ins. Co. *v.* Cheek, 259 U.S. 530, 543 (1922).

[74] Schenck *v.* United States, 249 U.S. 47 (1919); and *see* below.

[75] *See* Justice Brandeis concurring opinion in Whitney *v.* California, 274 U.S. 357 (1927); and cases reviewed below.

[76] Fiske *v.* Kansas, 274 U.S. 380 (1927).

[77] 133 U.S. 333 (1890).

[78] Ibid. 341-342.

[79] 236 U.S. 273 (1915).

[80] Fiske *v.* Kansas, 274 U.S. 380 (1927).

[81] Stromberg *v.* California, 283 U.S. 359 (1931).

[82] De Jonge *v.* Oregon, 299 U.S. 353 (1937).

[83] 249 U.S. 47 (1919).

[84] 40 Stat. 217, 219.

[85] 205 U.S. 454, 462 (1907).

[86] 249 U.S. 47, 51-52 (1919).

[87] 249 U.S. 204 (1919).

[88] Ibid. 206.

[89] 249 U.S. 211 (1919).

[90] Ibid. 215-216.

[91] 250 U.S. 616 (1919).

[92] Ibid. 627. It should be noted that Justice Holmes couples with his invocation of the clear and present danger test in his dissent in this case the contention that rightly construed the act of Congress involved (The Espionage Act of May 16, 1918; 40 Stat. 553) required that defendant's intent be specifically proved. He wrote: "I am aware of course that the word intent as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if at the time of his act he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not. But, when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless to aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind. It seems to me that this statute must be taken to use its words in a strict and accurate sense." 250 U.S. at 626-627. In the Holmes-Pollock Letters this is the main point discussed by the two correspondents regarding the Abrams Case; the clear and present danger doctrine is not mentioned. 2 Holmes-Pollock Letters, 29, 31, 32, 42, 44-45, 48, 65.

[93] 251 U.S. 466 (1920).

[94] Ibid. 479. *See also* to the same effect: Pierce *v.* United States, 252 U.S. 239 (1920).

[95] 268 U.S. 652 (1925).

[96] Ibid. 668, 669.

[97] Ibid. 670.

[98] Ibid. 671. Justice Holmes presented a dissenting opinion for himself and Justice Brandeis which contains a curious note of fatalism. He said: "If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this Manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief, and, if believed, it is acted on unless some other belief outweighs it, or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration. If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." Ibid. 673.

[99] 274 U.S. 357 (1927).

[100] Ibid. 373, 377. Apparently this means that the ultimate test of the constitutionality of legislation restricting freedom of utterance is whether there is still sufficient time to educate the utterers out of their mistaken

frame of mind, and the final say on this necessarily recondite matter rests with the Supreme Court! Justice Brandeis also asserts (274 U.S. at 376) that there is a distinction between "advocacy" and "incitement," but fails to adduce any supporting authority.

[101] 301 U.S. 242 (1937).

[102] Ibid. 261-263.

[103] 310 U.S. 88 (1940).

[104] Ibid. 105.

[105] Cantwell *v.* Connecticut, 310 U.S. 296, 308 (1940).

[106] Stromberg *v.* California, 283 U.S. 359, 369 (1931).

[107] Fox *v.* Washington, 236 U.S. 273, 277 (1915).

[108] Gitlow *v.* New York, 268 U.S. 652 (1925).

[109] Terminiello *v.* Chicago, 337 U.S. 1 (1949).

[110] Ibid. 4.

[111] Ibid. 33. Dissenting opinions were written by Chief Justice Vinson, Justice Frankfurter (with whom Justices Jackson and Burton concurred) and Justice Jackson, (with whom Justice Burton agreed).

[112] 340 U.S. 315 (1951).

[113] Ibid. 319-320. Anent this finding, Justice Douglas, in his dissent, declared that: "Public assemblies and public speech occupy an important role in American life. One high function of the police is to protect these lawful gatherings so that the speakers may exercise their constitutional rights. When unpopular causes are sponsored from the public platform, there will commonly be mutterings and unrest and heckling from the crowd. * * * But those extravagances * * *, do not justify penalizing the speaker by depriving him of the platform or by punishing him for his conduct. * * * If * * * the police throw their weight on the side of those who would break up the meetings, the police become the new censors of speech. Police censorship has all the vices of the censorship from city halls which we have repeatedy [sic] struck down."—Ibid. 330-331.

[114] 333 U.S. 507 (1948).

[115] Ibid. 514-515.

[116] Musser *v.* Utah, 333 U.S. 95 (1948).

[117] Ibid. 101. This dissent probably marks the climax of the clear and present danger doctrine.

"On March 20, 1949, members of the Vice Squad of the Philadelphia Police Department, at the direction of Inspector Craig Ellis, head of the Vice Squad, commenced a series of mass raids upon book stores and booksellers in Philadelphia. Inspector Ellis gave his men a list of books that in his opinion were obscene, and directed them to seize the books wherever found. Fifty-four booksellers were raided, and nearly twelve hundred copies of the books were confiscated.

"These raids were remarkable not only because of the scale on which they were conducted, but in several other respects. First, they were directed in major part against books written by authors in the forefront of American literature and published by some of the leading publishers in America. Second, the raids were conducted and the books were confiscated without warrants of search or seizure or court order of any kind. Third, the list of books to be seized was compiled by Inspector Ellis and a patrolman in his office, without consultation with the District Attorney's office or the obtaining of any legal opinion as to whether the books were obscene under the Pennsylvania statute.

"For once the publishers took the offensive. Houghton Mifflin Company, publisher of *Raintree County*, Alfred A. Knopf, Inc., publisher of *Never Love a Stranger*, and The Vanguard Press, Inc., publisher of books by James T. Farrell and Calder Willingham among those seized, commenced actions in the Federal District Court in Philadelphia to restrain further police seizures of these books and to recover damages from the police officers for their unlawful acts. In these two actions the authors Harold Robbins and James T. Farrell, as well as Charles Praissman, a courageous bookseller whose stores had been raided, joined the publishers as parties plaintiff. The District Attorney of Philadelphia countered by commencing criminal proceedings

against five of the booksellers whose stores had been raided, and on June 30, 1948 the grand jury, upon presentation of the District Attorney, indicted the booksellers on a charge of having violated the Pennsylvania statute prohibiting the sale of obscene books.

"In the meantime the Federal court cases brought by the publishers has come to trial before Judge Guy K. Bard, and at the conclusion of the trials Judge Bard had enjoined further seizures of the plaintiff's books, as well as police invasion of Praissman's stores or seizure of his books without a warrant. At the time of this writing, the Federal court cases have not been finally decided.

"On January 3, 1949 the criminal cases came on for trial before Judge Curtis Bok of the Pennsylvania Court of Quarter Sessions. The defendants pleaded not guilty and waived trial by jury. They stipulated that at the times and places mentioned in the indictments they had had possession of the books for the purpose of offering them for sale to the public. The books were then placed in evidence, and the prosecution rested its case. The defendants 'demurred to the evidence,' the effect of which was to raise the issue of whether the court, in the light of the constitutional guaranty of freedom of the press, could hold, beyond a reasonable doubt, that the books before it were obscene within the meaning of the Pennsylvania obscenity statute." Introductory note to a republication by Alfred Knopf Inc. of Judge Bok's opinion in Commonwealth *v.* Gordon *et al.*, 66 D & C (Pa.) 101 (1949).

On March 18, 1949 Judge Bok sustained the demurrers and entered judgment in favor of the defendants. The opinion which accompanies his judgment pivots in part on the clear and present danger rule. It reads: "The only clear and present danger to be prevented by section 524 that will satisfy both the Constitution and the current customs of our era is the imminence of the commission of criminal behavior resulting from the reading of a book. Publication alone can have no such automatic effect."

This obviously overlooks the primary purpose of governmental interference with the distribution of "obscene literature," namely to protect immature minds from contamination. Dealing with this point Judge Bok protests against putting "the entire reading public at the mercy of the adolescent mind." Should, on the other hand, the adolescent mind be put at the mercy of the uninhibited reading tastes of an elderly federal judge?

[118] 310 U.S. 88 (1940).

[119] 310 U.S. 106 (1940).

[120] Thornhill *v.* Alabama, 310 U.S. 88, 102, 105 (1940).

[121] Drivers Union *v.* Meadowmoor Co., 312 U.S. 287 (1941); *See also* Hotel and Restaurant Employees' Alliance *v.* Board, 315 U.S. 437 (1942).

[122] Drivers Union *v.* Meadowmoor Co., 312 U.S. 287, 293 (1941).

[123] American Federation of Labor *v.* Swing, 312 U.S. 321 (1941); Bakery and Pastry Drivers *v.* Wohl, 315 U.S. 769 (1942); Cafeteria Employees Union *v.* Gus Angelos, 320 U.S. 293 (1943).

[124] Teamsters Union *v.* Hanke, 339 U.S. 470, 474 (1950).

[125] Giboney *v.* Empire Storage Co., 336 U.S. 490 (1949).

[126] Building Service Union *v.* Gazzam, 339 U.S. 532 (1950).

[127] Hughes *v.* Superior Court, 339 U.S. 460 (1950).

[128] Carpenters Union *v.* Ritter's Cafe, 315 U.S. 722, 728 (1942).

[129] Giboney *v.* Empire Storage Co., 336 U.S. 490 (1949).

[130] Ibid. 501, 502, citing Fox *v.* Washington, 236 U.S. 273, 277, which predates any suggestion of the clear and present danger formula. *See* above.

[131] Lincoln Union *v.* Northwestern Co., 335 U.S. 525 (1949); A.F. of L. *v.* American Sash Co., ibid., 538.

[132] Auto Workers *v.* Wis. Board, 336 U.S. 245 (1949). In Teamsters Union *v.* Hanke, 339 U.S. 470 (1950), injunctions by State courts against picketing of a self-employer's place of business to compel him to adopt a union shop were sustained.

[133] Thomas *v.* Collins, 323 U.S. 516 (1945).

[134] Ibid. 566.

[135] Patterson *v.* Colorado, 205 U.S. 454 (1907). *Cf.* Toledo Newspaper Co. *v.* United States, 247 U.S. 402 (1918) in which the Court affirmed a judgment

imposing a fine for contempt of court on an editor who had criticized the action of a federal judge in a pending case. The majority held that such conviction did not violate the First Amendment. Justices Holmes and Brandeis dissented on the ground that the proceedings did not come within the applicable federal statute, but did not discuss the constitutional issue. This decision was overruled in Nye *v.* United States, 313 U.S. 33 (1941).

[136] 314 U.S. 252 (1941).

[137] Ibid. 271.

[138] Ibid. 283, 284.

[139] 328 U.S. 331 (1946).

[140] Ibid. 350.

[141] Ibid. 349.

[142] 331 U.S. 367 (1947).

[143] Ibid. 376.

[144] Davis *v.* Massachusetts, 107 U.S. 43 (1897).

[145] Ibid. 47.

[146] 307 U.S. 496, 515, 516 (1939).

[147] 334 U.S. 558 (1948).

[148] Kovacs *v.* Cooper, 336 U.S. 77 (1949).

[149] Public Utilities Commission *v.* Pollak, 343 U.S. 451 (1952). The decision overruled the United States Court of Appeals for the District of Columbia. Here Judge Edgerton, speaking for himself and two associates, said: "Exploitation of this audience through assault on the unavertible sense of hearing is a new phenomenon. It raises 'issues that were not implied in the means of communication known or contemplated by Franklin and Jefferson and Madison.' But the Bill of Rights, as appellants say in their brief, can keep up with anything an advertising man or an electronics engineer can think of. * * *

"If Transit obliged its passengers to read what it liked or get off the car, invasion of their freedom would be obvious. Transit obliges them to hear what it likes or get off the car. Freedom of attention, which forced listening destroys, is a part of liberty essential to individuals and to society. The Supreme Court has said that the constitutional guarantee of liberty 'embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all his faculties * * *.' One who is subjected to forced listening is not free in the enjoyment of all his faculties." He quoted with approval Justice Reed's statement in Kovacs *v.* Cooper, "The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners."—191 F. 2d 450, 456 (1951).

[150] Lovell *v.* Griffin, 303 U.S. 444 (1938); Schneider *v.* State, 308 U.S. 147 (1939); Largent *v.* Texas, 318 U.S. 418 (1943).

[151] Schneider *v.* State, 308 U.S. 147 (1930); Jamison *v.* Texas, 318 U.S. 413 (1943).

[152] Marsh *v.* Alabama, 326 U.S. 501 (1946).

[153] Tucker *v.* Texas, 326 U.S. 517 (1946).

[154] Valentine *v.* Chrestensen, 316 U.S. 52 (1942).

[155] Martin *v.* Struthers, 319 U.S. 141 (1943).

[156] Breard *v.* Alexandria, 341 U.S. 622 (1951).

[157] 221 U.S. 418, 439 (1911). *See* below.

[158] Near *v.* Minnesota, 283 U.S. 697 (1931).

[159] Drivers Union *v.* Meadowmoor Co., 312 U.S. 287 (1941); Carpenters Union *v.* Ritter's Cafe, 315 U.S. 722 (1942).

[160] 315 U.S. 568 (1942).

[161] 319 U.S. 624 (1943).

[162] 315 U.S. 568, 571, 572 (1942).

[163] 319 U.S. 624, 633 (1943).

[164] Lovell *v.* Griffin, 303 U.S. 444, 451 (1938).

[165] Chaplinsky *v.* New Hampshire, 315 U.S. 568 (1942); Cox *v.* New Hampshire, 312 U.S. 569 (1941).

[166] Lovell *v.* Griffin, 303 U.S. 444 (1938); Hague *v.* C.I.O., 307 U.S. 496, 516 (1939); Schneider *v.* State, 308 U.S. 147 (1939); Cantwell *v.* Connecticut, 310 U.S. 296 (1940); Largent *v.* Texas, 318 U.S. 418 (1943); Thomas *v.* Collins, 323 U.S. 516, 538 (1945); Saia *v.* New York, 334 U.S. 558 (1948).

[167] Radio Comm'n *v.* Nelson Bros. Co., 289 U.S. 266 (1933); Communications Comm'n. *v.* N.B.C., 319 U.S. 239 (1943).

[168] Mutual Film Corp. *v.* Ohio Indus'l Comm., 236 U.S. 230, 244 (1915).

[169] 334 U.S. 131 (1948).

[170] Ibid. 166.

[171] Joseph Burstyn, Inc. *v.* Wilson, 343 U.S. 495 (1952).

[172] Ibid. 502. Justice Frankfurter, concurring for himself and Justices Jackson and Burton, elaborates upon the vagueness of connotation of the New York Court's use of the word "sacrilegious." *See* Appendix to his opinion, Ibid. 533-40. Justice Reed, in his concurring opinion, suggests that the Court will now have the duty of examining "the facts of the refusal of a license in each case to determine whether the principles of the First Amendment have been honored." Ibid. 506-507.

[173] 314 U.S. 252 (1941).

[174] Ibid. 263.

[175] 323 U.S. 516 (1945).

[176] Ibid. 529-530.

[177] Palko *v.* Connecticut, 302 U.S. 319, 327 (1937).

[178] United States *v.* Carolene Products Co., 304 U.S. 144, 152, fn. 4 (1938).

[179] 328 U.S. 331 (1946).

[180] Ibid. 353.

[181] Kovacs *v.* Cooper, 336 U.S. 77, 88 (1949).

[182] Ibid. 90.

[183] Brinegar *v.* United States, 338 U.S. 160, 180 (1949).

[184] Terminiello *v.* Chicago, 337 U.S. 1, 4 (1949).

[185] Kunz *v.* New York, 340 U.S. 290, 302.

[186] Ibid. 309. In a footnote Justice Jackson points to the peculiarly protected position of the Court today, thanks to ch. 479, Public Law 250, 81st Congress, approved August 18, 1949. This makes it unlawful to "make any harangue or oration, or utter loud, threatening, or abusive language in the Supreme Court Building or grounds." § 5. It also forbids display of any "flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." § 6. Moreover, it authorizes the marshal to "prescribe such regulations approved by the Chief Justice of the United States, as may be deemed necessary for the adequate protection of the Supreme Court Building and grounds and of persons and property therein, and for the maintenance of suitable grounds." § 7. Violation of these provisions or regulations is an offense punishable by fine and imprisonment.

[187] Grosjean *v.* American Press Co., 297 U.S. 233, 246 (1936).

[188] Ibid. 250.

[189] Ibid.

[190] Murdock *v.* Pennsylvania, 319 U.S. 105 (1943); Jones *v.* Opelika, 319 U.S. 103 (1943); Follett *v.* McCormick, 321 U.S. 573 (1944).

[191] Associated Press *v.* United States, 326 U.S. 1 (1945). A newspaper publisher who enjoyed a substantial monopoly of mass distribution of news was enjoined from refusing advertising from persons advertising over a competing radio station. The Court sustained the injunction against the objection that it violated freedom of the press, holding that appellant was guilty of attempting to monopolize interstate commerce. Lorain Journal *v.* United States, 342 U.S. 143 (1951).

[192] Associated Press *v.* Labor Board, 301 U.S. 103, 133 (1937).

[193] Okla. Press Pub. Co. *v.* Walling, 327 U.S. 186 (1946).

[194] 221 U.S. 418 (1911).

[195] Ibid. 430.

[196] 314 U.S. 469 (1941).

[197] Ibid: 477.

[198] Ibid. 478.

[199] United States *v.* C.I.O., 335 U.S. 106 (1948).

[200] 106 U.S. 371 (1882).

[201] 19 Stat. 143 § 6 (1876).

[202] 53 Stat. 1147 (1939).

[203] United Public Workers *v.* Mitchell, 330 U.S. 75 (1947).

[204] Oklahoma *v.* United States Civil Serv. Comm., 330 U.S. 127 (1947).

[205] Schenck *v.* United States, 249 U.S. 47 (1919); Frohwerk *v.* United States, 249 U.S. 204 (1919); Debs *v.* United States, 249 U.S. 211 (1919); Abrams *v.* United States, 250 U.S. 616 (1919); Schaefer *v.* United States, 251 U.S. 466 (1919); Pierce *v.* United States, 252 U.S. 239 (1920); *cf.* Gilbert *v.* Minnesota 254 U.S. 325 (1920); Hartzel *v.*. United States, 322 U.S. 680 (1944).

[206] 341 U.S. 494 (1951).

[207] 61 Stat. 136, 146 (1947); "Taft-Hartley Act."

[208] 339 U.S. 382 (1950).

[209] 339 U.S. 846 (1950). Answering in 1882 the objection of a pensioner to the terms of an act under which he received his pension from the Government, the Court answered: "Pensions are the bounties of the government, which Congress has the right to give, withhold, distribute or recall, at its discretion." United States *v.* Teller, 107 U.S. 64, 68. Can it be doubted that Congress has power to repeal at any time the protection which present legislation affords organized labor?

[210] 339 U.S. 382, 394, 397 (1950).

[211] Dennis *v.* United States, 341 U.S. 494 (1951).

[212] 54 Stat. 670 (1940).

[213] 341 U.S. 494, 509.

[214] Ibid. 509.

[215] Ibid. 510; citing 183 F. (2d) at 212.

[216] 341 U.S. 494, 510-511.

[217] Ibid. 513.

[218] 341 U.S. 494, 519-520.

[219] Ibid. 525.

[220] Ibid. 527-528.

[221] 341 U.S. 494, 539.

[222] 268 U.S. 652 (1925).

[223] 341 U.S. 494, 541.

[224] Ibid. 542.

[225] Ibid. 551-552.

[226] 341 U.S. 494, 567-569.

[227] Ibid. 572.

[228] 341 U.S. 494, 586; citing 274 U.S. 357, 376-377.

[229] Anti-Fascist Committee *v.* McGrath, 341 U.S. 123 (1951) heads the list.

[230] 341 U.S. 494 (1951).

[231] 339 U.S. 382; ibid. 846 (1950).

[232] 341 U.S. 716 (1951).

[233] 342 U.S. 485 (1952).

[234] New York Laws, 1949, c. 360.

[235] 342 U.S. 485, 493. Justice Frankfurter dissented on jurisdictional grounds. Justices Black and Douglas attacked the merits of the decision. Said the latter: "What happens under this law is typical of what happens in a police state. Teachers are under constant surveillance; their pasts are combed for signs of disloyalty; their utterances are watched for clues to dangerous thoughts. A pall is cast over the classrooms. There can be no real academic freedom in that environment. Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect. Supineness and dogmatism take the place of inquiry. A 'party line'—as dangerous as the 'party line' of the Communists—lays hold. It is the 'party line' of the orthodox view, of the conventional thought, of the accepted approach. A problem can no longer be pursued with impunity to its edges. Fear stalks the classroom. The teacher is no longer a stimulant to adventurous thinking; she becomes instead a pipe line for safe and sound information. A deadening dogma takes the place of free inquiry. Instruction tends to become sterile; pursuit of knowledge is discouraged; discussion often leaves off where it should begin." Ibid. 510.

[236] 343 U.S. 250 (1952).

[237] Ibid. 258.

[238] Ibid, 259-263 *passim*. Justice Douglas, dissenting, urged the "absolute" character of freedom of speech and deplored recent cases in which, he asserted, the Court "has engrafted the right of regulation onto the First Amendment by placing in the hands of the legislative branch the right to regulate 'within reasonable length' the right of free speech. This to me is an ominous and alarming trend." Ibid. 285. Justices Black, Reed and Jackson also dissented. Justice Jackson's dissenting opinion is characteristically paradoxical: "An Illinois Act, construed by its Supreme Court to be a 'group libel' statute, has been used to punish criminally the author and distributor of an obnoxious leaflet attacking the Negro race. He answers that, as applied, the Act denies a liberty secured to him by the Due Process Clause of the Fourteenth Amendment. What is the liberty which that clause underwrites? The spectrum of views expressed by my seniors shows that disagreement as to the scope and effect of this Amendment underlies this, as it has many another, division of the Court. All agree that the Fourteenth amendment does confine the power of the State to make printed words criminal. Whence we are to derive metes and bounds of the state power is a subject to the confusion of which, I regret to say, I have contributed—comforted in the acknowledgment, however, by recalling that this Amendment is so enigmatic and abstruse that judges more experienced than I have had to reverse themselves as to its effect on state power. The thesis now tendered in dissent is that the 'liberty' which the Due Process Clause of the Fourteenth Amendment protects against denial by the States is the literal and identical 'freedom of speech or of the press' which the First Amendment forbids only Congress to abridge. The history of criminal libel in America convinces me that the Fourteenth Amendment did not 'incorporate' the First, that the powers of Congress and of the States over this subject are not of the same dimensions, and that because Congress probably could not enact this law it does not follow that the States may not." Ibid. 287-288. Proceeding from this position, Justice Jackson is able, none the less, to dissent from the Court's judgment. *Cf.* Chief Justice Stone's position in United States *v.* Carolene Products Co., 304 U.S. 144, at 152-53, note 4 (1938).

[239] 20 Stat. 355, 358 (1879); 48 Stat. 928 (1934).

[240] 327 U.S. 146 (1946).

[241] Ibid. 158. Justice Frankfurter, while concurring, apparently thought that the question of Congress's power in the premises was not involved. Ibid. 159-160. On this broader question, *see* p. 269. (The Postal Clause).

[242] 333 U.S. 178 (1948); Public Clearing House *v.* Coyne, 194 U.S. 497 (1904).

[243] Here it is recited in part: "That if we, our justiciary, our bailiffs, or any of our officers, shall in any circumstances have failed in the performance of them toward any person, or shall have broken through any of these articles of peace and security, and the offence be notified to four barons chosen out of the five-and-twenty before mentioned, the said four barons shall repair to us, or our justiciary, if we are out of the realm, and laying open the grievance, shall petition to have it redressed without delay."

[244] 12 Encyclopedia of the Social Sciences, 98 ff, "Petition, Right of" (New York, 1934).

[245] United States *v.* Cruikshank, 92 U.S. 542, 552 (1876) reflects this older view.

[246] De Jonge *v.* Oregon, 299 U.S. 353, 364, 365 (1937). *See also* Herndon *v.* Lowry, 301 U.S. 242 (1937).

[247] For the details of Adams' famous fight on "The Gag Rule," *see* Andrew C. McLaughlin, A Constitutional History of the United States, pp. 478-481, Appleton-Century-Crofts, Inc., New York (1935).

[248] Rules and Manual United States House of Representatives (1949), Eighty-first Congress, by Lewis Deschler, Parliamentarian, United States Government Printing Office, Washington (1949), pp. 430-433.

[249] United States *v.* Baltzer, Report of the Attorney General, 1918, p. 48.

[250] 92 U.S. 542 (1876).

[251] 16 Stat. 141 (1870).

[252] 92 U.S. 542, 552-553 (1876). At a later point in its opinion the Court used the following language: "Every republican government is in duty bound to protect all its citizens in the enjoyment of an equality of right. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the Amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty." Ibid. 555. These words have reference, quite clearly, to counts of the indictment alleging acts of the conspirators denying "equal protection of the laws" "to persons of color," Congress's power to protect which is derived from Amendment XIV and is confined as the Court says, to protection against State acts. The above quoted words have, however, caused confusion. *See* pp. 1176-1177.

[253] Hague *v.* C.I.O., 307 U.S. 496 (1939).

[254] 49 Stat. 449 (1935).

[255] 307 U.S. 496, 515-516 (1939).

[256] Ibid. 525.

[257] "As to the American Civil Liberties Union, which is a corporation, it cannot be said to be deprived of the civil rights of freedom of speech and of assembly, for the liberty guaranteed by the due process clause is the liberty of natural, not artificial, persons. Northwestern Nat. L. Ins. Co. *v.* Riggs, 203 U.S. 243, 255; Western Turf Asso. *v.* Greenberg, 204 U.S. 359, 363;" 307 U.S. 496, 527 (1939). *See also* ibid. 514.

[258] 167 U.S. 43 (1897). This case was treated above, at p. 784.

[259] 314 U.S. 252 (1941).

[260] 323 U.S. 516 (1945).

[261] Auto Workers *v.* Wis. Board, 336 U.S. 245 (1949).

[262] Collins *v.* Hardyman, 341 U.S. 651 (1951); 17 Stat. 13, 8 U.S.C. § 47 (3).

[263] 341 U.S. 651, 663 (1951).

[264] 2 U.S.C. §§ 261-270. *See also:* General Interim Report of the House Select Committee on Lobbying Activities, Eighty-First Congress, Second Session, created pursuant to H. Res. 298, October 20, 1950, United States Government Printing Office, Washington (1950): *see also* 9 Encyclopedia of the Social Sciences 567, "Lobbying."

[265] National Association of Manufacturers *v.* McGrath, 103 F. Supp. 510 (1952). Upon review, the Supreme Court vacated this judgment as moot.—334 U.S. 804, 807.

[266] Rumely *v.* United States, 197 F. 2d 166, 174-175 (1952).

AMENDMENT 2

[Pg 811]

BEARING ARMS

[Pg 813]

AMENDMENT 2

> 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.

The protection afforded by this amendment prevents infringement by Congress of the right to bear arms for a lawful purpose, but does not apply to such infringement by private citizens. For this reason an indictment under the Enforcement Act of 1870,[1] charging a conspiracy to prevent Negroes from bearing arms for lawful purposes was held defective.[2] A State statute which forbids bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, does not abridge the right of the people to keep and bear arms.[3] In the absence of evidence tending to show that possession or use of a shotgun having a barrel of less than 18 inches in length has some reasonable relationship to the preservation or efficiency of a well regulated militia, the Court refused to hold invalid a provision in the National Firearms Act[4] against the transportation of unregistered shotguns in interstate commerce.[5]

Notes

[1] 16 Stat. 140 (1870).

[2] United States *v.* Cruikshank, 92 U.S. 542, 553 (1876).

[3] Presser *v.* Illinois, 116 U.S. 252, 265 (1886).

[4] 48 Stat. 1236 (1934).

[5] United States *v.* Miller, 307 U.S. 174 (1939).

AMENDMENT 3

[Pg 815]

QUARTERING SOLDIERS

AMENDMENT 3

[Pg 817]

> 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.

"This amendment seems to have been thought necessary. It does not appear to have been the subject of judicial exposition; and it is so thoroughly in accord with all our ideas, that further comment is unnecessary."[1]

Notes

[1] Miller, Samuel F., The Constitution (1893), page 646.

AMENDMENT 4

[Pg 819]

SEARCHES AND SEIZURES

[Pg 821]

AMENDMENT 4

[Pg 823]

> 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.

Coverage of the Amendment

This amendment denounces only such searches and seizures as are "unreasonable," and is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted and in a manner to conserve public interests as well as the rights of individuals.[1] It applies only to governmental action, not to the unlawful acts of individuals in which the government has no part.[2] It has no reference to civil proceedings for the recovery of debts; consequently, a distress warrant issued by the Solicitor of the Treasury under an act of Congress is not forbidden, though issued without support of an oath or affirmation.[3] But the amendment is applicable to search warrants issued under any statute, including revenue and tariff laws.[4]

Security "in their persons, houses, papers and effects" is assured to the people by this article. Not only the search of a dwelling, but also of a place of business,[5] a garage,[6] or a vehicle,[7] is limited by its provisions. But open fields are not covered by the term "house"; they may be searched without a warrant.[8] A sealed letter deposited in the mails may not be opened by the postal authorities without the sanction of a magistrate.[9] The subpoena of private papers is subject to its test of reasonableness.[10] Retention for use as evidence of a letter voluntarily written by a prisoner, which, without threat or coercion, came into the possession of prison officials under the practice and discipline of the institution, is not prohibited.[11] Where officers demand admission to private premises in the name of the law, their subsequent explorations are [Pg 824] searches within the meaning of the Constitution, even though the occupant opens the door to admit them.[12] A peremptory demand by federal officers that a person suspected of crime open a locked room and hand over ration coupons kept there was held not to amount to a seizure in view of the fact that the coupons were government property which the custodian was under a duty to surrender.[13] Neither wiretapping,[14] nor the use of a detectaphone to listen to a conversation in an adjoining room,[15] nor interrogation under oath by a government official of a person lawfully in confinement[16] is within the purview of this article. Nor does it apply to statements made by an accused on his own premises to an "undercover agent" whose identity was not suspected and who had on his person a radio transmitter which communicated the statements to another agent outside the building.[17] Said Justice Jackson for the Court: "Petitioner relies on cases relating to the more common and clearly distinguishable problems raised where tangible property is unlawfully seized. Such unlawful seizure may violate the Fourth Amendment, even though the entry itself was by subterfuge or fraud rather than force. But such decisions are inapposite in the field of mechanical or electronic devices designed to overhear or intercept conversation, at least where access to the listening post was not obtained by illegal methods."[18] But narcotics seized in a hotel room during absence of the owner, in the course of a search without warrant for either search or arrest, were not adducible as evidence against the owner, who, however, was not entitled to have them returned since they were legal contraband.[19]

Necessity, Sufficiency and Effect of Warrants [Pg 825]

A warrant of commitment by a justice of the peace must state a good cause certain and be supported by oath.[20] A notary public is not authorized to administer oaths in federal criminal proceedings; hence a warrant based on affidavits verified before a notary is invalid.[21] A warrant of the Senate for attachment of a person who ignored a subpoena from a Senate committee is supported by oath within the requirement of this amendment when based upon the committee's report of the facts of the contumacy, made on the committee's own knowledge and having the sanction of the oath of office of its members.[22]

A belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search without a warrant.[23] A warrant issued upon an information stating only that "affiant has good reason to believe and does believe" that defendant has contraband materials in his possession is clearly bad under the Fourth Amendment.[24] It is enough, however, if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that the offense charged had been committed.[25]

The requirement of the Fourth Amendment that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken nothing is left to the discretion of the officer executing the warrant.[26] Private papers of no pecuniary value, in which the sole interest of the Federal Government is their value as evidence against the owner in a contemplated criminal prosecution, may not be taken from the owner's house or office under a search warrant.[27]

Records, Reports and Subpoenas

Since the common law did not countenance compulsory self incrimination, many years passed before the Supreme Court was called upon to interpret the constitutional provisions bearing upon the privilege against such testimonial compulsion. Not until Boyd *v.* United States[28] did it have to meet the issue; there, pursuant to an act of Congress, a court had issued an order in a proceeding for the forfeiture of goods for fraudulent nonpayment of customs duties, requiring the claimant to produce in court his invoices covering the goods, on pain of having the allegation [Pg 826] taken as confessed against him. The order and the statute which authorized it were held

unconstitutional in a notable opinion by Justice Bradley, as follows: "Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is [forbidden] * * * In this regard the Fourth and Fifth Amendments run almost into each other."[29] Thus the case established three propositions of far-reaching significance: (1) that a compulsory production of the private papers of the owner in such a suit was a search and seizure within the meaning of the Fourth Amendment;[30] (2) that in substance such seizure compelled him to be a witness against himself in violation of Amendment V,[31] and (3) that, because it was a violation of the Fifth Amendment, it was also an *unreasonable* search and seizure under the Fourth.[32]

Only natural persons can resist the subpoena of private papers on the ground of self incrimination.[33] Even an individual cannot refuse to produce records which are in his custody on the plea that they might incriminate the owner or himself where the documents belong to a corporation,[34] or to a labor union.[35] A bankrupt can be compelled to turn over records which are part of his estate.[36] Papers already in the custody of a United States court in consequence of their having been used by the owner himself as evidence on another proceeding may be used before a grand jury as a basis for an indictment for perjury.[37] A corporation may challenge an order for the production of records if it is unreasonable on grounds other than self incrimination, i.e., if it is too sweeping,[38] if the information sought is not relevant to any lawful inquiry,[39] or if it represents "a fishing expedition" in quest of evidence of crime.[40] In Oklahoma Press Pub. Co. *v.* Walling,[41] the question of the protection afforded by the Constitution against the subpoena of corporate records was thoroughly reviewed. Justice Rutledge summarized the Court's views in the following words: "* * * the Fifth Amendment affords no protection by virtue of the self incrimination provision, whether for the corporation or for its officers; and the Fourth, if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable. [Pg 827] * * * It is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command. * * * The requirement of 'probable cause, supported by oath or affirmation,' literally applicable in the case of a warrant is satisfied, in that of an order for production, by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry. Beyond this the requirement of reasonableness, including particularity in 'describing the place to be searched, and the persons or things to be seized,' also literally applicable to warrant, comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry."[42]

As a means of enforcing a valid statute, the Government may require any person subject thereto "to keep a record showing whether he has in fact complied with it,"[43] and to submit that record to inspection by government officers.[44] It may also compel the filing of returns disclosing the amount of tax liability,[45] and of reports under oath showing instances where employees have worked in excess of hours of labor permitted by law.[46] Without violating either the Fourth or Fifth Amendments, a judicial decree enjoining illegal practices under the Antitrust Act may provide that the Department of Justice shall be given access to all records and documents of the corporation relating to the matter covered by the decree.[47] The Supreme Court has intimated, however, that record keeping requirements must be limited to data which are relevant to the effective administration of the law.[48]

Search and Seizure Incidental to Arrest [Pg 828]

The right to search the person upon arrest has long been recognized[49] but authority to search the premises upon which the arrest is made has been approved only in recent years. In Agnello *v.* United States,[50] the Supreme Court asserted that: "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted."[51] Books and papers used to carry on a criminal enterprise, which are in the immediate possession and control of a person arrested for commission of an offense in the presence of the officers may be seized when discovered in plain view during a search of the premises following the arrest.[52] The lawful arrest of persons at their place of business does not justify a search of desks and files in the offices where the arrest is made and seizure of private papers found thereon.[53] A search which is unlawfully undertaken is not made valid by the evidence of crime which it brings to light.[54]

By a five to four decision in Harris *v.* United States[55] the Court sustained, as an incident to a lawful arrest, a five hour search by four federal officers of every nook and cranny of a four-room apartment. It also upheld the seizure of papers unrelated to the crime for which the arrest was

made, namely, Selective Service Registration cards which were discovered in a sealed envelope in the bottom of a bureau drawer. In justification of this conclusion, Chief Justice Vinson wrote: "Here the agents entered the apartment under the authority of lawful warrants of arrest. Neither was the entry tortious nor was the arrest which followed in any sense illegal. * * * The search was not a general exploration but was specifically directed to the means and instrumentalities by which the crimes charged had been committed, particularly the two canceled checks of the Mudge Oil Company. * * * If entry upon the premises be authorized and the search which follows be valid, there is nothing in the Fourth Amendment which inhibits the seizure by law- [Pg 829] enforcement agents of government property the possession of which is a crime, even though the officers are not aware that such property is on the premises when the search is initiated."[56] In a dissenting opinion in which Justices Murphy and Rutledge concurred, Justice Frankfurter challenged the major premises announced by the Court. "To derive from the common law right to search the person as an incident of his arrest the right of indiscriminate search of all his belongings, is to disregard the fact that the Constitution protects [against] both unauthorized arrest and unauthorized search. Authority to arrest does not dispense with the requirement of authority to search. * * * But even if the search was reasonable, it does not follow that the seizure was lawful. If the agents had obtained a warrant to look for the canceled checks, they would not be entitled to seize other items discovered in the process. * * * The Court's decision achieves the novel and startling result of making the scope of search without warrant broader than an authorized search."[57] A more limited search in connection with an arrest was held valid in United States *v.* Rabinowitz.[58] In that case, government officers, armed with a valid warrant for arrest, had arrested respondent in his one-room office which was open to the public. Thereupon, over his objection, they searched the desk, safe and file cabinets in the office for about an hour and a half and seized 573 forged and altered stamps. Justice Minton assigned five reasons for holding that the search and seizure was reasonable: "(1) the search and seizure were incident to a valid arrest; (2) the place of the search was a business room to which the public, including the officers, was invited; (3) the room was small and under the immediate and complete control of respondent; (4) the search did not extend beyond the room used for unlawful purposes; (5) the possession of the forged and altered stamps was a crime, just as it is a crime to possess burglars' tools, lottery tickets or counterfeit money."[59] This decision also overruled an intermediate case, Trupiano *v.* United States,[60] whereby the practical effect of the Harris decision had been circumscribed by a ruling that even where a valid arrest is made, a search without a warrant is not permissible if the circumstances make it feasible to procure a warrant in advance.

Search of Vehicles [Pg 830]

The Fourth Amendment has been construed "* * *, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon, or automobile for contraband goods, where is it not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought. * * * The measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported."[61] Where officers have reasonable grounds for searching an automobile which they are following, a search of the vehicle immediately after it has been driven into an open garage is valid.[62] The existence of reasonable cause for searching an automobile does not, however, warrant the search of an occupant thereof, although the contraband sought is of a character which might be concealed on the person.[63]

Use of Evidence

To remove the temptation to ignore constitutional restraints on search and seizure, evidence obtained in violation thereof is made inadmissible against an accused in federal courts.[64] This is contrary to the practice prevailing in the majority of States and has been severely criticized as a matter of principle.[65] The Court has intimated recently that the federal exclusionary rule is not a command of the Fourth Amendment, but merely a judicially created rule of evidence which Congress could overrule. In Wolf *v.* Colorado,[66] it ruled that while that amendment is binding on the States, it does not prevent State courts from admitting evidence obtained by illegal search. With respect to the federal rule, Justice Frankfurter said: "* * * though we have interpreted the Fourth Amendment to forbid the admission of such evidence, a different question would be presented if Congress, under its legislative powers, were to pass a statute purporting to negate the *Weeks* doctrine. We would then be faced with the problem of the respect to be accorded the legislative judgment on an issue as to which, in default of that judgment, we have been forced to depend upon our own."[67] This rule does not prevent the use of evidence unlawfully obtained by individuals,[68] or by State officers,[69] unless federal agents had a part in the unlawful acquisition,[70] or unless the arrest and search were made for an offense punishable only by federal law.[71] A search is deemed to be "a search by a federal official if he had a hand in it; * * * [Pg 831] [but not] if evidence secured by State authorities is turned over to the federal authorities on a silver platter. The decisive factor * * * is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means. It is immaterial whether a federal agent originated the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be

deemed to have participated in it."[72] Samples of illicit goods constituting part of a quantity seized by federal officials under a valid search warrant may be used as evidence, whether or not the officers become civilly liable as trespassers *ab initio*, by reason of the fact that they unlawfully destroyed the remainder of the goods at the time the seizure was made.[73]

In Silver Thorne Lumber Co. *v.*. United States,[74] the Court refused to permit the Government to subpoena corporate records of which it had obtained knowledge by an unlawful search. To permit "knowledge gained by the Government's own wrong" to be so used would do violence to the Bill of Rights.[75] But a defendant in a civil antitrust suit may be required to produce records which had been previously subpoenaed before a grand jury, despite the fact that the grand jury was illegally constituted because women were excluded from the panel.[76] Where government agents lawfully obtained knowledge of the contents of a cancelled check during examination of the records of a government contractor, the admission of such check in evidence was held not to be an abuse of discretion even if the seizure of the check itself was deemed illegal.[77] The seizure of papers under a writ of replevin issued in a civil suit between private persons does not violate the Fourth and Fifth Amendments.[78]

Notes

[1] Carroll *v.* United States, 267 U.S. 132, 147, 149 (1925).

[2] Burdeau *v.* McDowell, 256 U.S. 465, 475 (1921).

[3] Den ex dem. Murray *v.* Hoboken Land & Improv. Co., 18 How. 272, 285 (1856).

[4] Nathanson *v.* United States, 290 U.S. 41, 47 (1933)

[5] Gouled *v.* United States, 255 U.S. 298 (1921).

[6] Taylor *v.* United States, 286 U.S. 1 (1932).

[7] Carroll *v.* United States, 267 U.S. 132 (1925).

[8] Hester *v.* United States, 265 U.S. 57 (1924).

[9] Ex parte Jackson, 96 U.S. 727, 733 (1878).

[10] Boyd *v.* United States, 116 U.S. 616 (1886); Hale *v.* Henkel, 201 U.S. 43 (1906).

[11] Stroud *v.* United States, 251 U.S. 15, 21 (1919).

[12] Amos *v.* United States, 255 U.S. 313 (1921); Johnson *v.* United States, 333 U.S. 10 (1948).

[13] Davis *v.* United States, 328 U.S. 582 (1946).

[14] Olmstead *v.* United States, 277 U.S. 438 (1928). *Cf.* Nardone *v.* United States, 302 U.S. 379 (1937); 308 U.S. 338 (1939).

[15] Goldman *v.* United States, 316 U.S. 129 (1942).

[16] Bilokumsky *v.* Tod, 203 U.S. 149, 155 (1923).

[17] On Lee *v.* United States, 343 U.S. 747 (1952).

[18] Ibid. 753. Four Justices dissented, relying in the main on the dissent in the Olmstead case, which came later to be adopted by Congress. *See* note 10 above.

[19] United States *v.* Jeffers, 342 U.S. 48 (1951).

[20] Ex parte Burford, 3 Cr. 448 (1806).

[21] Albrecht *v.* United States, 273 U.S. 1 (1927).

[22] McGrain *v.* Daugherty, 273 U.S. 135, 156, 158 (1927).

[23] Agnello *v.* United States, 269 U.S. 20 (1925).

[24] Byars *v.* United States, 273 U.S. 28, 29 (1927).

[25] Steele *v.* United States, No. 1, 267 U.S. 498, 504, 505 (1925); Dumbra *v.* United States, 268 U.S. 435, 441 (1925).

[26] Marron *v.* United States, 275 U.S. 192, 196 (1927).

[27] Gouled *v.* United States, 255 U.S. 298 (1921).

[28] 116 U.S. 616 (1886).

[29] Ibid. 630.

[30] Ibid. 634, 635.

[31] Ibid. 633.

[32] Ibid. 635.

[33] Hale *v.* Henkel, 201 U.S. 43, 74 (1906); Essgee Co. *v.* United States, 262 U.S. 151 (1923). *Cf.* Interstate Commerce Commission *v.* Baird, 194 U.S. 25, 46 (1904).

[34] Wilson *v.* United States, 221 U.S. 361 (1911). *See also* Wheeler *v.* United States, 226 U.S. 478 (1913); Grant *v.* United States, 227 U.S. 74 (1913).

[35] United States *v.* White, 322 U.S. 694 (1944).

[36] Re Fuller, 262 U.S. 91 (1923). *See also* McCarthy *v.* Arndstein, 266 U.S. 34, 41 (1924).

[37] Perlman *v.* United States, 247 U.S. 7 (1918).

[38] Hale *v.* Henkel, 201 U.S. 43, 76 (1906).

[39] Oklahoma Press Pub. Co. *v.* Walling, 327 U.S. 186, 208 (1946).

[40] Federal Trade Commission *v.* American Tobacco Co. 264 U.S. 298, 305-306 (1924).

[41] 327 U.S. 186 (1946).

[42] Ibid. 208-209.

[43] United States *v.* Darby, 312 U.S. 100, 125 (1941).

[44] Shapiro *v.* United States, 335 U.S. 1, 32 (1918).

[45] Flint *v.* Stone Tracy Co., 220 U.S. 107, 175 (1911).

[46] Baltimore & O.R. Co. *v.* Interstate Commerce Comm'n., 21 U.S. 612 (1911).

[47] United States *v.* Bausch & L. Optical Co., 321 U.S. 707, 725 (1944). *Cf.* United States *v.* Morton Salt Co., 338 U.S. 632 (1950).

[48] Shapiro *v.* United States, 335 U.S. 1, 32 (1948); Oklahoma Press Pub. Co. *v.* Walling, 327 U.S. 186, 208 (1946).

[49] Weeks *v.* United States, 232 U.S. 383, 392 (1914).

[50] 269 U.S. 20 (1925).

[51] Ibid. 30.

[52] Marron *v.* United States, 275 U.S. 192 (1927).

[53] Go-Bart Importing Co. *v.* United States, 282 U.S. 344 (1931); United States *v.* Lefkowitz, 285 U.S. 452 (1932).

[54] Byars *v.* United States, 273 U.S. 28 (1927); Johnson *v.* United States, 333 U.S. 10, 16 (1948).

[55] 331 U.S. 145 (1947).

[56] Ibid. 153, 155.

[57] Ibid. 165. Separate dissenting opinions were written by Justices Murphy and Jackson.

[58] 339 U.S. 56 (1950).

[59] Ibid. 64.

[60] 334 U.S. 699 (1948); McDonald *v.* United States, 335 U.S. 451 (1948) is also overruled in effect, although it was not mentioned in the Court's opinion.

[61] Carroll *v.* United States, 267 U.S. 132, 153-156 (1925). Husty *v.* United States, 282 U.S. 694 (1931); Brinegar *v.* United States, 338 U.S. 160 (1949).

[62] Scher *v.* United States, 305 U.S. 251 (1938).

[63] United States *v.* Di Re, 332 U.S. 581 (1948).

[64] Weeks *v.* United States, 232 U.S. 383 (1914). This case was a virtual repudiation of Adams *v.* New York, 192 U.S. 585, 597 (1904). There the Supreme Court had ruled that in criminal proceedings in a State court the use of private papers obtained by unlawful search and seizure "was no violation of the constitutional guaranty of privilege from unlawful search or seizure." It added: "Nor do we think the accused was compelled to incriminate himself."

[65] Wolf *v.* Colorado, 338 U.S. 25, 29, 38 (1949); 8 Wigmore on Evidence (3d ed.) § 2184 (1940).

[66] 338 U.S. 25 (1949).

[67] Ibid. 33.

[68] Burdeau *v.* McDowell, 256 U.S. 465 (1921).

[69] Byars *v.* United States, 273 U.S. 28, 33 (1927).

[70] Ibid. 32; Lustig *v.* United States, 338 U.S. 74 (1949).

[71] Gambino *v.* United States, 275 U.S. 310 (1927).

[72] Lustig *v.* United States, 338 U.S. 74, 78, 79 (1949).

[73] McGuire *v.* United States, 273 U.S. 95 (1927).

[74] 251 U.S. 385 (1920).

[75] Ibid. 392.

[76] United States *v.* Wallace & Tiernan Co., 336 U.S. 793 (1949).

[77] Zap *v.* United States, 328 U.S. 624 (1946).

[78] American Tobacco Co. *v.* Werckmeister, 207 U.S. 284, 302 (1907).

AMENDMENT 5

[Pg 833]

RIGHTS OF PERSONS

[Pg 835]

RIGHTS OF PERSONS

[Pg 837]

AMENDMENT 5

> 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 offense 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.

Rights of Accused Persons

THE GRAND JURY CLAUSE

Within the meaning of this article a crime is made "infamous" by the quality of the punishment which may be imposed.[1] The Court has recognized that: "What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another."[2] Imprisonment in a State prison or penitentiary, with or without hard labor,[3] or imprisonment at hard labor in the workhouse of the District of Columbia,[4] falls within this category. The pivotal question is whether the offense is one for which the Court is authorized to award such punishment; the sentence actually imposed is immaterial. When an accused is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be put upon his trial, except on the accusation of a grand jury.[5] Thus, an act which authorizes imprisonment at hard labor for one year, as well as deportation, of Chinese aliens found to be unlawfully within the United States, creates an offense which can be tried only upon indictment.[6] Counterfeiting,[7] fraudulent alteration of poll books,[8] fraudulent voting,[9] and embezzlement[10] have been declared to be infamous crimes. It is immaterial how Congress has classified the offense.[11] An act punishable by a fine of not more than $1,000 or imprisonment for not more than six months is a misdemeanor, which can be tried without indictment, even [Pg 838] though the punishment exceeds that specified in the statutory definition of "petty offenses."[12]

A person can be tried only upon the indictment as found by the grand jury, and especially upon its language found in the charging part of the instrument. A change in the indictment deprives the court of the power to try the accused.[13] There is no constitutional requirement that an indictment be presented by a grand jury in a body; an indictment delivered by the foreman in the absence of the other grand jurors is valid.[14]

The words "when in actual service in time of war or public danger" apply to the militia only. All persons in the regular army or navy are subject to court martial rather than indictment or trial by jury, at all times.[15] The exception of "cases arising in the land or naval forces" was not aimed at trials of offenses against the laws of war. Its objective was to authorize trial by court martial of the members of the Armed Forces for all that class of crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in the civil court. Either citizen or alien enemy belligerents may be tried by a military commission for offenses against the laws of war.[16]

DOUBLE JEOPARDY

By the common law not only was a second punishment for the same offense prohibited, but a second trial was forbidden whether or not the accused had suffered punishment, or had been acquitted or convicted.[17] This clause embraces all cases wherein a second prosecution is attempted for the same violation of law, whether felony or misdemeanor.[18] Seventy-five years ago a closely divided Court held that the protection against double jeopardy prevented an appeal by the Government after a verdict of acquittal.[19] A judgment of acquittal on the ground of the bar of the statute of limitations is a protection against a second trial,[20] as is also a general [Pg 839] verdict of acquittal upon an issue of not guilty to an indictment which was not challenged as insufficient before the verdict.[21] Where a court inadvertently imposed both a fine and imprisonment for a crime for which the law authorized either punishment, but not both, it could not, after the fine had been paid, during the same term of court, change its judgment by sentencing the defendant to imprisonment.[22] But where a statute carried a minimum mandatory sentence of both a fine and imprisonment, the imposition of the minimum fine five hours after the court had erroneously sentenced the defendant to imprisonment only did not amount to double jeopardy.[23] Whether or not the discontinuance of a trial without a verdict bars a second trial depends upon the circumstances of each case.[24] Discharge of a jury because it is unable to reach an agreement[25] or because of the disqualification of a juror[26] does not preclude a

second trial. Where, after a demurrer to the indictment was overruled, a jury was impaneled and witnesses sworn, the discharge of the jury to permit the defendant to be arraigned did not bar a trial before a new jury.[27] The withdrawal of charges after a trial by a general court martial had begun, because the tactical situation brought about by the rapid advance of the army made continuance of the trial impracticable, did not bar a trial before a second court martial.[28] An accused is not put in jeopardy by preliminary examination and discharged by the examining magistrate,[29] by an indictment which is quashed,[30] nor by arraignment and pleading to the indictment.[31] In order to bar prosecution, a former conviction must be pleaded.[32]

A plea of former jeopardy must be upon a prosecution for the same identical offense.[33] The test [Pg 840] of identity of offenses is whether the same evidence is required to sustain them; if not, the fact that both charges relate to one transaction does not make a single offense where two are defined by the statutes.[34] Where a person is convicted of a crime which includes several incidents, a second trial for one of those incidents puts him twice in jeopardy.[35] Congress may impose both criminal and civil sanctions with respect to the same act or omission,[36] and may separate a conspiracy to commit a substantive offense from the commission of the offense and affix to each a different penalty.[37] A conviction for the conspiracy may be had though the subsequent offense was not completed.[38] Separate convictions under different counts charging a monopolization and a conspiracy to monopolize trade, in an indictment under the Sherman Antitrust Act, do not amount to double jeopardy.[39] In United States *v.* National Association of Real Estate Boards,[40] the Court held that an acquittal in a criminal suit charging violation of the Sherman Act does not prevent the issuance of an injunction against future violations. It distinguished but did not overrule an early case which held that where an issue as to the existence of a fact or act had been tried in a criminal proceeding instituted by the United States, a judgment of acquittal, was conclusive in a subsequent proceeding *in rem* involving the same matter.[41]

A civil action to recover taxes which were in fact penalties for violation of another statute was held to be punitive in character and barred by a prior conviction of the defendant for a criminal offense involving the same transaction.[42] In contrast, the additional income tax imposed when a fraudulent return is filed, was found to be a civil sanction designed to protect the revenue, which might be assessed after acquittal of the defendant for the same fraud.[43] A forfeiture proceeding for defrauding the Government of a tax on alcohol diverted to beverage uses is a proceeding *in rem*, rather than a punishment for a criminal offense, and may be prosecuted after a conviction of conspiracy to violate the statute imposing the tax.[44]

In an early case, the Court asserted that since robbery on the high seas is considered an offense [Pg 841] within the criminal jurisdiction of all nations, the plea of *autre fois acquit* would be good in any civilized State, though resting on a prosecution instituted in the courts of any other civilized State.[45] It has held, however, that where the same act is an offense against both the State and Federal Governments, its prosecution and punishment by both Governments is not double jeopardy.[46] A contumacious witness is not twice subjected to jeopardy for refusing to testify before a committee of the United States Senate, by being punished for contempt of the Senate and also indicted for a misdemeanor for such refusal.[47]

Self-Incrimination

SOURCE OF THE CLAUSE

"Nor shall be compelled in any criminal case to be a witness against himself." The source of this clause was the maxim that "no man is bound to accuse himself (*nemo tenetur prodere*—or *accusare seipsum*)," which was brought forward in England late in the sixteenth century in protest against the inquisitorial methods of the ecclesiastical courts. At that time the common law itself permitted accused defendants to be questioned. What the advocates of the maxim meant was merely that a person ought not to be put on trial and compelled to answer questions to his detriment unless he had first been properly accused, i.e., by the grand jury. But the idea once set going gained headway rapidly, especially after 1660, when it came to have attached to it most of its present-day corollaries.[48]

Under the clause a *witness* in any proceeding whatsoever in which testimony is legally required may refuse to answer any question, his answer to which might be used against him in a future criminal proceeding, or which might uncover further evidence against him.[49] The witness must explicitly claim his constitutional immunity or he will be considered to have waived it;[50] but he is not the final judge of the validity of his claim.[51] The privilege exists solely for the protection of the witness himself, and may not be claimed for the benefit of third parties.[52] The clause does not impair the obligation of a witness to testify if a prosecution against him is barred by lapse of time, by statutory enactment, or by a pardon;[53] but the effect of a mere tender of pardon by the [Pg 842] President remains uncertain.[54] A witness may not refuse to answer questions on the ground that he would thereby expose himself to prosecution by a state.[55] Conversely, the admission against a defendant in a federal court of testimony given by him in a state court under a statute of immunity is valid.[56] If an accused takes the stand in his own behalf, he must submit to cross-

examination;[57] while if he does not, it is by no means certain that the trial judge in a federal court may not, without violation of the clause, draw the jury's attention to the fact.[58] Neither does the Amendment preclude the admission in evidence against an accused of a confession made while in the custody of officers, if the confession was made freely, voluntarily, and without compulsion or inducement of any sort.[59] But in McNabb *v.* United States the Court[60] reversed a conviction in a federal court, based on a confession obtained by questioning the defendants for prolonged periods in the absence of friends and counsel and without their being brought before a commissioner or judicial officer, as required by law. Without purporting to decide the constitutional issue, Justice Frankfurter's opinion urged the duty of the Court, in supervising the conduct of the lower federal courts, to establish and maintain "civilized standards of procedure and evidence."[61] An individual who has acquired income by illicit means is not excused from making out an income tax return because he might thereby expose himself to a criminal prosecution by the United States. "He could not draw a conjurer's circle around the whole matter," said Justice Holmes, "by his own declaration that to write any word upon the government blank would bring him into danger of the law."[62] But a witness called to testify before a federal grand jury as to his relations with the Communist Party cannot, in view of existing legislation touching the subject, be compelled to answer.[63]he clause does not require the exclusion of the body of an accused as evidence of his identity;[64] but the introduction into evidence against one who was being prosecuted by a State for illegal possession of morphine of two capsules which he had swallowed and had then been forced by the police to disgorge, was held to violate due process of law.[65]

A bankrupt is not deprived of his constitutional right not to testify against himself by an order requiring him to surrender his books to a duly authorized receiver.[66] He may not object to the use of his books and papers as incriminating evidence against him while they are in the custody of the bankruptcy court;[67] nor may he condition their delivery by requiring a guaranty that they will not be used as incriminating evidence.[68] The filing of schedules by a bankrupt does not waive his right to refuse to answer questions pertaining to them when to do so may incriminate him.[69] A disclosure, not amounting to an actual admission of guilt or of incriminating facts, does not deprive him of the privilege of stopping short in his testimony whenever it may fairly tend to incriminate him.[70] The rule against self-incrimination may be invoked by a bankrupt (in the absence of any statute affording him complete immunity) when being examined concerning his estate.[71] [Pg 843]

The privilege of witnesses, being a purely personal one, may not be claimed by an agent or officer of a corporation either in its behalf or in his own behalf as regards books and papers of the corporation;[72] and the same rule holds in the case of the custodian of the records of a labor union;[73] nor does the Communist Party enjoy any immunity as to its books and records.[74] Finally, this Amendment, in connection with the interdiction of the Fourth Amendment against unreasonable searches and seizures, protects an individual from the compulsory production of private papers which would incriminate him.[75] The scope of this latter privilege was, however, greatly narrowed by the decision in Shapiro *v.* United States.[76] There, by a five-to-four majority, the Court held that the privilege against self incrimination does not extend to books and records which an individual is required to keep to evidence his compliance with lawful regulations. A conviction for violation of OPA regulations was affirmed, as against the contention that the prosecution was barred because the accused had been compelled over claim of constitutional immunity to produce records he was required to keep under applicable OPA orders. After construing the statutory immunity as inapplicable to the case, Chief Justice Vinson disposed of the constitutional objections by asserting that "the privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.'"[77] [Pg 844]

Due Process of Law

SOURCE AND EVOLUTION OF THE MEANING OF THE TERM

The phrase "due process of law" comes from chapter 3 of 28 Edw. III (1355), which reads: "No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law." This statute, in turn, harks back to the famous chapter 29 of Magna Carta (issue of 1225), where the King promises that "no free man (*nullus liber homo*) shall be taken or imprisoned or deprived of his freehold or his liberties or free customs, or outlawed or exiled, or in any manner destroyed, nor shall we come upon him or send against him, except by a legal judgment of his peers or by the law of the land (*per legem terrae*)." Coke in Part II of his Institutes, which was the source from which the founders of the American Constitutional System derived their understanding of the matter, equates the term "by law of the land" with "by due process of law," which he in turn defines as "by due process of the common law," that is "by the indictment or presentment of good and lawful men * * * or by writ original of the Common Law."[78] The significance of both terms was therefore purely procedural; the term "writ original of the common law" referring to the writs on which civil actions were brought into the King's courts; and this is the significance they [Pg 845]

clearly have in the State constitutions. In the earlier of such instruments the term "law of the land" was the form preferred, but following the adoption of Amendment V "due process of law" became the vogue with constitution draftsmen. Some State constitutions even today employ both terms. Whichever phraseology is used always occurs in close association with other safeguards of accused persons, just as does the clause here under discussion in Amendment V. As a limitation, therefore, on legislative power the due process clause originally operated simply to place certain procedures, and especially the grand jury-petit jury process, beyond its reach, but this did not remain its sole importance or its principal importance.[79]

Today the due process clause in Amendment V, in Amendment XIV, and in the State constitutions is important chiefly, not as consecrating certain procedures, but as limiting the substantive content of legislation. Thus one of the grounds on which Chief Justice Taney, in his opinion in the Dred Scott Case, stigmatized the Missouri Compromise as unconstitutional was that an act of Congress which deprived "a citizen of his liberty or property merely because he came himself or brought his property into a particular territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law";[80] and sixty-six years later the Court held the District of Columbia Minimum Wage Act for women and minors to be void under the due process clause of Amendment V, not on account of any objection to the methods by which it was to be enforced but because of the content of the act—its substantive requirements.[81] And it is because of this extension of the term "due process of law" beyond the procedural field that the Court has been asked to pass upon literally hundreds of State enactments since about 1890 on the representation that they invaded the "liberty" or property rights of certain persons "unreasonably." In short, this development of the meaning of "due process of law" came in time to furnish one of the principal bases of judicial review, and indeed it still remains such so far as State legislation is concerned. *See* pp. 971-974.

[Pg 846]

SCOPE OF GUARANTY

This clause is a restraint on Congress as well as on the executive and judicial powers of the National Government; it cannot be so construed as to leave Congress free to make any process it chooses "due process of law."[82] All persons within the territory of the United States are entitled to its protection, including corporations,[83] aliens,[84] and presumptively citizens seeking readmission to the United States.[85] It is effective in the District of Columbia[86] and in territories which are part of the United States,[87] but it does not apply of its own force to unincorporated territories.[88] Nor does it reach enemy alien belligerents tried by military tribunals outside the territorial jurisdiction of the United States.[89]

Procedural Due Process

GENERAL

The words "due process of law" do not necessarily imply a proceeding in a court of justice,[90] or a plenary suit and trial by jury in every case where personal or property rights are involved. "In all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts."[91] Proceedings for contempt of court[92] or to disbar an attorney[93] may be determined by a court without a jury trial. For persons in the military or naval services of the United States,[94] trial by military tribunals is due process. This principle extends to persons who commit offenses while undergoing punishment inflicted by court martial; as military prisoners they are still subject to military law.[95]

[Pg 847]

CRIMINAL PROSECUTIONS

The due process clause supplements the specific procedural guaranties enumerated in the Sixth Amendment and in preceding clauses of the Fifth Amendment for the protection of persons accused of crime. The Court has relied upon this provision in holding that an accused shall plead, or be ordered to plead, or a plea of not guilty be entered for him before his trial proceeds;[96] and in ruling that if the accused is in custody he must be personally present at every stage of the trial where his substantial rights may be affected by the proceedings against him.[97] It is not within the power of the accused or his attorney to waive such right. Inasmuch as proceedings for criminal contempt do not constitute a criminal prosecution, it is immaterial if proceedings are held in the absence of the defendant; the requirement of due process of law is satisfied by suitable notice and opportunity to be heard.[98]

NOTICE AND HEARING

Due process of law signifies a right to be heard. A decree *pro confesso* entered against a defendant after striking his answer from the files for contempt of court is void.[99] A man may, however, consent to be bound by a judgment in a case in which he has no right to participate.[100] Accordingly, due process of law was held not to be denied to a surety on an undertaking for the release of attached property when the undertaking required the parties to submit to the

jurisdiction of the court and to agree to abide by the judgment in relation to the property attached.[101] Where, in a suit for specific performance of a contract, evidence admitted without objection at the trial established all the facts necessary for application of the formula specified by [Pg 848] the contract, the appellate court which rejected the trial court's interpretation of the contract did not infringe the right to a hearing by entering judgment without remanding the case for a new trial.[102] After a State court, in proceedings designed *inter alia* to invalidate certain releases, rendered judgment without a special finding on the exact point, a federal court did not deny due process in a subsequent proceeding by treating such judgment as conclusive on the validity of the releases.[103] Since proceedings in bankruptcy are in the nature of proceedings *in rem*, personal notice to creditors is not required; creditors are bound by the proceedings in distribution on notice by publication and mail.[104] Where a statute providing for a public improvement levied an assessment against abutting property it was held to be "conclusive alike of the question of the necessity of the work and of the benefits as against abutting property."[105] Notice to the property owner is not necessary to sustain the assessment. On the other hand, when the legislature submits these questions to a commission or other officers the inquiry becomes judicial and the property owner is entitled to notice or an opportunity to be heard. Notice by publication is sufficient.[106]

EVIDENCE AND PRESUMPTION IN JUDICIAL PROCEEDINGS

Error in the admission of evidence or the entry of an erroneous judgment after a full hearing does not constitute a denial of due process.[107] A statute authorizing cancellation of naturalization certificates for fraud and providing that the taking up of permanent residence abroad within five years after naturalization shall be *prima facie* evidence of lack of intention to become a permanent resident of the United States at the time of applying for citizenship was found not to be so unreasonable as to deny due process of law.[108] Likewise, it was held reasonable for Congress to enact that a defendant who was discovered to be in possession of opium should be required to assume the burden of proving that he had not obtained it through illegal importation.[109] But a presumption that a firearm or ammunition in the possession of a person convicted of a crime of violence was transported or received in violation of law was held invalid because there was no rational connections between the facts proved and that presumed.[110]

ADMINISTRATIVE PROCEEDINGS [Pg 849]

With respect to action taken by administrative agencies the Court has held that the demands of due process do not require a hearing at the initial stage, or at any particular point in the proceeding so long as a hearing is held before the final order becomes effective.[111] In Bowles *v.* Willingham,[112] it sustained orders fixing maximum rents issued without a hearing at any stage, saying "* * * where Congress has provided for judicial review after the regulations or orders have been made effective it has all that due process under the war emergency requires."[113] But where, after consideration of charges brought against an employer by a complaining union, the National Labor Relations Board undertook to void an agreement between an employer and another independent union, the latter was entitled to notice and an opportunity to participate in the proceedings.[114] Although a taxpayer must be afforded a fair opportunity for hearing in connection with the collection of taxes,[115] collection by distraint of personal property is lawful if the taxpayer is allowed a hearing thereafter.[116]

"A FAIR HEARING"

When the Constitution requires a hearing it requires a fair one, held before a tribunal which at least meets currently prevailing standards of impartiality.[117] An opportunity must be given not only to present evidence, but also to know the claims of the opposing party and to meet them. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon the proposal before the final command is issued.[118] But a variance between the charges and findings will not invalidate administrative proceedings where the record shows that at no time during the hearing was there any misunderstanding as to the basis of the complaint.[119] The mere admission of evidence which would be inadmissible in judicial proceedings does [Pg 850] not vitiate the order of an administrative agency.[120] A provision that such a body shall not be controlled by rules of evidence does not, however, justify orders without a foundation in evidence having rational probative force. Mere uncorroborated hearsay does not constitute the substantial evidence requisite to support the findings of the agency.[121] While the Court has recognized that in some circumstances a "fair hearing" implies a right to oral argument,[122] it refuses to lay down a general rule that would cover all cases.[123] It says: "Certainly the Constitution does not require oral argument in all cases where only insubstantial or frivolous questions of law, or indeed even substantial ones, are raised. Equally certainly it has left wide discretion to Congress in creating the procedures to be followed in both administrative and judicial proceedings, as well as in their conjunction."[124]

JUDICIAL REVIEW

To the extent that constitutional rights are involved, due process of law imports a judicial review of the action of administrative or executive officers. This proposition is undisputed so far as questions of law are concerned, but the extent to which the courts should and will go in reviewing determinations of fact has been a highly controversial issue. In St. Joseph Stock Yards Co. *v.* United States,[125] the Supreme Court held that upon review of an order of the Secretary of Agriculture establishing maximum rates for services rendered by a stock yard company, due process required that the Court exercise its independent judgment upon the facts to determine whether the rates were confiscatory.[126] Subsequent cases sustaining rate orders of the Federal Power Commission have not dealt explicitly with this point.[127] The Court has said simply that a person assailing such an order "carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences."[128]

There has been a division of opinion in the Supreme Court as to what extent, if at all, the [Pg 851] proceedings before military tribunals should be reviewed by the courts for the purpose of determining compliance with the due process clause. In In re Yamashita[129] the majority denied a petition for certiorari and petitions for writs of *habeas corpus* to review the conviction of a Japanese war criminal by a military commission sitting in the Philippine Islands. It held that since the military commission, in admitting evidence to which objection was made, had not violated any act of Congress, a treaty or a military command defining its authority, its ruling on evidence and on the mode of conducting the proceedings were not reviewable by the courts. Without dissent, the Supreme Court in Hiatt *v.* Brown[130] reversed the judgment of a lower court which had discharged a prisoner serving a sentence imposed by a court-martial, because of errors whereby the respondent had been deprived of due process of law. The Supreme Court held that the Court below had erred in extending its review, for the purpose of determining compliance with the due process clause, to such matters as the propositions of law set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain respondent's conviction, the adequacy of the pre-trial investigation, and the competence of the law member and defense counsel. In summary, Justice Clark wrote: "In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision."[131] Again in Johnson *v.* Eisentrager[132] the Supreme Court overruled a lower court decision, which, in reliance upon the dissenting opinion in the Yamashita Case, had held that the due process clause required that the legality of the conviction of enemy alien belligerents by military tribunals should be tested by the writ of *habeas corpus*.

ALIENS

To aliens who have never been naturalized or acquired any domicile or residence in the United States, the decision of an executive or administrative officer, acting within powers expressly conferred by Congress, as to whether or not they shall be permitted to enter the country, is due [Pg 852] process of law.[133] The complete authority of Congress in the matter of admission of aliens justifies delegation of power to executive officers to enforce the exclusion of aliens afflicted with contagious diseases by imposing upon the owner of the vessel bringing any such alien into the country, a money penalty, collectible before and as a condition of the grant of clearance.[134] If the person seeking admission claims American citizenship, the decision of the Secretary of Labor may be made final, but it must be made after a fair hearing, however summary, and must find adequate support in the evidence. A decision based upon a record from which relevant and probative evidence has been omitted is not a fair hearing.[135] Where the statute made the decision of an immigration inspector final unless an appeal was taken to the Secretary of the Treasury, a person who failed to take such an appeal did not, by an allegation of citizenship, acquire a right to a judicial hearing on *habeas corpus*.[136]

DEPORTATION

Deportation proceedings are not criminal prosecutions within the meaning of the Bill of Rights. The authority to deport is drawn from the power of Congress to regulate the entrance of aliens and impose conditions upon the performance of which their continued liberty to reside within the United States may be made to depend. Findings of fact reached by executive officers after a fair, though summary deportation hearing may be made conclusive.[137] In Wong Yang Sung *v.* McGrath,[138] however, the Court intimated that a hearing before a tribunal which did not meet the standards of impartiality embodied in the Administrative Procedure Act[139] might not satisfy the requirements of due process of law. To avoid such constitutional doubts, the Court construed the law to disqualify immigration inspectors as presiding officers in deportation proceedings. Except in time of war, deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process which may be corrected on *habeas corpus*.[140] In contrast with the decision in United States *v.* Ju Toy[141] that a person seeking entrance to the United States was not entitled to a judicial hearing on his claim of citizenship, a person arrested and held for deportation is entitled to a day in court if he denies that he is an alien.[142] A closely divided Court has ruled that in time of war the deportation of an enemy alien may be ordered summarily by executive action; due process of law does not require the courts to determine the [Pg 853]

sufficiency of any hearing which is gratuitously afforded to the alien.[143]

Substantive Due Process

DISCRIMINATION

Almost all legislation involves some degree of classification whereby its operation is directed to particular categories of persons, things, or events; and it is partly in recognition of this fact that Amendment Fourteen forbids the States to deny to persons within their jurisdiction "equal protection of the laws." But this restriction does not rule out classifications that are "reasonable"; and the due process of law clause of Amendment Five is at least as tolerant of legislative classifications, which would have to be arbitrarily and unreasonably discriminatory to incur its condemnation.[144] In fact, it does not appear that the Court has up to this time ever held an act of Congress unconstitutional on this ground. Thus it has sustained a law imposing greater punishment for an offense involving rights and property of the United States than for a like offense involving the rights of property of a private person.[145] Likewise, a requirement that improved property in the District of Columbia be connected with the city sewage system, with different sanctions for residents and nonresidents was upheld over the argument that the classification was arbitrary.[146] The allowance to injured seamen of a choice between several measures of redress without any corresponding right in their employer was held not to deny due process of law.[147] Differences of treatment accorded marketing cooperatives in milk marketing orders issued by the Secretary of Agriculture[148] and the selection of a limited number of tobacco markets for compulsory grading of tobacco[149] have also been sustained. The priority of a federal tax lien against property passing at death, may, without offending the due process clause, be different from that which attaches to property transferred *inter vivos* in contemplation of death.[150]

There are indications, however, that the Court may be prepared to go further than it has in the past in condemning discrimination as a denial of due process of law. Relying upon public policy and its supervisory authority over federal courts, it has reached results similar to those arrived at under the equal protection clause of the Fourteenth Amendment, in refusing to enforce restrictive covenants in the District of Columbia,[151] and in reversing a judgment of a Federal District Court because of the exclusion of day laborers from the jury panel;[152] and in Steele *v.* Louisville & N.R. Co.[153] the Railway Labor Act was construed to require a collective bargaining representative to act for the benefit of all members of the craft without discrimination on account of race. Chief Justice Stone indicated that any other construction would raise grave constitutional doubts,[154] while in a concurring opinion, Justice Murphy asserted unequivocally that the act would be inconsistent with the Fifth Amendment if the bargaining agent, acting under color of federal authority, were permitted to discriminate against any of the persons he was authorized to represent.[155] [Pg 854]

DEPRIVATION OF LIBERTY

In consequence of the explicit assurances of individual liberty contained in other articles of the Bill of Rights, the clause in the Fifth Amendment forbidding the deprivation of "liberty" without due process of law has been invoked chiefly in resistance to measures alleged to abridge liberty of contract. The two leading cases which held legislation unconstitutional on this ground have, however, both been overturned in recent years. Adair *v.* United States,[156] which invalidated an act of Congress prohibiting any interstate carrier from threatening an employee with loss of employment if he joined a labor union, was overruled in substance by Phelps Dodge Corp. *v.* National Labor Relations Board.[157] Adkins *v.* Children's Hospital,[158] in which a minimum wage law for the District of Columbia was found to be an unwarranted abridgment of the liberty of contract, was expressly repudiated by West Coast Hotel Co. *v.* Parrish.[159] Numerous other statutes—antitrust laws,[160] acts limiting hours of labor,[161] prohibiting advance of wages to seamen,[162] making carriers liable for injuries suffered by employees irrespective of previous contractual arrangements,[163] requiring employers to bargain collectively with employees[164] and fixing prices of commodities[165] have been sustained against attack on this ground. [Pg 855]

Interpreting statutes which made the guaranty of due process of law applicable to Hawaii and the Philippine Islands, the Court enjoined enforcement of an act of the Territory of Hawaii which prohibited maintenance of foreign-language schools except upon written permit and payment of a fee based upon attendance,[166] and held unconstitutional a Philippine statute which prohibited Chinese merchants from keeping any accounts in Chinese.[167]

DEPRIVATION OF PROPERTY

Retroactive Legislation Sustained

Federal regulation of future action, based upon rights previously acquired by the person regulated, is not prohibited by the Constitution. So long as the Constitution authorizes the

subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. Accordingly, rent regulations were sustained as applied to prevent execution of a judgment of eviction rendered by a State court before the enabling legislation was passed.[168] An order by an Area Rent Director reducing an unapproved rental and requiring the landlord to refund the excess previously collected, was held, with one dissenting vote, not to be the type of retroactivity which is condemned by law.[169] The retroactive effect of a new principle announced by a decision of an administrative tribunal has [Pg 856] been likened to the effect of judicial decisions in cases of first impression. In Securities Comm'n. *v.* Chenery Corp.,[170] the Supreme Court sustained a decision of the Commission which refused to approve a plan of reorganization for a public utility holding company so long as the preferred stock purchased by the management was treated on a parity with other preferred stock even though the purchase of such stock, when made, did not conflict with any law or rule of the Commission. In the exercise of its comprehensive powers over revenue, finance and currency, Congress may make Treasury notes legal tender in payment of debts previously contracted[171] and may invalidate provisions in private contracts calling for payment in gold coin.[172] An award of additional compensation under the Longshoremen's and Harbor Workers' Compensation Act, [173] made pursuant to a private act of Congress passed after expiration of the period for review of the original award, directing the Commission to review the case and issue a new order, was held valid against the employer and insurer.[174] The application of a statute providing for tobacco marketing quotas, to a crop planted prior to its enactment, was held not to deprive the producers of property without due process of law since it operated, not upon production, but upon the marketing of the product after the act was passed.[175]

The validation by statute of a prior mortgage of personal property invalid because improperly recorded, did not deny due process of law to a judgment creditor seeking to levy an attachment on the mortgaged property.[176] Nor was property taken without due process of law by a statute of New Mexico territory, permitting disseisin of real property to ripen into title after ten years. [177] An order of the military governor of Porto Rico reducing the period during which the possession of real estate must continue, to permit an *ex parte* conversion of an entry of possessory title into record ownership was construed to apply only where there still remained a reasonable opportunity for the true owners to contest the claim. The Court said that any other construction would permit a taking of property without due process of law.[178]

Rights created by statute are subject to qualification by Congress; benefits conferred gratuitously [Pg 857] may be redistributed or withdrawn at any time.[179] Where Congress provided, in granting lands to a railroad, that such land could be resold only to actual settlers, at a price not exceeding $2.50 per acre, it could constitutionally, for breach of performance, resume title to the lands while assuring the railroad the equivalent of its interest.[180] An act making an appropriation for a private claim which restricted the attorney's fees payable therefrom to twenty per cent was valid although inconsistent with a prior contract with the claimant allowing a larger fee.[181] Statutory restrictions on compensation for services in connection with veterans' pensions or insurance have been upheld.[182] An increase in the penalty for production of wheat in excess of quota was not invalid as applied retroactively to wheat already planted, where Congress concurrently authorized a substantial increase in the amount of the loan which might be made to cooperating farmers upon stored "farm marketing excess wheat."[183]

Retroactive Legislation Disallowed

The due process clause has been successfully invoked to defeat retroactive invasion or destruction of property rights in a few cases. A revocation by the Secretary of the Interior of previous approval of plats and papers showing that a railroad was entitled to land under a grant was held void as an attempt to deprive the company of its property without due process of law. [184] The exception of the period of federal control from the time limit set by law upon claims against carriers for damages caused by misrouting of goods, was read as prospective only because the limitation was an integral part of the liability, not merely a matter of remedy, and would violate the Fifth Amendment if retroactive.[185] Rights against the United States arising out of contract are protected by the Fifth Amendment; hence a statute abrogating contracts of war risk insurance was held unconstitutional as applied to outstanding policies.[186]

Bankruptcy Legislation

The bankruptcy power of Congress is subject to the Fifth Amendment. A statute which authorized a court to stay proceedings for the foreclosure of a mortgage for five years, the debtor to remain in possession at a reasonable rental, with the option of purchasing the property at its appraised [Pg 858] value at the end of the stay, was held unconstitutional because it deprived the creditor of substantial property rights acquired prior to the passage of the act.[187] A modified law, under which the stay was subject to termination by the Court, and which continued the right of the creditor to have the property sold to pay the debt was sustained.[188] Without violation of the due process clause, the sale of collateral under the terms of a contract may be enjoined, if such sale would hinder the preparation or consummation of a proposed railroad reorganization, provided the injunction does no more than delay the enforcement of the contract.[189] A provision that

claims resulting from rejection of an unexpired lease should be treated as on a parity with provable debts, but limited to an amount equal to three years rent, was held not to amount to a taking of property without due process of law, since it provided a new and more certain remedy for a limited amount, in lieu of an existing remedy inefficient and uncertain in result.[190] A right of redemption allowed by State law upon foreclosure of a mortgage was unavailing to defeat a plan for reorganization of a debt or corporation where the trial court found that the claims of junior lienholders had no value.[191]

Right To Sue the Government

A right to sue the Government on a contract is a privilege, not a property right protected by the Constitution.[192] The right to sue for recovery of taxes paid may be conditioned upon an appeal to the Commissioner and his refusal to refund.[193] There was no denial of due process when Congress took away the right to sue for recovery of taxes, where the claim for recovery was without substantial equity, having arisen from the mistake of administrative officials in allowing the statute of limitations to run before collecting the tax.[194] The denial to taxpayers of the right to sue for refund of processing and floor taxes collected under a law subsequently held unconstitutional, and the substitution of a new administrative procedure for the recovery of such sums, was held valid.[195] Congress may cut off the right to recover taxes illegally collected by ratifying the imposition and collection thereof, where it could lawfully have authorized such exactions prior to their collection.[196]

CONGRESSIONAL POLICE MEASURES [Pg 859]

Numerous regulations of a police nature, imposed under powers specifically granted to the Federal Government, have been sustained over objections based on the due process clause. Congress may require the owner of a vessel on which alien seamen suffering from specified diseases are brought into the country to bear the expense of caring for such persons.[197] It may prohibit the transportation in interstate commerce of filled milk,[198] or the importation of convict made goods into any State where their receipt, possession or sale is a violation of local law.[199] It may require employers to bargain collectively with representatives of their employees chosen in a manner prescribed by statute, to reinstate employees discharged in violation of law,[200] and to permit use of a company owned hall for union meetings.[201] It may enforce continuance of the relationship of employer and employee in the event of a strike as a consequence of, or in connection with, a current labor dispute.[202] The fact that property subject to rent control in time of war suffers a decrease in value does not make such restriction offensive to the due process clause.[203]

The Postal Service

In its complete control over the postal service Congress may exclude lottery advertisements or any other matter objectionable on grounds of public policy.[204] An order requiring return to the senders of all letters addressed to a concern engaged in a fraudulent enterprise, or to its officers as such was held reasonable and valid because an order limited to matter obviously connected with the enterprise would be a practical nullity.[205] Such an order may be issued by the Postmaster General "upon evidence satisfactory to him,"[206] but if issued under a "mistake of law" as to what facts may properly be deemed to constitute fraud, it will be enjoined by the courts.[207] A hearing upon revocation of second-class mailing privileges by an assistant Postmaster General upon notice, at which relator was heard and evidence received was due process.[208]

Congressional Regulation of Public Utilities [Pg 860]

Inasmuch as Congress, in giving federal agencies jurisdiction over various public utilities, usually has prescribed standards substantially identical with those by which the Supreme Court has tested the validity of State action, the review of their orders seldom has turned on constitutional issues. In two cases, however, maximum rates for stockyard companies prescribed by the Secretary of Agriculture were sustained only after detailed consideration of numerous items excluded from the rate base or from operating expenses, apparently on the assumption that error with respect to any such item would render the rates confiscatory and void.[209] A few years later, in Federal Power Commission *v.* Hope Natural Gas Co.,[210] the Court adopted an entirely different approach. It took the position that the validity of the Commission's order depended upon whether the impact or total effect of the order is just and reasonable, rather than upon the method of computing the rate base. Rates which enable a company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed cannot be condemned as unjust and unreasonable even though they might produce only a meager return in a rate base computed by the "present fair value" method.[211]

Orders prescribing the form and contents of accounts kept by public utility companies,[212] and statutes requiring a private carrier to furnish information for valuing its property to the

Interstate Commerce Commission[213] have been sustained against the objection that they were arbitrary and invalid. An order of the Secretary of Commerce directed to a single common carrier by water requiring it to file a summary of its books and records pertaining to its rates was held not to violate the Fifth Amendment.[214]

Congressional Regulation of Railroads

[Pg 861]

Legislation or administrative orders pertaining to railroads have been challenged repeatedly under the due process clause but seldom with success. Orders of the Interstate Commerce Commission establishing through routes and joint rates have been sustained,[215] as has its division of joint rates to give a weaker group of carriers a greater share of such rates where the proportion allotted to the stronger group was adequate to avoid confiscation.[216] The recapture of one half of the earnings of railroads in excess of a fair net operating income, such recaptured earnings to be available as a revolving fund for loans to weaker roads, was held valid on the ground that any carrier earning an excess held it as trustee.[217] An order enjoining certain steam railroads from discriminating against an electric railroad by denying it reciprocal switching privileges did not violate the Fifth Amendment even though its practical effect was to admit the electric road to a part of the business being adequately handled by the steam roads.[218] Similarly, the fact that a rule concerning the allotment of coal cars operated to restrict the use of private cars did not amount to a taking of property.[219] Railroad companies were not denied due process of law by a statute forbidding them to transport in interstate commerce commodities which have been manufactured, mined or produced by them.[220] An order approving a lease of one railroad by another, upon condition that displaced employees of the lessor should receive partial compensation for the loss suffered by reason of the lease[221] is consonant with due process of law. A law prohibiting the issuance of free passes was held constitutional even as applied to abolish rights created by a prior agreement whereby the carrier bound itself to issue such passes annually for life, in settlement of a claim for personal injuries.[222]

Occasionally, however, regulatory action has been held invalid under the due process clause. An order issued by the Interstate Commerce Commission relieving short line railroads from the obligation to pay the usual fixed sum per day rental for cars used on foreign roads, for a space of two days was arbitrary and invalid.[223] A retirement act which made eligible for pensions all persons who had been in the service of any railroad within one year prior to the adoption of the law, counted past unconnected service of an employee toward the requirement for a pension without any contribution therefor, and treated all carriers as a single employer and pooled their assets, without regard to their individual obligations, was held unconstitutional.[224]

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TAXATION

In laying taxes, the Federal Government is less narrowly restricted by the Fifth Amendment than are the States by the Fourteenth. It may tax property belonging to its citizens, even if such property is never situated within the jurisdiction of the United States,[225] or the income of a citizen resident abroad, which is derived from property located at his residence.[226] The difference is explained by the fact that the protection of the Federal Government follows the citizen wherever he goes, whereas the benefits of State government accrue only to persons and property within the State's borders. The Supreme Court has said that, in the absence of an equal protection clause, "a claim of unreasonable classification or inequality in the incidence or application of a tax raises no question under the Fifth Amendment, * * *"[227] It has sustained, over charges of unfair differentiation between persons, a graduated income tax;[228] a higher tax on oleomargarine than on butter;[229] an excise tax on "puts" but not on "calls";[230] a tax on the income of businesses operated by corporations but not on similar enterprises carried on by individuals;[231] an income tax on foreign corporations, based on their income from sources within the United States, while domestic corporations are taxed on income from all sources;[232] a tax on foreign-built but not upon domestic yachts;[233] a tax on employers of eight or more persons, with exemptions for agricultural labor and domestic service;[234] a gift tax law embodying a plan of graduations and exemptions under which donors of the same amount might be liable for different sums;[235] an Alaska statute imposing license taxes only on nonresident fisherman;[236] an act which taxed the manufacture of oil and fertilizer from herring at a higher rate than similar processing of other fish or fish offal;[237] an excess profits tax which defined "invested capital" with reference to the original cost of the property rather than to its present value;[238] and an undistributed profits tax in the computation of which special credits were allowed to certain taxpayers;[239] an estate tax upon the estate of a deceased spouse in respect of the moiety of the surviving spouse where the effect of the dissolution of the community is to enhance the value of the survivor's moiety.[240]

Retroactive Taxes

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A gift tax cannot be imposed on gifts consummated before the taxing statute was adopted.[241] A

conclusive presumption that gifts made within two years of death were made in contemplation of death was condemned as arbitrary and capricious even with respect to subsequent transfers.[242] A tax may be made retroactive for a short period to include profits made while it was in process of enactment. A special income tax on profits realized by the sale of silver, retroactive for 35 days, which was approximately the period during which the silver purchase bill was before Congress, was held valid.[243] An income tax law, made retroactive to the beginning of the calendar year in which it was adopted, was found constitutional as applied to the gain from the sale, shortly before its enactment, of property received as a gift during the year.[244] Retroactive assessment of penalties for fraud or negligence,[245] or of an additional tax on the income of a corporation used to avoid a surtax on its shareholders,[246] does not deprive the taxpayer of property without due process of law.

An additional excise tax imposed upon property still held for sale, after one excise tax had been paid by a previous owner, does not violate the due process clause.[247] A transfer tax measured in part by the value of property held jointly by a husband and wife, including that which comes to the joint tenancy as a gift from the decedent spouse, is valid,[248] as is the inclusion in the gross income of the settler of income accruing to a revocable trust during any period when he had [Pg 864] power to revoke or modify it.[249]

GOVERNANCE OF THE INDIANS

The power of Congress in virtue of its wardship over Indians extends to a restriction on alienation of Indian lands even after a particular Indian has been granted citizenship.[250] But rights of tax exemption accruing to Indian allotments under an act of Congress, which have become vested, are protected by this amendment against repeal.[251] One who was duly enrolled as a member of the Chickasaw Nation acquired valuable rights which the Secretary of the Interior could not strike down without notice and hearing.[252] An act authorizing suit against allottees of Indian property as a class, for the value of services in securing the allotments, which provided for notice upon the governor of the tribe and designated the Attorney General to defend the suit, was consonant with due process.[253] Where the statute which created a tribal council for the Osage Indians, to be elected by the tribe, at the same time vested the Secretary of the Interior with discretion to remove a member without notice or hearing, there was no denial of due process of law since the right to elect was united in its creation with the right of removal.[254] A statute of the Choctaw Nation providing for the forfeiture and sale of buildings erected on their lands, was held to be unenforceable without giving the builder an opportunity to be heard.[255]

The National Eminent Domain Power

SCOPE OF POWER

Being an incident of sovereignty, the right of eminent domain requires no constitutional recognition. The requirement of just compensation is merely a limitation upon the exercise of a preexisting power[256] to which all private property is subject.[257] This prerogative of the National Government can neither be enlarged nor diminished by a State.[258] Whenever lands in a State are needed for a public purpose, Congress may authorize that they be taken, either by [Pg 865] proceedings in the courts of the State, with its consent, or by proceedings in the courts of the United States, with or without any consent or concurrent act of the State.[259] The facts that land included in a federal reservoir project is owned by a State, or that its taking may impair the tax revenue of the State, that the reservoir will obliterate part of the State's boundary and interfere with the State's own project for water development and conservation, constitute no barrier to the condemnation of the land by the United States under its superior power of eminent domain.[260]

ALIEN PROPERTY

There is no constitutional prohibition against confiscation of enemy property.[261] Congress may authorize seizure and sequestration through executive channels of property believed to be enemy owned if adequate provision is made for return in case of mistake.[262] An alien friend is entitled to the protection of the Fifth Amendment against a taking of property for public use without just compensation.[263] The fact that property of our citizens may be confiscated in that alien's country does not subject the alien friend's property to confiscation here.[264]

PUBLIC USE

The extent to which private property shall be taken for public use rests wholly in the legislative discretion.[265] Whether the courts have power to review a determination of the lawmakers that a particular use is a public use was left in doubt by the decision in United States ex rel. T.V.A. *v.* Welch.[266] Speaking for the majority, Justice Black declared: "We think that it is the function of Congress to decide what type of taking is for a public use * * *"[267] In a concurring opinion in which Chief Justice Stone joined, Justice Reed took exception to that portion of the opinion,

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insisting that whether or not a taking is for a public purpose is a judicial question.[268] Justice Frankfurter interpreted the controlling opinion as recognizing the doctrine that "whether a taking is for a public purpose is not a question beyond judicial competence."[269] All agreed that the condemnation of property which had been isolated by the flooding of a highway, to avoid the expense of constructing a new highway, was a lawful public purpose. Previous cases have held that the preservation for memorial purposes of the line of battle at Gettysburg was a public use for which private property could be taken by condemnation;[270] that where establishment of a reservoir involved flooding part of a town, the United States might take nearby property for a new townsite and the fact that there might be some surplus lots to be sold did not deprive the transaction of its character as taking for public use.[271]

RIGHTS FOR WHICH COMPENSATION MUST BE MADE

The franchise of a private corporation is property which cannot be taken for public use without compensation. Upon condemnation of a lock and dam belonging to a navigation company, the Government was required to pay for the franchise to take tolls as well as for the tangible property.[272] Letters patent for a new invention or discovery in the arts confer upon the patentee an exclusive property for which compensation must be made when the Government uses the patent.[273] The frustration of a private contract by the requisitioning of the entire output of a steel manufacturer is not a taking for which compensation is required.[274] Where, however, the Government requisitioned from a power company all of the electric power which could be produced by use of the water diverted through its intake canal, thereby cutting off the supply of a lessee which had a right, amounting to a corporeal hereditament under State law, to draw a portion of that water, the latter was awarded compensation for the rights taken.[275] An order requiring the removal or alteration of a bridge over a navigable river, to abate the obstruction to navigation, is not a taking of property within the meaning of the Constitution.[276] The exclusion, from the amount to be paid to the owners of condemned property, of the value of improvements made by the Government under a lease, was held constitutional.[277] An undertaking to reduce the menace from flood damages which was inevitable but for the Government's work does not constitute the Government a taker of all lands not fully protected; the Government does not owe compensation under the Fifth Amendment to every landowner whom it fails to or cannot protect.[278] [Pg 867]

When Property is Taken

According to the Legal Tender Cases,[279] the requirement of just compensation for property taken for public use refers only to direct appropriation and not to consequential injuries resulting from the exercise of lawful power. This formula leaves open the question as to whether injuries are "consequential" merely. Recent doctrine embodies a more definite test. In United States *v.* Dickinson,[280] the Supreme Court held that property is "taken" within the meaning of the Constitution "when inroads are made upon the owner's use of it to an extent that, as between private parties, a servitude has been acquired either by an agreement or in course of time."[281] Where the noise and glaring lights of planes landing at or leaving an airport leased to the United States, flying below the navigable air space as defined by Congress, interfere with the normal use of a neighboring farm as a chicken farm, there is such a taking as to give the owner a constitutional right to compensation.[282] That the Government had imposed a servitude on land adjoining its fort so as to constitute a taking within the law of eminent domain may be found from the facts that it had repeatedly fired the guns of the fort across the land and had established a fire control service there.[283] A corporation chartered by Congress to construct a tunnel and operate railway trains therein was held liable for damages in the suit by an individual whose property was so injured by smoke and gas forced from the tunnel as to amount to a taking of private property.[284]

Navigable Waters

Riparian ownership is subject to the power of Congress to regulate commerce. When damage results consequentially from an improvement of a navigable river, it is not a taking of property, but merely the exercise of a servitude to which the property is always subject.[285] What constitutes a navigable river within the purview of the commerce clause often involves sharply disputed issues of fact and of law. In the leading case of The Daniel Ball[286] the Court laid down the rule that: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[287] In 1940, over the dissent of two Justices, the Court held that the phrase "natural and ordinary condition" refers to volume of water, the gradients and the regularity of the flow. It further held that in determining the navigable character of a river it is proper to consider "the feasibility of interstate use after reasonable improvements which might be made."[288] A few months later it decided unanimously that Congress may exercise the power of eminent domain in connection with the construction of a dam and reservoir on the nonnavigable stretches of a river in order to preserve or promote [Pg 868]

commerce on the navigable portions.[289]

The Government does not have to compensate a riparian owner for cutting off his access to navigable waters by changing the course of the stream in order to improve navigation.[290] Where submerged land under navigable waters of a bay are planted with oysters, the action of the Government in dredging a channel across the bay in such a way as to destroy the oyster bed is not a "taking" of property in the constitutional sense.[291] The determination by Congress that the whole flow of a stream should be devoted to navigation does not take any private property rights of a water power company which holds a revocable permit to erect dams and dykes for the purpose of controlling the current and using the power for commercial purposes.[292] The interest of a riparian owner in keeping the level of a navigable stream low enough to maintain a power head for his use was not one for which he was entitled to be compensated when the Government raised the level by erecting a dam to improve navigation.[293] Inasmuch as a riparian owner has no private property in the flow of the stream, a license to maintain a hydroelectric dam, may, without offending the Fifth Amendment, contain a provision giving the United States an option to acquire the property at a value assumed to be less than its fair value at the time of taking.[294]

Where the Government erects dams and other obstructions across a river, causing an overflow of water which renders the property affected unfit for agricultural use and deprives it of all value, there is taking of property for which the Government is under an implied contract to make just compensation.[295] The construction of locks and for "canalizing" a river, which cause recurrent overflows, impairing but not destroying the value of the land amounts to a partial taking of property within the meaning of the Fifth Amendment;—the fee remains in the owner, subject to an easement in the United States to overflow it as often as may necessarily result from the operation of the lock and dam for purposes of navigation.[296] Compensation has been awarded for the erosion of land by waters impounded by a Government dam,[297] and for the destruction of the agricultural value of land located on a nonnavigable tributary of the Mississippi River, which as a result of the continuous maintenance of the river's level at high water mark, was permanently invaded by the percolation of the waters, and its drainage obstructed.[298] When the construction of locks and dams raised the water in a nonnavigable creek to about one foot below the crest of an upper milldam, thus preventing the drop in the current necessary to run the mill, there was a taking of property in the constitutional sense.[299] A contrary conclusion was reached with respect to the destruction of property of the owner of a lake through the raising of the lake level as a consequence of an irrigation project, where the result to the lake owner's property could not have been foreseen.[300] [Pg 869]

JUST COMPENSATION

If only a portion of a single tract is taken, the owner's compensation includes any element of value arising out of the relation of the part taken to the entire tract.[301] Thus, where the taking of a strip of land across a farm closed a private right of way, an allowance was properly made for value of the easement.[302] On the other hand, if the taking has in fact benefited the owner, the benefit may be set off against the value of the land condemned.[303] But there may not be taken into account any supposed benefit which the owner may receive in common with all from the public use to which the property is appropriated.[304] Where Congress condemned certain lands for park purposes, setting off resulting benefits against the value of property taken, and by subsequent act directed the erection of a fire-station house therein, it was held that property was not thereby taken without just compensation.[305] The Constitution does not require payment of consequential damages to other property of the owner consisting of separate tracts adjoining that affected by the taking.[306] [Pg 870]

Just compensation means the full and perfect equivalent, in money, of the property taken.[307] The owner's loss, not the taker's gain is the measure of such compensation.[308] Where the property has a determinable market value, that is the normal measure of recovery.[309] Market value is "what a willing buyer would pay in cash to a willing seller."[310] It may reflect not only the use to which the property is presently devoted but also that to which it may be readily converted.[311] But the value of the property to the Government for its particular use is not a criterion.[312] In two recent cases the Court held that the owners of cured pork[313] and black pepper[314] which was requisitioned by the Government during the war could recover only the O.P.A. ceiling price for those commodities, despite findings of the Court of Claims that the replacement cost of the meat exceeded its ceiling price, and that the pepper had a "retention value" in excess of that price. By a five-to-four decision it ruled that the Government was not obliged to pay the market value of a tug where such value had been enhanced as a consequence of the Government's urgent war time needs.[315]

Consequential damages such as destruction of a business,[316] the expense of moving fixtures and personal property from the premises, or the loss of goodwill which inheres in the location of the land, are not recoverable when property is taken in fee.[317] But a different principle obtains where only a temporary occupancy is assumed. If a portion of a long term lease is taken, damage [Pg 871]

to fixtures is allowed in addition to the value of the occupancy, and the expenses of moving, storage charges, and the cost of preparing the space for occupancy by the Government are proper elements to be considered in determining the fair rental value of the premises for the period taken.[318] These elements are not taken into account in fixing compensation for condemnation of leaseholds for the remainder of their term.[319] In Kimball Laundry Co. *v.* United States,[320] the Court by a close division held that when the United States condemned a laundry plant for temporary occupancy, evidence should have been received concerning the diminution in the value of its business due to destruction of its trade routes, and compensation allowed for any demonstrable loss of going-concern value. In United States *v.* Pewee Coal Co.,[321] involving another temporary seizure by the government, a similarly divided Court sustained the Court of Claims in awarding the company compensation for losses attributable to increased wage payments by the government. Four Justices thought no such loss had been shown.

Interest

Ordinarily property is taken under a condemnation suit upon the payment of the money award by the condemner and no interest accrues.[322] If, however, the property is taken in fact before payment is made, just compensation includes an increment which, to avoid use of the term "interest," the Court has called "an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking."[323] If the owner and the Government enter into a contract which stipulates the purchase price for lands to be taken, with no provision for interest, the Fifth Amendment is inapplicable and the landowner cannot recover interest even though payment of the purchase price is delayed.[324] Where property of a citizen has been mistakenly seized by the Government, converted into money and invested, the owner is entitled, in recovering compensation, to an allowance for the use of his property.[325]

Enforcement of Right to Compensation

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When a taking of private property has been ordered, the question of just compensation is judicial.[326] The compensation to be paid may be ascertained by any appropriate tribunal capable of estimating the value of the property. Whether the tribunal shall be created directly by Congress or one already established by the State shall be adopted for the occasion, is a matter of legislative discretion.[327] The estimate of just compensation is not required to be made by a jury, but may be entrusted to commissioners appointed by a court or by the executive, or to an inquest consisting of more or fewer men than an ordinary jury.[328] The federal courts may take jurisdiction of an action in ejectment by a citizen against officers of the Government, to recover property of which he has been deprived by force and which has been converted to the use of the Government without lawful authority and without just compensation.[329] Where property is taken by the United States in the exercise of the power of eminent domain, but without condemnation proceedings, the owner may, under the Tucker Act, bring suit for just compensation in the Court of Claims or in a district court sitting as a Court of Claims.[330]

The Fifth Amendment does not require that compensation shall actually be paid in advance of the taking[331] but the owner is entitled to reasonable, certain, and adequate provision for obtaining compensation before his occupancy is disturbed.[332] In time of war or immediate public danger private property may be impressed into public service without the consent of the owner, but such taking raises an implied promise on the part of the United States to reimburse the owner.[333] An objection that an act of Congress providing for condemnation of land for a public purpose limited the aggregate amount to be expended was rejected, since the limitation did not affect the right of property holders in the event of condemnation.[334]

Notes

[1] Ex parte Wilson, 114 U.S. 417 (1885).

[2] Ibid. 427.

[3] Mackin *v.* United States, 117 U.S. 348, 352 (1886).

[4] United States *v.* Moreland, 258 U.S. 433 (1922).

[5] Ex parte Wilson, 114 U.S. 417, 426 (1885).

[6] Wong Wing *v.* United States, 163 U.S. 228, 237 (1896).

[7] Ex parte Wilson, 114 U.S. 417 (1885).

[8] Mackin *v.* United States, 117 U.S. 348 (1886).

[9] Parkinson *v.* United States, 121 U.S. 281 (1887).

[10] United States *v.* DeWalt, 128 U.S. 393 (1888).

[11] Ex parte Wilson, 114 U.S. 417, 426 (1885).

[12] Duke *v.* United States, 301 U.S. 492 (1937).

[13] Ex parte Bain, 121 U.S. 1, 12 (1887).

[14] Breese *v.* United States, 226 U.S. 1 (1912).

[15] Johnson *v.* Sayre, 158 U.S. 109, 114 (1895).

[16] Ex parte Quirin, 317 U.S. 1, 43, 44 (1942).

[17] Ex parte Lange, 18 Wall. 103, 169 (1874).

[18] Ibid. 172, 173.

[19] Kepner *v.* United States, 195 U.S. 100 (1904). This case arose under the act of Congress of July 1, 1902 (32 Stat. 631) for the temporary civil government of the Philippine Islands. To the same effect are United States *v.* Sanges, 144 U.S. 310, 323 (1892), and United States *v.* Evans, 213 U.S. 297 (1909), both cases arising within the United States.

[20] United States *v.* Oppenheimer, 242 U.S. 85 (1916).

[21] United States *v.* Ball, 161 U.S. 622, 669 (1896).

[22] Ex parte Lange, 18 Wall. 163 (1874).

[23] Bozza *v.* United States, 330 U.S. 160 (1947).

[24] Wade *v.* Hunter, 336 U.S. 684, 689 (1949).

[25] United States *v.* Perez, 9 Wheat. 579 (1824); Logan *v.* United States, 144 U.S. 263, 298 (1892).

[26] Simmons *v.* United States, 142 U.S. 148 (1891); Thompson *v.* United States, 155 U.S. 271 (1894).

[27] Lovato *v.* New Mexico, 242 U.S. 199 (1916).

[28] Wade *v.* Hunter, 336 U.S. 684 (1949).

[29] Collins *v.* Loisel, 262 U.S. 426 (1923).

[30] Taylor *v.* United States, 207 U.S. 120, 127 (1907).

[31] Bassing *v.* Cady, 208 U.S. 386, 391-392 (1908).

[32] United States *v.* Wilson, 7 Pet. 150, 160 (1883).

[33] Burton *v.* United States, 202 U.S. 344 (1906); United States *v.* Randenbush, 8 Pet. 288, 289 (1834).

[34] Morgan *v.* Devine, 237 U.S. 632 (1915). *See also* Carter *v.* McClaughry, 183 U.S. 365 (1902); Albrecht *v.* United States, 273 U.S. 1 (1927).

[35] Ex parte Nielsen, 131 U.S. 176, 188 (1889).

[36] Helvering *v.* Mitchell, 303 U.S. 391 (1938).

[37] Pinkerton *v.* United States, 328 U.S. 640 (1946); United States *v.* Bayer, 331 U.S. 532 (1947).

[38] Pinkerton *v.* United States, 328 U.S. 640 (1946).

[39] American Tobacco Co. *v.* United States, 328 U.S. 781 (1946).

[40] 339 U.S. 485 (1950).

[41] Coffey *v.* United States, 116 U.S. 436 (1886).

[42] United States *v.* La Franca, 282 U.S. 568 (1931).

[43] Helvering *v.* Mitchell, 303 U.S. 391 (1938).

[44] Waterloo Distilling Corp. *v.* United States, 282 U.S. 577 (1931).

[45] United States *v.* Furlong, 5 Wheat. 184, 197 (1820).

[46] United States *v.* Lanza, 260 U.S. 377 (1922); Jerome *v.* United States, 318 U.S. 101 (1943).

[47] In re Chapman, 166 U.S. 661, 672 (1897).

[48] See generally J.H. Wigmore, 4 Evidence in Trials at Common Law, § 2250 (2nd ed., 1923); also Edward S. Corwin, The Supreme Court's Construction of the Self-Incrimination Clause, 29 Michigan Law Review, 1-27, 195-207 (1930).

[49] McCarthy *v.* Arndstein, 266 U.S. 34, 40 (1924). *See also* Boyd *v.* United States, 116 U.S. 616 (1886); Counselman *v.* Hitchcock, 142 U.S. 547 (1892); Brown *v.* Walker, 161 U.S. 591 (1896).

[50] Rogers *v.* United States, 340 U.S. 367, 370 (1951); United States *v.* Monia, 317 U.S. 424, 427 (1943).

[51] Hoffman *v.* United States, 341 U.S. 479, 486 (1951); Mason *v.* United States, 244 U.S. 362, 363 (1917).

[52] Rogers *v.* United States, 340 U.S. 367, 371 (1951); United States *v.* Murdock, 284 U.S. 141, 148 (1931).

[53] Brown *v.* Walker, 161 U.S. 591, 598-599 (1896).

[54] *Cf.* Burdick *v.* United States, 236 U.S. 79 (1915); and Biddle *v.* Perovich, 274 U.S. 480 (1927).

[55] United States *v.* Murdock, 284 U.S. 141, 149 (1931).

[56] Feldman *v.* United States, 322 U.S. 487 (1944).

[57] Brown *v.* Walker, 161 U.S. 591 (1896); Johnson *v.* United States, 318 U.S. 189 (1943).

[58] *Cf.* Twining *v.* New Jersey, 211 U.S. 78 (1908). However, a defendant in a prosecution by the United States enjoys a statutory right to have the jury instructed that his failure to testify creates no presumption against him. 28 U.S.C. 632; Bruno *v.* U.S., 308 U.S. 287 (1939). *See also* 318 U.S. at 196.

[59] Pierce *v.* United States, 160 U.S. 355 (1896); Wilson *v.* United States, 162 U.S. 613 (1896); United States *v.* Mitchell, 322 U.S. 65 (1944).

[60] 318 U.S. 332 (1943).

[61] *Ibid.*, 340. In Upshaw *v.* United States, 335 U.S. 410 (1948), a sharply divided Court found the McNabb case inapplicable to a case in which respondent, while under arrest for assault with intent to rape, was brought, by extended questioning, to confess having previously committed murder in an attempt to rape.

[62] Sullivan *v.* United States, 274 U.S. 259, 263 264 (1927).

[63] Blau *v.* United States, 340 U.S. 159 (1950). *See also* Blau *v.* United States, 340 U.S. 332 (1951); Rogers *v.* United States, 340 U.S. 367 (1951); Dennis *v.* United States, 341 U.S. 494 (1951).

[64] Holt *v.* United States, 218 U.S. 245 (1910).

[65] Rochin *v.* California, 342 U.S. 165 (1952).

[66] Re Harris, 221 U.S. 274, 279 (1911).

[67] Dier *v.* Banton, 262 U.S. 147 (1923).

[68] Re Fuller, 262 U.S. 91 (1923).

[69] Arndstein *v.* McCarthy, 254 U.S. 71 (1920).

[70] McCarthy *v.* Arndstein, 262 U.S. 355 (1923).

[71] McCarthy *v.* Arndstein, 266 U.S. 34 (1924).

[72] Hale *v.* Henkel, 201 U.S. 43 (1906); Wilson *v.* United States, 221 U.S. 361 (1911); Oklahoma Press Pub. Co. *v.* Walling, 327 U.S. 186 (1946).

[73] United States *v.* White, 322 U.S. 694 (1944).

[74] Rogers *v.* United States, 340 U.S. 367, 372 (1951).

[75] *See* pp. 825-828 *ante*.

[76] 335 U.S. 1 (1948).

[77] Ibid. 33. In a dissenting opinion Justice Frankfurter argued: "The underlying assumption of the Court's opinion is that all records which Congress in the exercise of its constitutional powers may require individuals to keep in the conduct of their affairs, because those affairs also have aspects of public interest, become 'public' records in the sense that they fall outside the constitutional protection of the Fifth Amendment. The validity of such a doctrine lies in the scope of its implications. The claim touches records that may be required to be kept by federal regulatory laws, revenue measures, labor and census legislation in the conduct of business which the understanding and feeling of our people still treat as private enterprise, even though its relations to the public may call for governmental regulation, including the duty to keep designated records.... If Congress by the easy device of requiring a man to keep the private papers that he has customarily kept can render such papers 'public' and nonprivileged, there is little left to either the right of privacy or the constitutional privilege." Ibid. 70.

[78] The Institutes, Part 2, 50-51 (1669).

[79] On the above *see* especially Justice Harlan's dissenting opinion in Hurtado *v.* California, 110 U.S. 516, 538 (1884); *also* Den ex dem. Murray *v.* Hoboken Land & Improvement Co., 18 How. 272, 280 (1856); Twining *v.* New Jersey, 211 U.S. 78 (1908); *also* Corwin, Liberty Against Government (Louisiana State University Press), chap. III.

[80] Scott *v.* Sandford, 10 How. 393, 450 (1857).

[81] Adkins *v.* Children's Hospital, 261 U.S. 525 (1923). *See also* Adair *v.* United States, 208 U.S. 161 (1908); and Lochner *v.* New York, 198 U.S. 45 (1905).

[82] Den ex dem. Murray *v.* Hoboken Land & Improvement Co., 18 How. 272, 276 (1856).

[83] Union P.R. Co. *v.* United States (Sinking Fund Cases), 99 U.S. 700, 719 (1879).

[84] Wong Wing *v.* United States, 163 U.S. 228, 238 (1896).

[85] United States *v.* Ju Toy, 198 U.S. 253, 263 (1905); *cf.* Quon Quon Poy *v.* Johnson, 273 U.S. 352 (1927).

[86] Wight *v.* Davidson, 181 U.S. 371, 384 (1901).

[87] Lovato *v.* New Mexico, 242 U.S. 199, 201 (1916).

[88] Public Utility Comrs. *v.* Ynchausti & Co., 251 U.S. 401, 406 (1920).

[89] Johnson *v.* Eisentrager, 339 U.S. 763 (1950); *cf.* In re Yamashita, 327 U.S. 1 (1946). Both decisions were reached by a divided Court. In the Yamashita Case, Justices Rutledge and Murphy dissented on the ground that the due process clause applies to every human being, including enemy belligerents.

[90] Davidson *v.* New Orleans, 96 U.S. 97, 102 (1878). Public Clearing House *v.* Coyne, 194 U.S. 497, 508 (1904).

[91] Ex parte Wall, 107 U.S. 265, 289 (1883).

[92] Interstate Commerce Commission *v.* Brimson, 154 U.S. 447, 489 (1894); Cooke *v.* United States, 267 U.S. 517, 537 (1925).

[93] Ex parte Wall, 107 U.S. 265 (1883).

[94] Reaves *v.* Ainsworth, 219 U.S. 296, 304 (1911). *See also* Ex parte Reed, 100 U.S. 13 (1879); Johnson *v.* Sayre, 158 U.S. 109 (1895); Mullan *v.* United States, 212 U.S. 516 (1909); United States ex rel. Creary *v.* Weeks, 259 U.S. 336 (1922).

[95] Kahn *v.* Anderson, 255 U.S. 1 (1921).

[96] Crain *v.* United States, 162 U.S. 625, 645 (1896).

[97] Hopt *v.* Utah, 110 U.S. 574, 579 (1884).

[98] Blackmer *v.* United States, 284 U.S. 421, 440 (1932).

[99] Hovey *v.* Elliott, 167 U.S. 409, 417 (1897).

[100] Beall *v.* New Mexico ex rel. Griffin, 16 Wall. 535 (1873).

[101] United Surety Co. *v.* American Fruit Product Co., 238 U.S. 140 (1915).

[102] Helis *v.* Ward, 308 U.S. 365 (1939).

[103] Fayerweather *v.* Ritch, 195 U.S. 276 (1904).

[104] Hanover Nat. Bank *v.* Moyses, 186 U.S. 181, 192 (1902).

[105] Parsons *v.* District of Columbia, 170 U.S. 45 (1898).

[106] Wright *v.* Davidson, 181 U.S. 371 (1901).

[107] Jones *v.* Buffalo Creek Coal & Coke Co., 245 U.S. 328 (1917).

[108] Luria *v.* United States, 231 U.S. 9 (1913).

[109] Yee Hem *v.* United States, 268 U.S. 178 (1925).

[110] Tot *v.* United States, 319 U.S. 463 (1943).

[111] Opp Cotton Mills *v.* Administrator, 312 U.S. 126, 152, 153 (1941).

[112] 321 U.S. 503 (1944).

[113] Ibid. 521.

[114] Consolidated Edison Co. *v.* National Labor Relations Board, 305 U.S. 197 (1938).

[115] Central of Georgia R. Co. *v.* Wright, 207 U.S. 127, 136, 138, 142 (1907); Lipke *v.* Lederer, 259 U.S. 557, 562 (1922).

[116] Phillips *v.* Comr. of Internal Revenue, 283 U.S. 589 (1931). *Cf.* Springer *v.* United States, 102 U.S. 586, 593 (1881); and Passavant *v.* United States, 148 U.S. 214 (1893).

[117] Wong Yang Sung *v.* McGrath, 339 U.S. 33, 50 (1950).

[118] Morgan *v.* United States, 304 U.S. 1, 18-19 (1938).

[119] National Labor Relations Board *v.* Mackay Co., 304 U.S. 333, 349-350 (1938).

[120] Western Paper Makers' Chemical Co. *v.* United States, 271 U.S. 268 (1926). *See also* United States *v.* Abilene & S.R. Co., 265 U.S. 274, 288 (1924).

[121] Consolidated Edison Co. *v.* National Labor Relations Board, 305 U.S. 197, 229-230 (1938).

[122] Londoner *v.* Denver, 210 U.S. 373 (1908).

[123] Federal Communications Commission *v.* WJR, 337 U.S. 265, 274-277 (1949).

[124] Ibid. 276. "The requirements imposed by the guaranty [of due process of law] are not technical, nor is any particular form of procedure necessary." Inland Empire Council *v.* Millis, 325 U.S. 697, 710 (1945). *See* Administrative Procedure Act, 60 Stat. 237 (1946); 5 U.S.C. §§ 1001-1011.

[125] 298 U.S. 38 (1936).

[126] Ibid. 51-54. Justices Brandeis, Stone and Cardozo, while concurring in the result, took exception to this proposition.

[127] Federal Power Commission *v.* Natural Gas Pipeline Co., 315 U.S. 575, 586 (1942); Federal Power Commission *v.* Hope Natural Gas Co., 320 U.S. 591 (1944).

[128] Federal Power Commission *v.* Hope Natural Gas Co., 320 U.S. 591, 602 (1944).

[129] 327 U.S. 1 (1946).

[130] 339 U.S. 103 (1950).

[131] Ibid. 111.

[132] 339 U.S. 703 (1950). Justices Black, Douglas and Burton dissented.

[133] United States *v.* Ju Toy, 198 U.S. 253, 263 (1905). *See also* Yamataya *v.* Fisher, 189 U.S. 86, 100 (1903). *Cf.* United States ex rel. Knauff *v.* Shaughnessy, 338 U.S. 537 (1950).

[134] Oceanic Steam Navig. Co. *v.* Stranahan, 214 U.S. 320 (1909).

[135] Kwock Jan Fat *v.* White, 253 U.S. 454, 457 (1920). *See also* Chin Yow *v.* United States, 208 U.S. 8 (1908).

[136] United States *v.* Sing Tuck, 194 U.S. 161 (1904). *See also* Quon Quon Poy *v.* Johnson, 273 U.S. 352, 358 (1927).

[137] Zakonaite *v.* Wolf, 226 U.S. 272 (1012).

[138] 339 U.S. 33 (1950).

[139] 60 Stat. 237 (1946); 5 U.S.C. § 1001 *et seq.* (1946).

[140] United States ex rel. Vajtauer *v.* Comr. of Immigration, 273 U.S. 103, 106 (1927). *See also* Mahler *v.* Eby, 264 U.S. 32, 41 (1924).

[141] 198 U.S. 253 (1905).

[142] Ng Fung Ho *v.* White, 259 U.S. 276, 281 (1922).

[143] Ludecke *v.* Watkins, 335 U.S. 160 (1948). Three of the four dissenting Justices, Justices Douglas, Murphy and Rutledge, argued that even an enemy alien could not be deported without a fair hearing.

[144] Steward Machine Co. *v.* Davis, 301 U.S. 548, 584-585 (1937); Currin *v.* Wallace, 306 U.S. 1, 14 (1939); Sunshine Anthracite Coal Co. *v.* Adkins, 310 U.S. 381, 401 (1940); Detroit Bank *v.* United States, 317 U.S. 329, 337, 338 (1943).

[145] Hill *v.* United States ex rel. Weiner, 300 U.S. 105, 109 (1937).

[146] District of Columbia *v.* Brooke, 214 U.S. 138 (1909).

[147] Panama R. Co. *v.* Johnson, 264 U.S. 375, 392 (1924).

[148] United States *v.* Rock Royal Co-operative, 307 U.S. 533, 562, 565 (1939).

[149] Currin *v.* Wallace, 306 U.S. 1 (1939).

[150] Detroit Bank *v.* United States, 317 U.S. 329 (1943).

[151] Hurd *v.* Hodge, 334 U.S. 24 (1948).

[152] Thiel *v.* Southern Pacific Co., 328 U.S. 217 (1946).

[153] 323 U.S. 192 (1944).

[154] Ibid. 198, 199.

[155] Ibid. 208, 209. *Cf.* the following sentence from the concurring opinion of Justice Jackson in Railway Express Agency, Inc. *v.* New York, 336 U.S. 106, 112 (1949): "I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation."

[156] 208 U.S. 161, 174 (1908).

[157] 313 U.S. 177, 187 (1941).

[158] 261 U.S. 525, 546 (1923).

[159] 300 U.S. 379, 400 (1937).

[160] Addyston Pipe and Steel Co. *v.* United States, 175 U.S. 211, 229 (1899).

[161] Baltimore & O.R. Co. *v.* Interstate Commerce Commission, 221 U.S. 612 (1911); Wilson *v.* New, 243 U.S. 322 (1917); Ellis *v.* United States, 206 U.S. 246 (1907). *See also* United States *v.* Garbish, 222 U.S. 257 (1911).

[162] Patterson *v.* The "Eudora," 190 U.S. 169 (1903).

[163] Philadelphia, B. & W.R. Co. *v.* Schubert, 224 U.S. 603 (1912).

[164] Texas & N.O.R. Co. *v.* Brotherhood of Railway & S.S. Clerks, 281 U.S. 548 (1930); Virginian R. Co. *v.* System Federation, 300 U.S. 515, 559 (1937); National Labor Relations Board *v.* Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[165] Highland *v.* Russell Car & Snow Plow Co., 279 U.S. 253, 261 (1929); United States *v.* Rock Royal Co-operative, 307 U.S. 533 (1939); Sunshine Anthracite Coal Co. *v.* Adkins, 310 U.S. 381 (1940); Bowles *v.* Willingham, 321 U.S. 503 (1944).

[166] Farrington *v.* Tokushige, 273 U.S. 284 (1927).

[167] Yu Cong Eng *v.* Trinidad, 271 U.S. 500, 525 (1926).

[168] Fleming *v.* Rhodes, 331 U.S. 100, 107 (1947).

[169] Woods *v.* Stone, 333 U.S. 472 (1948).

[170] 332 U.S. 194, 203 (1947).

[171] Knox *v.* Lee, 12 Wall. 457, 551 (1871).

[172] Norman *v.* Baltimore & O.R. Co., 294 U.S. 240 (1935).

[173] 44 Stat. 1424 (1927), 33 U.S.C. 901 *et seq.* (1946).

[174] Paramino Lumber Co. *v.* Marshall, 309 U.S. 370 (1940).

[175] Mulford *v.* Smith, 307 U.S. 38 (1939).

[176] McFaddin *v.* Evans-Snider-Buel Co., 185 U.S. 505 (1902).

[177] Montoya *v.* Gonzales, 232 U.S. 375 (1914).

[178] Ochoa *v.* Hernandez y Morales, 230 U.S. 139 (1913).

[179] United States ex rel. Burnett *v.* Teller, 107 U.S. 64, 68 (1883).

[180] Oregon & C.R. Co. *v.* United States, 243 U.S. 549 (1917).

[181] Capital Trust Co. *v.* Calhoun, 250 U.S. 208 (1919).

[182] Frisbie *v.* United States, 157 U.S. 160 (1895); *see also* Margolin *v.* United States, 269 U.S. 93 (1925); Hines *v.* Lowrey, 305 U.S. 85 (1938).

[183] Wickard *v.* Filburn, 317 U.S. 111 (1942).

[184] Noble *v.* Union River Logging R. Co., 147 U.S. 165 (1893).

[185] Danzer Co. *v.* Gulf & S.I.R. Co., 268 U.S. 633 (1925).

[186] Lynch *v.* United States, 292 U.S. 571, 579 (1934). *See also* Perry *v.* United States, 294 U.S. 330 (1935).

[187] Louisville Joint Stock Land Bank *v.* Radford, 295 U.S. 555 (1935).

[188] Wright *v.* Mountain Trust Co., 300 U.S. 440 (1937).

[189] Continental Illinois Nat. Bank & Trust Co. *v.* Chicago R.I. & P.R. Co., 294 U.S. 648 (1935).

[190] Kuehner *v.* Irving Trust Co., 299 U.S. 445 (1937).

[191] Re 620 Church Street Bldg. Corp., 299 U.S. 24 (1936).

[192] Lynch *v.* United States, 292 U.S. 571, 581 (1934).

[193] Dodge *v.* Osborn, 240 U.S. 118 (1916).

[194] Graham *v.* Goodcell, 228 U.S. 409 (1931).

[195] Anniston Mfg. Co. *v.* Davis, 301 U.S. 337 (1937).

[196] United States *v.* Heinszen & Co., 206 U.S. 370, 386 (1907).

[197] United States *v.* New York & C. Mail S.S. Co., 269 U.S. 304 (1925).

[198] United States *v.* Carolene Products Co., 304 U.S. 144 (1938); Carolene Products Co. *v.* United States, 323 U.S. 18 (1944).

[199] Kentucky Whip Collar Co. *v.* Illinois C.R. Co., 299 U.S. 334 (1937).

[200] Virginian R. Co. *v.* System Federation, 300 U.S. 515, 559 (1937); National Labor Relations Board *v.* Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[201] National Labor Relations Board *v.* Stowe Spinning Co., 336 U.S. 226 (1949).

[202] National Labor Relations Board *v.* Mackay Co., 304 U.S. 333 (1938).

[203] Woods *v.* Miller, 333 U.S. 138, 146 (1948). *See also* Bowles *v.* Willingham, 321 U.S. 503 (1944).

[204] Ex parte Jackson, 96 U.S. 727 (1878).

[205] Public Clearing House *v.* Coyne, 194 U.S. 497 (1904); sustained in Donaldson *v.* Read Magazine, 333 U.S. 178 (1948).

[206] 194 U.S. 497, 505-506.

[207] American School of Magnetic Healing *v.* McAnnulty, 187 U.S. 94 (1902).

[208] United States ex rel. Milwaukee Social Democratic Pub. Co. *v.* Burleson, 255 U.S. 407 (1921).

[209] St. Joseph Stock Yards Co. *v.* United States, 298 U.S. 38 (1936); Denver Union Stock Yards Co. *v.* United States, 304 U.S. 470 (1938).

[210] 320 U.S. 591 (1944). The result of this case had been foreshadowed by the opinion of Justice Stone in Federal Power Commission *v.* Natural Gas Pipeline Co., 315 U.S. 575, 586 (1942) to the effect that the Commission was not bound to the use of any single formula or combination of formulas in determining rates.

[211] 320 U.S. 591, 602, 605 (1944).

[212] American Telephone & Telegraph Co. *v.* United States, 299 U.S. 232 (1936); United States *v.* New York Telephone Co., 326 U.S. 638 (1946); Northwestern Electric Co. *v.* Federal Power Commission, 321 U.S. 119 (1944).

[213] Valvoline Oil Co. *v.* United States, 308 U.S. 141 (1939); Champlin Refining Co. *v.* United States, 329 U.S. 29 (1946).

[214] Isbrandtsen-Moller Co. *v.* United States, 300 U.S. 139, 146 (1937).

[215] St. Louis S.W. Ry. Co. *v.* United States, 245 U.S. 136, 143 (1917).

[216] Akron C. & Y.R. Co. *v.* United States, 261 U.S. 184 (1923).

[217] Dayton-Goose Creek R. Co. *v.* United States, 263 U.S. 456, 481, 483 (1924).

[218] Chicago, I. & L.R. Co. *v.* United States, 270 U.S. 287 (1926). *Cf.* Seaboard Air Line R. Co. *v.* United States, 254 U.S. 57 (1920).

[219] United States *v.* Berwind-White Coal Mine Co., 274 U.S. 564, 575 (1927).

[220] United States ex rel. Attorney General *v.* Delaware & Hudson Co., 213 U.S. 366, 405, 411, 415 (1909).

[221] United States *v.* Lowden, 308 U.S. 225 (1939).

[222] Louisville & N.R. Co. *v.* Mottley, 219 U.S. 467 (1911).

[223] Chicago, R.I. & P.R. Co. *v.* United States, 284 U.S. 80 (1931).

[224] Railroad Retirement Board *v.* Alton R. Co., 295 U.S. 330 (1935).

[225] United States *v.* Bennett, 232 U.S. 299, 307 (1914).

[226] Cook *v.* Tait, 265 U.S. 47 (1924).

[227] Helvering *v.* Lerner Stores Corp., 314 U.S. 463, 468 (1941).

[228] Brushaber *v.* Union P.R. Co., 240 U.S. 1, 24 (1916).

[229] McCray *v.* United States, 195 U.S. 27, 61 (1904).

[230] Treat *v.* White, 181 U.S. 264 (1901).

[231] Flint *v.* Stone Tracy Co., 220 U.S. 107 (1911).

[232] National Paper & Type Co. *v.* Bowers, 266 U.S. 373 (1924).

[233] Billings *v.* United States, 232 U.S. 261, 282 (1914).

[234] Steward Machine Co. *v.* Davis, 301 U.S. 548 (1937); Helvering *v.* Davis, 301 U.S. 619 (1937).

[235] Bromley *v.* McCaughn, 280 U.S. 124 (1929).

[236] Haavik *v.* Alaska Packers' Association, 263 U.S. 510 (1924).

[237] Alaska Fish Salting & By-Products Co. *v.* Smith, 255 U.S. 44 (1921).

[238] La Belle Iron Works *v.* United States, 256 U.S. 377 (1921).

[239] Helvering *v.* Northwest Steel Mills, 311 U.S. 46 (1940).

[240] Fernandez *v.* Wiener, 326 U.S. 340 (1945); *cf.* Coolidge *v.* Long, 282 U.S. 582 (1931).

[241] Untermeyer *v.* Anderson, 276 U.S. 440 (1928). *See also* Blodgett *v.* Holden, 275 U.S. 142 (1927); Nichols *v.* Coolidge, 274 U.S. 531 (1927).

[242] Heiner *v.* Donnan, 285 U.S. 312 (1932).

[243] United States *v.* Hudson, 299 U.S. 498 (1937). *See also* Stockdale *v.* Insurance Companies, 20 Wall. 323, 331, 341 (1874); Brushaber *v.* Union Pac. R.R., 240 U.S. 1, 20 (1916); Lynch *v.* Hornby, 247 U.S. 339, 343 (1918).

[244] Cooper *v.* United States, 280 U.S. 409 (1930); *see also* Reinecke *v.* Smith, 289 U.S. 172 (1933).

[245] Helvering *v.* Mitchell, 303 U.S. 391 (1938).

[246] Helvering *v.* Nat. Grocery Co., 304 U.S. 282 (1938).

[247] Patton *v.* Brady, 184 U.S. 608 (1902).

[248] Tyler *v.* United States, 281 U.S. 497 (1930); United States *v.* Jacobs, 306 U.S. 363 (1939).

[249] Reinecke *v.* Smith, 289 U.S. 172 (1933).

[250] Tiger *v.* Western Investment Co., 221 U.S. 286 (1911). *See also* Brader *v.* James, 246 U.S. 88 (1918); Williams *v.* Johnson, 239 U.S. 414 (1915); Lone Wolf *v.*. Hitchcock, 187 U.S. 553 (1903).

[251] Choate *v.* Trapp, 224 U.S. 665 (1912). *See also* English *v.* Richardson, 224 U.S. 680 (1912).

[252] Garfield *v.* United States, 211 U.S. 249 (1908). *See also* United States ex rel. Turner *v.* Fisher, 222 U.S. 204 (1911).

[253] Winton *v.* Amos, 255 U.S. 373 (1921).

[254] United States ex rel. Brown *v.* Lane, 232 U.S. 598 (1914).

[255] Walker *v.* McLoud, 204 U.S. 302, 309 (1907); Carpenter *v.* Shaw, 280 U.S. 363 (1930).

[256] United States *v.* Jones, 109 U.S. 513, 518 (1883); United States *v.* Carmack,

329 U.S. 230, 241 (1946).

[257] United States *v.* Lynah, 188 U.S. 445, 465 (1903).

[258] Kohl *v.* United States, 91 U.S. 367, 374 (1876).

[259] Chappell *v.* United States, 160 U.S. 499, 510 (1896).

[260] Oklahoma *v.* Atkinson Co., 313 U.S. 508, 534 (1941).

[261] United States *v.* Chemical Foundation, 272 U.S. 1, 11 (1926). *See also* Brown *v.* U.S., 8 Cr. 110 (1814); Page (Miller) *v.* United States, 11 Wall. 268, 304 (1871); Woodson *v.* Deutsche G. & S.S.V. Roessler, 292 U.S. 449 (1934); United States *v.* Dunnington, 146 U.S. 338 (1892); Cummings *v.* Deutsche Bank, 300 U.S. 115 (1937).

[262] Stoehr *v.* Wallace, 255 U.S. 239, 245 (1921).

[263] Silesian-American Corp. *v.* Clark, 332 U.S. 469 (1947); Becker Steel Co. *v.* Cummings, 296 U.S. 74 (1935).

[264] Russian Volunteer Fleet *v.* United States, 282 U.S. 481 (1931), followed in Guessefeldt *v.* McGrath, 342 U.S. 308 (1952).

[265] Shoemaker *v.* United States, 147 U.S. 282, 298 (1893).

[266] 327 U.S. 546 (1946).

[267] Ibid. 551.

[268] Ibid. 556-557; citing United States *v.* Gettysburg Electric R. Co., 160 U.S. 668, 680 (1896); Rindge Co. *v.* Los Angeles County, 262 U.S. 700, 709 (1923); Old Dominion Land Co. *v.* United States, 269 U.S. 55, 66 (1925); Cincinnati *v.* Vester, 281 U.S. 439, 446 (1930).

[269] 327 U.S. 546, 557-558.

[270] United States *v.* Gettysburg Electric R. Co., 160 U.S. 668 (1896).

[271] Brown *v.* United States, 263 U.S. 78 (1923).

[272] Monongahela Nav. Co. *v.* United States, 148 U.S. 312, 345 (1893).

[273] James *v.* Campbell, 104 U.S. 356, 358 (1882). *See also* Hollister *v.* Benedict & B. Mfg. Co., 113 U.S. 59, 67 (1885).

[274] Omnia Commercial Co. *v.* United States, 261 U.S. 502 (1923).

[275] International Paper Co. *v.* United States, 282 U.S. 399 (1931).

[276] Hannibal Bridge Co. *v.* United States, 221 U.S. 194, 205 (1911).

[277] Old Dominion Land Co. *v.* United States, 269 U.S. 55 (1925).

[278] United States *v.* Sponenbarger, 308 U.S. 256 (1939).

[279] 12 Wall. 457, 551 (1871).

[280] 331 U.S. 745 (1947).

[281] Ibid. 748.

[282] United States *v.* Causby, 328 U.S. 256 (1946).

[283] Portsmouth Harbor Land & Hotel Co. *v.* United States, 260 U.S. 327 (1922). *Cf.* Portsmouth Harbor Land & Hotel Co. *v.* United States, 250 U.S. 1 (1919); Peabody *v.* United States, 231 U.S. 530 (1913).

[284] Richards *v.* Washington Terminal Co., 233 U.S. 546 (1914).

[285] Gibson *v.* United States, 166 U.S. 269, 271, 272 (1897).

[286] 10 Wall. 557 (1871).

[287] Ibid. 563.

[288] United States *v.* Appalachian Electric Power Co., 311 U.S. 377, 407, 409 (1940).

[289] Oklahoma *v.* Atkinson Co., 313 U.S. 508, 523 (1941).

[290] United States *v.* Commodore Park, Inc., 324 U.S. 386 (1945).

[291] Lewis Blue Point Oyster Cultivation Co. *v.* Briggs, 229 U.S. 82 (1913).

[292] United States *v.* Chandler-Dunbar Co., 229 U.S. 53 (1913).

[293] United States *v.* Willow River Power Co., 324 U.S. 499 (1945).

[294] United States *v.* Appalachian Electric Power Co., 311 U.S. 377, 427 (1940).

[295] United States *v.* Lynah, 188 U.S. 445 (1903). *See also* Jacobs *v.* United States, 290 U.S. 13 (1933).

[296] United States *v.* Cress, 243 U.S. 316, 328, 329 (1917).

[297] United States *v.* Dickinson, 331 U.S. 745 (1947).

[298] United States *v.* Kansas City Ins. Co., 339 U.S. 799 (1950).

[299] United States *v.* Cress, 243 U.S. 316 (1917).

[300] Horstmann Co. *v.* United States, 257 U.S. 138 (1921).

[301] Bauman *v.* Ross, 167 U.S. 548 (1897); Sharp *v.* United States, 191 U.S. 341, 351-352, 354 (1903).

[302] United States *v.* Welch, 217 U.S. 333 (1910).

[303] Bauman *v.* Ross, 167 U.S. 548 (1897).

[304] Monongahela Nav. Co. *v.* United States, 148 U.S. 312, 326 (1893).

[305] Reichelderfer *v.* Quinn, 287 U.S. 315, 318 (1932).

[306] Sharp *v.* United States, 191 U.S. 341 (1903).

[307] Monongahela Nav. Co. *v.* United States, 148 U.S. 312, 326 (1893).

[308] United States ex rel. T.V.A. *v.* Powelson, 319 U.S. 266, 281 (1943); United States *v.* Miller, 317 U.S. 369, 375 (1943).

[309] United States ex rel. T.V.A. *v.* Powelson, 319 U.S. 266, 275 (1943); United States *v.* New River Collieries Co., 262 U.S. 341 (1923).

[310] United States *v.* Miller, 317 U.S. 369, 374 (1943). *See also* Olson *v.* United States, 292 U.S. 246 (1934). *Cf.* Kimball Laundry Co. *v.* United States, 338 U.S. 1 (1949).

[311] Boom Co. *v.* Patterson, 98 U.S. 403 (1879); McCandless *v.* United States, 298 U.S. 342 (1936).

[312] United States *v.* Chandler-Dunbar Co., 229 U.S. 53 (1913).

[313] United States *v.* John J. Felin & Co., 334 U.S. 624 (1948).

[314] United States *v.* Commodities Trading Corp., 339 U.S. 121 (1950).

[315] United States *v.* Cors, 337 U.S. 325, 333 (1949). In United States *v.* Toronto Nav Co., 338 U.S. 396 (1949) the Court reversed a decision of the Court of Claims which based an award for an obsolete Great Lakes car ferry in part on a capitalization of its prior earnings, and in part on isolated sales of similar vessels used between Florida and Cuba.

[316] Mitchell *v.* United States, 267 U.S. 341 (1925).

[317] United States *v.* General Motors Corp., 323 U.S. 373, 379 (1945).

[318] Ibid. 382-384.

[319] United States *v.* Petty Motor Co., 327 U.S. 372 (1946).

[320] 338 U.S. 1 (1949).

[321] 341 U.S. 114 (1951).

[322] Danforth *v.* United States, 308 U.S. 271, 284 (1939).

[323] United States *v.* Klamath Indians, 304 U.S. 119, 123 (1938); Jacobs *v.* United States, 290 U.S. 13, 17 (1933).

[324] Albrecht *v.* United States, 329 U.S. 599 (1947).

[325] Henkels *v.* Sutherland, 271 U.S. 298 (1926). *See also* Phelps *v.* United States, 274 U.S. 341 (1927).

[326] Monongahela Nav. Co. *v.* United States, 148 U.S. 312, 327 (1893).

[327] United States *v.* Jones, 109 U.S. 513, 519 (1883).

[328] Bauman *v.* Ross, 167 U.S. 548, 593 (1897).

[329] United States *v.* Lee, 106 U.S. 196, 220 (1882).

[330] Jacobs *v.* United States, 290 U.S. 13 (1933); United States *v.* Great Falls Mfg. Co., 112 U.S. 645 (1884).

[331] Hurley *v.* Kincaid, 285 U.S. 95 (1932).

[332] Cherokee Nation *v.* Southern Kansas R. Co., 135 U.S. 641, 659 (1890).

[333] United States *v.* Russell, 13 Wall. 623 (1871).

[334] Shoemaker *v.* United States, 147 U.S. 282, 302 (1893).

AMENDMENT 6

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RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS

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RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS

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AMENDMENT 6

> 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 defense.

Coverage of the Amendment

Criminal prosecutions in the District of Columbia[1] and in incorporated territories[2] must conform to this amendment, but those in unincorporated territories need not.[3] For this purpose, Alaska was held to be an incorporated territory even before the organization of its territorial government.[4] In in re Ross[5] the requirements of this amendment were held to cover only citizens and others within the United States or who are brought to the United States for trial for alleged offenses committed elsewhere, not to citizens residing or temporarily sojourning abroad.[6] Accordingly, laws passed to carry into effect treaties granting extraterritorial rights were not rendered unconstitutional by the fact that they did not secure to an accused the right to trial by jury.

Offenses Against the United States

There are no common law offenses against the United States. Only those acts which Congress has forbidden, with penalties for disobedience of its command, are crimes.[7] As used in the Constitution the word "crime" embraces only offenses of a serious character. Petty offenses may [Pg 878] be proceeded against summarily in any tribunal legally constituted for that purpose.[8] The nature of the act and the severity of punishment prescribed determine whether an offense is serious or petty. A penalty of $50 for a violation, not necessarily involving moral delinquency, of a revenue statute indicates only a petty offense.[9] The unlawful sale of the unused portion of railway excursion tickets without a license, is at most an infringement of local police regulations; and its moral quality is relatively inoffensive; it may therefore be tried without a jury.[10] But a charge of driving an automobile recklessly, so as to endanger life and property, is a "grave offense" for which a jury trial is requisite.[11] A conspiracy to invade the rights of another person also falls in that category.[12]

Actions to recover penalties imposed by act of Congress,[13] deportation proceedings[14] and contempt proceedings[15] for violation of an injunction have been held not to be criminal prosecutions. Only a prosecution which is technically criminal in its nature falls within the purview of Amendment VI.[16] The concept of a criminal prosecution is much narrower than that of a "criminal case" under the Fifth Amendment.[17]

Trial by Jury

The trial by jury required by the Constitution includes all the essential elements of jury trial which were recognized in this country and in England when the Constitution was adopted;[18] a jury must consist of twelve men, neither more nor less;[19] the trial must be held in the presence and under the superintendence of a judge having power to instruct the jurors as to the law and advise them in respect of the facts,[20] and the verdict must be unanimous.[21] But the requirement of a jury trial is not jurisdictional; it is a privilege which the defendant may waive with the consent of the Government and the approval of the court. There is no distinction [Pg 879] between a complete waiver of a jury and a consent to be tried by less than twelve men.[22] When a person is charged with more than one crime, the right to a speedy trial does not require that he be first tried on the earliest indictment; no constitutional right is violated by removing him to another jurisdiction for trial on a later indictment.[23]

Impartial Jury

"* * *, the guarantee of an impartial jury to the accused in a criminal prosecution, * * *, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offense charged. * * * To accord to the accused a right to be tried by a jury, in an appellate court, after he has been once fully tried otherwise than by a jury, in the court of original jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirements of the Constitution."[24]

The qualification of government employees to serve on juries in the District of Columbia has been the principal source of controversy concerning the meaning of the phrase "impartial jury." In 1909, the Supreme Court decided, on common law grounds, that such employees were disqualified in criminal proceedings instituted by the Government.[25] As the proportion of public to private employees increased, this decision created difficulties in securing properly qualified jurors. To meet the situation, Congress removed the disqualification by statute in 1935. In United States *v.* Wood,[26] the act was held valid as applied in a criminal prosecution for theft from a private corporation. By a narrow majority the Court has subsequently held that government employees as a class are not disqualified by an implied bias against a person accused of violating the federal narcotics statutes,[27] nor against an officer of the Communist party charged with willful failure to appear before a Congressional committee in compliance with a subpoena.[28] In both cases, the way was left open for a defendant to establish the disqualification of federal employees by adducing proof of actual bias.

The Constitution does not require Congress to allow peremptory challenge to jurors in criminal [Pg 880] cases. Consequently the contention that several defendants being tried together on a charge of conspiracy were denied a trial by an impartial jury because each was not allowed the full statutory number of peremptory challenges was without merit.[29] It is good ground for challenge for cause that a juror has formed an opinion as to the issue to be tried. But every opinion which a juror may entertain does not necessarily disqualify him. Upon the trial of the issue of fact raised by such a challenge, the Court must determine whether the nature and strength of the opinion are such as in law necessary to raise the presumption of partiality.[30] A member of the Socialist party is not denied any constitutional right by being tried by a jury composed exclusively of members of other parties and of property owners.[31]

Place of Trial

An accused cannot be tried in one district under an indictment showing that the offense was committed in another;[32] the locality in which the offense is charged to have been committed determines the place and court of trial.[33] In a prosecution for conspiracy, the accused may be tried in any State and district where an overt act was performed.[34] Where a United States Senator was indicted for agreeing to receive compensation for services to be rendered in a proceeding before a government department, and it appeared that a tentative arrangement for such services was made in Illinois and confirmed in St. Louis, the defendant was properly tried in St. Louis, although he was not physically present in Missouri when notice of ratification was dispatched.[35] The offense of obtaining transportation of property in interstate commerce at less than the carrier's published rates,[36] or the sending of excluded matter through the mails,[37] may be made triable in any district through which the forbidden transportation is conducted. By virtue of a presumption that a letter is delivered in the district to which it is addressed, the offense of scheming to defraud a corporation by mail was held to have been committed in that district although the letter was posted elsewhere.[38] The Constitution does not require any preliminary hearing before issuance of a warrant for removal of an accused to the court having jurisdiction of the charge.[39] The assignment of a district judge from one district to another, conformably to statute, does not create a new judicial district whose boundaries are undefined nor subject the accused to trial in a district not established when the offense with which he is charged was committed.[40] For offenses against federal laws not committed within any State, Congress has the sole power to prescribe the place of trial; such an offense is not local and may be tried at such place as Congress may designate.[41] The place of trial may be designated by [Pg 881] statute after the offense has been committed.[42]

Definition of Crime

The effect of the clause entitling an accused to know the nature and cause of the accusation against him commences with the statutes fixing or declaring offenses. It adopts the general rule of the common law that such statutes are not to be construed to embrace offenses which are not within their intention and terms. Under this clause it is necessary that a crime "be in some way declared by the legislative power"; it "cannot be constructed by the courts from any supposed intention of the legislature which the statute fails to state."[43] A criminal statute which is so vague that it leaves the standard of guilt to the "variant views of the different courts and juries which may be called on to enforce it"[44] cannot be squared with this provision. Thus it was held, in the United States v. Cohen Grocery Co.,[45] that a statute making it unlawful "for any person willfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" was unconstitutional because it was not "adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them."[46] But a provision of the Immigration Act[47] which makes it a felony for an alien against whom a specified order of deportation is pending to "willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure" is not, on its face, void for indefiniteness.[48]

An important aspect of this problem was presented, but not definitely settled, in Screws *v.* United States.[49] There State law enforcement officers had been convicted of violating a federal law making it a crime for anyone acting under color of any law willfully to deprive anyone of rights secured by the Constitution of the United States.[50] The indictment charged that in beating to death a man whom they had just arrested, these officers had deprived him of life without due process of law. The defendant claimed that the statute was unconstitutional insofar as it made criminal acts in violation of the due process clause, because that concept was too vague to supply an ascertainable standard of guilt.[51] Four opinions were written in the Supreme Court, no one of which obtained the concurrence of a majority of the Justices. To "avoid grave constitutional questions" four members construed the word "willfully" as "connoting a purpose to deprive a person of a specific constitutional right,"[52] and held that such "requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law saves the Act from any charge of unconstitutionality on the grounds of vagueness."[53] Justices Murphy and Rutledge considered the statute to be sufficiently definite with respect to the offense charged and thought it unnecessary to anticipate doubts that might arise in other cases.[54] However, to prevent a stalemate, Justice Rutledge voted with the four members who believed the case should be reversed to be tried again on their narrower interpretation of the statute. Justices Roberts, Frankfurter and Jackson found the act too indefinite to be rescued by a restrictive interpretation. With respect to the effect of the requirement of willfulness, they said: "If a statute does not satisfy the due-process requirement of giving decent advance notice of what it is which, if happening, will be visited with punishment, so that men may presumably have an opportunity to avoid the happening * * *, then 'willfully' bringing to pass such an undefined and too uncertain event cannot make it sufficiently definite and ascertainable. 'Willfully' doing something that is forbidden, when that something is not sufficiently defined according to the general conceptions of requisite certainty in our criminal law, is not rendered sufficiently definite by that unknowable having been done 'willfully.' It is true also of a statute that it cannot lift itself up by its bootstraps."[55] In Williams *v.* United States,[56] however, it was held by a sharply divided Court that § 20 did not err for vagueness where the indictment made it clear that the constitutional right violated by the defendant was immunity from the use of force and violence to obtain a confession, and this meaning was also made clear by the trial judge's charge to the jury.[57]

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Statutes prohibiting the coercion of employers to hire unneeded employees,[58] establishing minimum wages and maximum hours of service for persons engaged in the production of goods for interstate commerce,[59] forbidding undue or unreasonable restraints of trade,[60] making it unlawful to build fires near any forest or inflammable material,[61] banning the receipt of contributions by members of Congress from federal employees for any political purpose,[62] or penalizing the copying or taking of documents connected with the national defense, with intent, or reason to believe that they are to be used to the injury of the United States or to the advantage of a foreign nation,[63] have been held to be sufficiently definite to be constitutional. A provision penalizing excessive charges in connection with loans from the Home Owners Loan Corporation was not rendered indefinite by the exception of "ordinary fees for services actually rendered,"[64] nor was a statute forbidding misstatement of the quantity of the contents of a package wanting in certainty by reason of a proviso permitting "reasonable variations."[65]

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The constitutional right to be informed of the nature and cause of the accusation entitles the defendant to insist that the indictment apprise him of the crime charged with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution on the same charge.[66] No indictment is sufficient if it does not allege all of the ingredients which constitute the crime. Where the language of a statute is, according to the natural import of the words, fully descriptive of the offense, it is sufficient if the indictment follows the statutory phraseology;[67] but where the elements of the crime have to be ascertained by reference to the common law or to other statutes, it is not sufficient to set forth the offense in

the words of the statute; the facts necessary to bring the case within the statutory definition must also be alleged.[68] If an offense cannot be accurately and clearly described without an allegation that the accused is not within an exception contained in the statutes, an indictment which does not contain such allegation is defective.[69] Despite the omission of obscene particulars, an indictment in general language is good if the unlawful conduct is so described so as reasonably to inform the accused of the nature of the charge sought to be established against him.[70] The Constitution does not require the Government to furnish a copy of the indictment to an accused.[71]

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Right of Confrontation

The right of confrontation did not originate in the Sixth Amendment; it was a common law right having recognized exceptions. The purpose of the constitutional provision was to preserve that right, but not to broaden it or wipe out the exceptions.[72] The amendment does not accord a right to be apprised of the names of witnesses who appeared before a grand jury.[73] It does not preclude the admission of dying declarations,[74] nor of the stenographic report of testimony given at a former trial by a witness since deceased.[75] An accused who is instrumental in concealing a witness cannot complain of the admission of evidence to prove what that witness testified at a former trial on a different indictment.[76] If the absence of the witness is chargeable to the negligence of the prosecution, rather than to the procurement of the accused, evidence given in a preliminary hearing before a United States Commissioner cannot be used at the trial.[77] A statute which declared that the judgment of conviction against the principal felons should be conclusive evidence, in a prosecution against persons to whom they had transferred property, that the property had been stolen or embezzled from the United States, was held to contravene this clause.[78]

Assistance of Counsel

The Sixth Amendment withholds from the federal courts, in all criminal proceedings, the power to deprive an accused of his life or liberty unless he has waived, or waives, the assistance of counsel.[79] Since deportation proceedings are not criminal in character, the admission of testimony given by the alien during investigation prior to arrest did not render the hearing unfair, despite the fact that he had not been advised of his right to have counsel or to decline to answer questions as to his alienage.[80] The right to counsel is violated where, over the defendant's objection, the court requires his counsel to represent a co-defendant whose interest may possibly conflict with his;[81] likewise where the trial judge decided, without notice to a defendant and without his presence, that the latter had consented to be represented by counsel who also represented another defendant in the same case.[82] The right may be waived by a defendant whose education qualifies him to make an intelligent choice.[83] A sentence imposed upon a plea of guilty is invalid if such plea was entered through deception or coercion of the prosecuting attorney, or in reliance upon erroneous advice given by a lawyer in the employ of the Government, where the defendant did not have the assistance of counsel and had not understandingly waived the right to such assistance.[84]

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Notes

[1] Callan *v.* Wilson, 127 U.S. 540 (1888).

[2] Reynolds *v.* United States, 98 U.S. 145 (1879). *See also* Lovato *v.* New Mexico, 242 U.S. 199 (1916).

[3] Balzac *v.* Porto Rico, 258 U.S. 298, 304-305 (1922).

[4] Rassmussen *v.* United States, 197 U.S. 516 (1905).

[5] 140 U.S. 453 (1891).

[6] Ibid. 464.

[7] United States *v.* Hudson & Goodwin, 7 Cr. 32, 33 (1812); United States *v.* Coolidge, 1 Wheat. 415 (1816); United States *v.* Britton, 108 U.S. 199, 206 (1883); United States *v.* Eaton, 144 U.S. 677, 687 (1892).

[8] Callan *v.* Wilson, 127 U.S. 540, 552 (1888).

[9] Schick *v.* United States, 195 U.S. 65, 68 (1904).

[10] District of Columbia *v.* Clawans, 300 U.S. 617 (1937).

[11] District of Columbia *v.* Colts, 282 U.S. 63 (1930).

[12] Callan *v.* Wilson, 127 U.S. 540 (1888).

[13] Oceanic Navigation Co. *v.* Stranahan, 214 U.S. 320 (1909); Hepner *v.* United States, 213 U.S. 103 (1909); United States *v.* Regan, 232 U.S. 37 (1914).

[14] United States ex rel. Turner *v.* Williams, 194 U.S. 279, 289 (1904); Zakonaite *v.* Wolf, 226 U.S. 272 (1912).

[15] In re Debs, 158 U.S. 564, 594 (1895); Gompers *v.* United States, 233 U.S. 604 (1914); Myers *v.* United States, 264 U.S. 95 (1924).

[16] United States *v.* Zucker, 161 U.S. 475, 481 (1896).

[17] Counselman *v.* Hitchcock, 142 U.S. 547, 563 (1892).

[18] Patton *v.* United States, 281 U.S. 276 (1930).

[19] Thompson *v.* Utah, 170 U.S. 343, 350 (1898); Rassmussen *v.* United States, 197 U.S. 518 (1905).

[20] Capital Traction Co. *v.* Hof, 174 U.S. 1, 13 (1899).

[21] Maxwell *v.* Dow, 176 U.S. 581, 586 (1900); Andres *v.* United States, 333 U.S. 740 (1948).

[22] Patton *v.* United States, 281 U.S. 276 (1930).

[23] Beavers *v.* Haubert, 198 U.S. 77 (1905).

[24] Callan *v.* Wilson, 127 U.S. 540, 557 (1888).

[25] Crawford *v.* United States, 212 U.S. 183 (1909).

[26] 299 U.S. 123 (1936).

[27] Frazier *v.* United States, 335 U.S. 497 (1948).

[28] Dennis *v.* United States, 339 U.S. 162 (1950).

[29] Stilson *v.* United States, 250 U.S. 583, 586 (1919).

[30] Reynolds *v.* United States, 98 U.S. 145 (1879).

[31] Ruthenberg *v.* United States, 245 U.S. 480 (1918).

[32] Salinger *v.* Loisel, 265 U.S. 224 (1924).

[33] Beavers *v.* Henkel, 194 U.S. 73, 83 (1904).

[34] Brown *v.* Elliott, 225 U.S. 392 (1912); Hyde *v.* United States, 225 U.S. 347 (1912); Haas *v.* Henkel, 216 U.S. 462 (1910).

[35] Burton *v.* United States, 202 U.S. 344 (1906).

[36] Armour Packing Co. *v.* United States, 209 U.S. 56 (1908).

[37] United States *v.* Johnson, 323 U.S. 273, 274 (1944).

[38] Hagner *v.* United States, 285 U.S. 427, 429 (1932).

[39] Hughes *v.* Gault, 271 U.S. 142 (1926). *Cf.* Tinsley *v.* Treat, 205 U.S. 20 (1907); Beavers *v.* Henkel, 194 U.S. 73, 84 (1904).

[40] Lamar *v.* United States, 241 U.S. 103 (1916).

[41] Jones *v.* United States, 137 U.S. 202, 211 (1890); United States *v.* Dawson, 15 How. 467, 488 (1853).

[42] Cook *v.* United States, 138 U.S. 157, 182 (1891). *See also* United States *v.* Socony-Vacuum Oil Co., 310 U.S. 150, 250-254 (1940); *also* United States *v.* Johnson, 323 U.S. 273 (1944).

[43] United States *v.* Potter, 56 F. 83, 88 (1892). *See also* Viereck *v.* United States, 318 U.S. 236 (1943); Kraus Bros. *v.* United States, 327 U.S. 614, 621 (1946).

[44] United States *v.* Cohen Grocery Co., 264 F. 218, 220 (1920), affirmed 255 U.S. 81 (1921).

[45] 255 U.S. 81 (1921).

[46] Ibid. 89.

[47] 8 U.S.C. § 145 (c).

[48] United States *v.* Spector, 343 U.S. 169 (1952).

[49] 325 U.S. 91 (1945).

[50] Section 20 of the Criminal Code; 18 U.S.C. § 242.

[51] 325 U.S. 91, 94, 95.

[52] Ibid. 101.

[53] Ibid. 103.

[54] Ibid. 113, 135.

[55] Ibid. 154.

[56] 341 U.S. 97 (1951).

[57] *See also* Koehler et al. *v.* United States, 342 U.S. 852 (1951).

[58] United States *v.* Petrillo, 332 U.S. 1 (1947).

[59] United States *v.* Darby, 312 U.S. 100, 125 (1941).

[60] Nash *v.* United States, 229 U.S. 373 (1913).

[61] United States *v.* Alford, 274 U.S. 264 (1927).

[62] United States *v.* Wurzbach, 280 U.S. 396 (1930).

[63] Gorin *v.* United States, 312 U.S. 19 (1941).

[64] Kay *v.* United States, 303 U.S. 1 (1938).

[65] United States *v.* Shreveport Grain & Elevator Co., 287 U.S. 77 (1932).

[66] United States *v.* Cruikshank, 92 U.S. 542, 544, 558 (1876); United States *v.* Simmons, 96 U.S. 360 (1878); Bartell *v.* United States, 227 U.S. 427 (1913); Burton *v.* United States, 202 U.S. 344 (1906).

[67] Potter *v.* United States, 155 U.S. 438, 444 (1894).

[68] United States *v.* Carll, 105 U.S. 611 (1882).

[69] United States *v.* Cook, 17 Wall. 168, 174 (1872).

[70] Rosen *v.* United States, 161 U.S. 29, 40 (1896).

[71] United States *v.* Van Duzee, 140 U.S. 169, 173 (1891).

[72] Salinger *v.* United States, 272 U.S. 542, 548 (1926).

[73] Wilson *v.* United States, 221 U.S. 361 (1911).

[74] Kirby *v.* United States, 174 U.S. 47, 61 (1809); Robertson *v.* Baldwin, 165 U.S. 275, 282 (1897).

[75] Mattox *v.* United States, 156 U.S. 237, 240 (1895).

[76] Reynolds *v.* United States, 98 U.S. 145, 160 (1879).

[77] Motes *v.* United States, 178 U.S. 458 (1900).

[78] Kirby *v.* United States, 174 U.S. 47 (1899).

[79] Johnson *v.* Zerbst, 304 U.S. 458, 463 (1938).

[80] United States ex rel. Bilokumsky *v.* Tod, 263 U.S. 149 (1923).

[81] Glasser *v.* United States, 315 U.S. 60 (1942).

[82] United States *v.* Hayman, 342 U.S. 205 (1952).

[83] Adams *v.* United States, 317 U.S. 269 (1942).

[84] Walker *v.* Johnston, 312 U.S. 275 (1941); Von Moltke *v.* Gillies, 332 U.S. 708 (1948). *See also* United States ex rel. McCann *v.* Adams, 320 U.S. 220 (1943).

AMENDMENT 7

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CIVIL TRIALS

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CIVIL TRIALS

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AMENDMENT 7

> 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.

Trial by Jury in Civil Cases

ORIGIN AND PURPOSE OF THE AMENDMENT

Late in the Federal Convention it was moved that a clause be inserted in article III, section 2 of the draft Constitution to read "* * * and a trial by jury shall be preserved as usual in civil cases." The proposal failed when it was pointed out that the make-up and powers of juries differed greatly in different States and that a uniform provision for all States was impossible.[1] The objection evidently anticipated that in cases falling to their jurisdiction on account of the diversity of citizenship of the parties, the federal courts would conform their procedure to the laws of the several States.[2] The omission, however, raised an objection to the Constitution which "was pressed with an urgency and zeal * * * well-nigh preventing its ratification."[3] Nor was the agitation assuaged by Hamilton's suggestion in The Federalist that Congress would have ample power, in establishing the lower federal courts and in making "exceptions" to the Supreme Court's appellate jurisdiction, to safeguard jury trial in civil cases according to the standards of the common law.[4] His argument bore fruit, nevertheless, in the Seventh Amendment, whereby, in the words of the Court, the right of trial by jury is preserved as it "existed under the English common law when the amendment was adopted."[5]

TRIAL BY JURY, ELEMENTS OF, PRESERVED

"Trial by jury," in the sense of Amendment VII, "is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts and (except in acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence."[6] A further requisite is "that there shall be a unanimous verdict of the twelve jurors in all federal courts where a jury trial is held."[7] Assuming such a jury, the amendment has for its primary purpose the preservation of "* * * the common law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court."[8] But the amendment "does not exact the retention of old forms of procedure" nor does it "prohibit the introduction of new methods of ascertaining what facts are in issue * * *" or new rules of evidence.[9]

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TO WHAT COURTS AND CASES APPLICABLE

Amendment VII governs only courts which sit under the authority of the United States,[10] including courts in the territories[11] and the District of Columbia.[12] It does not apply to a State court even when it is enforcing a right created by federal statute.[13] Its coverage is "* * * limited to rights and remedies peculiarly legal in their nature, and such as it was proper to assert in courts of law and by the appropriate modes and proceedings of courts of law."[14] The term "common law" is used in contradistinction to suits in which equitable rights alone were recognized at the time of the framing of the amendment and equitable remedies were administered.[15] Hence it does not apply to cases where recovery of money damages is incident to equitable relief even though damages might have been recovered in an action at law.[16] Nor does it apply to cases in admiralty and maritime jurisdiction, in which the trial is by a court without a jury.[17] Nor does it reach statutory proceedings unknown to the common law, such as an application to a court of equity to enforce an order of an administrative body.[18]

CASES NOT GOVERNED BY THE AMENDMENT

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Omission of a jury has been upheld in the following instances on the ground that the suit in question was not a suit at common law within the meaning of the Seventh Amendment;

(1) Suits to enforce claims against the United States.[19]

(2) Suit authorized by Territorial law against a municipality, based upon a moral obligation only.[20]

(3) Suit to cancel a naturalization certificate for fraud.[21]

(4) Order of deportation of an alien.[22]

(5) Assessment of damages in patent infringement suit.[23]

(6) Longshoremen's and Harbor Workers' Compensation Act.[24]

(7) Jurisdiction of bankruptcy court to examine into reasonableness of fees paid by person for legal services in contemplation of bankruptcy.[25]

(8) Final decision of customs appraisers in regard to value of imports.[26]

It has been further held that there was no infringement of the constitutional right to trial by jury in the following circumstances:

(1) A territorial statute requiring specific answers to special interrogations, in addition to a general verdict.[27] [Pg 894]

(2) A rule of a District of Columbia court authorizing judgment by default in an action *ex contractu*, on failure to show by affidavit a good defense.[28]

(3) A federal court's observance of a State statute making a certified copy of a coroner's verdict *prima facie* evidence of the facts stated.[29]

(4) A federal statute (24 Stat. 379) giving *prima facie* effect to findings of the Interstate Commerce Commission.[30]

(5) An order of a District of Columbia court appointing an auditor in a law case to examine books and papers, make computations, hear testimony, and render a report which will serve as *prima facie* evidence of the facts found and conclusions reached, unless rejected by the court.[31]

(6) A decree of the Supreme Court enjoining, in the exercise of its original jurisdiction, the State of Louisiana from continuing to trespass upon lands under the ocean beyond its coasts and requiring the State to account for the money derived from that area.[32]

RESTRICTIVE FORCE OF THE AMENDMENT

But the absolute right to a trial of the facts by a jury may not be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Such aid in the federal courts must be sought in separate proceedings.[33] Federal statutes from Revised Statutes (§ 723) through the Judicial Code (§ 267), prohibiting courts of the United States to sustain suits in equity where the remedy is complete at law, serve to guard the right of trial by jury, and should be liberally construed.[34] So also should Equity Rule 30, requiring the answer to a bill in equity to state any counterclaim arising out of the same transaction; such rule was not intended to change the line between law and equity, and must be construed as referring to equitable counterclaims only.[35] Nor may the distinction between law and equity, so far as federal courts are concerned, be obliterated by State legislation.[36] So, where State law, in advance of judgment, treated the whole proceeding upon a simple contract, including determination of validity and of amount due, as an equitable proceeding, it brought the case within the federal equity jurisdiction on removal. Ascertainment of plaintiff's demand being properly by action at law, however, the fact that the equity court had power to summon a jury on occasion did not afford an equivalent of the right of trial by jury secured by the Seventh Amendment.[37] But where State law gives an equitable remedy, such as to quiet title to land, the federal courts will enforce it if it does not obstruct the rights of the parties as to trial by jury.[38] An order of the Court of Claims attempting to reinstate a dismissed case in violation of plaintiff's right to dismiss violates the latter's right to trial by jury and may be corrected by mandamus.[39] [Pg 895]

Judge and Jury

LINE DRAWN BY THE COMMON LAW

As was noted above, the primary purpose of the amendment was to preserve the historic line separating the province of the jury from that of the judge, without at the same time preventing procedural improvement which did not transgress this line. Elucidating this formula, the Court has achieved the following results: It is constitutional for a federal judge, in the course of trial, to express his opinion upon the facts, provided all questions of fact are ultimately submitted to the jury;[40] to call the jury's attention to parts of the evidence he deems of special importance,[41] being careful to distinguish between matters of law and matters of opinion in relation thereto;[42] to inform the jury when there is not sufficient evidence to justify a verdict, that such is the case;[43] to direct the jury, after plaintiff's case is all in, to return a verdict for the defendant on the ground of the insufficiency of the evidence;[44] to set aside a verdict which in his opinion is against the law or the evidence, and order a new trial;[45] to refuse defendant a new trial on the condition, accepted by plaintiff, that the latter remit a portion of the damages awarded him;[46] but not, on the other hand, to deny plaintiff a new trial on the converse condition, although

defendant accepted it.[47]

DIRECTED VERDICTS

[Pg 896]

In 1913 the Court held, in Slocum *v.* New York Life Insurance Company,[48] that where upon the evidence a federal trial court, sitting in New York, ought to have directed a verdict for one party but the jury found for the other contrary to the evidence, the amendment rendered it improper for a federal appeals court to order, in accordance with New York practice, the entry of a judgment contrary to the verdict; that the only course open to either court was to order a new trial. While plainly in accordance with the common law as it stood in 1791, the decision was five-to-four and was subjected to a heavy fire of professional criticism urging the convenience of the thing and the theory of the capacity of the common law for growth.[49] It has, moreover, been impaired, if not completely undermined by certain more recent holdings. In the first of these,[50] in which the same Justice spoke for the Court as in the Slocum Case, it was held that a trial court had the right to enter a judgment on the verdict of the jury for the plaintiff after overruling a motion by defendant for dismissal on the ground of insufficient evidence. The Court owned that its ruling was out of line with some of its expressions in the Slocum Case.[51] In the second case[52] the Court sustained a United States district court in Arkansas, in an action between parties of diverse citizenship, in rejecting a motion by defendant for dismissal and peremptorily directing a verdict for the plaintiff. The Supreme Court held that there was ample evidence to support the verdict and that the trial court, in following Arkansas procedure, had acted consistently with the Federal Conformity Act.[53] In the third case,[54] which involved an action against the Government for benefits under a war risk insurance policy which had been allowed to lapse, the trial court directed a verdict for the Government on the ground of the insufficiency of the evidence and was sustained in so doing by both the circuit court of appeals and the Supreme Court. Three Justices, speaking by Justice Black, dissented in an opinion in which it is asserted that "today's decision marks a continuation of the gradual process of judicial erosion which in [Pg 897] one-hundred-fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment."[55] That the Court should experience occasional difficulty in harmonizing the idea of preserving the historic common law covering the relations of judge and jury with the notion of a developing common law is not surprising.

WAIVER OF RIGHT OF TRIAL BY JURY

Parties have a right to enter into a stipulation waiving a jury and submitting the case to the court upon an agreed statement of facts, even without any legislative provision for waiver.[56] "* * * Congress has, by statute, provided for the trial of issues of fact in civil cases by the court without the intervention of a jury, only when the parties waive their right to a jury by a stipulation in writing. Revised Statutes sections 648, 649."[57] This statutory provision for a written stipulation, however, does not preclude other kinds of waivers.[58] But every reasonable presumption should be indulged against a waiver.[59] None is to be implied from a request for a directed verdict.[60]

APPEALS FROM STATE COURTS TO THE SUPREME COURT

The last clause of Amendment VII is not restricted in its application to suits at common law tried before juries in United States courts. It applies equally to a case tried before a jury in a State court and brought to the United States Supreme Court on appeal.[61]

Notes

[1] 2 Farrand, Records, 628.

[2] *See* Federal Conformity Act, 28 U.S.C.A. § 724.

[3] 2 Story, Commentaries on the Constitution, § 1763.

[4] Federalist, Nos. 81 and 83.

[5] Baltimore & C. Line *v.* Redman, 295 U.S. 654, 657 (1935); Parsons *v.* Bedford, 3 Pet. 433, 446-448 (1830).

[6] Capital Traction Co. *v.* Hof, 174 U.S. 1, 13, 14 (1899). Here it was held that a civil trial before a justice of the peace in the District of Columbia, although by a jury of twelve men, was not a jury trial in the sense of Amendment VII.

[7] Maxwell *v.* Dow, 176 U.S. 581, 586 (1900). *See also* American Publishing Co. *v.* Fisher, 166 U.S. 464 (1897); Springville *v.* Thomas, 166 U.S. 707 (1897); Andres *v.* United States, 333 U.S. 740, 748 (1948).

[8] Baltimore & C. Line *v.* Redman, 295 U.S. 654, 657 (1935); Walker *v.* New Mexico, & S.P.R. Co., 165 U.S. 593, 596 (1897); Gasoline Products Co. *v.* Champlin Ref. Co., 283 U.S. 494, 497-499 (1931); Dimick *v.* Schiedt, 293 U.S. 474, 476, 485-486 (1935).

[9] Gasoline Products Co. *v.* Champlin Ref. Co., 283 U.S. 494, 498 (1931); Ex

parte Peterson, 253 U.S. 300, 309 (1920).

[10] Pearson *v.* Yewdall, 95 U.S. 294, 296 (1877). *See also* Edwards *v.* Elliott, 21 Wall. 532, 557 (1874); Justices of the Sup. Ct. *v.* United States ex rel. Murray, 9 Wall. 274, 277 (1870); Walker *v.* Sauvinet, 92 U.S. 90 (1876); St. Louis & K.C. Land Co. *v.* Kansas City, 241 U.S. 419 (1916).

[11] Webster *v.* Reid, 11 How. 437, 460 (1851); Kennon *v.* Gilmer, 131 U.S. 22, 28 (1889).

[12] Capital Traction Co. *v.* Hof, 174 U.S. 1, 5 (1899).

[13] Minneapolis & St. L.R. Co. *v.* Bombolis, 241 U.S. 211 (1916), which involved The Federal Employers Liability Act of 1908. The ruling is followed in four other cases in the same volume. *See* ibid. 241, 261, 485 and 494.

[14] Shields *v.* Thomas, 18 How. 253, 262 (1856).

[15] Parsons *v.* Bedford, 3 Pet. 433, 447 (1830); Barton *v.* Barbour, 104 U.S. 126, 133 (1881).

[16] Clark *v.* Wooster, 119 U.S. 322, 325 (1886); Pease *v.* Rathbun-Jones Eng. Co., 243 U.S. 273, 279 (1917).

[17] Parsons *v.* Bedford, above; Waring *v.* Clarke, 5 How. 441, 460 (1847). *See also* The "Sarah," 8 Wheat. 390, 391 (1823), and cases there cited.

[18] Labor Board *v.* Jones & Laughlin, 301 U.S. 1, 48 (1937). *See also* Interstate Commerce Commission *v.* Brimson, 154 U.S. 447, 488 (1894); Yakus *v.* United States, 321 U.S. 414, 447 (1944).

[19] McElrath *v.* United States, 102 U.S. 426, 440 (1880). *See also* Galloway *v.* United States, 319 U.S. 372, 388 (1943).

[20] Guthrie Nat. Bank *v.* Guthrie, 173 U.S. 528, 534 (1899). *See also* United States *v.* Realty Co., 163 U.S. 427, 439 (1896); Jefferson City Gaslight Co. *v.* Clark, 95 U.S. 644, 653 (1877).

[21] Luria *v.* United States, 231 U.S. 9, 27 (1913).

[22] Gee Wah Lee *v.* United States, 25 F. (2d) 107 (1928); certiorari denied, 277 U.S. 608 (1928).

[23] Filer & S. Co. *v.* Diamond Iron Works, 270 F. 489 (1921); certiorari denied, 256 U.S. 691 (1921).

[24] Crowell *v.* Benson, 285 U.S. 22, 45 (1932).

[25] In re Wood and Henderson, 210 U.S. 246 (1908).

[26] Auffmordt *v.* Hedden, 137 U.S. 310, 329 (1890).

[27] Walker *v.* New Mexico & S.P.R. Co., 165 U.S. 593, 598 (1897).

[28] Fidelity & D. Co. *v.* United States, 187 U.S. 315, 320 (1902).

[29] Jensen *v.* Continental Life Ins. Co., 28 F. (2d) 545 (1928), certiorari denied, 279 U.S. 842 (1929).

[30] Meeker *v.* Lehigh Valley R. Co., 236 U.S. 434, 439 (1915).

[31] Ex parte Peterson, 253 U.S. 300 (1920).

[32] United States *v.* Louisiana, 339 U.S. 699 (1950).

[33] Scott *v.* Neely, 140 U.S. 106, 109 (1891). *See also* Bennett *v.* Butterworth, 11 How. 669 (1850); Hipp *v.* Babin, 19 How. 271, 278 (1857); Lewis *v.* Cocks, 23 Wall. 466, 470 (1874); Killian *v.* Ebbinghaus, 110 U.S. 568, 573 (1884); Buzard *v.* Houston, 119 U.S. 347, 351 (1886).

[34] Schoenthal *v.* Irving Trust Co., 287 U.S. 92, 94 (1932).

[35] American Mills Co. *v.* American Surety Co., 260 U.S. 360, 364 (1922). *See also* Stamey *v.* United States, 37 F. (2d) 188 (1929).

[36] Thompson *v.* Central Ohio R. Co., 6 Wall. 134 (1868).

[37] Whitehead *v.* Shattuck, 138 U.S. 146 (1891); Buzard *v.* Houston, 119 U.S. 347 (1886); Greeley *v.* Lowe, 155 U.S. 58, 75 (1894).

[38] Clark *v.* Smith, 13 Pet. 195 (1839); Holland *v.* Challen, 110 U.S. 15 (1884); Reynolds *v.* Crawfordsville First Nat. Bank, 112 U.S. 405 (1884); Chapman *v.* Brewer, 114 U.S. 158 (1885); Cummings *v.* Merchants Nat. Bank, 101 U.S. 153, 157 (1880); United States *v.* Landram, 118 U.S. 81 (1886); More *v.* Steinbach, 127 U.S. 70 (1888). *Cf.* Re Simons, 247 U.S. 231 (1918).

[39] Ex parte Skinner & Eddy Corp., 265 U.S. 86, 96 (1924).

[40] Vicksburg & M.R. Co. *v.* Putnam, 118 U.S. 545, 553 (1886); United States *v.* Reading Railroad, 123 U.S. 113, 114 (1887).

[41] 118 U.S. 545; where are cited Carver *v.* Jackson ex dem. Astor et al., 4 Pet. 1, 80 (1830); Magniac *v.* Thompson, 7 Pet. 348, 390 (1833); Mitchell *v.* Harmony, 13 How. 115, 131 (1852); Transportation Line *v.* Hope, 95 U.S. 297, 302 (1877).

[42] Games *v.* Dunn, 14 Pet. 322, 327 (1840).

[43] Sparf *v.* United States, 156 U.S. 51, 99-100 (1895); Pleasants *v.* Fant, 22 Wall. 116, 121 (1875); Randall *v.* Baltimore & Ohio R.R. Co., 109 U.S. 478, 482 (1883); Meehan *v.* Valentine, 145 U.S. 611, 625 (1892); Coughran *v.* Bigelow, 164 U.S. 301 (1896).

[44] Treat Mfg. Co. *v.* Standard Steel & Iron Co., 157 U.S. 674 (1895); Randall *v.* Baltimore & Ohio R.R. Co., 109 U.S. 478, 482 (1883) and cases there cited.

[45] Capital Traction Co. *v.* Hof, 174 U.S. 1, 13 (1899).

[46] Arkansas Land & Cattle Co. *v.* Mann, 130 U.S. 69, 74 (1889).

[47] Dimick *v.* Schiedt, 293 U.S. 474, 476-478 (1935).

[48] 228 U.S. 364 (1913).

[49] *See* Austin Wakeman Scott, Fundamentals of Procedure in Actions at Law (1922), 103 and articles there cited.

[50] Baltimore & C. Line *v.* Redman, 295 U.S. 654 (1935).

[51] Ibid. 661.

[52] Lyon *v.* Mutual Benefit Assn., 305 U.S. 484 (1939).

[53] 28 U.S.C.A. § 724.

[54] Galloway *v.* United States, 319 U.S. 372 (1943).

[55] Ibid. 397. As a matter of fact, the case being a claim against the United States need not have been tried by a jury except for the allowance of Congress.

[56] Henderson's Distilled Spirits, 14 Wall. 44, 53 (1872). *See also* Rogers *v.* United States, 141 U.S. 548, 554 (1891); Parsons *v.* Armor, 3 Pet. 413 (1830); Campbell *v.* Boyreau, 21 How. 223 (1859).

[57] Baylis *v.* Travelers' Ins. Co., 113 U.S. 316, 321 (1885), holding it error for a judge, in absence of any waiver, to find the facts and render judgment thereon.

[58] Duignan *v.* United States, 274 U.S. 195, 198 (1927), holding jury trial waived by an appearance and participation in the trial without demanding a jury.

[59] Hodges *v.* Easton, 106 U.S. 408, 412 (1883).

[60] Aetna Insurance Co. *v.* Kennedy, 301 U.S. 389 (1937).

[61] *See* Justices of the Sup. Ct. *v.* United States ex rel. Murray, 9 Wall. 274 (1870); Chicago, B. & Q.R. Co. *v.* Chicago, 166 U.S. 226, 242 (1897).

AMENDMENT 8

[Pg 899]

BAIL, FINES, AND OTHER PUNISHMENT FOR CRIME

[Pg 901]

PUNISHMENT FOR CRIME

[Pg 903]

AMENDMENT 8

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

When the Bill of Rights was being debated in Congress, two members took exception to this

proposal. One "objected to the words 'nor cruel and unusual punishment,' the import of them being too indefinite."[1] Another leveled a similar criticism at the entire amendment; "What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind."[2]

Excessive Bail

A United States District Court fixed the bail of twelve persons who were arrested on charge of conspiring to violate the Smith Act[3] at $50,000 each. This was on the theory advanced by the Government that each petitioner was a pawn in a conspiracy and in obedience to a superior would flee the jurisdiction, a theory to support which no evidence was introduced. The Court held that bail set before trial at a figure higher than reasonably calculated to assure the presence of defendant at his trial is "excessive" in the sense of the Eighth Amendment, and that the case of each defendant must be determined on its merits. Bail of larger amount than that usually fixed for serious crimes must be justified by evidence to the point.[4] But the power of the Attorney General, under § 23 of the Internal Security Act of 1950,[5] to hold in custody without bail, at his discretion, pending determination as to their deportability, aliens who are members of the Communist Party of the United States, is not unconstitutional.[6]

Excessive Fines

[Pg 904]

The Supreme Court has had little to say with reference to excessive fines or bail. In an early case it held that it had no appellate jurisdiction to revise the sentence of an inferior court, even though the excessiveness of the fine was apparent on the face of the record.[7] In a dissenting opinion in United States ex rel. Milwaukee Publishing Co. *v.* Burleson,[8] Justice Brandeis intimated that the additional mailing costs incurred by a newspaper to which the second-class mailing privilege had been denied constituted, in effect, a fine for a past offense which, since it was made to grow indefinitely each day, was an unusual punishment interdicted by the Constitution.[9]

Cruel and Unusual Punishments

The ban against "cruel and unusual punishment" has received somewhat greater attention. In Wilkerson *v.* Utah[10] the Court observed that: "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted, but it is safe to affirm that punishments of torture, ... and all others in the same line of unnecessary cruelty, are forbidden by that Amendment to the Constitution."[11] Shooting as a mode of executing the death penalty was sustained over the objection that it was cruel and unusual.

A partially successful effort has been made to enlarge the concept of unusual punishment to cover penalties which shock the sense of justice by their absolute or relative severity. Justice Field pointed the way for this development in his dissenting opinion in O'Neil *v.* Vermont,[12] wherein the majority refused to apply the Eighth Amendment to a State. With the concurrence of two other Justices he wrote that the amendment was directed "against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged."[13] Eighteen years later a divided Court condemned a Philippine statute prescribing fine and imprisonment of from twelve to twenty years for entry of a known false statement in a public record, on the ground that the gross disparity between this punishment and that imposed for other more serious fines made it cruel and unusual, and as such, repugnant to the Bill of Rights.[14] No constitutional infirmity was discovered in a measure punishing as a separate offense each act of placing a letter in the mails in pursuance of a single scheme to defraud.[15]

[Pg 905]

Notes

[1] 1 Annals of Congress 754 (1791).

[2] Ibid.

[3] 18 U.S.C. §§ 371, 2385.

[4] Stack *v.* Boyle, 342 U.S. 1 (1951).

[5] 8 U.S.C.A. § 156 (a) (1); 64 Stat. 1011.

[6] Carlson *v.* Landon, 342 U.S. 524 (1952).

[7] Ex parte Watkins, 7 Pet. 568, 574 (1833).

[8] 255 U.S. 407 (1921).

[9] Ibid. 435.

[10] 99 U.S. 130 (1879).

[11] Ibid. 135.

[12] 144 U.S. 323 (1892).

[13] Ibid. 339, 340.

[14] Weems *v.* United States, 217 U.S. 349, 371, 382 (1910).

[15] Badders *v.* United States, 240 U.S. 391 (1916). *Cf.* Donaldson *v.* Read Magazine, 333 U.S. 178, 191 (1948).

AMENDMENT 9

[Pg 907]

RIGHTS RETAINED BY THE PEOPLE

AMENDMENT 9 [Pg 909]

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The only right which the Supreme Court has explicitly acknowledged as protected by this amendment is the right to engage in political activity. That recognition was accorded by way of *dictum* in United Public Workers *v.* Mitchell, where the powers of Congress to restrict the political activities of federal employees was sustained.[1] An argument that the competition of the TVA in selling electricity at rates lower than those previously charged by private companies serving the area amounted to an indirect regulation of the rates of those companies and a destruction of the liberty said to be guaranteed by the Ninth Amendment to the people of the States to acquire property and employ it in a lawful business, was summarily rejected.[2] Previously the Court had upheld the right of the TVA to sell electricity, saying that the Ninth Amendment did not withdraw the right expressly granted by section 3 of article IV to dispose of property belonging to the United States.[3]

Notes

[1] 330 U.S. 75, 94 (1947).

[2] Tennessee Electric Power Co. *v.* T.V.A., 306 U.S. 118, 143, 144 (1939).

[3] Ashwander *v.* T.V.A., 297 U.S. 288, 330, 331 (1936). *See also* the language of Justice Chase in Calder *v.* Bull, 3 Dall. 386, 388 (1798); and of Justice Miller for the Court in Loan Asso. *v.* Topeka, 20 Wall. 655, 662-663 (1874).

AMENDMENT 10

[Pg 911]

RESERVED STATE POWERS

[Pg 913]

RESERVED STATE POWERS

[Pg 915]

AMENDMENT 10

> 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.

Scope and Purpose

"The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people. It added nothing to the instrument as originally ratified * * *."[1] That this

provision was not conceived to be a yardstick for measuring the powers granted to the Federal Government or reserved to the States was clearly indicated by its sponsor, James Madison, in the course of the debate which took place while the amendment was pending concerning Hamilton's proposal to establish a national bank. He declared that: "Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitutions of the States."[2] Nevertheless, for approximately a century, from the death of Marshall until 1937, the Tenth Amendment was frequently invoked to curtail powers expressly granted to Congress, notably the powers to regulate interstate commerce, to enforce the Fourteenth Amendment and to lay and collect taxes.

The first, and logically the strongest, effort to set up the Tenth Amendment as a limitation on federal power was directed to the expansion of that power by virtue of the necessary and proper clause. In McCulloch *v.* Maryland,[3] the Attorney-General of Maryland cited the charges made by the enemies of the Constitution that it contained "* * * a vast variety of powers, lurking under the generality of its phraseology, which would prove highly dangerous to the liberties of the people, and the rights of the states, * * *" and he cited the adoption of the Tenth Amendment to allay these apprehensions, in support of his contention that the power to create corporations was reserved by that amendment to the States.[4] Stressing the fact that this amendment, unlike the [Pg 916] cognate section of the Articles of Confederation, omitted the word "expressly" as a qualification of the powers granted to the National Government, Chief Justice Marshall declared that its effect was to leave 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 upon a fair construction of the whole instrument."[5]

The Taxing Power

Not until after the Civil War was the idea that the reserved powers of the States comprise an independent qualification of otherwise constitutional acts of the Federal Government actually applied to nullify, in part, an act of Congress. This result was first reached in a tax case—Collector *v.* Day.[6] Holding that a national income tax, in itself valid, could not be constitutionally levied upon the official salaries of State officers, Justice Nelson made the sweeping statement that "* * * the States within the limits of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States."[7] In 1939, Collector *v.* Day was expressly overruled.[8] Nevertheless, the problem of reconciling State and national interests still confronts the Court occasionally, and was elaborately considered in New York *v.* United States,[9] where, by a vote of six-to-two, the Court upheld the right of the United States to tax the sale of mineral waters taken from property owned by a State. Speaking for four members of the Court, Chief Justice Stone justified the tax on the ground that "The national taxing power would be unduly curtailed if the State, by extending its activities, could withdraw from it subjects of taxation traditionally within it."[10] Justices Frankfurter and Rutledge found in the Tenth Amendment "* * * no restriction upon Congress to include the States in levying a tax exacted equally from private persons upon the same subject matter."[11] Justices Douglas and Black dissented, saying: "If the power of the federal government to tax the States is conceded, the reserved power of the States guaranteed by the Tenth Amendment does not give them the independence which they have always been assumed to have."[12]

The Commerce Power [Pg 917]

A year before Collector *v.* Day was decided, the Court held invalid, except as applied in the District of Columbia and other areas over which Congress has exclusive authority, a federal statute penalizing the sale of dangerous illuminating oils.[13] The Court did not refer to the Tenth Amendment. Instead, it asserted that the "* * * express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested."[14] Similarly, in the Employers' Liability Cases,[15] an act of Congress making every carrier engaged in interstate commerce liable to "any" employee, including those whose activities related solely to intrastate activities, for injuries caused by negligence, was held unconstitutional by a closely divided Court, without explicit reliance on the Tenth Amendment. Not until it was confronted with the Child Labor Law, which prohibited the transportation in interstate commerce of goods produced in establishments in which child labor was employed, did the Court hold that the State police power was an obstacle to adoption of a measure which operated directly and immediately upon interstate commerce. In Hammer *v.* Dagenhart,[16] five members of the Court found in the Tenth Amendment a mandate to nullify this law as an unwarranted invasion of the reserved powers of the States. This decision was expressly overruled in United States *v.* Darby.[17]

During the twenty years following Hammer *v.* Dagenhart, a variety of measures designed to regulate economic activities, directly or indirectly, were held void on similar grounds. Excise taxes on the profits of factories in which child labor was employed,[18] on the sale of grain futures

on markets which failed to comply with federal regulations,[19] on the sale of coal produced by nonmembers of a coal code established as a part of a federal regulatory scheme,[20] and a tax on the processing of agricultural products, the proceeds of which were paid to farmers who complied with production limitations imposed by the Federal Government,[21] were all found to invade the reserved powers of the States. In Schechter Poultry Corporation *v.* United States[22] the Court, after holding that the commerce power did not extend to local sales of poultry, cited the Tenth Amendment to refute the argument that the existence of an economic emergency [Pg 918] justified the exercise of what Chief Justice Hughes called "extraconstitutional authority."[23]

In 1941 the Court came full circle in its exposition of this amendment. Having returned to the position of John Marshall four years earlier when it sustained the Social Security[24] and National Labor Relations Acts,[25] it explicitly restated Marshall's thesis in upholding the Fair Labor Standards Act in United States *v.* Darby.[26] Speaking for a unanimous Court, Chief Justice Stone wrote: "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.' * * * That power can neither be enlarged nor diminished by the exercise or non-exercise of state power. * * * 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. * * * Our conclusion is unaffected by the Tenth Amendment which * * * states but a truism that all is retained which has not been surrendered."[27]

Police Power

But even prior to 1937 not all measures taken to promote objectives which had traditionally been regarded as the responsibilities of the States had been held invalid. In Hamilton *v.* Kentucky Distilleries Co.,[28] a unanimous Court, speaking by Justice Brandeis, upheld "War Prohibition", saying: "That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power."[29] And in a series of cases, which today seem irreconcilable with Hammer *v.* Dagenhart, it sustained federal laws penalizing the interstate transportation of lottery tickets,[30] of women for immoral purposes,[31] of stolen automobiles,[32] and of tick-infested [Pg 919] cattle.[33] It affirmed the power of Congress to punish the forgery of bills of lading purporting to cover interstate shipments of merchandise,[34] to subject prison made goods moved from one State to another to the laws of the receiving State,[35] and to regulate prescriptions for the medicinal use of liquor as an appropriate measure for the enforcement of the Eighteenth Amendment.[36] But while Congress might thus prevent the use of the channels of interstate commerce to frustrate State law, it could not itself, the Court held, undertake to punish a violation of that law by discriminatory taxation; and in United States *v.* Constantine,[37] a grossly disproportionate excise tax imposed on retail liquor dealers carrying on business in violation of local law was held unconstitutional.

State Activities and Instrumentalities

Today it is apparent that the Tenth Amendment does not shield the States nor their political subdivisions from the impact of the authority affirmatively granted to the Federal Government. It was cited to no avail in Case *v.* Bowles,[38] where a State officer was enjoined from selling timber on school lands at a price in excess of the maximum prescribed by the Office of Price Administration. When California violated the Federal Safety Appliance Act in the operation of the State Belt Railroad as a common carrier in interstate commerce it was held liable for the statutory penalty.[39] At the suit of the Attorney General of the United States, the Sanitary District of Chicago was enjoined from diverting water from Lake Michigan in excess of a specified rate. On behalf of a unanimous court, Justice Holmes wrote: "This is not a controversy among equals. The United States is asserting its sovereign power to regulate commerce and to control the navigable waters within its jurisdiction. * * * There is no question that this power is superior to that of the States to provide for the welfare or necessities of their inhabitants."[40] Some years earlier, in a suit brought by Kansas to prevent Colorado from using the waters of the [Pg 920] Arkansas River for irrigation, the Attorney General of the United States had unsuccessfully advanced the claim that the Federal Government had an inherent legislative authority to deal with the matter. In a petition to intervene in the suit he had taken the position, as summarized by the Supreme Court, that "the National Government * * * has the right to make such legislative provision as in its judgment is needful for the reclamation of all these arid lands and for that purpose to appropriate the accessible waters. * * * All legislative power must be vested in either the state or the National Government; no legislative powers belong to a state government other than those which affect solely the internal affairs of that State; consequently all powers which are national in their scope must be found vested in the Congress of the United States."[41] The petition to intervene was dismissed on the ground that the authority claimed for the Federal Government was incompatible with the Tenth Amendment; but this could hardly happen today.[42] Under its superior power of eminent domain, the United States may condemn land owned by

a State even where the taking will interfere with the State's own project for water development and conservation.[43] The rights reserved to the States are not invaded by a statute which requires a reduction in the amount of a federal grant-in-aid of the construction of highways upon failure of a State to remove from office a member of the State Highway Commission found to have violated federal law by participating in a political campaign.[44]

Federal legislation frequently has been challenged as an unconstitutional interference with the prerogative of the States to control the entities they create, but the attack has been successful only once, in Hopkins Federal Savings and Loan Association *v.* Cleary.[45] There an act of Congress authorizing the conversion of State building and loan associations without State consent was found to contravene the Tenth Amendment. Thirty years earlier, in Northern Securities Co. *v.* United States,[46] a closely divided Court had ruled that this amendment was no barrier to the application of the Sherman Antitrust Act to prevent one corporation from restraining commerce by means of stock ownership in two competing corporations. It announced the general proposition that: "No State can, by merely creating a corporation, or in any other [Pg 921] mode, project its authority into other States, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce. It cannot be said that any State may give a corporation, created under its laws, authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress. Every corporation created by a State is necessarily subject to the supreme law of the land."[47] Even a charter contract between a State and an intrastate railroad, limiting the rates of the latter, is no barrier to enforcement of an order of the Interstate Commerce Commission requiring an increase in local rates to remove a discrimination against interstate commerce.[48] An order of the Federal Power Commission prescribing the methods of keeping the accounts of an electric company was sustained over the objection that it violated the reserved right of the States under the Tenth Amendment.[49] A similar objection to the levy of a special surtax on any corporation formed or availed of to prevent the imposition of a surtax upon its shareholders was rejected, since the taxing statute did not limit in any way the power of the corporations to declare or withhold dividends as permitted by State law.[50] Likewise, the Court held that the failure to allow a credit against the undistributed profits tax for earnings which could not be distributed under State law did not infringe the reserved power of the State over its corporate offspring.[51]

Notes

[1] United States *v.* Sprague, 282 U.S. 716, 733 (1931).

[2] II Annals of Congress 1897 (1791).

[3] 4 Wheat. 316 (1819).

[4] Ibid. 372.

[5] Ibid. 406.

[6] 11 Wall. 113 (1871).

[7] Ibid. 124.

[8] Graves *v.* O'Keefe, 306 U.S. 466 (1939).

[9] 326 U.S. 572 (1946).

[10] Ibid. 589.

[11] Ibid. 584.

[12] Ibid. 595.

[13] United States *v.* Dewitt, 9 Wall. 41 (1870).

[14] Ibid. 44.

[15] 207 U.S. 463 (1908). *See also* Keller *v.* United States, 213 U.S. 138 (1909).

[16] 247 U.S. 251 (1918).

[17] 312 U.S. 100, 116, 117 (1941).

[18] Bailey *v.* Drexel Furniture Co., 259 U.S. 20, 36, 38 (1922).

[19] Hill *v.* Wallace, 259 U.S. 44 (1922). *See also* Trusler *v.* Crooks, 269 U.S. 475 (1926).

[20] Carter *v.* Carter Coal Co., 298 U.S. 238 (1936).

[21] United States *v.* Butler, 297 U.S. 1 (1936).

[22] 295 U.S. 495 (1935).

[23] Ibid. 529.

[24] Steward Machine Co. *v.* Davis, 301 U.S. 548 (1937); Helvering *v.* Davis, 301 U.S. 619 (1937).

[25] National Labor Relations Board *v.* Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[26] 312 U.S. 100 (1941). *See also* United States *v.* Carolene Products Co., 304 U.S. 144, 147 (1938); Case *v.* Bowles, 327 U.S. 92, 101 (1946).

[27] 312 U.S. 100, 114, 123, 124 (1941). *See also* Fernandez *v.* Wiener, 326 U.S. 340, 362 (1945).

[28] 251 U.S. 146 (1919).

[29] Ibid. 156.

[30] Champion *v.* Ames, 188 U.S. 321 (1903).

[31] Hoke *v.* United States, 227 U.S. 308 (1913).

[32] Brooks *v.* United States, 267 U.S. 432 (1925).

[33] Thornton *v.* United States, 271 U.S. 414 (1926).

[34] United States *v.* Ferger, 250 U.S. 199 (1919).

[35] Kentucky Whip & Collar Co. *v.* Illinois C.R. Co., 299 U.S. 334 (1937).

[36] Everhard's Breweries *v.* Day, 265 U.S. 545 (1924).

[37] 296 U.S. 287 (1935). The Civil Rights Act of 1875, which made it a crime for one person to deprive another of equal accommodations at inns, theaters or public conveyances was found to exceed the powers conferred on Congress by the Thirteenth and Fourteenth Amendments, and hence to be an unlawful invasion of the powers reserved to the States by the Tenth—Civil Rights Cases, 109 U.S. 3, 15 (1883).

[38] 327 U.S. 92, 102 (1946).

[39] United States *v.* California, 297 U.S. 175 (1936).

[40] Sanitary District of Chicago *v.* United States, 266 U.S. 405, 425, 426 (1925).

[41] Kansas *v.* Colorado, 206 U.S. 46, 87, 89 (1907).

[42] *See* United States *v.* Appalachian Electric Power Co., 311 U.S. 377 (1940).

[43] Oklahoma *v.* Atkinson Co., 313 U.S. 508, 534 (1941).

[44] Oklahoma *v.* United States Civil Service Commission, 330 U.S. 127, 142-144 (1947).

[45] 296 U.S. 315 (1935).

[46] 193 U.S. 197 (1904).

[47] Ibid. 345, 346.

[48] New York *v.* United States, 257 U.S. 591 (1922).

[49] Northwestern Electric Co. *v.* Federal Power Commission, 321 U.S. 119 (1944). *See also* Federal Power Commission *v.* East Ohio Gas Company, 338 U.S. 404 (1950).

[50] Helvering *v.* National Grocery Co., 304 U.S. 282 (1938).

[51] Helvering *v.* Northwest Steel Mills, 311 U.S. 46 (1940).

AMENDMENT 11

[Pg 923]

SUITS AGAINST STATES

[Pg 925]

SUITS AGAINST STATES

[Pg 929]

AMENDMENT 11

> 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.

Purpose and Early Interpretation

The action of the Supreme Court in accepting jurisdiction of a suit against a State by a citizen of another State in 1793, in Chisholm *v.* Georgia[1] provoked such angry reactions in Georgia and such anxieties in other States that at the first meeting of Congress after this decision what became the Eleventh Amendment was proposed by an overwhelming vote and ratified with "vehement speed."[2] The earliest decisions interpretative of the amendment were three by Chief Justice Marshall. In Cohens *v.* Virginia,[3] speaking for the Court, he held that the prosecution of a writ of error to review a judgment of a State court, alleged to be in violation of the Constitution or laws of the United States, "does not commence or prosecute a suit against the State," but continues one commenced by the State. The contrary holding would have virtually repealed the 25th Section of the Judiciary Act of 1789 (*see* p. 554), and brought something like anarchy in its wake. In Osborn *v.* Bank of the United States,[4] decided three years later, the Court laid down two rules, one of which has survived and the other of which was soon abandoned. The latter was the holding that a suit is not one against a State unless the State is a party to the record.[5] This rule the Court was forced to repudiate seven years later in Governor of Georgia *v.* Madrazo,[6] in which it was conceded that the suit had been brought against the governor solely in his official capacity and with the design of forcing him to exercise his official powers. It is now a well-settled rule that in determining whether a suit is prosecuted against a State "the Court will look behind and through the nominal parties on the record to ascertain who are the real parties to the suit."[7] The other, more successful rule was that a State official possesses no official capacity when acting illegally and hence can derive no protection from an unconstitutional statute of a State.[8]

Expansion of State Immunity

[Pg 930]

Subsequent cases giving the amendment a restrictive effect are those holding that counties and municipalities are suable in the federal courts;[9] and that government corporations of the State are not immune when suable under the law which created them.[10] Meantime other cases have expanded the prohibitions of the amendment to include suits brought against a State by its own citizens,[11] by a foreign state,[12] by a federally chartered corporation,[13] or by a State as an agent of its citizens to collect debts owed them by another State.[14] These rulings are based on the premise expressed in Hans *v.* Louisiana[15] that the amendment "actually reversed the decision" in Chisholm *v.* Georgia and, as Chief Justice Hughes indicated in Monaco *v.* Mississippi,[16] had the effect of prohibiting any suit against a State without its consent except when brought by the United States[17] or another State.

Suits Against State Officials: Two Categories

[Pg 931]

Most of the cases involving the Eleventh Amendment and those creating the greatest difficulties are suits brought against State officials. Such suits are governed by the same rules and principles as pertain to the immunity of the United States itself from suits,[18] with the result that the rules of governmental immunity from suit generally are grounded on decisions arising under both article III and the Eleventh Amendment without distinction as to whether a suit is against the United States or a State.[19] The line is not always easy to draw, nor are the cases always strictly consistent. They do yield, however, to the formulation of certain general rules. Thus, suits brought against State officials acting either in excess of their statutory authority[20] or in pursuance of an unconstitutional statute[21] are suits against the officer in his individual capacity and therefore are not prohibited by the Eleventh Amendment; and suits against an officer for the commission of a common law tort alleged to be justified by a statute or administrative order of the State belong to the same category.[22] On the other hand, suits against the officers of a State involving what is conceded to be State property or suits asking for relief which clearly call for the exercise of official authority cannot be sustained.[23]

Mandamus Proceedings

[Pg 932]

Thus mandamus proceedings which seek "affirmative official action" on the part of State officials

as "the performance of an obligation which belongs to the State in its political capacity"[24] are uniformly regarded as suits against the State. This rule is well illustrated by Louisiana ex rel. Elliott *v.* Jumel[25] where a holder of Louisiana State bonds sought to compel the State treasurer to apply a sinking fund that had been created under an earlier constitution for the payment of the bonds to such purpose after a new constitution had abolished this provision for retiring the bonds. The proceeding was held to be a suit against the State because: "The relief asked will require the officers against whom the process is issued to act contrary to the positive orders of the supreme political power of the State, whose creatures they are, and to which they are ultimately responsible in law for what they do. They must use the public money in the treasury and under their official control in one way, when the supreme power has directed them to use it in another, and they must raise more money by taxation when the same power has declared that it shall not be done."[26] However, mandamus proceedings to compel a State official to perform a plain or ministerial duty which admits of no discretion are not suits against the State since the official is regarded as acting in his individual capacity in failing to act according to law.[27]

Early Limitation on Injunction Proceedings

In spite of a dictum by Justice Bradley in the McComb Case that the writs of mandamus and injunction are somewhat correlative to each other in suits against State officials for illegal actions,[28] injunctions against State officials to restrain the enforcement of an unconstitutional statute or action in excess of statutory authority are more readily obtainable. They constitute in fact the single largest class of cases involving the issue of State immunity. Until Reagan *v.* [Pg 933] Farmers' Loan and Trust Company[29] the Court maintained a distinction between the duty imposed upon an official by the general laws of the State and the duty imposed by a specific unconstitutional statute and held that whereas an injunction would not lie to restrain a State official from enforcing an act alleged to be unconstitutional in pursuance of the general duties of his office, it would lie to restrain him from performing special duties vested in him by an unconstitutional statute.[30] The leading cases assertive of this distinction are Ex parte Ayers and Fitts *v.* McGhee, decided respectively in 1887 and 1899.[31]

Injunction Proceedings Today: Ex parte Young

However, the distinction between injunction suits to restrain an official from pursuing his general duties under the law and those to restrain the performance of special duties under an unconstitutional statute had been largely lost even before Fitts *v.* McGhee, in Reagan *v.* Farmers' Loan and Trust Company[32] and Smyth *v.* Ames,[33] where injunctions issued by the lower federal courts to restrain the enforcement of railroad rate regulations were sustained even though the officials against whom the suits were brought were acting under general law. What remained of the distinction as a limitation upon suits against State officials was dispelled by Ex parte Young,[34] which not only sustained an injunction restraining State officials from exercising their discretionary duties but also upheld the authority of the lower court to enjoin the enforcement of the statute prior to a determination of its unconstitutionality. While Ex parte Ayers and Fitts *v.* McGhee[35] were not overruled, the inevitable effect of the Young Case was to abrogate the rule that a suit in equity against a State official to enjoin discretionary action is a suit against the State, and to convert the injunction into a device to test the validity of State legislation in the federal courts prior to its interpretation in the State courts and prior to any opportunity for State officials to put the act into operation.[36]

But the earlier rule still crops up at times. Thus as recently as 1937, Ex parte Ayers[37] was [Pg 934] applied to the interpretation of the Federal Interpleader Act,[38] so as to prevent taxpayers from enjoining tax officials from collecting death taxes arising from the competing claims of two States as being the last domicile of a decedent.[39] On the other hand, the Eleventh Amendment was held not to be infringed by joinder of a State court judge and receiver in an interpleader proceeding in which the State had no interest and neither the judge nor the receiver was enjoined by the final decree.[40]

Tort Actions Against State Officials

In tort actions against State officials the rule of United States *v.* Lee[41] has been substantially incorporated into the Eleventh Amendment. In Tindal *v.* Wesley[42] the Lee Case was held to permit a suit by claimants to real property in South Carolina which they had purchased from the State sinking fund commission but which had been retaken by the State because the purchaser insisted on paying for the property with revenue bond scrip issued by the State. In other cases the Court had held that the immunity of a State from suit does not extend to actions against State [Pg 935] officials for damages arising out of willful and negligent disregard of State laws.[43]

Suits to Recover Taxes

Recent decisions, however, have rendered suits against State officials to recover taxes increasingly difficult to maintain. Although the Court long ago held that the sovereign immunity of the State prevented a suit to recover money in the general treasury,[44] it also held that a suit

would lie against a revenue officer to recover tax moneys illegally collected and still in his possession.[45] Beginning, however, with Great Northern Life Insurance Co. *v.* Read[46] in 1944 the Court has held that this kind of suit cannot be maintained unless the State expressly consents to suits in the federal courts. In this case the State statute provided for the payment of taxes under protest and for suits afterwards against State tax collection officials for the recovery of taxes illegally collected. The act also provided for the segregation by the collector of taxes paid under protest. The Read Case has been followed in two more recent cases[47] involving a similar state of facts, with the result that the rule once permitting such suits to recover taxes from a segregated fund has been distinguished away.

Consent of State to be Sued

Although *dicta* in some cases suggested that once a State consented generally to be sued in a court of competent jurisdiction,[48] suits could be maintained against it in the federal courts, later decisions involving statutory provisions for the payment of taxes under protest followed by a suit in a court of competent jurisdiction to recover do not authorize suits in the federal courts. These rulings are based on the assumption that when the court is dealing "with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the State's intention to submit its fiscal problems to other courts than those of its own creation must be found."[49] Long before these decisions it had been settled that a State could confine to its own courts suits against it to recover taxes.[50] Thus the questions involved in the cases laying down the above rule concerned only the lack of an express consent to suit in the federal courts.

Waiver of Immunity [Pg 936]

The immunity of a State from suit is a privilege which it may waive at pleasure by voluntary submission to suit,[51] as distinguished from appearing in a similar suit to defend its officials,[52] and by general law specifically consenting to suit in the federal courts. Such consent must be clear and specific and consent to suit in its own courts does not imply a waiver of immunity in the federal courts.[53] It follows, therefore, that in consenting to be sued, the States, like the National Government, may attach such conditions to suit as they deem fit.

Notes

[1] 2 Dall. 419 (1793).

[2] Justice Frankfurter dissenting in Larson *v.* Domestic & Foreign Corp., 337 U.S. 682, 708 (1949).

[3] 6 Wheat. 264, 411-412 (1821).

[4] 9 Wheat. 738 (1824).

[5] Ibid. 850-858.

[6] 1 Pet. 110 (1828).

[7] Ex parte Ayers, 123 U.S. 443, 487 (1887).

[8] Osborn *v.* Bank of the United States, 9 Wheat. at 858, 859, 868.

[9] Lincoln County *v.* Luning, 133 U.S. 529 (1890).

[10] Hopkins *v.* Clemson Agricultural College, 221 U.S. 636 (1911). *See also* Bank of the United States *v.* Planters' Bank of Georgia, 9 Wheat. 904 (1824), where a State bank was held liable to suit although the State owned a portion of its stock, and Briscoe *v.* Bank of Kentucky, 11 Pet. 257 (1837), and Bank of Kentucky *v.* Wister, 2 Pet. 318 (1829), where the State bank was held liable to suit even though the State owned all of the stock. Compare, however, Murray *v.* Wilson Distilling Co., 213 U.S. 151 (1909), which held that a State in engaging in the retail liquor business does not surrender its immunity to suit for transaction of a nongovernmental nature. Here the State conducted the business directly rather than through the medium of a corporation.

[11] Hans *v.* Louisiana, 134 U.S. 1 (1890); Fitts *v.* McGhee, 172 U.S. 516, 524 (1899); Duhne *v.* New Jersey, 251 U.S. 311, 313 (1920); Ex parte New York, 256 U.S. 490 (1921).

[12] Monaco *v.* Mississippi, 292 U.S. 313, 329 (1934).

[13] Smith *v.* Reeves, 178 U.S. 436 (1900).

[14] New Hampshire *v.* Louisiana, 108 U.S. 76 (1883). However, this rule does not preclude a suit by a State to collect debts which have been assigned to it and the proceeds of which will remain with it. South Dakota *v.* North Carolina, 192 U.S. 286 (1904)

[15] 134 U.S. 1, 11 (1890).

[16] 292 U.S. 313, 328-332 (1934).

[17] For the liability of the States to suit by the United States *see* the discussion of the right of the United States to sue under article III, § 2, *supra*, pp. 584-585.

[18] Tindal *v.* Wesley, 167 U.S. 204, 213 (1897). This case applied the rule of United States *v.* Lee, 106 U.S. 196 (1882), to suits against States.

[19] *See* for example Larson *v.* Domestic & Foreign Corp., 337 U.S. 682 (1949), where both the majority and dissenting opinions utilize both types of cases in a suit against a federal official.

[20] Pennoyer *v.* McConnaughy, 140 U.S. 1 (1891); Scully *v.* Bird, 209 U.S. 481 (1908); Atchison, Topeka & S.F.R. Co. *v.* O'Connor, 223 U.S. 280 (1912); Greene *v.* Louisville & I.R. Co., 244 U.S. 499 (1917); Louisville & Nashville R. Co. *v.* Greene, 244 U.S. 522 (1917).

[21] Osborn *v.* Bank of the United States, 9 Wheat. 728 (1824); Board of Liquidation *v.* McComb, 92 U.S. 531 (1876); Poindexter *v.* Greenhow, 114 U.S. 270 (1885); Pennoyer *v.* McConnaughy, 140 U.S. 1 (1891); Reagan *v.* Farmers' Loan & Trust Co., 154 U.S. 362 (1894); Smyth *v.* Ames, 169 U.S. 466 (1898); Ex parte Young, 209 U.S. 123 (1908); Truax *v.* Raich, 239 U.S. 33 (1915); Public Service Co. *v.* Corboy, 250 U.S. 153 (1919); Sterling *v.* Constantin, 287 U.S. 378 (1932); Davis *v.* Gray, 16 Wall. 203 (1873); Tomlinson *v.* Branch, 15 Wall. 460 (1873); Litchfield *v.* Webster Co., 101 U.S. 773 (1880); Allen *v.* Baltimore & O.R. Co., 114 U.S. 311 (1885); Gunter *v.* Atlantic C.L.R. Co., 200 U.S. 273 (1906); Prout *v.* Starr, 188 U.S. 537 (1903); Scott *v.* Donald, 165 U.S. 58; *also* 165 U.S. 107 (1897).

[22] South Carolina *v.* Wesley, 155 U.S. 542 (1895); Tindal *v.* Wesley, 167 U.S. 204 (1897); Hopkins *v.* Clemson Agricultural College, 221 U.S. 636 (1911). In this last case the Court held that a suit would lie against the State Agricultural College, and relief could be granted to the extent that it would not affect the property rights of the State. These cases involve such matters as the seizure and distraint of property, wrongs done by government corporations, etc.

[23] *See* for example Governor of Georgia *v.* Madrazo, 1 Pet. 110 (1828); Cunningham *v.* Macon and Brunswick R. Co., 109 U.S. 446 (1883); Louisiana ex rel. Elliott *v.* Jumel, 107 U.S. 711 (1883); Hagood *v.* Southern, 117 U.S. 52 (1886); Chandler *v.* Dix, 194 U.S. 590 (1904); Murray *v.* Wilson Distilling Co., 213 U.S. 151 (1909); Hopkins *v.* Clemson Agricultural College, 221 U.S. 636 (1911); Lankford *v.* Platte Iron Works, 235 U.S. 461 (1915); Carolina Glass Co. *v.* South Carolina, 240 U.S. 305 (1916); Kennecott Copper Corp. *v.* State Tax Commission, 327 U.S. 573 (1946).

[24] Hagood *v.* Southern, 117 U.S. 52, 70 (1886). *See also* Pennoyer *v.* McConnaughy, 140 U.S. 1, 10 (1891) where Justice Lamar also emphasizes the operation of the judgment against the State itself.

[25] 107 U.S. 711, 721 (1883). *See also* Christian *v.* Atlantic & N.C.R. Co., 133 U.S. 233 (1890).

[26] Louisiana ex rel. Elliott *v.* Jumel, 107 U.S. 711, 721 (1883).

[27] Board of Liquidation *v.* McComb, 92 U.S. 531, 541 (1876). This was a case involving an injunction, but Justice Bradley regarded mandamus and injunction as correlative to each other in cases where the official unlawfully commits or omits an act. *See also* Rolston *v.* Missouri Fund Commissioners, 120 U.S. 390, 411 (1887), where it is held that an injunction would lie to restrain the sale of a railroad on the ground that a suit to compel a State official to do what the law requires of him is not a suit against the State. *See also* Houston *v.* Ormes, 252 U.S. 469 (1920).

[28] Board of Liquidation *v.* McComb, 92 U.S. 531, 541 (1876).

[29] 154 U.S. 362 (1894).

[30] Poindexter *v.* Greenhow, 114 U.S. 270 (1885); Allen *v.* Baltimore & O.R. Co., 114 U.S. 311 (1885); Pennoyer *v.* McConnaughy, 140 U.S. 1 (1891); In re Tyler, 149 U.S. 164 (1893). As stated by Justice Harlan in Fitts *v.* McGhee, 172 U.S. 516, 529-530 (1899), "There is a wide difference between a suit against individuals, holding official positions under a State, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a State merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State." *See also* North Carolina *v.* Temple, 134 U.S. 22 (1890).

[31] *See* 123 U.S. 443; and 172 U.S. 516.

[32] 154 U.S. 362 (1894).

[33] 169 U.S. 466 (1898).

[34] 209 U.S. 123 (1908).

[35] 123 U.S. 443 (1887); 172 U.S. 516 (1899).

[36] For cases following Ex parte Young, *see* Home Telephone & Telegraph Co. *v.* Los Angeles, 227 U.S. 278 (1913); Truax *v.* Raich, 239 U.S. 33 (1915); Cavanaugh *v.* Looney, 248 U.S. 453 (1919); Terrace *v.* Thompson, 263 U.S. 197 (1923); Hygrade Provision Co. *v.* Sherman, 266 U.S. 497 (1925); Massachusetts State Grange *v.* Benton, 272 U.S. 525 (1926); Hawks *v.* Hamill, 288 U.S. 52 (1933). These last cases, however, emphasize "manifest oppression" as a prerequisite to issuance of such injunctions. *See also* Fenner *v.* Boykin, 271 U.S. 240 (1926), where an injunction to restrain the enforcement of a State law penalizing gambling contracts was denied. The rule of Ex parte Young applies equally to the governor of a State in the enforcement of an unconstitutional statute. Continental Baking Co. *v.* Woodring, 286 U.S. 352 (1932); Sterling *v.* Constantin, 287 U.S. 378 (1932). Joseph D. Block, "Suit Against Government Officers and the Sovereign Immunity Doctrine," 59 Harv. L. Rev. 1060, 1078 (1946), points out that Ex parte Young is enunciating the doctrine that an official proceeding unconstitutionally is "stripped of his official ... character" has given impetus to the fiction that the suit must be against the officer as an individual to be permissible under the Eleventh Amendment. Two recent cases in which Ex parte Young was followed are Alabama Comm'n *v.* Southern R. Co., 341 U.S. 341, 344 (1951); and Georgia R. *v.* Redwine, 342 U.S. 299, 304-305 (1952).

[37] 123 U.S. 443 (1887). *See also* Larson *v.* Domestic and Foreign Corp., 337 U.S. 682, 687-688 (1949).

[38] 49 Stat. 1096 (1936).

[39] Worcester County Trust Co. *v.* Riley, 302 U.S. 292 (1937); *see also* Old Colony Trust Co. *v.* Seattle, 271 U.S. 426 (1926).

[40] Treinies *v.* Sunshine Mining Co., 308 U.S. 66 (1939). *See also* Missouri *v.* Fiske, 290 U.S. 18 (1933).

[41] 106 U.S. 196 (1882).

[42] 167 U.S. 204 (1897).

[43] Johnson *v.* Lankford, 245 U.S. 541 (1918); Martin *v.* Lankford, 245 U.S. 547 (1918).

[44] Smith *v.* Reeves, 178 U.S. 436 (1900).

[45] Atchison, Topeka & S.F.R. Co. *v.* O'Connor, 223 U.S. 280 (1912).

[46] 322 U.S. 47 (1944).

[47] Ford Motor Co. *v.* Dept. of Treasury of Indiana, 323 U.S. 459 (1945); Kennecott Copper Corp. *v.* State Tax Commission, 327 U.S. 573 (1946).

[48] Lincoln County *v.* Luning, 133 U.S. 529 (1890); Hopkins *v.* Clemson Agricultural College, 221 U.S. 636 (1911).

[49] Great Northern Ins. Co. *v.* Read, 322 U.S. 47, 54 (1944); Ford Motor Co. *v.* Dept. of Treasury of Indiana, 323 U.S. 459 (1945); Kennecott Copper Corp. *v.* State Tax Commission, 327 U.S. 573 (1946).

[50] Smith *v.* Reeves, 178 U.S. 436 (1900). *See also* Murray *v.* Wilson Distilling Co., 213 U.S. 151 (1909); Chandler *v.* Dix, 194 U.S. 590 (1904).

[51] Clark *v.* Barnard, 108 U.S. 436, 447 (1883); Ashton *v.* Cameron County Water Improvement Dist., 298 U.S. 513, 531 (1936).

[52] Farish *v.* State Banking Board, 235 U.S. 498 (1915); Missouri *v.* Fiske, 290 U.S. 18 (1933).

[53] Murray *v.* Wilson Distilling Co., 213 U.S. 151, 172 (1909), citing Smith *v.* Reeves, 178 U.S. 436 (1900); Chandler *v.* Dix, 194 U.S. 590 (1904). *See also* Graves *v.* Texas Co., 298 U.S. 393, 403-404 (1936).

AMENDMENT 12

ELECTION OF PRESIDENT [Pg 941]

AMENDMENT 12

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[1] next following, then the Vice-President shall act as President, as [Pg 942] in the case of the death or other constitutional disability of the President.[2]—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.

Purpose and Operation of the Amendment

This amendment, which supersedes clause 3 of section 1 of article II, of the original Constitution, was inserted on account of the tie between Jefferson and Burr in the election of 1800. The difference between the procedure which it defines and that which was laid down in the original Constitution is in the provision it makes for a separate designation by the Electors of their choices for President and Vice President, respectively. The final sentence of clause 1, above, has been in turn superseded today by Amendment XX. In consequence of the disputed election of 1876, Congress, by an act passed in 1887, has laid down the rule that if the vote of a State is not certified by the governor under the seal thereof, it shall not be counted unless both Houses of Congress are favorable.[3] It should be noted that no provision is made by this Amendment for the situation which would result from a failure to choose either a President or Vice President, an inadequacy which Amendment XX undertakes to cure.

Electors as Free Agents

Acting under the authority of state law, the Democratic Committee of Alabama adopted a rule requiring that a party candidate for the office of Presidential Elector take a pledge to support the nominees of the party's National Convention for President and Vice President and that the party's officers refuse to certify as a candidate for such office any person who, otherwise qualified, refused to take such a pledge. One Blair did so refuse and was upheld, in mandamus [Pg 943] proceedings, by the State Supreme Court, which ordered the Chairman of the State Democratic Executive Committee to certify him to the Secretary of State as a candidate for the office of Presidential Elector in the Democratic Primary to be held on May 6, 1952. The Supreme Court at Washington granted certiorari and reversed this holding.[4] The constitutional issue arose out of the Alabama Court's findings that the required pledge was incompatible with the Twelfth Amendment, which contemplated that Electors, once appointed, should be absolutely free to vote for any person who was constitutionally eligible to the office of President or Vice President.[5]

This position the Supreme Court combatted as follows: "It is true that the Amendment says the electors shall vote by ballot. But it is also true that the Amendment does not prohibit an elector's announcing his choice beforehand, pledging himself. The suggestion that in the early elections candidates for electors—contemporaries of the Founders—would have hesitated, because of constitutional limitations, to pledge themselves to support party nominees in the event of their selection as electors is impossible to accept. History teaches that the electors were expected to support the party nominees. Experts in the history of government recognize the longstanding practice. Indeed, more than twenty states do not print the names of the candidates for electors on the general election ballot. Instead, in one form or another, they allow a vote for the presidential candidate of the national conventions to be counted as a vote for his party's nominees for the electoral college. This long-continued practical interpretation of the constitutional propriety of an implied or oral pledge of his ballot by a candidate for elector as to his vote in the electoral college weighs heavily in considering the constitutionality of a pledge, such as the one here required, in the primary. However, even if such promises of candidates for the electoral college are legally unenforceable because violative of an assumed constitutional freedom of the elector under the Constitution, Art. II, § 1, to vote as he may choose in the electoral college, it would not follow that the requirement of a pledge in the primary is unconstitutional. A candidacy in the primary is a voluntary act of the applicant. He is not barred, discriminatorily, from participating but must comply with the rules of the party. Surely one may voluntarily assume obligations to vote for a certain candidate. The state offers him opportunity to become a candidate for elector on his own terms, although he must file his declaration before the primary. Ala. Code, Tit. 17, § 145. Even though the victory of an independent candidate for elector in Alabama cannot be anticipated, the state does offer the opportunity for the development of other strong political organizations where the need is felt for them by a sizable block of voters. Such parties may leave their electors to their own choice. We conclude that the Twelfth Amendment does not bar a political party from requiring the pledge to support the [Pg 944] nominees of the National Convention. Where a state authorizes a party to choose its nominees for elector in a party primary and to fix the qualifications for the candidates, we see no federal constitutional objection to the requirement of this pledge."[6] Justice Jackson conceding that "as an institution the Electoral College suffered atrophy almost indistinguishable from *rigor mortis*," nevertheless dissented on the following ground: "It may be admitted that this law does no more than to make a legal obligation of what has been a voluntary general practice. If custom were sufficient authority for amendment of the Constitution by Court decree, the decision in this matter would be warranted. Usage may sometimes impart changed content to constitutional generalities, such as 'due process of law,' 'equal protection,' or 'commerce among the states.' But I do not think powers or discretions granted to federal officials by the Federal Constitution can be forfeited by the Court for disuse. A political practice which has its origin in custom must rely upon custom for its sanctions."[7]

Notes

[1] By the Twentieth Amendment, adopted in 1933, the term of the President is to begin on the 20th of January.

[2] Under the Twentieth Amendment, § 3, in case a President is not chosen before the time for beginning of his term, the Vice President-elect shall act as President, until a President shall have qualified.

[3] 3 U.S.C.A. § 17.

[4] Ray *v.* Blair, 343 U.S. 214 (1952).

[5] Ibid. 218-219.

[6] Ibid. 228-231.

[7] Ibid. 232-233.

AMENDMENT 13 [Pg 945]

SLAVERY AND INVOLUNTARY SERVITUDE

[Pg 947]

SLAVERY AND INVOLUNTARY SERVITUDE [Pg 949]

AMENDMENT 13

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.

Origin and Purpose of the Amendment

"The language of the Thirteenth Amendment," which "reproduced the historic words of the ordinance of 1787 for the government of the Northwest Territory, and gave them unrestricted application within the United States,"[1] was first construed in the Slaughter-House Cases.[2] Presented there with the contention that a Louisiana statute, by conferring upon a single corporation the exclusive privilege of slaughtering cattle in New Orleans, had imposed an unconstitutional servitude on the property of other butchers disadvantaged thereby, the Court expressed its inability, even after "a microscopic search," to find in said amendment any "reference to servitudes, which may have been attached to property in certain localities * * *." On the contrary, the term "servitude" appearing therein was declared to mean "a personal servitude * * * [as proven] by the use of the word 'involuntary,' which can only apply to human beings. * * * The word servitude is of larger meaning than slavery, * * *, and the obvious purpose was to forbid all shades and conditions of African slavery." But while the Court was initially in doubt as to whether persons other than negroes could share in the protection afforded by this amendment, it nevertheless conceded that although "* * * negro slavery alone was in the mind of the Congress which proposed the thirteenth article, [the latter] forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void."[3] All uncertainty on this score was dispelled in later decisions; and in Hodges *v.* United States[4] the Justices proclaimed unequivocally that the Thirteenth Amendment is "not a declaration in favor of a particular people. It reaches every race and every individual, and if in [Pg 950] any respect it commits one race to the nation, it commits every race and every individual thereof. Slavery or involuntary servitude of the Chinese, of the Italian, of the Anglo-Saxon are as much within its compass as slavery or involuntary servitude of the African."[5]

Peonage

Notwithstanding its early acknowledgment in the Slaughter-House Cases that peonage was comprehended within the slavery and involuntary servitude proscribed by the Thirteenth Amendment,[6] the Court has had frequent occasion to determine whether State legislation or the conduct of individuals has contributed to reestablishment of that prohibited status. Defined as a condition of enforced servitude by which the servitor is compelled to labor in liquidation of some debt or obligation, either real or pretended, against his will, peonage was found to have been unconstitutionally sanctioned by an Alabama statute, directed at defaulting sharecroppers, which imposed a criminal liability and subjected to imprisonment farm workers or tenants who abandoned their employment, breached their contracts, and exercised their legal right to enter into employment of a similar nature with another person. The clear purpose of such a statute was declared to be the coercion of payment, by means of criminal proceedings, of a purely civil liability arising from breach of contract.[7] Several years later, in Bailey *v.* Alabama,[8] the Court voided another Alabama statute which made the refusal without just cause to perform the labor called for in a written contract of employment, or to refund the money or pay for the property advanced thereunder, *prima facie* evidence of an intent to defraud and punishable as a criminal offense; and which was enforced subject to a local rule of evidence which prevented the accused, for the purpose of rebutting the statutory presumption, from testifying as to his "uncommunicated motives, purpose, or intention." Inasmuch as a State "may not compel one man to labor for another in payment of a debt by punishing him as a criminal if he does not perform the service or pay the debt," the Court refused to permit it "to accomplish the same result [indirectly] by creating a statutory presumption which, upon proof of no other fact, exposes him to conviction."[9] In 1914, in United States *v.* Reynolds,[10] a third Alabama enactment was condemned as conducive to peonage through the permission it accorded to persons, fined upon conviction for a misdemeanor, to confess judgment with a surety in the amount of the fine and costs, and then to agree with said surety, in consideration of the latter's payment of the confessed judgment, to reimburse him by working for him upon terms approved by the court, [Pg 951] which, the Court pointed out, might prove more onerous than if the convict had been sentenced to imprisonment at hard labor in the first place. Fulfillment of such a contract with the surety was viewed as being virtually coerced by the constant fear it induced of rearrest, a new prosecution, and a new fine for breach of contract, which new penalty the convicted person might undertake to liquidate in a similar manner attended by similar consequences. More recently, Bailey *v.* Alabama has been followed in Taylor *v.* Georgia[11] and Pollock *v.* Williams,[12] in which statutes of Georgia and Florida not materially different from that voided in the Bailey Case, were found to be unconstitutional. Although the Georgia statute prohibited the defendant from testifying under oath, it did not prevent him from entering an unsworn denial both of the contract and of the receipt of any cash advancement thereunder, a factor which, the Court emphasized, was no more controlling than the customary rule of evidence in the Bailey Case. In the Florida Case, notwithstanding the fact that the defendant pleaded guilty and accordingly obviated the

necessity of applying the *prima facie* presumption provision, the Court reached an identical result, chiefly on the ground that the presumption provision, despite its nonapplication, "had a coercive effect in producing the plea of guilty."

Discriminations and Legal Compulsions Less Than Servitude

A contention of "involuntary servitude" was rejected in the following cases:

(1) Racial discrimination. Denial of admission to public places, such as inns, restaurants, or theaters, or the segregation of races in public conveyances, etc., was held not to give rise to a "condition of enforced compulsory service of one to another," and effected no deprivation of one's legal right to dispose of his person, property, and services. Even prior to the amendment, such discriminations had never been "regarded as badges of slavery"; and it was not "the intent of the [Pg 952] amendment to denounce every act which was wrong if done to a free man and yet justified in a condition of slavery."[13] Likewise, individuals who conspired to prevent citizens of African descent, because of their race or color, from making or carrying out contracts of labor, and so from pursuing a common calling, were not deemed to have reduced negroes to a condition of involuntary servitude; and hence a federal statute which penalized such a conspiracy was declared to be in excess of the enforcement powers vested in Congress by the Thirteenth Amendment.[14]

(2) "Services which have from time immemorial been treated as exceptional." Thus, contracts of seamen, which have from earliest historical times been treated as exceptional, and involving, to a certain extent, the surrender of personal liberty may be enforced without regard to the amendment.[15]

(3) "Enforcement of those duties which individuals owe the State, such as services in the army, militia, on the jury, etc." Thus, "a State has inherent power to require every able-bodied man within its jurisdiction to labor for a reasonable time on public roads near his residence without direct compensation."[16] Similarly, the exaction by Congress of enforced military duty from citizens of the United States, as was done by the Selective Service Act of May 18, 1917 (40 Stat. 76); and the requirement, under the Selective Training and Service Act of 1940 (50 U.S.C.A. App. § 305 (g)), that conscientious objectors be assigned to work of national importance under civilian direction, were held not to contravene the Thirteenth Amendment.[17]

(4) A State law which made it a misdemeanor for a lessor, or his agent or janitor, intentionally to fail to furnish such water, heat, light, elevator, telephone, or other service as may be required by the terms of the lease and necessary to the proper and customary use of the building, did not create an involuntary servitude.[18]

(5) Section 506 (a) of the Communications Act (47 U.S.C.A. § 506) making it unlawful to coerce, compel, or constrain a licensee to employ persons in excess of the number of the employees needed by the licensee in the conduct of a radio broadcasting business, on its face, was construed as not violating this amendment.[19]

Enforcement [Pg 953]

"* * * this amendment, besides abolishing forever slavery and involuntary servitude * * *, gives power to Congress to protect all persons within the jurisdiction of the United States from being in any way subject to slavery or involuntary servitude, except as a punishment for crime, and in the enjoyment of that freedom which it was the object of the amendment to secure. * * *"[20] It "is undoubtedly self-executing without any ancillary legislation, * * * [but] legislation may be necessary and proper to meet all the various * * * circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit." This legislation, moreover, "may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not; [whereas] under the Fourteenth [Amendment], * * * it * * * can only be, corrective in its character, addressed to counteract and afford relief against State regulations or proceedings."[21]

Pursuant to its powers of enforcement under section two of this amendment, Congress on March 2, 1867 enacted a statute[22] by the terms of which the system of peonage was abolished and prohibited and penalties were imposed on anyone who holds, arrests, or returns, or causes, or aids in the arrest or return of a person to peonage. The validity of this act was sustained in Clyatt *v.* United States;[23] and more recently, in United States *v.* Gaskin,[24] a proviso thereof was [Pg 954] construed as capable of supporting a conviction for arrest with intent to compel performance of labor even though the debtor in fact rendered no service after his arrest. Each of the acts enumerated in that proviso, the "holding, arresting, or the returning, may be the subject of indictment and punishment."

Notes

[1] Bailey *v.* Alabama, 219 U.S. 219, 240 (1911).

[2] 16 Wall. 36 (1873).

[3] Ibid. 69, 71-72.

[4] 203 U.S. 1 (1906).

[5] Ibid. 16-17.

[6] Pursuant to its enforcement powers under section 2 of this amendment, Congress, on March 2, 1867 adopted a statute (14 Stat. 546), which is now found in 8 U.S.C.A. § 56 and 18 U.S.C.A. § 1581, by the terms of which peonage was prohibited, and persons returning any one to a condition of peonage were subjected to criminal punishment. This statute was upheld in Clyatt *v.* United States, 197 U.S. 207 (1905).

[7] Peonage Cases, 123 F. 671 (1903).

[8] 219 U.S. 219 (1911). Justice Holmes, who was joined by Justice Lurton, dissented on the ground that a State was not forbidden by this amendment from punishing a breach of contract as a crime. "Compulsory work for no private master in a jail is not peonage."—Ibid. 247.

[9] Ibid. 244.

[10] 235 U.S. 133 (1914).

[11] 315 U.S. 25 (1942).

[12] 322 U.S. 4 (1944). Justice Reed, with Chief Justice Stone concurring, contended in a dissenting opinion that a State is not prohibited by the Thirteenth Amendment from "punishing the fraudulent procurement of an advance in wages."—Ibid. 27.

[13] Civil Rights Cases, 109 U.S. 3, 23-25 (1883); Plessy *v.* Ferguson, 163 U.S. 537 (1896).

[14] Hodges *v.* United States; 203 U.S. 1 (1906).

[15] Robertson *v.* Baldwin, 165 U.S. 275, 282 (1897).

[16] Butler *v.* Perry, 240 U.S. 328, 333 (1916).—Work-or-fight laws, such as States enacted during World War I, which required male residents to be employed during the period of that War were sustained on similar grounds, as were municipal ordinances, enforced during the Depression, which compelled indigents physically able to perform manual labor to serve the municipality without compensation as a condition of receiving financial assistance.—State *v.* McClure, 7 Boyce (Del.) 265; 105 A. 712 (1919); Commonwealth *v.* Pouliot, 292 Mass. 229; 198 N.E. 256 (1935).

[17] Arver *v.* United States (Selective Draft Law Cases), 245 U.S. 366, 390 (1918); United States *v.* Brooks, 54 F. Supp. 995 (1944); affirmed 147 F. (2d) 134 (1945); certiorari denied, 324 U.S. 878 (1945). It may be noted in this connection that labor leaders have contended that conscription of labor in time of war, unaccompanied by nationalization of industry, would mean that the conscripts, having thus been forced by the Government to work for private profit, would be reduced to involuntary servitude. This position is not supported by the precedents.—*See* Corwin, Total War and the Constitution, 89-90 (1947).

[18] Brown (Marcus) Holding Co. *v.* Feldman, 256 U.S. 170, 109 (1921).

[19] United States *v.* Petrillo, 332 U.S. 1, 12-13 (1947). Injunctions and "cease and desist" orders in labor disputes have also been repeatedly sustained against charges by labor that the prohibitions of this amendment had been violated. *See* Auto Workers *v.* Wis. Board, 336 U.S. 245 (1949), in which application of the Wisconsin Employment Peace Act in support of an order forbidding recurrent, intermittent work stoppages for unstated ends was held not to have imposed involuntary servitude. *See also* Western Union Tel. Co. *v.* International B. of E. Workers, 2 F. (2d) 993 (1924); International Brotherhood, Etc. *v.* Western U. Tel. Co., 46 F. (2d) 736 (1931), certiorari denied, 284 U.S. 630 (1931).

[20] United States *v.* Harris, 106 U.S. 629, 640 (1883). An act of Congress which penalized a conspiracy to deprive any person of the equal protection of the laws or of equal privileges and immunities under the laws was accordingly held unconstitutional insofar as its validity was made to depend upon the Thirteenth Amendment.

[21] Civil Rights Cases, 109 U.S. 3, 20, 23 (1883).

[22] 14 Stat. 546; 8 U.S.C.A. § 56; 18 U.S.C.A. § 1581.

[23] 197 U.S. 207, 218 (1905).

[24] 320 U.S. 527, 529 (1944).

AMENDMENT 14

[Pg 955]

RIGHTS OF CITIZENS

[Pg 957]

RIGHTS OF CITIZENS

[Pg 963]

AMENDMENT 14

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.

Citizens of the United States

KIND AND SOURCES OF CITIZENSHIP

There are three categories of persons who, if subject to the jurisdiction of the United States, are citizens thereof: (1) those who are born citizens, of whom there are two classes, those who are born in the United States and those who are born abroad of American parentage; (2) those who achieve citizenship by qualifying for it in accordance with the naturalization statutes; (3) those who have citizenship thrust upon them, such as the members of certain Indian tribes and the inhabitants of certain dependencies of the United States. In the present connection we are interested in those who are citizens by virtue of birth in the United States.[1]

HISTORY

In the famous Dred Scott Case,[2] Chief Justice Taney had ruled that United States citizenship was enjoyed by two classes of individuals: (1) white persons born in the United States as descendants of "persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States and [who] became also citizens of this new political body," the United States of America, and (2) those who, having been "born outside the dominions of the United States," had migrated thereto and been naturalized therein. The States were competent, he conceded, to confer State citizenship upon anyone in their midst, but could not make the recipient of such status a citizen of the United States. The Negro, however, according to the [Pg 964] Chief Justice, was ineligible to attain United States citizenship either from a State or by virtue of birth in the United States, even as a free man descended from a Negro residing as a free man in one of the States at the date of ratification of the Constitution. That basic document did not contemplate the possibility of Negro citizenship.[3] By the Fourteenth Amendment this deficiency of the original Constitution was cured.[4]

JUDICIAL ELUCIDATION OF THE CITIZENSHIP CLAUSE

By the decision in 1898 in United States *v.* Wong Kim Ark,[5] all children born in the United

States to aliens, even temporary sojourners, if they are not exempt from territorial jurisdiction, are citizens irrespective of race or nationality. But children born in the United States to alien enemies in hostile occupation or to diplomatic representatives of a foreign state, not being "subject to the jurisdiction thereof," i.e., of the United States, are not citizens.[6] Likewise persons born on a public vessel of a foreign country while within the waters of the United States are not considered as having been born within the jurisdiction of the United States, and hence are not citizens thereof.[7] Conversely, a Chinese born on the high seas aboard an American vessel of Chinese parents residing in the United States was declared not to be a citizen on the ground of not having been born "in the United States."[8] But a child who was born in like circumstances of parents who were citizens of the United States was declared, shortly before the Civil War, to be a citizen thereof.[9]

NATIONAL AND STATE CITIZENSHIP

[Pg 965]

With the ratification of the Fourteenth Amendment a distinction between citizenship of the United States and citizenship of a State was 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."[10] National citizenship, although not created by this amendment, was thereby made "paramount and dominant."[11]

CORPORATIONS

Citizens of the United States within the meaning of this article must be natural and not artificial persons; a corporate body is not a citizen of the United States.[12]

Privileges and Immunities

PURPOSE AND EARLY HISTORY OF THE CLAUSE

Unique among constitutional provisions, the privileges and immunities clause of the Fourteenth Amendment enjoys the distinction of having been rendered a "practical nullity" by a single decision of the Supreme Court rendered within five years after its ratification. In the Slaughter-House Cases[13] a bare majority of the Court frustrated the aims of the most aggressive sponsors of this clause, to whom was attributed an intention to centralize "in the hands of the Federal Government large powers hitherto exercised by the States" with a view to enabling business to develop unimpeded by State interference. This expansive alteration of the Federal System was to have been achieved by converting the rights of the citizens of each State as of the date of the [Pg 966] adoption of the Fourteenth Amendment into privileges and immunities of United States citizenship and thereafter perpetuating this newly defined *status quo* through judicial condemnation of any State law challenged as "abridging" any one of the latter privileges. To have fostered such intentions, the Court declared, would have been "to transfer the security and protection of all the civil rights * * * to the Federal Government, * * * to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States," and to "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 effect of] so great a departure from the structure and spirit of our institutions; * * * 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; * * * We are convinced that no such results were intended by the Congress * * *, nor by the legislatures * * * which ratified" this amendment, and that the sole "pervading purpose" of this and the other War Amendments was "the freedom of the slave race."

Conformably to these conclusions the Court advised the New Orleans butchers that the Louisiana statute conferring on a single corporation a monopoly of the business of slaughtering cattle abrogated no rights possessed by them as United States citizens and that insofar as that law interfered with their claimed privilege of pursuing the lawful calling of butchering animals, the privilege thus terminated was merely one of "those which belonged to the citizens of the States as such, and" that these had been "left to the State governments for security and protection" and had not been by this clause "placed under the special care of the Federal Government." The only privileges which the latter clause expressly protected against State encroachment were declared to be those "which owe their existence to the Federal Government, its National character, its Constitution, or its laws."—privileges, indeed, which had been available to United States citizens even prior to the adoption of the Fourteenth Amendment; and inasmuch as under the principle of federal supremacy no State ever was competent to interfere with their enjoyment, the privileges and immunities clause of the Fourteenth Amendment was thereby reduced to a superfluous reiteration of a prohibition already operative against the States.[14]

PRIVILEGES AND IMMUNITIES OF CITIZENS OF THE UNITED STATES

[Pg 967]

Although the Court has expressed a reluctance to attempt a definitive enumeration of those privileges and immunities of United States citizens such as are protected against State encroachment, it nevertheless felt obliged in the Slaughter-House Cases "to suggest some which owe their existence to the Federal Government, its National character, its Constitution, or its laws." Among those then identified were the following: right of access to the seat of Government, and to the seaports, subtreasuries, land offices, and courts of justice in the several States; right to demand protection of the Federal Government on the high seas, or abroad; right of assembly and privilege of the writ of *habeas corpus*; right to use the navigable waters of the United States; and rights secured by treaty.[15]

In a later listing in Twining *v.* New Jersey,[16] decided in 1908, the Court recognized "among the rights and privileges" of national citizenship the following: The right to pass freely from State to State;[17] the right to petition Congress for a redress of grievances;[18] the right to vote for national officers;[19] the right to enter public lands;[20] the right to be protected against violence while in the lawful custody of a United States marshal;[21] and the right to inform the United States authorities of violations of its laws.[22] Earlier in a decision not referred to in the aforementioned enumeration, the Court had also acknowledged that the carrying on of interstate commerce is "a right which every citizen of the United States is entitled to exercise."[23]

During the past fifteen years this clause has been accorded somewhat uneven treatment by the Court which, on two occasions at least, has manifested a disposition to magnify the restraint which it imposes on State action by enlarging previous enumerations of the privileges protected [Pg 968] thereby. In Hague *v.* C.I.O.,[24] decided in 1939, the Court affirmed that freedom to use municipal streets and parks for the dissemination of information concerning provisions of a federal statute and to assemble peacefully therein for discussion of the advantages and opportunities offered by such act was a privilege and immunity of a United States citizen. The latter privilege was deemed to have been abridged by city officials who acted in pursuance of a void ordinance which authorized a director of safety to refuse permits for parades or assemblies on streets or parks whenever he believed riots could thereby be avoided and who forcibly evicted from their city union organizers who sought to use the streets and parks for the aforementioned purposes.[25] Again in Edwards *v.* California,[26] four Justices[27] who concurred in the judgment that a California statute restricting the entry of indigent migrants was unconstitutional preferred to rest their decision on the ground that the act interfered with the right of citizens to move freely from State to State. In thus rejecting the commerce clause, relied on by the majority as the basis for disposing of this case, the minority thereby resurrected an issue first advanced in the old decision of Crandall *v.* Nevada[28] and believed to have been resolved in favor of the commerce clause by Helson and Randolph *v.* Kentucky.[29] Colgate *v.* Harvey,[30] however, which was decided in 1935 and overruled in 1940,[31] represented the first attempt by the Court since adoption of the Fourteenth Amendment to convert the privileges and immunities clause into a source of protection of other than those "interests growing out of the relationship between the citizen and the national government." Here the Court declared that the right of a citizen, resident in one State, to contract in another, to transact any lawful business, or to make a loan of money, in any State other than that in which the citizen resides was a privilege of national citizenship which was abridged by a State income tax law excluding from taxable income interest received on money loaned within the State.[32] Whether or not this overruled precedent is again to be revived and the privileges and immunities clause again placed in readiness for further expansion cannot yet be determined with assurance; but in Oyama *v.* California,[33] decided in 1948, the Court, in a single sentence, affirmed the contention of a native-born youth that California's Alien Land Law, applied so as to work a forfeiture of property purchased in his name with funds advanced by his parent, a Japanese alien ineligible to citizenship and precluded from owning land by the terms thereof, deprived him "of his privileges as an American citizen." In none of the previous enumerations has the right to acquire and retain property been set forth as one of the privileges of American citizenship protected against State abridgment; nor is any connection readily discernible between this right and the "relationship between the citizen and the national government." However, the right asserted by Oyama was supported by a "federal statute enacted before the Fourteenth Amendment" which provided that "all citizens of the United States shall [Pg 969] have the same right, in every State and Territory, as is enjoyed by white citizens thereof to * * * purchase, * * * and hold * * * real * * * property."[34]

PRIVILEGES HELD NOT WITHIN THE PROTECTION OF THE CLAUSE

In the following cases State action was upheld against the challenge that it abridged the immunities or privileges of citizens of the United States:

(1) Statute limiting hours of labor in mines.[35]

(2) Statute taxing the business of hiring persons to labor outside the State.[36]

(3) Statute requiring employment of only licensed mine managers and examiners, and imposing liability on the mine owner for failure to furnish a reasonably safe place for workmen.[37]

(4) Statute restricting employment under public works of the State to citizens of the United States, with a preference to citizens of the State.[38]

(5) Statute making railroads liable to employees for injuries caused by negligence of fellow servants, and abolishing the defense of contributory negligence.[39]

(6) Statute prohibiting a stipulation against liability for negligence in delivery of interstate telegraph messages.[40]

(7) Refusal of State court to license a woman to practice law.[41]

(8) Law taxing in the hands of a resident citizen a debt owing from a resident of another State and secured by mortgage of land in the debtors' State.[42]

(9) Statutes regulating the manufacture and sale of intoxicating liquors.[43]

(10) Statute regulating the method of capital punishment.[44]

(11) Statute restricting the franchise to male citizens.[45]

(12) Statute requiring persons coming into a State to make a declaration of intention to become citizens and residents thereof before being permitted to register as voters.[46] [Pg 970]

(13) Statute restricting dower, in case wife at time of husband's death is a nonresident, to lands of which he died seized.[47]

(14) Statute restricting right to jury trial in civil suits at common law.[48]

(15) Statute restricting drilling or parading in any city by any body of men without license of the Governor. "The right voluntarily to associate together as a military company or organization, or to drill * * *, without, and independent of, an act of Congress or law of the State authorizing the same, is not an attribute of national citizenship."[49]

(16) Provision for prosecution upon information, and for a jury (except in capital cases) of eight persons.[50] Upon an extended review of the cases, the Court held that "the privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to the Federal Constitution against the powers of the Federal Government"; and specifically, that the right to be tried for an offense only upon indictment, and by a jury of 12, rests with the State governments and is not protected by the Fourteenth Amendment. "Those are not distinctly privileges or immunities [of national citizenship] where everyone has the same as against the Federal Government, whether citizen or not." Similarly, freedom from testimonial compulsion, or self-incrimination, is not "an immunity that is protected by the Fourteenth Amendment against State invasion."[51]

(17) Statute penalizing the becoming or remaining a member of any oath-bound association (other than benevolent orders, etc.,) with knowledge that the association has failed to file its constitution and membership lists. The privilege of remaining a member of such an association, "if it be a privilege arising out of citizenship at all," is an incident of State rather than United States citizenship.[52]

(18) Statute allowing a State to appeal in criminal cases for errors of law and to retry the accused.[53]

(19) Statute making the payment of poll taxes a prerequisite to the right to vote.[54]

(20) Statute whereby deposits in banks outside the State are taxed at 50¢ per $100 and deposits in banks within the State are taxed at 10¢ per $100. "* * * the right to carry out an incident to a trade, business or calling such as the deposit of money in banks is not a privilege of national citizenship."[55]

(21) The right to become a candidate for State office is a privilege of State citizenship, not national citizenship.[56]

(22) The Illinois Election Code which requires that a petition to form and nominate candidates for a new political party be signed by at least 200 voters from each of at least 50 of the 102 counties in the State, notwithstanding that 52% of the voters reside in only one county and 87%, in the 49 most populous counties.[57] [Pg 971]

Due Process of Law Clause

HISTORICAL DEVELOPMENT

Although many years after ratification the Court ventured the not very informative observation that the Fourteenth Amendment "operates to extend * * * the same protection against arbitrary State legislation, affecting life, liberty and property, as is offered by the Fifth Amendment,"[58] and that "ordinarily if an act of Congress is valid under the Fifth Amendment it would be hard to say that a State law in like terms was void under the Fourteenth,"[59] the significance of the due process clause as a restraint on State action appears to have been grossly underestimated by litigants no less than by the Court in the years immediately following its adoption. From the

outset of our constitutional history due process of law as it occurs in the Fifth Amendment had been recognized as a restraint upon government, but, with one conspicuous exception,[60] only in the narrower sense that a legislature must provide "due process for the enforcement of law"; and [Pg 972] it was in accordance with this limited appraisal of the clause that the Court disposed of early cases arising thereunder.

Thus, in the Slaughter-House Cases,[61] in which the clause was timidly invoked by a group of butchers challenging on several grounds the validity of a Louisiana statute which conferred upon one corporation the exclusive privilege of butchering cattle in New Orleans, the Court declared that the prohibition against a deprivation of property "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. * * * 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."[62] Four years later, in Munn *v.* Illinois,[63] the Court again refused to interpret the due process clause as invalidating State legislation regulating the rates charged for the transportation and warehousing of grain. Overruling contentions that such legislation effected an unconstitutional deprivation of property by preventing the owner from earning a reasonable compensation for its use and by transferring to the public an interest in a private enterprise, Chief Justice Waite emphasized that "the great office of statutes is to remedy defects in the common law as they are developed, * * * We know that this power [of rate regulation] may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts."[64]

Deploring such attempts, nullified consistently in the preceding cases, to convert the due process clause into a substantive restraint on the powers of the States, Justice Miller in Davidson *v.* New Orleans[65] obliquely counseled against a departure from the conventional application of the clause, albeit he acknowledged the difficulty of arriving at a precise, all inclusive, definition thereof. "It is not a little remarkable," he observed, "that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal Government, [Pg 973] for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded. If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law. But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, * * *, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, * * *"[66]

In thus persisting in its refusal to review, on other than procedural grounds, the constitutionality of State action, the Court was rejecting additional business; but a bare half-dozen years later, in again reaching a result in harmony with past precedents, the Justices gave fair warning of the imminence of a modification of their views. Thus, after noting that the due process clause, by reason of its operation upon "all the powers of government, legislative as well as executive and judicial," could not be appraised solely in terms of the "sanction of settled usage," Justice Mathews, speaking for the Court in Hurtado *v.* California,[67] declared that, "arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and [Pg 974] national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government."[68] Thus were the States put on notice that every species of State legislation, whether dealing with procedural or substantive rights, was subject to the scrutiny of the Court when the question of its essential justice is raised.

Police Power: Liberty: Property

What induced the Court to dismiss its fears of upsetting the balance in the distribution of powers under the Federal System and to enlarge its own supervisory powers over state legislation were the appeals more and more addressed to it for adequate protection of property rights against the remedial social legislation which the States were increasingly enacting in the wake of industrial expansion. At the same time the added emphasis on the due process clause which satisfaction of these requests entailed afforded the Court an opportunity to compensate for its earlier virtual nullification of the privileges and immunities clause of the amendment. So far as such modification of its position needed to be justified in legal terms, theories concerning the relation of government to private rights were available to demonstrate the impropriety of leaving to the state legislatures the same ample range of police power they had enjoyed prior to the Civil War. Preliminary, however, to this consummation the Slaughter-House Cases and Munn *v.* Illinois had to be overruled in part, at least, and the views of the dissenting Justices in those cases converted into majority doctrine.

About twenty years were required to complete this process, in the course of which the restricted view of the police power advanced by Justice Field in his dissent in Munn *v.* Illinois,[69] namely, that it is solely a power to prevent injury, was in effect ratified by the Court itself. This occurred in 1887, in Mugler *v.* Kansas,[70] where the power was defined as embracing no more than the power to promote public health, morals, and safety. During the same interval, ideas embodying the social compact and natural rights, which had been espoused by Justice Bradley in his dissent in the Slaughter-House Cases,[71] had been transformed tentatively into constitutionally enforceable limitations upon government,[72] with the consequence that the States, in exercising their police power, could foster only those purposes of health, morals, and safety which the Court [Pg 975] had enumerated and could employ only such means as would not unreasonably interfere with the fundamental natural rights of liberty and property, which Justice Bradley had equated with freedom to pursue a lawful calling and to make contracts for that purpose.[73]

So having narrowed the scope of the State's police power in deference to the natural rights of liberty and property, the Court next proceeded to read into the latter currently accepted theories of *laissez faire* economics, reinforced by the doctrine of evolution as elaborated by Herbert Spencer, to the end that "liberty", in particular, became synonymous with governmental hands-off in the field of private economic relations. In Budd *v.* New York,[74] decided in 1892, Justice Brewer in a dictum declared: "The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government." And to implement this point of view the Court next undertook to water down the accepted maxim that a State statute must be presumed to be valid until clearly shown to be otherwise.[75] The first step was taken with the opposite intention. This occurred in Munn *v.* Illinois,[76] where the Court, in sustaining the legislation before it, declared: "For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed."[77] Ten years later, in Mugler *v.* Kansas[78] this procedure was improved upon, and a State-wide anti-liquor law was sustained on the basis of the proposition that deleterious social effects of the excessive use of alcoholic liquors were sufficiently notorious for the Court to be able to take notice of them; that is to say, for the Court to review and appraise the considerations which had [Pg 976] induced the legislature to enact the statute in the first place.[79] However, in Powell *v.* Pennsylvania,[80] decided the following year, the Court, being confronted with a similar act involving oleomargarine, concerning which it was unable to claim a like measure of common knowledge, fell back upon the doctrine of presumed validity, and declaring that "it does not appear upon the face of the statute, or from any of the facts of which the Court must take judicial cognizance, that it infringes rights secured by the fundamental law, * * *"[81] sustained the measure.

In contrast to the presumed validity rule under which the Court ordinarily is not obliged to go beyond the record of evidence submitted by the litigants in determining the validity of a statute, the judicial notice principle, as developed in Mugler *v.* Kansas, carried the inference that unless the Court, independently of the record, is able to ascertain the existence of justifying facts accessible to it by the rules governing judicial notice, it will be obliged to invalidate a police power regulation as bearing no reasonable or adequate relation to the purposes to be subserved by the latter; namely, health, morals, or safety. For appraising State legislation affecting neither liberty nor property, the Court found the rule of presumed validity quite serviceable; but for invalidating legislation constituting governmental interference in the field of economic relations, and, more particularly, labor-management relations, the Court found the principle of judicial notice more advantageous. This advantage was enhanced by the disposition of the Court, in litigation embracing the latter type of legislation, to shift the burden of proof from the litigant charging unconstitutionality to the State seeking enforcement. To the latter was transferred the task of demonstrating that a statute interfering with the natural right of liberty or property was in fact "authorized" by the Constitution and not merely that the latter did not expressly prohibit enactment of the same.

Liberty of Contract—Labor Relations

Although occasionally acknowledging in abstract terms that freedom of contract is not absolute but is subject to restraint by the State in the exercise of its police powers, the Court, in [Pg 977] conformity with the aforementioned theories of economics and evolution, was in fact committed to the principle that freedom of contract is the general rule and that legislative authority to abridge the same could be justified only by exceptional circumstances. To maintain such abridgments at a minimum, the Court intermittently employed the rule of judicial notice in a manner best exemplified by a comparison of the early cases of Holden *v.* Hardy[82] and Lochner *v.* New York,[83] decisions which bear the same relation to each other as Powell *v.* Pennsylvania[84] and Mugler *v.* Kansas.[85]

In Holden *v.* Hardy, decided in 1898, the Court, in reliance upon the principle of presumed validity, allowed the burden of proof to remain with those attacking the validity of a statute and upheld a Utah act limiting the period of labor in mines to eight hours per day. Taking cognizance of the fact that labor below the surface of the earth was attended by risk to person and to health and for these reasons had long been the subject of State intervention, the Court registered its willingness to sustain a limitation on freedom of contract which a State legislature had adjudged "necessary for the preservation of health of employees," and for which there were "reasonable grounds for believing that * * * [it was] supported by the facts."[86]

Seven years later, however, a radically altered court was predisposed in favor of the doctrine of judicial notice, through application of which it arrived at the conclusion, in Lochner *v.* New York, that a law restricting employment in bakeries to ten hours per day and 60 hours per week was an unconstitutional interference with the right of adult laborers, *sui juris*, to contract with respect to their means of livelihood. Denying that in so holding that the Court was in effect substituting its own judgment for that of the legislature, Justice Peckham, nevertheless, maintained that whether the act was within the police power of the State was a "question that must be answered by the Court"; and then, in disregard of the accumulated medical evidence proffered in support of the act, uttered the following observation: "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 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. * * * It might be safely affirmed that almost all occupations more or less affect the health. * * * But are we all, on that account, at the [Pg 978] mercy of the legislative majorities?"[87]

Of two dissenting opinions filed in the case, one, prepared by Justice Harlan, stressed the abundance of medical testimony tending to show that the life expectancy of bakers was below average, that their capacity to resist diseases was low, and that they were peculiarly prone to suffer irritations of the eyes, lungs, and bronchial passages; and concluded that the very existence of such evidence left the reasonableness of the measure under review open to discussion and that the the latter fact, of itself, put the statute within legislative discretion. "'Responsibility,' according to Justice Harlan, 'therefore, rests upon the legislators, not upon the courts. No evils arising from such legislation could be more far reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. * * * The public interest imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably beyond all question in violation of the fundamental law of the Constitution.'"[88]

The second dissenting opinion written by Justice Holmes has received the greater measure of attention, however, for the views expressed therein were a forecast of the line of reasoning to be followed by the Court some decades later. According to Justice Holmes: "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. * * * The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. * * * 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 * * * I think that the word [Pg 979] '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."[89]

In part, Justice Holmes's criticism of his colleagues was unfair, for his "rational and fair man" could not function in a vacuum, and, in appraising the constitutionality of State legislation, could no more avoid being guided by his preferences or "economic predilections" than were the Justices constituting the majority. Insofar as he was resigned to accept the broader conception of due process of law in preference to the historical concept thereof as pertaining to the

enforcement rather than the making of law and did not affirmatively advocate a return to the maxim that the possibility of abuse is no argument against possession of a power, Justice Holmes, whether consciously or not, was thus prepared to observe, along with his opponents in the majority, the very practices which were deemed to have rendered inevitable the assumption by the Court of a "perpetual censorship" over State legislation. The basic distinction, therefore, between the positions taken by Justice Peckham for the majority and Justice Holmes, for what was then the minority, was the espousal of the conflicting doctrines of judicial notice by the former and of presumed validity by the latter.

Although the Holmes dissent bore fruit in time in the form of the Bunting *v.* Oregon[90] and Muller *v.* Oregon[91] decisions overruling the Lochner Case, the doctrinal approach employed in the earlier of these by Justice Brewer continued to prevail until the depression in the 1930's. In view of the shift in the burden of proof which application of the principle of judicial notice entailed, counsel defending the constitutionality of social legislation developed the practice of submitting voluminous factual briefs replete with medical or other scientific data intended to establish beyond question a substantial relationship between the challenged statute and public health, safety, or morals. Whenever the Court was disposed to uphold measures pertaining to industrial relations, such as laws limiting hours[92] of work, it generally intimated that the facts thus submitted by way of justification had been authenticated sufficiently for it to take judicial cognizance thereof; but whenever it chose to invalidate comparable legislation, such as enactments establishing minimum wages for women and children,[93] it brushed aside such supporting data, proclaimed its inability to perceive any reasonable connection between the statute and the legitimate objectives of health or safety, and condemned the former as an arbitrary interference with freedom of contract.

During the great Depression, however, the *laissez faire* tenet of self-help was supplanted by the belief that it is peculiarly the duty of government to help those who are unable to help themselves; and to sustain remedial legislation enacted in conformity with the latter philosophy, the Court had to revise extensively its previously formulated concepts of "liberty" under the due process clause. Not only did the Court take judicial notice of the demands for relief arising from the depression when it overturned prior holdings and sustained minimum wage legislation,[94] but in upholding State legislation designed to protect workers in their efforts to organize and bargain collectively, the Court virtually had to exclude from consideration the employer's contention that such legislation interfered with his liberty of contract in contravention of the due process clause and to exalt as a fundamental right the correlative liberty of employees, which right the State legislatures were declared to be competent to protect against interference from private sources. To enable these legislatures to balance the equities, that is, to achieve equality in bargaining power between employer and employees, the Court thus sanctioned a diminution of liberty in the sense of the employer's freedom of contract and a corresponding increase in the measure of liberty enjoyable by the workers. To the extent that it acknowledged that liberty of the individual may be infringed by the coercive conduct of other individuals no less than by the arbitrary action of public officials, the Court in effect transformed the due process clause into a source of encouragement to State legislatures to intervene affirmatively by way of mitigating the effects of such coercion. By such modification of its views, liberty, in the constitutional sense of freedom resulting from restraint upon government, was replaced by the civil liberty which an individual enjoys by virtue of the restraints which government, in his behalf, imposes upon his neighbors. [Pg 980]

DEFINITIONS [Pg 981]

"Persons" Defined

Notwithstanding the historical controversy that has been waged as to whether the framers of the Fourteenth Amendment intended the word, "person," to mean only natural persons, or whether the word, "person," was substituted for the word, "citizen," with a view to protecting corporations from oppressive state legislation,[95] the Supreme Court, as early as the Granger cases,[96] decided in 1877, upheld on the merits various state laws without raising any question as to the status of railway corporation-plaintiffs to advance due process contentions. There is no doubt that a corporation may not be deprived of its property without due process of law;[97] and although prior decisions have held that the "liberty" guaranteed by the Fourteenth Amendment is the liberty of natural, not artificial, persons,[98] nevertheless a newspaper corporation was sustained, in 1936, in its objection that a state law deprived it of liberty of press.[99] As to the natural persons protected by the due process clause, these include all human beings regardless of race, color, or citizenship.[100]

Ordinarily, the mere interest of an official as such, in contrast to an actual injury sustained by a natural or artificial person through invasion of personal or property rights, has not been deemed adequate to enable him to invoke the protection of the Fourteenth Amendment against State action.[101] Similarly, municipal corporations are viewed as having no standing "to invoke the provisions of the Fourteenth Amendment in opposition to the will of their creator," the State.[102] However, State officers are acknowledged to have an interest, despite their not having sustained any "private damage," in resisting an "endeavor to prevent the enforcement of laws in relation to which they have official duties," and, accordingly, may apply to federal courts for the "review of [Pg 982]

decisions of State courts declaring State statutes which [they] seek to enforce to be repugnant to the" Fourteenth Amendment.[103]

Due Process and the Police Power

Definition.—The police power of a State today embraces regulations designed to promote the public convenience or the general prosperity as well as those to promote public safety, health, morals, and is not confined to the suppression of what is offensive, disorderly, or unsanitary, but extends to what is for the greatest welfare of the State.[104]

Limitations on the Police Power.—Because the police power of a State is the least limitable of the exercises of government, such limitations as are applicable thereto are not readily definable. Being neither susceptible of circumstantial precision, nor discoverable by any formula, these limitations can be determined only through appropriate regard to the subject matter of the exercise of that power.[105] "It is settled [however] that neither the 'contract' clause nor the 'due process' clause had the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property [or other vested] rights are held subject to its fair exercise."[106] Insofar as the police power is utilized by a State, the means employed to [Pg 983] effect its exercise can be neither arbitrary nor oppressive, but must bear a real and substantial relation to an end which is public, specifically, the public health, public safety, or public morals, or some other phase of the general welfare.[107]

The general rule is that if a police power regulation goes too far, it will be recognized as a taking of property for which compensation must be paid.[108] Yet where mutual advantage is a sufficient compensation, an ulterior public advantage may justify a comparatively insignificant taking of private property for what in its immediate purpose seems to be a private use.[109] On the other hand, mere "cost and inconvenience (different words, probably, for the same thing) would have to be very great before they could become an element in the consideration of the right of a State to exert its reserved power or its police power."[110] Moreover, it is elementary that enforcement of uncompensated obedience to a regulation passed in the legitimate exertion of the police power is not a taking without due process of law.[111] Similarly, initial compliance with a regulation which is valid when adopted occasions no forfeiture of the right to protest when that regulation subsequently loses its validity by becoming confiscatory in its operation.[112]

"Liberty" in General

Definition.—"While * * * [the] Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long [Pg 984] recognized at common law as essential to the orderly pursuit of happiness by free men."[113]

Personal Liberty: Compulsory Vaccination: Sexual Sterilization.—Personal liberty is not infringed by a compulsory vaccination law[114] enacted by a State or its local subdivisions pursuant to the police power for the purpose of protecting inhabitants against the spread of smallpox. "The principle that sustains compulsory vaccination is [also] broad enough to cover" a statute providing for sexual sterilization of inmates of State supported institutions who are found to be afflicted with an hereditary form of insanity or imbecility.[115] Equally constitutional is a statute which provides for the commitment, after probate proceedings, of a psychopathic personality, defined by the State court as including those persons who, by habitual course of misconduct in sexual matters, have evidenced utter lack of power to control their sexual impulses and are likely to commit injury.[116] However, a person cannot be deprived of his liberty under a vague statute which subjected to fine or imprisonment, as a "gangster," any one not engaged in any lawful occupation, known to be a member of a gang consisting of two or more persons, and who had been convicted of a crime in any State in the Union.[117]

Liberties Pertaining to Education (of Teachers, Parents, Pupils).—A State law forbidding the teaching in any private denominational, parochial, or public school, of any modern language, other than English, to any child who has not successfully passed the eighth grade was declared, in Meyer *v.* Nebraska[118] to be an unconstitutional interference with the right of a foreign language teacher to teach and "of parents to engage him so to instruct their children." Although the Court did incorporate into its opinion in this case the general definition of "liberty" set forth above, its holding was substantially a reaffirmation of the liberty, in this instance of the teacher, to pursue a lawful calling free and clear of arbitrary restraints imposed by the State. In Pierce *v.* Society of the Sisters,[119] the Court elaborated further upon the liberty of parents when it declared that a State law requiring compulsory public school education of children, aged eight to sixteen, "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[120] As to a student, neither his liberty

to pursue his happiness nor his property or property rights were infringed when he was denied admission to a State university for refusing to comply with a law requiring renunciation of allegiance to, or affiliation with, a Greek letter fraternity. The right to attend such an institution [Pg 985] was labelled, not an absolute, but a conditional right; inasmuch as the school was wholly under the control of the State, the latter was competent to enact measures such as the present one regulating internal discipline thereat.[121] Similarly, "the Fourteenth Amendment as a safeguard of 'liberty' [does not] confer the right to be students in the State university free from obligation to take military training as one of the conditions of attendance."[122]

Liberties Safeguarded by the First Eight Amendments.—In what has amounted to a constitutional revolution, the Court, since the end of World War I, has substantially enlarged the meaning of the term, "liberty," appearing in the due process clause of the Fourteenth Amendment. As a consequence of this altered interpretation, States and their local subdivisions have been restrained in their attempts to interfere with the press, or with the freedom of speech, assembly, or religious precepts of their inhabitants, and prevented from withholding from persons charged with commission of a crime certain privileges deemed essential to the enjoyment of a "fair trial." Cases revealing to what extent there has been incorporated into the "liberty" of the due process clause of the Fourteenth Amendment the substance of the First Amendment are set forth in the discussion presented under the latter amendment; whereas the decisions indicating the scope of the absorption into the Fourteenth Amendment of the procedural protection afforded by the Fourth, Fifth, Sixth, and Eighth Amendments are included in the material hereinafter presented under the subtitle, Criminal Proceedings.

Liberty of Contract (Labor Relations)

In General.—Liberty of contract, a concept originally advanced by Justices Bradley and Field in the Slaughter-House Cases,[123] was elevated to the status of accepted doctrine in 1897 in Allgeyer *v.* Louisiana.[124] Applied repeatedly in subsequent cases as a restraint on State power, freedom of contract has also been alluded to as a property right, as is evident in the language of the Court in Coppage *v.* Kansas:[125] "Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long- [Pg 986] established constitutional sense."

However, by a process of reasoning that was almost completely discarded during the depression, the Court was nevertheless able, prior thereto, to sustain State ameliorative legislation by acknowledging that freedom of contract was "a qualified and not an absolute right. * * * Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. * * * In dealing with the relation of the 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."[126] Through observance of such qualifying statement the Court was induced to uphold the following types of labor legislation.

Laws Regulating Hours of Labor.—The due process clause has been construed as permitting enactment by the States of laws: (1) limiting the hours of labor in mines and smelters to eight hours per day;[127] (2) prescribing eight hours a day or a maximum of 48 hours per week as a limitation of the hours at which women may labor;[128] and (3) providing that no person shall work in any mill, etc., more than ten hours per day (with exceptions) but permitting overtime, not to exceed three hours a day, on condition that it is paid at the rate of one and one-half times the regular wage.[129] Because of the almost plenary powers of the State and its municipal subdivisions to determine the conditions under which work shall go forward on public projects, statutes limiting the hours of labor on public works were also upheld at a relatively early date.[130]

Laws Regulating Labor in Mines.—The regulation of mines being so patently within the police [Pg 987] power, States have been upheld in the enactment of laws providing for appointment of mining inspectors and requiring payment of their fees by mine owners,[131] compelling employment of only licensed mine managers and mine examiners, and imposing upon mine owners liability for the wilful failure of their manager and examiner to furnish a reasonably safe place for workmen.[132] Other similar regulations which have been sustained have included laws requiring that entries be of a specified width,[133] that boundary pillars be installed between adjoining coal properties as a protection against flood in case of abandonment,[134] and that washhouses be provided for employees.[135]

Laws Prohibiting Employment of Children in Hazardous Occupations.—To make effective its prohibition against the employment of persons under 16 years of age in dangerous occupations, a State has been held to be competent to require employers at their peril to ascertain whether their employees are in fact below that age.[136]

Laws Regulating Payment of Wages.—No unconstitutional deprivation of liberty of contract was deemed to have been occasioned by a statute requiring redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages.[137] Nor was any constitutional defect discernible in laws requiring railroads to pay their employees semimonthly[138] and to pay them on the day of discharge, without abatement or reduction, any funds due them.[139] Similarly, freedom of contract was held not to be infringed by an act requiring that miners, whose compensation was fixed on the basis of weight, be paid according to coal in the mine car rather than at a certain price per ton for coal screened after it has been brought to the surface, and conditioning such payment on the presence of no greater percentage of dirt or impurities than that ascertained as unavoidable by the State Industrial Commission.[140]

Minimum Wage Laws.—The theory that a law prescribing minimum wages for women and children violates due process by impairing freedom of contract was finally discarded in 1937.[141] The current theory of the Court, particularly when labor is the beneficiary of legislation, was recently stated by Justice Douglas for a majority of the Court, in the following terms: "Our recent decisions make plain that we do not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. The legislative power has limits * * *. But the state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare; they may within extremely broad limits control practices in the business-labor field, so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided."[142] Proceeding from this basis the Court sustained a Missouri statute giving employees the right to absent themselves four hours on election day, between the opening and closing of the polls, without deduction of wages for their absence. It was admitted that this was a minimum wage law, but, said Justice Douglas, "the protection of the right of suffrage under our scheme of things is basic and fundamental," and hence within the police power. "Of course," the Justice added, "many forms of regulation reduce the net return of the enterprise * * * Most regulations of business necessarily impose financial burdens on the enterprise for which no compensation is paid. Those are part of the costs of our civilization. Extreme cases are conjured up where an employer is required to pay wages for a period that has no relation to the legitimate end. Those cases can await decision as and when they arise. The present law has no such infirmity. It is designed to eliminate any penalty for exercising the right of suffrage and to remove a practical obstacle to getting out the vote. The public welfare is a broad and inclusive concept. The moral, social, economic, and physical well-being of the community is one part of it; the political well-being, another. The police power which is adequate to fix the financial burden for one is adequate for the other. The judgment of the legislature that time out for voting should cost the employee nothing may be a debatable one. It is indeed conceded by the opposition to be such. But if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision. We could strike down this law only if we returned to the philosophy of the *Lochner*, *Coppage*, and *Adkins* cases."[143]

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Workmen's Compensation Laws.—"This Court repeatedly has upheld the authority of the States to establish by legislation departures from the fellow-servant rule and other common-law rules affecting the employer's liability for personal injuries to the employee.[144] * * * These decisions have established the propositions that the rules of law concerning the employer's responsibility for personal injury or death of an employee arising in the course of employment are not beyond alteration by legislation in the public interest; that no person has a vested right entitling him to have these any more than other rules of law remain unchanged for his benefit; and that, if we exclude arbitrary and unreasonable changes, liability may be imposed upon the employer without fault, and the rules respecting his responsibility to one employee for the negligence of another and respecting contributory negligence and assumption of risk are subject to legislative change."[145]

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Accordingly, a State statute which provided an exclusive system to govern the liabilities of employers and the rights of employees and their dependents, in respect of compensation for disabling injuries and death caused by accident in certain hazardous occupations,[146] was held not to work a deprivation of property without due process of law in rendering the employer liable irrespective of the doctrines of negligence, contributory negligence, assumption of risk, and negligence of fellow-servants, nor in depriving the employee, or his dependents, of the higher damages which, in some cases, might be rendered under these doctrines.[147] Likewise, an act which allowed an injured employee an election of remedies permitting restricted recovery under a compensation law although guilty of contributory negligence, and full compensatory damages under the Employers' Liability Act did not deprive an employer of his property without due process of law.[148] Similarly, an elective statute has been sustained which provided that, in actions against employers rejecting the system, the inquiry should be presumed to have resulted directly from the employer's negligence and the burden of rebutting said presumption shall rest upon the latter.[149]

Contracts limiting liability for injuries, consummated in advance of the injury received, may be prohibited by the State, which may further stipulate that subsequent acceptance of benefits under such contracts shall not constitute satisfaction of a claim for injuries thereafter sustained.[150] Also, as applied to a nonresident alien employee hired within the State but injured on the outside, an act forbidding any contracts exempting employers from liability for injuries outside

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the State has been construed as not denying due process to the employer.[151] The fact that a State, after having allowed employers to cover their liability with a private insurer, subsequently withdrew that privilege and required them to contribute to a State Insurance Fund was held to effect no unconstitutional deprivation as applied to an employer who had obtained protection from an insurance company before this change went into effect.[152] Likewise, as long as the right to come under a workmen's compensation statute is optional with an employer, the latter, having chosen to accept benefits thereof, is estopped from attempting to escape its burdens by challenging the constitutionality of a provision thereof which makes the finding of fact of an industrial commission conclusive if supported by any evidence regardless of its preponderance.[153]

When, by the terms of a workmen's compensation statute, the wrongdoer, in case of wrongful death, is obliged to indemnify the employer or the insurance carrier of the employer of the decedent, in the amount which the latter were required under said act to contribute into special compensation funds, no unconstitutional deprivation of the wrongdoer's property was discernible.[154] By the same course of reasoning neither the employer nor the carrier was held to have been denied due process by another provision in an act requiring payments by them, in case an injured employee dies without dependents, into special funds to be used for vocational rehabilitation or disability compensation of injured workers of other establishments.[155] Compensation also need not be based exclusively on loss of earning power, and an award authorized by statute for injuries resulting in disfigurement of the face or head, independent of compensation for inability to work, has been conceded to be neither an arbitrary nor oppressive exercise of the police power.[156]

Collective Bargaining.—During the 1930's, liberty, in the sense of freedom of contract, judicially [Pg 991] translated into what one Justice has labelled the Allgeyer-Lochner-Adair-Coppage doctrine,[157] lost its potency as an obstacle to the enforcement of legislation calculated to enhance the bargaining capacity of workers as against that already possessed by their employers. Prior to the manifestation, in Senn *v.* Tile Layers Protective Union,[158] decided in 1937, of a greater willingness to defer to legislative judgment as to the wisdom and need of such enactments, the Court had, on occasion, sustained measures such as one requiring every corporation to furnish, upon request, to any employee, when discharged or leaving its service, a letter, signed by the superintendent or manager, setting forth the nature and duration of his service to the corporation and stating truly the cause of his leaving.[159] Added provisions that such letters shall be on plain paper selected by the employee, signed in ink and sealed, and free from superfluous figures, and words, were also sustained as not amounting to any unconstitutional deprivation of liberty and property.[160] On the ground that the right to strike is not absolute, the Court in a similar manner upheld a statute by the terms of which an officer of a labor union was punished for having ordered a strike for the purpose of enforcing a payment to a former employee of a stale claim for wages.[161]

The significance of the case of Senn *v.* Tile Layers Protective Union[162] as an indicator of the [Pg 992] range of the alteration of the Court's views concerning the constitutionality of State labor legislation derives in part from the fact that the statute upheld therein was not appreciably different from that voided in Truax *v.* Corrigan.[163] Both statutes were alike in that they withheld the remedy of injunction; but by reason of the fact that the invalidated act did not contain the more liberal and also more precise definition of a labor dispute set forth in the later enactment and, above all, did not affirmatively purport to sanction peaceful picketing only, the Court was enabled to maintain that Truax *v.* Corrigan, insofar as "the statute there in question was * * * applied to legalize conduct which was not simply peaceful picketing," was distinguishable. Specifically, the Court in the Senn Case gave its approval to the application of a Wisconsin statute which authorized the giving of publicity to labor disputes, declared peaceful picketing and patrolling lawful, and prohibited the granting of injunctions against such conduct to a controversy in which the matter at issue was the refusal of a tiling contractor employing nonunion workmen to sign a closed shop agreement unless a provision requiring him to abstain from working in his business as a tile layer or helper should be eliminated. Inasmuch as the enhancement of job opportunities for members of the union was a legitimate objective, the State was held competent to authorize the fostering of that end by peaceful picketing, and the fact that the sustaining of the union in its efforts at peaceful persuasion might have the effect of preventing Senn from continuing in business as an independent entrepreneur was declared to [Pg 993] present an issue of public policy exclusively for legislative determination.[164]

The policy of many State legislatures in recent years, however, has been to adopt legislation designed to control the abuse of the enormous economic power which previously enacted protective measures enabled labor unions to amass; and it is the constitutionality of such restrictive measures that has lately concerned the Court. Thus, in Railway Mail Association *v.* Corsi,[165] section 43 of New York's Civil Rights Law which forbids a labor organization to deny any person membership by reason of race, color, or creed, or to deny any member, on similar grounds, equal treatment in designation for employment, promotion, or dismissal by an employer was sustained, when applied to an organization of railway mail clerks, as not interfering unlawfully with the latter's right to choose its members nor abridging its property rights, or liberty of contract. Inasmuch as it held "itself out to represent the general business needs of employees" and functioned "under the protection of the State," the union was deemed to have

forfeited the right to claim exemption from legislation protecting workers against discriminatory exclusion.[166] Similarly approved as constitutional in Lincoln Union *v.* Northwestern Co.[167] and American Federation of Labor *v.* American Sash Co.[168] were State laws outlawing the closed shop; and when labor unions invoked in their own defense the freedom of contract doctrine that hitherto had been employed to nullify legislation intended for their protection, the Court, speaking through Justice Black announced its refusal "to return, * * * to * * * [a] due process philosophy that has been deliberately discarded. * * * The due process clause," it maintained, does not "forbid a State to pass laws clearly designed to safeguard the opportunity of nonunion workers to get and hold jobs, free from discrimination against them because they are nonunion workers."[169] Also in harmony with the last mentioned pair of cases is Auto Workers *v.* Wisconsin Board[170] in which was upheld enforcement of the Wisconsin Employment Peace Act which proscribed as an unfair labor practice efforts of a union, after collective bargaining negotiations had become deadlocked, to coerce an employer through a "slow-down" in production achieved by the irregular, but frequent, calling of union meetings during working hours without advance notice to the employer or notice as to whether or when the employees would return, and without informing him of the specific terms sought by such tactics. "No one," declared the Court, can question "the State's power to police coercion by * * * methods" which involve "considerable [Pg 994] injury to property and intimidation of other employees by threats."[171] Finally, in Giboney *v.* Empire Storage Co.,[172] the Court acknowledged that no violation of the Constitution results when a State law forbidding agreements in restraint of trade is construed by State courts as forbidding members of a union of ice peddlers from peacefully picketing a wholesale ice distributor's place of business for the sole purpose of inducing the latter not to sell to nonunion peddlers.

REGULATION OF CHARGES; "BUSINESSES AFFECTED WITH A PUBLIC INTEREST"

History

In endeavoring to measure the impact of the due process clause upon efforts by the States to control the charges exacted by various businesses for their services, the Supreme Court, almost from the inception of the Fourteenth Amendment, has devoted itself to the examination of two questions: (1) whether that clause precluded that kind of regulation of certain types of business, and (2) the nature of the restraint, if any, which this clause imposes on State control of rates in the case of businesses as to which such control exists. For a brief interval following the ratification of the Fourteenth Amendment, the Supreme Court appears to have underestimated the significance of this clause as a substantive restraint on the power of States to fix rates chargeable by an industry deemed appropriately subject to such controls. Thus, in Munn *v.* Illinois,[173] the first of the "Granger" cases, in which maximum charges established by a State legislature for Chicago grain elevator companies were challenged, not as being confiscatory in [Pg 995] character, but rather as a regulation beyond the power of any State agency to impose, the Court, in an opinion that was largely an *obiter dictum*, declared that the due process clause did not operate as a safeguard against oppressive rates, that if regulation was permissible, the severity thereof was within legislative discretion and could be ameliorated only by resort to the polls. Not much time was permitted to elapse, however, before the Court effected a complete withdrawal from this position; and by 1890[174] it had fully converted the due process clause into a positive restriction which the judicial branch is duty bound to enforce whenever State agencies seek to impose rates which, in its estimation, are arbitrary or unreasonable.

In contrast to the speed with which the Court arrived at those above mentioned conclusions, more than fifty years were to elapse before it developed its currently applicable formula for determining the propriety of subjecting specific businesses to State regulation of their prices or charges. Prior to 1934, unless a business were "affected with a public interest," control of its prices, rates, or conditions of service was viewed as an unconstitutional deprivation of liberty and property without due process of law. During the period of its application, however, this standard, "business affected with a public interest," never acquired any precise meaning; and as a consequence lawyers were never able to identify all those qualities or attributes which invariably distinguished a business so affected from one not so affected. The best the Court ever offered by way of enlightenment was the following classification of businesses subject to regulation, prepared by Chief Justice Taft.[175] These were said to comprise: "(1) Those [businesses] which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities. (2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and grist mills. * * * (3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to [Pg 996] protection accordingly."

Through application of this now outmoded formula the Court found it possible to sustain State laws regulating charges made by grain elevators,[176] stockyards,[177] and tobacco warehouses,[178] and fire insurance rates[179] and commissions paid to fire insurance agents.[180] Voided, because the businesses sought to be controlled were deemed to be not so affected, were State statutes fixing the price at which gasoline may be sold,[181] or at which ticket brokers may resell tickets purchased from theatres,[182] and limiting competition in the manufacture and sale of ice through the withholding of licenses to engage therein.[183]

Nebbia *v.* New York

In upholding, by a vote of five-to-four, a depression induced New York statute fixing prices at which fluid milk might be sold, the Court, in 1934, finally shelved the concept of "a business affected with a public interest."[184] Older decisions, insofar as they negatived a power to control prices in businesses found not "to be clothed with a public use" were now reviewed as resting, "finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. Price control, like any other form of regulation, is [now] unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." Conceding that "the dairy industry is not, in the accepted sense of the phrase, a public utility"; that is, a "business affected with a public interest," the Court in effect declared that price control henceforth is to be viewed merely as an exercise by the State of its police power, and as such is subject only to the restrictions which due process of law imposes on arbitrary interference with liberty and property. Nor was the Court disturbed by the fact that a "scientific validity" had been claimed for the theories of Adam Smith relating to the "price that will clear the market." However much the minority might stress the unreasonableness of any artificial State regulation interfering with the determination of prices by "natural forces,"[185] the majority was content to note that the "due process clause makes no mention of prices" and that "the courts are both incompetent and unauthorized to deal with the wisdom of the policy adopted or the practicability of the law enacted to forward it." [Pg 997]

Having thus concluded that it is no longer the nature of the business which determines the validity of a regulation of its rates or charges but solely the reasonableness of the regulation, the Court had little difficulty in upholding, in Olsen *v.* Nebraska,[186] a State law prescribing the maximum commission which private employment agencies may charge. Rejecting the contentions of the employment agencies that the need for such protective legislation had not been shown, the Court held that differences of opinion as to the wisdom, need, or appropriateness of the legislation "suggest a choice which should be left to the States"; and that there was "no necessity for the State to demonstrate before us that evils persist despite the competition" between public, charitable, and private employment agencies. The older case of Ribnik *v.* McBride,[187] which founded the invalidation of similar legislation upon the now obsolete concept of a "business affected with a public interest" was expressly overruled.

JUDICIAL REVIEW OF PUBLICLY DETERMINED RATES AND CHARGES [Pg 998]

Development

In Munn *v.* Illinois,[188] its initial holding concerning the applicability of the Fourteenth Amendment to governmental price fixing,[189] the Court, not only asserted that governmental regulation of rates charged by public utilities and allied businesses was within the States' police power but added that the determination of such rates by a legislature was conclusive and not subject to judicial review or revision. Expanding the range of permissible governmental fixing of prices, the Court, in the Nebbia Case,[190] more recently declared that prices established for business in general would invite judicial condemnation only if "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt." The latter standard of judicial appraisal, as will be subsequently noted, represents less of a departure from the principle enunciated in the Munn Case than that which the Court evolved, in the years following 1877, to measure the validity of State imposed public utility rates, and this difference in the judicial treatment of prices and rates accordingly warrants an explanation at the outset. Unlike operators of public utilities who, in return for the grant of certain exclusive, virtually monopolistic privileges by the governmental unit enfranchising them, must assume an obligation to provide continuous service, proprietors of other businesses are in receipt of no similar special advantages and accordingly are unrestricted in the exercise of their right to liquidate and close their establishments. At liberty, therefore, as public utilities invariably are not, to escape, by dissolution, the consequences of publicly imposed charges deemed to be oppressive, owners of ordinary business, presumably for that reason, have thus far been unable to convince the courts that they too, no less than public utilities, are in need of that protection which judicial review affords.

Consistently with its initial pronouncement in the Munn Case, that the reasonableness of compensation allowed under permissible rate regulation presented a legislative rather than a judicial question, the Court, in Davidson *v.* New Orleans,[191] also rejected the contention that, by virtue of the due process clause, businesses, even though subject to control of their prices or

charges, were nevertheless entitled to "just compensation." Less than a decade was to elapse, however, before the Court, appalled perhaps by prospective consequences of leaving business "at the mercy of the majority of the legislature," began to reverse itself. Thus, in 1886, Chief Justice Waite, in the Railroad Commission Cases,[192] warned that "this power to regulate is not a power [Pg 999] to destroy; [and] the State cannot do that in law which amounts to a taking of property for public use without just compensation or without due process of law"; or, in other words, cannot impose a confiscatory rate. By treating "due process of law" and "just compensation" as equivalents, the Court, contrary to its earlier holding in Davidson *v.* New Orleans, was in effect asserting that the imposition of a rate so low as to damage or diminish private property ceased to be an exercise of a State's police power and became one of eminent domain. Nevertheless, even the added measure of protection afforded by the doctrine of the Railroad Commission Cases proved inadequate to satisfy public utilities; for through application of the latter the courts were competent to intervene only to prevent legislative imposition of a confiscatory rate, a rate so low as to be productive of a loss and to amount to a taking of property without just compensation. Nothing less than a judicial acknowledgment that when the "reasonableness" of legislative rates is questioned, the courts should finally dispose of the contention was deemed sufficient by such businesses to afford the relief desired; and although as late as 1888[193] the Court doubted that it possessed the requisite power, it finally acceded to the wishes of the utilities in 1890, and, in Chicago, M. & St. P.R. Co. *v.* Minnesota[194] ruled as follows: "The question of the reasonableness of a rate * * *, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law * * *"

Despite a last hour attempt, in Budd *v.* New York,[195] to reconcile Munn *v.* Illinois with Chicago, M. & St. P.R. Co. *v.* Minnesota by confining application of the latter decision to cases wherein rates had been fixed by a commission and denying its pertinence to rates directly imposed by a legislature, the Court, in Reagan *v.* Farmers' Loan and Trust Co.,[196] set at rest all lingering doubts as to the scope of judicial intervention by declaring that, "if a carrier," in the absence of a legislative rate, "attempted to charge a shipper an unreasonable sum," the Court, in accordance with common law principles, will pass on the reasonableness of its rates and has "jurisdiction * * * to award to the shipper any amount exacted * * * in excess of a reasonable rate; * * * The [Pg 1000] province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of a carrier prescribes the rates."[197] Reiterating virtually the same principle in Smyth *v.* Ames,[198] the Court not only obliterated the distinction between confiscatory and unreasonable rates, but also contributed the additional observation that the requirements of due process are not met unless a court reviews not merely the reasonableness of a rate but also determines whether the rate permits the utility to earn a fair return on a fair valuation of its investment.

Limitations on Judicial Review

As to what courts will not do, when reviewing rate orders of a State commission, the following negative statements of the Supreme Court appear to have enduring value. As early as 1894, the Court asserted: "The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the [Pg 1001] shippers; they do not engage in any mere administrative work; * * * [however, there can be no doubt] of their power and duty to inquire whether a body of rates * * * is unjust and unreasonable, * * *, and if found so to be, to restrain its operation."[199] And later, in 1910, although it was examining the order of a federal rate-making agency, the Court made a similar observation which appears to be equally applicable to the judicial review of regulations of State agencies. The courts cannot, "under the guise of exerting judicial power, usurp merely administrative functions by setting aside" an order of the commission within the scope of the power delegated to such commission, upon the ground that such power was unwisely or inexpediently exercised.[200]

Also inferable from these early holdings, and effective to restrict the bounds of judicial investigation, is the notion that a distinction can be made between factual questions which give rise only to controversies as to the wisdom or expediency of an order issued by a commission and determinations of fact which bear on a commission's power to act; namely those questions which are inseparable from the constitutional issue of confiscation, and that judicial review does not extend to the former. This distinction is accorded adequate emphasis by the Court in Louisville & N.R. Co. *v.* Garrett,[201] in which it declared that "the appropriate question for the courts" is simply whether a "commission," in establishing a rate, "acted within the scope of its power" and did not violate "constitutional rights * * * by imposing confiscatory requirements" and that a carrier, contesting the rate thus established, accordingly was not entitled to have a court also pass upon a question of fact regarding the reasonableness of a higher rate charged by it prior to the order of the commission. All that need concern a court, it said, is the fairness of the proceeding whereby the commission determined that the existing rate was excessive; but not the expediency or wisdom of the commission's having superseded that rate with a rate regulation of

its own.

Likewise, with a view to diminishing the number of opportunities which courts may enjoy for invalidating rate regulations of State commissions, the Supreme Court has placed various obstacles in the path of the complaining litigant. Thus, not only must a person challenging a rate assume the burden of proof,[202] but he must present a case of "manifest constitutional invalidity";[203] and if, notwithstanding his effort, the question of confiscation remains in doubt, no relief will be granted.[204] Moreover, even though a public utility, which has petitioned a commission for relief from allegedly confiscatory rates, need not await indefinitely a decision by [Pg 1002] the latter before applying to a court for equitable relief,[205] the latter ought not to interfere in advance of any experience of the practical result of such rates.[206]

In the course of time, however, a distinction emerged between ordinary factual determinations by State commissions and factual determinations which were found to be inseparable from the legal and constitutional issue of confiscation. In two older cases arising from proceedings begun in lower federal courts to enjoin rates, the Court initially adopted the position that it would not disturb such findings of fact insofar as these were supported by substantial evidence. Thus, in San Diego Land and Town Company *v.* National City,[207] the Court declared that: After a legislative body has fairly and fully investigated and acted, by fixing what it believes to be reasonable rates, the courts cannot step in and say its action shall be set aside because the courts, upon similar investigation, have come to a different conclusion as to the reasonableness of the rates fixed. "Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulation as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use." And in a similar later case[208] the Court expressed even more clearly its reluctance to reexamine factual determinations of the kind just described. The Court is not bound "to reexamine and weigh all the evidence, * * *, or to proceed according to * * * [its] independent opinion as to what are proper rates. It is enough if * * * [the Court] cannot say that it was impossible for a fair-minded board to come to the result which was reached."

Moreover, in reviewing orders of the Interstate Commerce Commission, the Court, at least in earlier years,[209] chose to be guided by approximately the same standards of appraisal as it had originally formulated for examining regulations of State commissions; and inasmuch as the following excerpt from its holding in Interstate Commerce Commission *v.* Union Pacific R. Co. [210] represents an adequate summation of the law as it stood prior to 1920, it is set forth below: [Pg 1003] "* * * questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that the rate is so low as to be confiscatory * * *; or if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. * * * In determining these mixed questions of law and fact, the Court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. * * * [The Commission's] conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, * * *, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

The Ben Avon Case

These standards of review were abruptly rejected by the Court in Ohio Valley Water Company *v.* Ben Avon Borough,[211] decided in 1920, as being no longer sufficient to satisfy the requirements of due process. Unlike previous litigation involving allegedly confiscatory rate orders of State commissions, which had developed from rulings of lower federal courts in injunctive proceedings, this case reached the Supreme Court by way of appeal from a State appellate tribunal;[212] and although the latter did in fact review the evidence and ascertained that the State commission's findings of fact were supported by substantial evidence, it also construed the statute providing for review as denying to State courts "the power to pass upon the weight of such evidence." Largely on the strength of this interpretation of the applicable State statute, the Supreme Court held that when the order of a legislature, or of a commission, prescribing a schedule of maximum future rates is challenged as confiscatory, "the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment."

Without departing from the ruling, previously enunciated in Louisville & N.R. Co. *v.* Garrett,[213] [Pg 1004] that the failure of a State to grant a statutory right of judicial appeal from a commission's regulation is not violative of due process as long as relief is obtainable by a bill in equity for injunction, the Court also held that the alternative remedy of injunction expressly provided by State law did not afford an adequate opportunity for testing judicially a confiscatory rate order. It conceded the principle stressed by the dissenting Justices that "where a State offers a litigant the choice of two methods of judicial review, of which one is both appropriate and unrestricted, the

mere fact that the other which the litigant elects is limited, does not amount to a denial of the constitutional right to a judicial review."[214]

History of the Valuation Question

For almost fifty years the Court was to wander through a maze of conflicting formulas for valuing public service corporation property only to emerge therefrom in 1944 at a point not very far removed from Munn *v.* Illinois.[215] By holding, in 1942, in Federal Power Commission *v.* Natural Gas Pipeline Co.,[216] that the "Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas," and in 1944, in Federal Power Commission *v.* Hope Gas Co.,[217] that "it is the result reached not the method employed which is controlling, * * * [that] it is not the theory but the impact of the rate order which counts, [and that] if the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end," the Court, in effect, abdicated from the position assumed in the Ben Avon Case.[218] Without surrendering the judicial power to declare rates unconstitutional on grounds of a substantive[219] deprivation of due process, the Court announced that it would not overturn a result deemed by it to be just simply because "the method employed [by a commission] to reach that result may contain infirmities. * * * [A] Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order * * * carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences."[220]

In dispensing with the necessity of observing any of the formulas for rate computation which previously had currency, the Court did not undertake to devise, by way of substitution, any discernible guide to aid it in ascertaining whether a so-called end result is unreasonable. It did intimate that rate-making "involves a balancing of the investor and consumer interests," which does not, however, "'insure that the business shall produce net revenues,' * * * From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. * * * By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital."[221] Nevertheless, in the light of the court's concentration on the reasonableness of the final result rather than on the correctness of the methods employed to reach that result, it is conceivable that methods or formulas, now discredited in whole or in part, might continue to be observed by State commissions in drafting rate orders that will prove to be justiciably sustainable.[222] [Pg 1005]

REGULATION OF PUBLIC UTILITIES (OTHER THAN RATES) [Pg 1008]

In General

By virtue of the nature of the business they carry on and the public's interest in it, public utilities are subject, as to their local business, to State regulation exerted either directly by legislature or by duly authorized administrative bodies.[223] But inasmuch as their property remains under the full protection of the Constitution, it follows that whenever this power of regulation is exerted in what the Court considers to be an "arbitrary" or "unreasonable" way and to be in effect an infringement upon the right of ownership, such exertion of power is void as repugnant to the due process clause.[224] Thus, a city cannot take possession of the equipment of a street railway company, the franchise of which has expired,[225] although it may subject said company to the alternative of accepting an inadequate price for its property or of ceasing operations and removing its property from the streets.[226] Likewise, a city, which is desirous of establishing a lighting system of its own, may not remove, without compensation, the fixtures of a lighting company already occupying the streets under a franchise;[227] but in erecting its own waterworks in competition with that of a company which has no exclusive charter, a municipality inflicts no unconstitutional deprivation.[228] Nor is the property of a telegraph company illegally taken by a municipal ordinance which demands, as a condition of the establishment of poles and conduits in the city streets, that positions be reserved for the city's wires, which shall be carried free of charge, and which provides for the moving of the conduits, when necessary, at company expense.[229] And, the fact that a State, by mere legislative or administrative fiat, cannot convert a private carrier into a common carrier will not protect a foreign corporation which has elected to enter a State, the Constitution and laws of which require that it operate its local private pipe line as a common carrier. Such foreign corporation is viewed as having waived its constitutional right to be secure against imposition of conditions which amount to a taking of property without due process of law.[230] [Pg 1009]

Compulsory Expenditures

The enforcement of uncompensated obedience to a regulation for the public health and safety is not an unconstitutional taking of property without due process of law.[231] Thus, where the

applicable rule so required at the time of the granting of its charter, a water company may be compelled to furnish connections at its own expense to one residing on an ungraded street in which it voluntarily laid its lines.[232] However, if pipe and telephone lines are located on a right of way owned by a pipe line company, the latter cannot, without a denial of due process, be required to relocate such equipment at its own expense;[233] but if its pipes are laid under city [Pg 1010] streets, a gas company validly may be obligated to assume the cost of moving them to accommodate a municipal drainage system.[234]

To require a turnpike company, as a condition of its taking tolls, to keep its road in repair and to suspend collection thereof, conformably to a State statute, until the road is put in good order, does not take property without due process of law, notwithstanding the fact that present patronage does not yield revenue sufficient to maintain the road in proper condition.[235] Nor is a railroad bridge company unconstitutionally deprived of its property when, in the absence of proof that the addition will not yield a reasonable return, it is ordered to widen its bridge by inclusion of a pathway for pedestrians and a roadway for vehicles.[236]

Grade Crossings and Other Expenditures by Railroads.—When railroads are required to repair a viaduct under which they operate,[237] or to reconstruct a bridge or provide means for passing water for drainage through their embankment,[238] or to sprinkle that part of the street occupied by them,[239] their property is not taken without due process of law. But if an underground cattle-pass is to be constructed, not as a safety measure but as a means of sparing the farmer the inconvenience attendant upon the use of an existing and adequate grade crossing, collection of any part of the cost thereof from a railroad is a prohibited taking for private use.[240] As to grade crossing elimination, the rule is well established that the State may exact from railroads the whole, or such part, of the cost thereof as it deems appropriate, even though commercial highway users, who make no contribution whatsoever, benefit from such improvements. But, the power of the State in this respect is not unlimited. If its imposition is "arbitrary" and "unreasonable" it may be set aside; but to reach that conclusion, it may become necessary to consider certain relevant facts; e.g., whether a new highway on which an underpass is to be constructed is essential to the transportation needs of a community already well served by a crossing equipped with devices which are adequate for safety and convenience of a local traffic; whether the underpass is prescribed as part of a national system of federal aid highways for the [Pg 1011] furtherance of motor vehicle traffic, much of which is in direct competition with the railroad; whether the increase in such traffic will greatly decrease rail traffic and hence the revenue of the railroad; whether the amount of taxes paid by the railroads of the State, part of which is devoted to the upkeep of public highways used by motor carriers, is disproportionately higher than the amount paid by motor carriers.[241]

Compellable Services

The primary duty of a public utility being to serve on reasonable terms all those who desire the service it renders, it follows that a company cannot pick and choose and elect to serve only those portions of its territory which it finds most profitable, leaving the remainder to get along without the service which it alone is in a position to give. Compelling a gas company to continue serving specified cities as long as it continues to do business in other parts of the State entails therefore no unconstitutional deprivation.[242] Likewise a railway may be compelled to continue the service of a branch or part of a line although the operation involves a loss.[243] But even though a utility, as a condition of enjoyment of powers and privileges granted by the State, is under a continuing obligation to provide reasonably adequate service, and even though that obligation cannot be avoided merely because performance occasions financial loss, yet if a company is at liberty to surrender its franchise and discontinue operations, it cannot be compelled to continue at a loss.[244]

Pursuant to the principle that the State may require railroads to provide adequate facilities suitable for the convenience of the communities served by them,[245] such carriers have been obligated to establish stations at proper places for the convenience of patrons,[246] to stop all [Pg 1012] their intrastate trains at county seats,[247] to run a regular passenger train instead of a mixed passenger and freight train,[248] to furnish passenger service on a branch line previously devoted exclusively to carrying freight,[249] to restore a siding used principally by a particular plant but available generally as a public track, and to continue, even though not profitable by itself, a sidetrack[250] as well as the upkeep of a switch-track leading from its main line to industrial plants.[251] However, a statute requiring a railroad without indemnification to install switches on the application of owners of grain elevators erected on its right of way was held void.[252] Whether a State order requiring transportation service is to be viewed as reasonable may necessitate consideration of such facts as the likelihood that pecuniary loss will result to the carrier, the nature, extent and productiveness of the carrier's intrastate business, the character of the service required, the public need for it, and its effect upon service already being rendered.[253] If the service required has no substantial relation to transportation, it will be deemed arbitrary and void, as in the case of an order requiring railroads to maintain cattle scales to facilitate trading in cattle,[254] and of a prohibition against letting down an unengaged upper berth while the lower berth was occupied.[255]

Intercompany Railway Service.—"Since the decision in Wisconsin M. & P.R. Co. *v.* Jacobson, 179 U.S. 287 (1900), there can be no doubt of the power of a State, acting through an administrative body, to require railroad companies to make track connections. But manifestly that does not mean that a Commission may compel them to build branch lines, so as to connect roads lying at a distance from each other; nor does it mean that they may be required to make connections at every point where their tracks come close together in city, town and country, regardless of the amount of business to be done, or the number of persons who may utilize the connection if built. The question in each case must be determined in the light of all the facts, and with a just regard [Pg 1013] to the advantage to be derived by the public and the expense to be incurred by the carrier. * * * If the order involves the use of property needed in the discharge of those duties which the carrier is bound to perform, then, upon proof of the necessity, the order will be granted, even though 'the furnishing of such necessary facilities may occasion an incidental pecuniary loss.' * * * Where, however, the proceeding is brought to compel a carrier to furnish a facility not included within its absolute duties, the question of expense is of more controlling importance. In determining the reasonableness of such an order the Court must consider all the facts—the places and persons interested, the volume of business to be affected, the saving in time and expense to the shipper, as against the cost and loss to the carrier."[256]

Although a carrier is under a duty to accept goods tendered at its station, it cannot be required, upon payment simply for the service of carriage, to accept cars offered at an arbitrary connection point near its terminus by a competing road seeking to reach and use the former's terminal facilities. Nor may a carrier be required to deliver its cars to connecting carriers without adequate protection from loss or undue detention or compensation for their use.[257] But a carrier may be compelled to interchange its freight cars with other carriers under reasonable terms,[258] and to accept, for reshipment over its lines to points within the State, cars already loaded and in suitable condition.[259]

Intercompany Discriminatory Railroad Service Charges.—Due process is not denied when two carriers, who wholly own and dominate a small connecting railroad, are prohibited from exacting higher charges from shippers accepting delivery over said connecting road than are collected from shippers taking delivery at the terminals of said carriers.[260] Nor is it "unreasonable" or "arbitrary" to require a railroad to desist from demanding freight in advance on merchandise received from one carrier while it accepts merchandise of the same character at the same point from another carrier without such prepayment.[261]

Safety Regulations Applicable to Railroads [Pg 1014]

The following regulations with reference to railroads have been upheld: a prohibition against operation on certain streets,[262] restrictions on speed, operations, etc., in business sections,[263] requirement of construction of a sidewalk across a right of way,[264] or removal of a track crossing a thoroughfare,[265] compelling the presence of a flagman at a crossing notwithstanding that automatic device might be cheaper and better,[266] compulsory examination of employees for color blindness,[267] full crews on certain trains,[268] specification of a type of locomotive headlight,[269] safety appliance regulations,[270] and a prohibition on the heating of passenger cars from stoves or furnaces inside or suspended from the cars.[271]

Liabilities and Penalties

A statute making the initial carrier[272] or the connecting or delivering carrier,[273] liable to the shipper for the nondelivery of goods is not unconstitutional; nor is a law which provides that a railroad shall be responsible in damages to the owner of property injured by fire communicated by its locomotive engines and which grants the railroad an insurable interest in such property along its route and authority to procure insurance against such liability.[274] Equally consistent with the requirements of due process are the following two enactments; the first, imposing on all common carriers a penalty for failure to settle within a reasonable specified period claims for freight lost or damaged in shipment and conditioning payment of that penalty upon recovery by the claimant in subsequent suit of more than the amount tendered,[275] and the second, levying double damages and an attorney's fee upon a railroad for failure to pay within a reasonable time after demand the amount claimed by an owner for stock injured or killed. However, only in the event that the application of the latter statute is limited to cases where the plaintiff has not demanded more than he recovered in court will its constitutionality be upheld;[276] but when the penalty allowed thereunder is exacted in a case in which the plaintiff demanded more than he sued for and recovered, a defendant railroad is arbitrarily deprived of its property without due process.[277] The requirements of fair play are similarly violated by a statute which, by imposing [Pg 1015] double liability for failure to pay the full amount of damages within 60 days after notice, unless the claimant recovers less than the amount offered in settlement, in effect penalizes a carrier for guessing incorrectly what a jury would award.[278]

To penalize a carrier which has collected transportation charges in excess of established maximum rates by permitting a person wronged to sue for and collect as liquidated damages $500 plus a reasonable attorney's fee is to subject the carrier to a requirement so unreasonable as to be repugnant to the due process clause; for such liability is not only disproportionate to

actual damages, but is being exacted under conditions which do not afford the carrier an adequate opportunity for safely testing the validity of the rates before any liability for the penalty attaches.[279] Where it appears, however, that the carrier had an opportunity to test the reasonableness of the rate, and that its deviation therefrom, by collection of an overcharge, did not proceed from any belief that the rate was invalid, the validity of the penalty imposed is not to be tested by comparison with the amount of the overcharge. Inasmuch as it is imposed as punishment for violation of a law, the legislature may adjust its amount to the public wrong rather than the private injury, and the only limitation which the Fourteenth Amendment imposes is that the penalty prescribed shall not be "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." In accordance with the latter standard, a statute granting an aggrieved passenger (who recovered $100 for an overcharge of 60 cents) the right to recover in a civil suit not less than $50 nor more than $300 plus costs and a reasonable attorney's fee is constitutional.[280]

For like reasons, a statute requiring railroads to erect and maintain fences and cattle guards, and making them liable in double amount of damages for their failure to so maintain them is not unconstitutional.[281] Nor is a Nebraska law which establishes a minimum rate of speed for delivery of livestock and which requires every carrier violating the same to pay the owner of such livestock the sum of $10 per car per hour.[282] On the other hand, when a telephone company, in [Pg 1016] accordance with its established and uncontested regulations, suspends the service of a patron in arrears, infliction upon it of penalties aggregating $3,600, levied pursuant to a statute imposing fines of $100 per day for alleged discrimination, is so plainly arbitrary and oppressive as to take property without due process.[283]

REGULATION OF CORPORATIONS, BUSINESS, PROFESSIONS, AND TRADES

Domestic Corporations

Although a corporation is the creation of a State which reserves the power to amend or repeal corporate charters, the retention of such power will not support the taking of the corporate property without due process of law. To terminate the life of a corporation by annulling its charter is not to confiscate its property but to turn it over to the stockholders after liquidation.[284] Conversely, unreasonable regulation, as by the imposition of confiscatory rates, although it ostensibly falls short of termination of the corporate existence, entails an invalid deprivation.[285]

Foreign Corporations

Foreign corporations also enjoy the protection which the due process clause affords; but such protection does not entitle them to enter another State or, once having been permitted to enter, to continue to do business therein.[286] The power of a State to exclude or to expel a foreign corporation being almost plenary as long as interstate commerce is not directly affected, it follows that a State may subject such entry or continued operation to conditions. Thus, a State law which requires the filing of articles with a local official as a condition prerequisite to the validity of conveyances of local realty to such corporations is not violative of due process.[287] Neither is a State statute which requires a foreign insurance company, as part of the price of entry, to maintain reserves computed by a specific percentage of premiums, including membership fees, received in all States.[288] Similarly a statute requiring corporations to dispose of farm land not necessary to the conduct of their business is not invalid as applied to a foreign hospital corporation, even though the latter, because of changed economic conditions, is unable to recoup its original investment from the sale which it is thus compelled to make.[289]

Business: In General [Pg 1017]

"The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned. * * * Statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the State's competency."[290]

Laws Prohibiting Trusts, Discrimination, Restraint of Trade.—A State act prohibiting trusts, etc., is not in conflict with the Fourteenth Amendment as to a person combining with others to pool and fix prices, divide net earnings, and prevent competition in the purchase and sale of grain.[291] Nor does the Fourteenth Amendment preclude a State from adopting a policy against all combinations of competing corporations and enforcing it even against combinations which may have been induced by good intentions and from which benefit and not injury may have resulted.[292] Nor is freedom of contract unconstitutionally abridged by a statute which prohibits retail lumber dealers from uniting in an agreement not to purchase materials from wholesalers selling directly to consumers in the retailers' localities,[293] nor by a law punishing combinations for "maliciously" injuring a rival in his business profession or trade.[294] Similarly, a prohibition of unfair discrimination by any one engaged in the manufacture or distribution of a commodity in general use for the purpose of intentionally destroying competition of any regular dealer in such commodity by making sales thereof at a lower rate in one section of the State than in another,

after equalization for distance, effects no invalid deprivation of property or interference with freedom of contract.[295] Liberty of contract is infringed, however, by a law punishing dealers in cream who pay higher prices in one locality than in another. Although high bidding by strong buyers tends toward monopoly, the statute has no reasonable relation to such bidding, but infringes private rights whose exercise is not shown to produce evil consequences.[296] A law sanctioning contracts requiring that commodities identified by trade mark will not be sold by the vendee or subsequent vendees except at prices stipulated by the original vendor does not violate the due process clause.[297]

Statutes Preventing Fraud in Sale of Goods.—Laws and ordinances tending to prevent frauds and [Pg 1018] requiring honest weights and measures in the sale of articles of general consumption have long been considered lawful exertions of the police power.[298] Thus, a prohibition on the issuance by other than an authorized weigher of any weight certificate for grain weighed at any warehouse or elevator where State weighers are stationed, or to charge for such weighing, is not unconstitutional.[299] Nor is a municipal ordinance requiring that commodities sold in load lots by weight be weighed by a public weigh-master within the city invalid as applied to one delivering coal from State-tested scales at a mine outside the city.[300] A statute requiring merchants to record sales in bulk not made in the regular course of business is also within the police power.[301]

Similarly, the power of a State to prescribe standard containers to protect buyers from deception as well as to facilitate trading and to preserve the condition of the merchandise is not open to question. Accordingly, an administrative order issued pursuant to an authorizing statute and prescribing the dimensions, form, and capacity of containers for strawberries and raspberries is not arbitrary inasmuch as the form and dimensions bore a reasonable relation to the protection of the buyers and the preservation in transit of the fruit.[302] Similarly, an ordinance fixing standard sizes of bread loaves and prohibiting the sale of other sizes is not unconstitutional.[303] However, by a case decided in 1924, a "tolerance" of only two ounces in excess of the minimum weight of a loaf of bread is unreasonable when it is impossible to manufacture good bread without frequently exceeding the prescribed tolerance and is consequently unconstitutional;[304] but by one decided ten years later, regulations issued in furtherance of a statutory authorization which impose a rate of tolerance not to exceed three ounces to a pound of bread and requiring that the bread maintain the statutory minimum weight for not less than 12 hours after cooling are constitutional.[305] Likewise a law requiring that lard not sold in bulk should be put upon in containers holding one, three, or five pounds weight, or some whole multiple of these numbers, does not deprive sellers of their property without the process of law.[306]

The right of a manufacturer to maintain secrecy as to his compounds and processes must be held [Pg 1019] subject to the right of the State, in the exercise of the police power and in the promotion of fair dealing, to require that the nature of the product be fairly set forth.[307] Nor does a statute providing that the purchaser of harvesting or threshing machinery for his own use shall have a reasonable time after delivery for inspecting and testing it, and permitting recission of the contract if the machinery does not prove reasonably adequate, and further declaring any agreement contrary to its provisions to be against public policy and void, does not violate the due process clause.[308]

Blue Sky Laws; Laws Regulating Boards of Trade, Etc.—In the exercise of its power to prevent fraud and imposition, a State may regulate trading in securities within its borders, require a license of those engaging in such dealing, make issuance of a license dependent on a public officer's being satisfied of the good repute of the applicants, and permit him, subject to judicial review of his findings, to revoke the same.[309] A State may forbid the giving of options to sell or buy at a future time any grain or other commodity.[310] It may also forbid sales on margin for future delivery;[311] and may prohibit the keeping of places where stocks, grain, etc., are sold but not paid for at the time, unless a record of the same be made and a stamp tax paid.[312] Making criminal any deduction by the purchaser from the actual weight of grain, hay, seed, or coal under a claim of right by reason of any custom or rule of a board of trade is a valid exercise of the police power and does not deprive the purchaser of his property without due process of law, nor interfere with his liberty of contract.[313]

Trading Stamps.—A prohibitive license fee upon the use of trading stamps is not unconstitutional.[314]

Banking [Pg 1020]

The Fourteenth Amendment does not deny to States the power to forbid a business simply because it was permitted at common law; and therefore, where public interests so demand, a State may place the banking business under legislative control and prohibit it except under prescribed conditions. Accordingly, a statute subjecting State banks to assessments for a depositors' guaranty fund is within the police power of the States and does not deprive the banks of property without due process of law.[315] Also, a law requiring savings banks to turn over to the State deposits inactive for thirty years (when the depositor cannot be found), with provision for payment to the depositor or his heirs on establishment of the right, does not effect an invalid

taking of the property of said banks; nor does a Kentucky statute requiring banks to turn over to the protective custody of that State deposits that have been inactive ten or twenty-five years (depending on the nature of the deposit).[316]

The constitutional rights of creditors in an insolvent bank in the hands of liquidators are not violated by a later statute permitting reopening under a reorganization plan approved by the Court, the liquidating officer, and by three-fourths of the creditors.[317] Similarly, a Federal Reserve bank is not unlawfully deprived of business rights of liberty of contract by a law which allows State banks to pay checks in exchange when presented by or through a Federal Reserve bank, post office, or express company and when not made payable otherwise by a maker.[318]

Loans, Interest, Assignments

In fixing maximum rates of interest on money loaned within its borders, a State is acting clearly within its police power; and the details are within legislative discretion if not unreasonably or arbitrarily exercised.[319] Equally valid as an exercise of a State's police power is a requirement that assignments of future wages as security for debts of less than $200, to be valid, must be [Pg 1021] accepted in writing by the employer, consented to by the assignors, and filed in a public office. Such a requirement deprives neither the borrower nor the lender of his property without due process of law.[320]

Insurance

The relations generally of those engaged in the insurance business[321] as well as the business itself have been peculiarly subject to supervision and control.[322] The State may fix insurance rates and regulate the compensation of insurance agents.[323] It may impose a fine on "any person 'who shall act in any manner in the negotiation or transaction of unlawful insurance * * * with a foreign insurance company not admitted to do business [within said State].'"[324] It may forbid life insurance companies and their agents to engage in the undertaking business and undertakers to serve as life insurance agents.[325] Nor does a Virginia law which forbids the making of contracts of casualty or surety insurance, by companies authorized to do business therein, except through registered agents, which requires that such contracts applicable to persons or property in the State be countersigned by a registered local agent, and which prohibits such agents from sharing more than 50% of a commission with a nonresident broker, deprive authorized foreign casualty and surety insurers of due process.[326] And just as all banks may be required to contribute to a depositors' guaranty fund, so may all automobile liability insurers be required to submit to the equitable apportionment among them of applicants who are in good faith entitled to, but are financially unable to, procure such insurance through ordinary methods.[327]

However, a statute which prohibits the assured from contracting directly with a marine insurance company outside the State for coverage of property within the State is invalid as a deprivation of liberty without due process of law.[328] For the same reason, a State may not prevent a citizen from concluding with a foreign life insurance company at its home office a policy loan agreement whereby the policy of his life is pledged as collateral security for a cash loan to become due upon [Pg 1022] default in payment of premiums, in which case the entire policy reserve might be applied to discharge the indebtedness. Authority to subject such an agreement to the conflicting provisions of domestic law is not deducible from the power of a State to license a foreign insurance company as a condition of its doing business therein.[329]

A stipulation that policies of hail insurance shall take effect and become binding twenty-four hours after the hour in which an application is taken and further requiring notice by telegram of rejection of an application is not invalid.[330] Nor is any arbitrary restraint upon their liberty of contract imposed upon surety companies by a statute providing that any bond executed after its enactment for the faithful performance of a building contract shall inure to the benefit of materialmen and laborers, notwithstanding any provision of the bond to the contrary.[331] Likewise constitutional is a law requiring that a policy, indemnifying a motor vehicle owner against liability to persons injured through negligent operation, shall provide that bankruptcy of the insured shall not release the insurer from liability to an injured person.[332]

If fire insurance companies, in case of total loss, are compelled to pay the amount for which the property was insured, less depreciation between the time of issuing the policy and the time of the loss, such insurers are not deprived of their property without due process of law.[333] Moreover, even though it has its attorney-in-fact located in Illinois, signs all its contracts there, and forwards therefrom all checks in payment of losses, a reciprocal insurance association, if it covers real property located in New York, may be compelled to comply with New York regulations which require maintenance of an office in that State and the countersigning of policies by an agent resident therein.[334] Also, to discourage monopolies and to encourage competition in the matter of rates, a State constitutionally may impose on all fire insurance companies connected with a tariff association fixing rates a liability or penalty to be collected by the insured of 25% in excess of actual loss or damage, stipulations in the insurance contract to the contrary notwithstanding.[335]

A State statute by which a life insurance company, if it fails to pay upon demand the amount due under a policy after death of the insured, is made liable in addition for fixed damages, reasonable in amount, and for a reasonable attorney's fee is not unconstitutional even though payment is resisted in good faith and upon reasonable grounds.[336] It is also proper by law to cut off a defense by a life insurance company based on false and fraudulent statements in the application, unless the matter misrepresented actually contributed to the death of the insured.[337] A provision that suicide, unless contemplated when the application for a policy was made, shall be no defense is equally valid.[338] When a cooperative life insurance association is reorganized so as to permit it to do a life insurance business of every kind, policyholders are not deprived of their property without due process of law.[339] Similarly, when the method of liquidation provided by a plan of rehabilitation of a mutual life insurance company is as favorable to dissenting policyholders as would have been the sale of assets and pro rata distribution to all creditors, the dissenters are unable to show any taking without due process. Dissenters have no constitutional right to a particular form of remedy.[340] [Pg 1023]

Professions, Trades, Occupations

Employment Agencies.—An act imposing license fees for operating such agencies and prohibiting them from sending applicants to an employer who has not applied for labor does not deny due process of law.[341]

Pharmacies.—A Pennsylvania law forbidding a corporation to own therein any drug store, excepting those owned and operated at the time of the enactment, unless all its stockholders are licensed pharmacists, violates the due process clause as applied to a foreign corporation, all of whose stockholders are not pharmacists, which sought to extend its business in Pennsylvania by acquiring and operating therein two additional stores.[342]

Miscellaneous Business, Professions, Trades, and Occupations.—The practice of medicine, using this word in its most general sense, has long been the subject of regulation;[343] and in pursuance of its power a State may exclude osteopathic physicians from hospitals maintained by it or its municipalities;[344] and may regulate the practice of dentistry by prescribing qualifications that are reasonably necessary, requiring licenses, establishing a supervisory administrative board, and by prohibiting certain advertising regardless of its truthfulness.[345] But while statutes requiring pilots to be licensed[346] and railroad engineers to pass color blindness tests[347] have been sustained, an act making it a misdemeanor for a person to act as a railway passenger conductor without having had two years' experience as a freight conductor or brakeman is invalid.[348] [Pg 1024]

Legislation has been upheld which regulated or required licenses for admissions to places of amusement,[349] grain elevators,[350] detective agencies,[351] sale of cigarettes,[352] or cosmetics,[353] and the resale of theatre tickets;[354] or which absolutely forbade the advertising of cigarettes,[355] or the use of a representation of the United States flag on an advertising medium,[356] the solicitation by a layman of business of collecting and adjusting claims,[357] the keeping of private markets within six squares of a public market,[358] the keeping of billiard halls except in hotels,[359] or the purchase by junk dealers of wire, copper, etc., without ascertaining the sellers' right to sell.[360]

PROTECTION OF RESOURCES OF THE STATE [Pg 1025]

Oil and Gas

To prevent waste production may be prorated; the prohibition of wasteful conduct, whether primarily in behalf of the owners of gas in a common reservoir or because of the public interests involved is consistent with the Constitution.[361] Thus a statute which defines waste as including, in addition to its ordinary meaning, economic waste, surface waste, and waste incident to production in excess of transportation or marketing facilities or reasonable market demands, and which provides that whenever full production from a common source of supply can be obtained only under conditions constituting waste, a producer may take only such proportion of all that may be produced from such common source without waste, as the production of his wells bears to the total production of such common source, is not repugnant to the due process clause.[362] But whether a system of proration based on hourly potential is as fair as one based upon estimated recoverable reserves or some other combination of factors is a question for administrative and not judicial judgment. In a domain of knowledge still shifting and growing, and in a field where judgment is necessarily beset by the necessity of inferences bordering on the conjecture even for those learned in the art, it has been held to be presumptuous for courts, on the basis of conflicting expert testimony, to nullify an oil proration order, promulgated by an administrative commission in execution of a regulatory scheme intended to conserve a State's oil resources, as violative of due process.[363] On the other hand, where the evidence showed that an order, purporting to limit daily total production of a gas field and to prorate the allowed production among several wells, had for its real purpose, not the prevention of waste nor the undue drainage from the reserves of other well owners, but rather the compelling of pipe line

owners to furnish a market to those who had no pipe line connections, the order was held void as a taking of private property for private benefit.[364] As authorized by statute the Oklahoma Corporation Commission, finding that existing low field prices for gas were resulting in economic and physical waste, issued orders fixing a minimum price for natural gas and requiring the Cities Service Company to take gas ratably from another producer in the same field at the dictated price. The orders were sustained by the Court as conservation measures.[365]

Even though carbon black is more valuable than the gas from which it is extracted, and notwithstanding a resulting loss of investment in a plant for the manufacture of carbon black, a State, in the exercise of its police power, may forbid the use of natural gas for products, such as carbon black, in the production of which such gas is burned without fully utilizing for other manufacturing or domestic purposes the heat therein contained.[366] Likewise, for the purpose of regulating and adjusting coexisting rights of surface owners to underlying oil and gas, it is within the power of a State to prohibit the operators of wells from allowing natural gas, not conveniently necessary for other purposes, to come to the surface without its lifting power having been utilized to produce the greatest quantity of oil in proportion.[367] [Pg 1026]

Protection of Property Damaged by Mining or Drilling of Wells

An ordinance conditioning the right to drill for oil and gas within the city limits upon the filing of a bond in the sum of $200,000 for each well, to secure payment of damages from injuries to any persons or property resulting from the drilling operation, or maintenance of any well or structures appurtenant thereto, is consistent with due process of law, and is not rendered unreasonable by the requirement that the bond be executed, not by personal sureties, but by a bonding company authorized to do business in the State.[368] On the other hand, a Pennsylvania statute, which forbade the mining of coal under private dwellings or streets or cities by a grantor that had reserved the right to mine, was viewed as restricting the use of private property too much, and hence as a "taking" without due process of law.[369]

Water

A statute making it unlawful for a riparian owner to divert water into another State does not deprive him of property without due process of law. "The constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. * * * What it has it may keep and give no one a reason for its will."[370]

Apple and Citrus Fruit Industries

A statute requiring the destruction of cedar trees to avoid the infecting with cedar rust of apple orchards within the vicinity of two miles is not unreasonable, notwithstanding the absence of provision for compensation for the trees thus removed or the decrease in the market value of realty caused by their destruction. Apple growing being one of the principal agricultural pursuits in Virginia and the value of cedar trees throughout that State being small as compared with that of apple orchards, the State was constitutionally competent to decide upon the destruction of one class of property in order to save another which, in the judgment of its legislature, is of greater value to the public.[371] With a similar object in view; namely, to protect the reputation of one of its major industries, Florida was held to possess constitutional authority to penalize the delivery for shipment in interstate commerce of citrus fruits so immature as to be unfit for consumption.[372] [Pg 1027]

Fish and Game

Over fish found within its waters, and over wild game, the State has supreme control.[373] It may regulate or prohibit fishing and hunting within its limits;[374] and for the effective enforcement of such restrictions, it may forbid the possession within its borders of special instruments of violations, such as nets, traps, and seines, regardless of the time of acquisition or the protestations of lawful intentions on the part of a particular possessor.[375] To conserve for food fish found within its waters, a State constitutionally may provide that a reduction plant, processing fish for commercial purposes, may not accept more fish than can be used without deterioration, waste, or spoilage; and, as a shield against the covert depletion of its local supply, may render such restriction applicable to fish brought into the State from the outside.[376] Likewise, it is within the power of a State to forbid the transportation outside the State of game killed therein;[377] and to make illegal possession during the closed season even of game imported from abroad.[378]

LIMITATIONS ON OWNERSHIP

Zoning, Building Lines, Etc.

By virtue of their possession of the police power, States and their municipal subdivisions may declare that in particular circumstances and in particular localities specific businesses, which are

not nuisances *per se* are to be deemed nuisances in fact and in law.[379] Consequently when, by an ordinance enacted in good faith, a municipality prohibited brickmaking in a designated area, the land of a brickmaker in said area was not taken without due process of law, although such land contained valuable clay deposits which could not profitably be removed for processing elsewhere, was far more valuable for brickmaking than for any other purpose, and had been acquired by him before it was annexed to the municipality, and had long been used as a brickyard.[380] On the same basis laws have been upheld which restricted the location of dairy or cow stables,[381] of livery stables,[382] of the grazing of sheep near habitations.[383] Also a State may declare the emission of dense smoke in cities or populous neighborhoods a nuisance and restrain it; and regulations to that effect are not invalid even though they affect the use of property or subject the owner to the expense of complying with their terms.[384] [Pg 1028]

Not only may the height of buildings be regulated;[385] but it also is permissible to create a residential district in a village and to exclude therefrom apartment houses, retail stores, and billboards. Before holding unconstitutional an ordinance establishing such a district, it must be shown to be clearly arbitrary and unreasonable and to have no substantial relation to the public health, safety, or general welfare.[386] On the other hand, erection of a home for the aged within a residential district cannot be made to depend upon the consent of owners of two-thirds of the property within 400 feet of the site thereof;[387] nor may the interests of nonassenting property owners be ignored by an ordinance which requires municipal officers to establish building lines in a block on request of owners of two-thirds of the property therein.[388] But ordinances requiring lot owners, when constructing new buildings, to set them back a certain distance from the street lines is constitutional unless clearly arbitrary or unreasonable.[389] However, colored persons cannot be forbidden to occupy houses in blocks where the greater number of houses are occupied by white persons, and vice versa. Such a prohibition, the practical effect of which is to prevent the sale of lots in such blocks to colored persons, violates the constitutional prohibitions against interference with property rights except by due process of laws; and cannot be sustained on the ground that it will promote public peace by preventing race conflicts.[390]

Safety Regulations

[Pg 1029]

As a legitimate exercise of the police power calculated to promote public safety and diminish fire hazards, municipal ordinances have been sustained which prohibit the storage of gasoline within 300 feet of any dwelling,[391] or require that all tanks with a capacity of more than ten gallons, used for the storage of gasoline, be buried at least three feet under ground,[392] or which prohibit washing and ironing in public laundries and wash houses, within defined territorial limits, from 10 p.m. to 6 a.m.[393] Equally sanctioned by the Fourteenth Amendment is the demolition and removal by cities of wooden buildings erected within defined fire limits contrary to regulations in force at the time.[394] Nor does construction of property in full compliance with existing laws confer upon the owner an immunity against exercise of the police power. Thus, a 1944 amendment to a Multiple Dwelling Law, requiring installation of automatic sprinklers in lodginghouses of nonfireproof construction erected prior to said enactment, does not, as applied to a lodginghouse constructed in 1940 in conformity with all laws then applicable, deprive the owner thereof of due process, even though compliance entails an expenditure of $7,500 on a property worth only $25,000.[395]

THE POLICE POWER

General

According to settled principles, the police power of a State must be held to embrace the authority not only to enact directly quarantine[396] and health laws of every description but also to vest in municipal subdivisions a capacity to safeguard by appropriate means public health, safety and morals. The manner in which this objective is to be accomplished is within the discretion of the State and its localities, subject only to the condition that no regulation adopted by either shall contravene the Constitution or infringe any right granted or secured by that instrument.[397]

Health Measures

[Pg 1030]

Protection of Water Supply.—A State may require the removal of timber refuse from the vicinity of a watershed for a municipal water supply to prevent the spread of fire and consequent damage to such watershed.[398]

Garbage.—An ordinance for cremation of garbage and refuse at a designated place as a means for the protection of the public health is not a taking of private property without just compensation even though such garbage and refuse may have some elements of value for certain purposes.[399]

Sewers.—Compelling property owners to connect with a publicly maintained system of sewers and enforcing that duty by criminal penalties does not violate the due process clause.[400]

Food and Drugs, Etc.—"The power of the State to * * * prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well

established";[401] and statutes forbidding or regulating the manufacture of oleomargarine have been upheld as a valid exercise of such power.[402] For the same reasons, statutes ordering the destruction of unsafe and unwholesome food[403], prohibiting the sale and authorizing confiscation of impure milk[404] have been sustained, notwithstanding that such articles had a value for purposes other than food. There also can be no question of the authority of the State, in the interest of public health and welfare, to forbid the sale of drugs by itinerant vendors,[405] or the sale of spectacles by an establishment not in charge of a physician or optometrist.[406] Nor is it any longer possible to doubt the validity of State regulations pertaining to the administration, sale, prescription, and use of dangerous and habit-forming drugs.[407]

Milk.—Equally valid as police power regulations are laws forbidding the sale of ice cream not containing a reasonable proportion of butter fat,[408] or of condensed milk made from skimmed milk rather than whole milk,[409] or of food preservatives containing boric acid.[410] Similarly, a statute which prohibits the sale of milk to which has been added any fat or oil other than milk fat, [Pg 1031] and which has, as one of its purposes, the prevention of fraud and deception in the sale of milk products, does not, when applied to "filled milk" having the taste, consistency, and appearance of whole milk products, violate the due process clause. Filled milk is inferior to whole milk in its nutritional content; and cannot be served to children as a substitute for whole milk without producing a dietary deficiency.[411] However, a statute forbidding the use of shoddy, even when sterilized, was held to be arbitrary and therefore invalid.[412]

Protection of the Public Morals

Gambling and Lotteries.—Unless effecting a clear, unmistakable infringement of rights securely by fundamental law, legislation suppressing gambling will be upheld by the Court as concededly within the police power of a State.[413] Accordingly, a State may validly make a judgment against those winning money a lien upon the property in which gambling is conducted with the owner's knowledge and consent.[414] For the same reason, lotteries, including those operated under a legislative grant, may be forbidden, irrespective of any particular equities.[415]

Red Light Districts.—An ordinance prescribing limits in a city outside of which no woman of lewd character shall dwell does not deprive persons owning or occupying property in or adjacent to said limits of any rights protected by the Constitution.[416]

Sunday Blue Laws.—The Supreme Court has uniformly recognized State laws relating to the observance of Sunday as representing a legitimate exercise of the police power. Thus, a law forbidding the keeping open of barber shops on Sunday is constitutional.[417]

Intoxicating Liquor.—"* * * on account of their well-known noxious qualities and the extraordinary evils shown by experience to be consequent upon their use, a State * * * [is competent] to prohibit [absolutely the] manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders * * *."[418] And to implement such prohibition, a State has the power to declare that places where liquor is manufactured or kept shall be deemed common nuisances; [Pg 1032] [419] and even to subject an innocent owner to the forfeiture of his property for the acts of a wrongdoer.[420]

Regulation of Motor Vehicles and Carriers

The highways of a State are public property, the primary and preferred use of which is for private purposes; their uses for purposes of gain may generally be prohibited by the legislature or conditioned as it sees fit.[421] In limiting the use of its highways for intrastate transportation for hire, a State reasonably may provide that carriers who have furnished adequate, responsible, and continuous service over a given route from a specified date in the past shall be entitled to licenses as a matter of right, but that the licensing of those whose service over the route began later than the date specified shall depend upon public convenience and necessity.[422] To require private contract carriers for hire to obtain a certificate of convenience and necessity, which is not granted if the service of common carriers is impaired thereby, and to fix minimum rates applicable thereto which are not less than those prescribed for common carriers is valid as a means of conserving highways;[423] but any attempt to convert private carriers into common carriers,[424] or to subject them to the burdens and regulations of common carriers, without expressly declaring them to be common carriers, is violative of due process.[425] In the absence of legislation by Congress a State may, in protection of the public safety, deny an interstate motor carrier the use of an already congested highway.[426]

In exercising its authority over its highways, on the other hand, a State is limited not merely to the raising of revenue for maintenance and reconstruction, or to regulations as to the manner in which vehicles shall be operated, but may also prevent the wear and hazards due to excessive size of vehicles and weight of load. Accordingly, a statute limiting to 7,000 pounds the net load permissible for trucks is not unreasonable.[427] No less constitutional is a municipal traffic regulation which forbids the operation in the streets of any advertising vehicle, excepting [Pg 1033] vehicles displaying business notices or advertisements of the products of the owner and not used

mainly for advertising; and such regulation may be validly enforced to prevent an express company from selling advertising space on the outside of its trucks. Inasmuch as it is the judgment of local authorities that such advertising affects public safety by distracting drivers and pedestrians, courts are unable to hold otherwise in the absence of evidence refuting that conclusion.[428]

Any appropriate means adopted to insure compliance and care on the part of licensees and to protect other highway users being consonant with due process, a State may also provide that one, against whom a judgment is rendered for negligent operation and who fails to pay it within a designated time, shall have his license and registration suspended for three years, unless, in the meantime, the judgment is satisfied or discharged.[429] By the same token a nonresident owner who loaned his automobile in another State, by the law of which he was immune from liability for the borrower's negligence, and who was not in the State at the time of an accident, is not subjected to any unconstitutional deprivation by a law thereof, imposing liability on the owner for the negligence of one driving the car with the owner's permission.[430] Compulsory automobile insurance is so plainly valid as to present no federal question.[431]

Succession to Property

When a New York Decedent Estate Law, effective after 1930, grants for the first time to a surviving spouse a right of election to take as in intestacy, and the husband, by executing in 1934 a codicil to his will drafted in 1929, made this provision operative, his widow, notwithstanding her waiver in 1922 of any right in her husband's estate, may avail herself of such right of election. The deceased husband's heirs cannot contend that the impairment of the widow's waiver by subsequent legislation deprived his estate of property without due process of law. Rights of succession to property are of statutory creation. Accordingly, New York could have conditioned any further exercise of testamentary power upon the giving of right of election to the surviving spouse regardless of any waiver however formally executed.[432]

[Pg 1034]

Administration of Estates.—Even after the creation of testamentary trust, a State retains the power to devise new and reasonable directions to the trustee to meet new conditions arising during its administration, especially such as the depression presented to trusts containing mortgages. Accordingly, no constitutional right is violated by the retroactive application to an estate on which administration had already begun of a statute which had the effect of taking away a remainderman's right to judicial examination of the trustee's computation of income. Judicial rules, promulgated prior to such statute and which were more favorable to the interests of remaindermen, can be relied upon by the latter only insofar as said rules were intended to operate retroactively; for the decedent, in whose estate the remaindermen had an interest, died even before such court rules were established. If a property right in a particular rule of income allotment in salvage proceedings vested at all, it would seem to have done so at the death of the decedent or testator.[433]

Abandoned Property.—As applied to insurance policies on the lives of New York residents issued by foreign corporations for delivery in New York, where the insured persons continued to be residents and the beneficiaries were resident at the maturity date of the policies, a New York Abandoned Property Law requiring payment to the State of money owing by life insurers and remaining unclaimed for seven years does not deprive such foreign companies of property without due process. The relationship between New York and its residents who abandon claims against foreign insurance companies, and between New York and foreign insurance companies doing business therein is sufficiently close to give New York jurisdiction.[434] In Standard Oil Co. *v.* New Jersey,[435] a sharply divided Court held recently that due process is not violated by a statute escheating to the State shares of stock in a domestic corporation and unpaid dividends declared thereon, even though the last-known owners were nonresidents and the stock was issued and the dividends were held in another State. The State's power over the debtor corporation gives it power to seize the debts or demands represented by the stock and dividends.

Vested Rights, Remedial Rights, Political Candidacy

[Pg 1035]

Inasmuch as the right to become a candidate for State office is a privilege only of State citizenship, an unlawful denial of such right is not a denial of a right of "property."[436] However, an existing right of action to recover damages for an injury is property, which a legislature has no power to destroy.[437] Thus, the retroactive repeal of a provision which made directors liable for moneys embezzled by corporate officers, by preventing enforcement of a liability which already had arisen, deprived certain creditors of their property without due process of law.[438] But while a vested cause of action is property, a person has no property, in the constitutional sense, in any particular form of remedy; and is guaranteed only the preservation of a substantial right to redress by any effective procedure.[439] Accordingly, a statute creating an additional remedy for enforcing stockholders' liability is not, as applied to stockholders then holding stock, violative of due process.[440] Nor is a law which lifts a statute of limitations and make possible a suit, theretofore barred, for the value of certain securities. "The Fourteenth Amendment does not make an act of State legislation void merely because it has some retrospective operation. * * * Some rules of law probably could not be changed retroactively without hardship and oppression, * * *, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a

remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment." [441]

Man's Best Friend

A statute providing that no dog shall be entitled to the protection of the law unless placed upon the assessment rolls, and that in a civil action for killing a dog the owner cannot recover beyond the value fixed by himself in the last assessment preceding the killing is within the police power of the State.[442]

Control of Local Units of Government

The Fourteenth Amendment does not deprive a State of the power to determine what duties may be performed by local officers, nor whether they shall be appointed or popularly elected.[443] Its power over the rights and property of cities held and used for governmental purposes was unaltered by the ratification thereof.[444] Thus, notwithstanding that it imposes liability irrespective of the power of a city to have prevented the violence, a statute requiring cities to indemnify owners of property damaged by mobs or during riots effects no unconstitutional deprivation of the property of such municipalities.[445] Likewise, a person obtaining a judgment against a municipality for damages resulting from a riot is not deprived of property without due process of law by an act which so limits the municipality's taxing power as to prevent collection of funds adequate to pay it. As long as the judgment continues as an existing liability unconstitutional deprivation is experienced.[446] [Pg 1036]

Local units of government obliged to surrender property to other units newly created out of the territory of the former cannot successfully invoke the due process clause,[447] nor may taxpayers allege any unconstitutional deprivation as the result of changes in their tax burden attendant upon the consolidation of contiguous municipalities.[448] Nor is a statute requiring counties to reimburse cities of the first class but not other classes for rebates allowed for prompt payment of taxes in conflict with the due process clause.[449]

TAXATION

In General

It was not contemplated that the adoption of the Fourteenth Amendment would restrain or cripple the taxing power of the States.[450] Rather, the purpose of the amendment was to extend to the residents of the States the same protection against arbitrary State legislation affecting life, liberty, and property as was afforded against Congress by the Fifth Amendment.[451]

Public Purpose

Inasmuch as public moneys cannot be expended for other than public purposes, it follows that an exercise of the taxing power for merely private purposes is beyond the authority of the States.[452] Whether a use is public or private is ultimately a judicial question, however, and in the determination thereof the Court will be influenced by local conditions and by the judgments of State tribunals as to what are to be deemed public uses in any State.[453] Taxes levied for each of the following listed purposes have been held to be for a public use: city coal and fuel yard,[454] State bank, warehouse, elevator, flour-mill system, and homebuilding projects,[455] society for preventing cruelty to animals (dog license tax),[456] railroad tunnel,[457] books for school children attending private as well as public schools,[458] and relief of unemployment.[459] [Pg 1037]

Other Considerations Affecting Validity: Excessive Burden; Ratio of Amount to Benefit Received

When the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers;[460] and the Court will refrain from condemning a tax solely on the ground that it is excessive.[461] Nor can the constitutionality of the power to levy taxes be made to depend upon the taxpayer's enjoyment of any special benefit from use of the funds raised by taxation.[462]

Estate, Gift, and Inheritance Taxes

The power of testamentary disposition and the privilege of inheritance being legitimate subjects of taxation, a State may apply its inheritance tax to either the transmission, or the exercise of the legal power of transmission, of property by will or descent, or to the legal privilege of taking property by devise or descent.[463] Accordingly, an inheritance tax law, enacted after the death of a testator, but before the distribution of his estate, constitutionally may be imposed on the shares of legatees, notwithstanding that under the law of the State in effect on the date of such enactment, ownership of the property passed to the legatees upon the testator's death.[464] Equally consistent with due process is a tax on an *inter vivos* transfer of property by deed

intended to take effect upon the death of the grantor.[465]

The due process clause places no restriction on a State as to the time at which an inheritance tax shall be levied or the property valued for purposes of such a tax; and for that reason a graduated [Pg 1038] tax on the transfer of contingent remainders, undiminished by the value of an intervening life estate but not payable until after the death of the life tenant, is valid.[466] Also, when a power of appointment has been granted by deed, transfer tax upon the exercise of the power by will is not a taking of property without due process of law, even though the instrument creating the power was executed prior to enactment of the taxing statute.[467] Likewise when a transfer tax law did not become effective until after a deed creating certain remainders had been executed, but the State court applied the tax on the theory that the vesting actually occurred after the tax law became operative, no denial of due process resulted. "* * *, the statute unquestionably might have made the tax applicable to this transfer, * * * [and the Court need] * * * not inquire * * * into the reasoning by which * * *" the State held the statute operative.[468]

On the other hand, when remainders indisputably vest at the time of the creation of a trust and a succession tax is enacted thereafter, the imposition of said tax on the transfer of such remainder is unconstitutional.[469] But where the remaindermen's interests are contingent and do not vest until the donor's death subsequent to the adoption of the statute, the tax is valid.[470] Another example of valid retroactive taxation is to be found in a New York statute amending a 1930 estate tax law. The amendment required inclusion in the decedent's gross estate, for tax computation purposes, of property in respect of which the decedent exercised after 1930, by will, a nongeneral power of appointment created prior to that year. The amendment reached such transfers under powers of appointment as under the previous statute escaped taxation. In sustaining application of the amendment, the Court held that the inclusion in the gross estate of property never owned by the decedent, but appointed by her will under a limited power which could not be exercised in favor of the decedent, her creditors, or her estate, did not deny due process to those who inherited the decedent's property, even though, because the tax rate was progressive, the net amount they inherited was less than it would have been if the appointed property had not been included in the gross estate.[471] In summation, the Court has noted that insofar as retroactive taxation of vested gifts has been voided, the justification therefor has been that "the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the [retroactive] statute later made the taxable event * * * Taxation, * * *, of a gift which * * * [the donor] might well have refrained from making [Pg 1039] had he anticipated the tax, * * * [is] thought to be so arbitrary * * * as to be a denial of due process."[472]

Other Types of Taxes

Income Taxes.—Any attempt by a State to measure a tax on one person's income by reference to the income of another is contrary to due process as guaranteed by the Fourteenth Amendment. Thus a husband cannot be taxed on the combined total of his and his wife's incomes as shown by separate returns, where her income is her separate property and where, by reason of the tax being graduated, its amount exceeded the sum of the taxes which would have been due had their separate incomes been separately assessed.[473] Moreover, a tax on income, unlike a gift tax, is not necessarily unconstitutional, because retroactive. Taxpayers cannot complain of arbitrary action or assert surprise in the retroactive apportionment of tax burdens to income when that is done by the legislature at the first opportunity after knowledge of the nature and amount of the income is available.[474]

Franchise Taxes.—A city ordinance imposing annual license taxes on light and power companies is not violative of the due process clause merely because the city has entered the power business in competition with such companies.[475] Nor does a municipal charter authorizing the imposition upon a local telegraph company of a tax upon the lines of the company within its limits at the rate at which other property is taxed, but upon an arbitrary valuation per mile, deprive the company of its property without due process of law, inasmuch as the tax is a mere franchise or privilege tax.[476]

Severance Taxes.—A State excise on the production of oil which extends to the royalty interest of the lessor in the oil produced under an oil lease as well as to the interest of the lessee engaged in the active work of production, the tax being apportioned between these parties according to their respective interest in the common venture, is not arbitrary as regards the lessor, but consistent with due process.[477]

Real Property Taxes (Assessment).—The maintenance of a high assessment in the face of declining value is merely another way of achieving an increase in the rate of property tax. Hence, an over-assessment constitutes no deprivation of property without due process of law.[478] [Pg 1040] Likewise, land subject to mortgage may be taxed for its full value without deduction of the mortgage debt from the valuation.[479]

Real Property Taxes: Special Assessments.—A State may defray the entire expense of creating, developing, and improving a political subdivision either from funds raised by general taxation, or by apportioning the burden among the municipalities in which the improvements are made, or by

creating, or authorizing the creation of, tax districts to meet sanctioned outlays.[480] Where a State statute authorizes municipal authorities to define the district to be benefited by a street improvement and to assess the cost of the improvement upon the property within the district in proportion to benefits, their action in establishing the district and in fixing the assessments on included property, after due hearing of the owners as required by the statute cannot, when not arbitrary or fraudulent, be reviewed under the Fourteenth Amendment upon the ground that other property benefited by the improvement was not included.[481]

It is also proper to impose a special assessment for the preliminary expenses of an abandoned road improvement, even though the assessment exceeds the amount of the benefit which the assessors estimated the property would receive from the completed work.[482] Likewise a levy upon all lands within a drainage district of a tax of twenty-five cents per acre to defray preliminary expenses does not unconstitutionally take the property of landowners within that district who may not be benefited by the completed drainage plans.[483] On the other hand, when the benefit to be derived by a railroad from the construction of a highway will be largely offset by the loss of local freight and passenger traffic, an assessment upon such railroad is violative of due process,[484] whereas any gains from increased traffic reasonably expected to result from a road improvement will suffice to sustain an assessment thereon.[485] Also the fact that the only use made of a lot abutting on a street improvement is for a railway right of way does not make invalid, for lack of benefits, an assessment thereon for grading, curbing, and paving.[486] However, when a high and dry island was included within the boundaries of a drainage district from which it could not be benefited directly or indirectly, a tax on such island was held to be a deprivation of property without due process of law.[487] Finally, a State may levy an assessment for special benefits resulting from an improvement already made[488] and may validate an assessment previously held void for want of authority.[489]

JURISDICTION TO TAX

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Land

Prior even to the ratification of the Fourteenth Amendment, it was settled principle that a State could not tax land situated beyond its limits; and subsequently elaborating upon that principle the Court has said that "* * *, we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another State, much less where such action has been defended by a court."[490] Insofar as a tax payment may be viewed as an exaction for the maintenance of government in consideration of protection afforded, the logic sustaining this rule is self-evident.

Tangible Personalty

As long as tangible personal property has a situs within its borders, a State validly may tax the same, whether directly through an *ad valorem* tax or indirectly through death taxes, irrespective of the residence of the owner.[491] By the same token, if tangible personal property makes only occasional incursions into other States, its permanent situs remains in the State of origin, and is taxable only by the latter.[492] The ancient maxim, *mobilia sequuntur personam*, which had its origin when personal property consisted in the main of articles appertaining to the person of the owner, yielded in modern times to the "law of the place where the property is kept and used." In recent years, the tendency has been to treat tangible personal property as "having a situs of its own for the purpose of taxation, and correlatively to * * * exempt [it] at the domicile of its owner."[493] The benefit-protection theory of taxation, upon which the Court has in fact relied to sustain taxation exclusively by the situs State, logically would seem to permit taxation by the domiciliary State as well as by the nondomiciliary State in which the tangibles are situate, especially when the former levies the tax on the owner in terms of the value of the tangibles. Thus far, however, the Court has taken the position that when the tangibles have a situs elsewhere, the domiciliary State can neither control such property nor extend to it or to its owner such measure of protection as would be adequate to meet the jurisdictional requirements of due process.

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Intangible Personalty

General.—To determine whether a State, or States, may tax intangible personal property, the Court has applied the fiction, *mobilia sequuntur personam* and has also recognized that such property may acquire, for tax purposes, a business or commercial situs where permanently located; but it has never clearly disposed of the issue as to whether multiple personal property taxation of intangibles is consistent with due process. In the case of corporate stock, however, the Court has obliquely acknowledged that the owner thereof may be taxed at his own domicile, at the commercial situs of the issuing corporation, and at the latter's domicile; but, as of the present date, constitutional lawyers are speculating whether the Court would sustain a tax by all three jurisdictions, or by only two of them, and, if the latter, which two, the State of the commercial situs and of the issuing corporation's domicile, or the State of the owner's domicile and that of the commercial situs.[494]

Taxes on Intangibles Sustained.—Thus far, the Court has sustained the following personal property

taxes on intangibles:

(1) A debt held by a resident against a nonresidence, evidenced by a bond of the debtor and secured by a mortgage on real estate in the State of the debtor's residence.[495]

(2) A mortgage owned and kept outside the State by a nonresident but on land within the State.[496]

(3) Investments, in the form of loans to residents, made by a resident agent of a nonresident creditor, are taxable to the nonresident creditor.[497]

(4) Deposits of a resident in a bank in another State, where he carries on a business and from which these deposits are derived, but belonging absolutely to him and not used in the business, are subject to a personal property tax in the city of his residence, whether or not they are subject to tax in the State where the business is carried on. The tax is imposed for the general advantage of living within the jurisdiction [benefit-protection theory], and may be measured by reference to the riches of the person taxed.[498] [Pg 1043]

(5) Membership owned by a nonresident in a domestic exchange, known as a chamber of commerce.[499]

(6) Membership by a resident in a stock exchange located in another State. "Double taxation" the Court observed "by one and the same State is not" prohibited "by the Fourteenth Amendment; much less is taxation by two States upon identical or closely related property interests falling within the jurisdiction of both, forbidden."[500]

(7) A resident owner may be taxed on stock held in a foreign corporation that does no business and has no property within the taxing State. The Court also added that "undoubtedly the State in which a corporation is organized may * * *, [tax] of all its shares whether owned by residents or nonresidents."[501]

(8) Stock in a foreign corporation owned by another foreign corporation transacting its business within the taxing State. The Court attached no importance to the fact that the shares were already taxed by the State in which the issuing corporation was domiciled and might also be taxed by the State in which the issuing corporation was domiciled and might also be taxed by the State in which the stock owner was domiciled; or at any rate did not find it necessary to pass upon the validity of the latter two taxes. The present levy was deemed to be tenable on the basis of the benefit-protection theory; namely, "the economic advantages realized through the protection, at the place * * *, [of business situs] of the ownership of rights in intangibles * * *"[502]

(9) Shares owned by nonresident shareholders in a domestic corporation, the tax being assessed on the basis of corporate assets and payable by the corporation either out of its general fund or by collection from the shareholder. The shares represent an aliquot portion of the whole corporate assets, and the property right so represented arises where the corporation has its home, and is therefore within the taxing jurisdiction of the State, notwithstanding that ownership of the stock may also be a taxable subject in another State.[503]

(10) A tax on the dividends of a corporation may be distributed ratably among stockholders regardless of their residence outside the State, the stockholders being the ultimate beneficiaries of the corporation's activities within the taxing State and protected by the latter and subject to its jurisdiction.[504] This tax, though collected by the corporation, is on the transfer to a stockholder of his share of corporate dividends within the taxing State, and is deducted from said dividend payments.[505]

(11) Stamp taxes on the transfer within the taxing State by one nonresident to another of stock certificates issued by a foreign corporation;[506] and upon promissory notes executed by a domestic corporation, although payable to banks in other States.[507] These taxes, however, were deemed to have been laid, not on the property, but upon an event, the transfer in one instance, and execution, in the latter, which took place in the taxing State. [Pg 1044]

Taxes on Intangibles Invalidated.—The following personal property taxes on intangibles have not been upheld:

(1) Debts evidenced by notes in safekeeping within the taxing State, but made and payable and secured by property in a second State and owned by a resident of a third State.[508]

(2) A property tax sought to be collected from a life beneficiary on the corpus of a trust composed of property located in another State and as to which said beneficiary had neither control nor possession, apart from the receipt of income therefrom.[509] However, a personal property tax may be collected on one-half of the value of the corpus of a trust from a resident who is one of the two trustees thereof, notwithstanding that the trust was created by the will of a resident of another State in respect of intangible property located in the latter State, at least where it does not appear that the trustee is exposed to the danger of other *ad valorem* taxes in another State.[510] The first case, Brooke *v.* Norfolk,[511] is distinguishable by virtue of the fact that the property tax therein voided was levied upon a resident beneficiary rather than upon a resident trustee in control of nonresident intangibles. Different too is Safe Deposit and Trust Co. *v.*

Virginia,[512] where a property tax was unsuccessfully demanded of a nonresident trustee with respect to nonresident intangibles under its control.

(3) A tax, measured by income, levied on trust certificates held by a resident, representing interests in various parcels of land (some inside the State and some outside), the holder of the certificates, though without a voice in the management of the property, being entitled to a share in the net income and, upon sale of the property, to the proceeds of the sale.[513]

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Transfer Taxes (Inheritance, Estate, Gift Taxes).—Being competent to regulate exercise of the power of testamentary disposition and the privilege of inheritance, a State may base its succession taxes upon either the transmission, or an exercise of the legal power of transmission, of property by will or by descent, or the enjoyment of the legal privilege of taking property by devise or descent.[514] But whatever may be the justification of their power to levy such taxes, States have consistently found themselves restricted by the rule, established as to property taxes in 1905 in Union Refrigerator Transit Co. *v.* Kentucky,[515] and subsequently reiterated in Frick *v.* Pennsylvania[516] in 1925, which precludes imposition of transfer taxes upon tangible personal property by any State other than the one in which such tangibles are permanently located or have an actual situs. In the case of intangibles, however, the States have been harassed by the indecision of the Supreme Court; for to an even greater extent than is discernible in its treatment of property taxes on intangibles, it has oscillated in upholding, then rejecting, and again currently sustaining the levy by more than one State of death taxes upon intangibles comprising the estate of a decedent.

Until 1930, transfer taxes upon intangibles levied by both the domiciliary as well as nondomiciliary, or situs State, were with rare exceptions approved. Thus, in Bullen *v.* Wisconsin,[517] the domiciliary State of the creator of a trust was held competent to levy an inheritance tax, upon the death of the settlor, on his trust fund consisting of stocks, bonds, and notes kept and administered in another State and as to which the settlor reserved the right to control disposition and to direct payment of income for life, such reserved powers being equivalent to a fee. Cognizance was taken of the fact that the State in which these intangibles had their situs had also taxed the trust. Levy of an inheritance tax by a nondomiciliary State was sustained on similar grounds in Wheeler *v.* Sohmer, wherein it was held that the presence of a negotiable instrument was sufficient to confer jurisdiction upon the State seeking to tax its transfer.[518] On the other hand, the mere ownership by a foreign corporation of property in a nondomiciliary State was held insufficient to support a tax by that State on the succession to shares of stock in that corporation owned by a nonresident decedent.[519] Also against the trend was Blodgett *v.* Silberman[520] wherein the Court defeated collection of a transfer tax by the domiciliary State by treating coins and bank notes deposited by a decedent in a safe deposit box in another State as tangible property, albeit it conceded that the domiciliary State could tax the transfer of books and certificates of indebtedness found in that safe deposit box as well as the decedent's interest in a foreign partnership.

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In the course of about two years following the recent Depression, the Court handed down a group of four decisions which, for the time being at any rate, placed the stamp of disapproval upon multiple transfer and—by inference—other multiple taxation of intangibles. Asserting, as it did in one of these cases, that "practical considerations of wisdom, convenience and justice alike dictate the desirability of a uniform general rule confining the jurisdiction to impose death transfer taxes as to intangibles to the State of the [owner's] domicile; * * *"[521] the Court, through consistent application of the maxim, *mobilia sequuntur personam*, proceeded to deny the right of nondomiciliary States to tax and to reject as inadequate jurisdictional claims of the latter founded upon such bases as control, benefit, and protection or situs. During this interval, 1930-1932, multiple transfer taxation of intangibles came to be viewed, not merely as undesirable, but as so arbitrary and unreasonable as to be prohibited by the due process clause.

Beginning, in 1930, with Farmers' Loan and Trust Co. *v.* Minnesota,[522] the Court reversed its former ruling in Blackstone *v.* Miller,[523] in which it had held that the State in which a debtor was domiciled or a bank located could levy an inheritance tax on the transfer of the debt or the deposit, notwithstanding that the creditor had his domicile in a different State. Farmers' Loan and Trust Co. *v.* Minnesota, strictly appraised, was authority simply for the proposition that jurisdiction over a debtor, in this instance a State which had issued bonds held by a nonresident creditor, was inadequate to sustain a tax by that debtor State on the transfer of such securities. The securities in question, which had never been used by the creditor in any business in the issuing State, were located in the State in which the creditor had his domicile, and were deemed to be taxable only in the latter. In Baldwin *v.* Missouri,[524] a nondomiciliary State was prevented from applying its inheritance tax to bonds, bank deposits, and promissory notes, all physically present within its limits and some of them secured by lands therein, when the owner thereof was domiciled in another State. A like result, although on this occasion on grounds of lack of evidence of any "business situs," was reached in Beidler *v.* South Carolina Tax Commission,[525] in which the Court ruled that a State, upon the death of a nonresident creditor, may not apply its inheritance tax to a debt [open account] owned by one of its domestic corporations. Finally, in First National Bank *v.* Maine,[526] which has since been overruled in State Tax Commission *v.* Aldrich,[527] the Court declared that only the State in which the owner of corporate stock died domiciled was empowered to tax the succession to the shares by will or inheritance and that the

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State in which the issuing corporation was domiciled could not do so.

Without expressly overruling more than one of these four cases condemning multiple succession taxation of intangibles, the Court, beginning with Curry *v.* McCanless[528] in 1939, announced a departure from the "doctrine, of recent origin, that the Fourteenth Amendment precludes the taxation of any interest in the same intangible in more than one State * * *." Taking cognizance of the fact that this doctrine had never been extended to the field of income taxation or consistently applied in the field of property taxation, where the concepts of business situs as well as of domiciliary situs had been utilized to sustain double taxation, especially in connection with shares of corporate stock, the Court declared that a correct interpretation of constitutional requirements would dictate the following conclusions: "From the beginning of our constitutional system control over the person at the place of his domicile and his duty there, common to all citizens, to contribute to the support of government have been deemed to afford an adequate constitutional basis for imposing on him a tax on the use and enjoyment of rights in intangibles measured by their value. * * * But when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another State, in such a way as to bring his person or * * * [his intangibles] within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains, * * * [However], the State of domicile is not deprived, by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax." In accordance with this line of reasoning, Tennessee, where a decedent died domiciled, and [Pg 1048] Alabama, where a trustee, by conveyance from said decedent, held securities on specific trusts, were both deemed competent to impose a tax on the transfer of these securities passing under the will of the decedent. "In effecting her purposes," the testatrix was viewed as having "brought some of the legal interests which she created within the control of one State by selecting a trustee there, and others within the control of the other State, by making her domicile there." She had found it necessary to invoke "the aid of the law of both States, and her legatees" were subject to the same necessity.

These statements represented a belated adoption of the views advanced by Chief Justice Stone in dissenting or concurring opinions which he filed in three of the four decisions rendered during 1930-1932. By the line of reasoning taken in these opinions, if protection or control was extended to, or exercised over, intangibles or the person of their owner, then as many States as afforded such protection or were capable of exerting such dominion should be privileged to tax the transfer of such property. On this basis, the domiciliary State would invariably qualify as a State competent to tax and a nondomiciliary State, so far as it could legitimately exercise control or could be shown to have afforded a measure of protection that was not trivial or insubstantial.

On the authority of Curry *v.* McCanless, the Court, in Pearson *v.* McGraw,[529] also sustained the application of an Oregon transfer tax to intangibles handled by an Illinois trust company and never physically present in Oregon, jurisdiction to tax being viewed as dependent, not on the location of the property in the State, but on control over the owner who was a resident of Oregon. In Graves *v.* Elliott,[530] decided in the same year, the Court upheld the power of New York, in computing its estate tax, to include in the gross estate of a domiciled decedent the value of a trust of bonds managed in Colorado by a Colorado trust company and already taxed on its transfer by Colorado, which trust the decedent had established while in Colorado and concerning which he had never exercised any of his reserved powers of revocation or change of beneficiaries. It was observed that "the power of disposition of property is the equivalent of ownership, * * * and its exercise in the case of intangibles is * * * [an] appropriate subject of taxation at the place of the domicile of the owner of the power. Relinquishment at death, in consequence of the non-exercise in life, of a power to revoke a trust created by a decedent is likewise an appropriate subject of taxation."[531] Consistent application of the principle enunciated in Curry *v.* McCanless is also discernible in two later cases in which the Court sustained the right of a domiciliary State to tax the transfer of intangibles kept outside its boundaries, notwithstanding that "in some instances they may be subject to taxation in other [Pg 1049] jurisdictions, to whose control they are subject and whose legal protection they enjoyed." In Graves *v.* Schmidlapp[532] an estate tax was levied upon the value of the subject of a general testamentary power of appointment effectively exercised by a resident donee over intangibles held by trustees under the will of a nonresident donor of the power. Viewing the transfer of interest in said intangibles by exercise of the power of appointment as the equivalent of ownership, the Court quoted from McCulloch *v.* Maryland[533] to the effect that the power to tax "'is an incident of sovereignty, and is coextensive with that to which it is an incident.'" Again, in Central Hanover Bank & T. Co. *v.* Kelly,[534] the Court approved a New Jersey transfer tax imposed on the occasion of the death of a New Jersey grantor of an irrevocable trust executed, and consisting of securities located, in New York, and providing for the disposition of the corpus to two nonresident sons.

The costliness of multiple taxation of estates comprising intangibles is appreciably aggravated when each of several States founds its tax not upon different events or property rights but upon an identical basis; namely that, the decedent died domiciled within its borders. Not only is an estate then threatened with excessive contraction but the contesting States may discover that the assets of the estate are insufficient to satisfy their claims. Thus, in Texas *v.* Florida,[535] the State of Texas filed an original petition in the Supreme Court, in which it asserted that its claim, together with those of three other States, exceeded the value of the estate, that the portion of the estate within Texas alone would not suffice to discharge its own tax, and that its efforts to collect

its tax might be defeated by adjudications of domicile by the other States. The Supreme Court disposed of this controversy by sustaining a finding that the decedent had been domiciled in Massachusetts, but intimated that thereafter it would take jurisdiction in like situations only in the event that an estate did not exceed in value the total of the conflicting demands of several States and that the latter were confronted with a prospective inability to collect.

Corporation Taxes

(1) Intangible Personal Property.—A State in which a foreign corporation has acquired a commercial domicile and in which it maintains its general business offices may tax the latter's bank deposits and accounts receivable even though the deposits are outside the State and the [Pg 1050] accounts receivable arise from manufacturing activities in another State.[536] Similarly, a nondomiciliary State in which a foreign corporation did business can tax the "corporate excess" arising from property employed and business done in the taxing State.[537] On the other hand, when the foreign corporation transacts only interstate commerce within a State, any excise tax on such excess is void, irrespective of the amount of the tax.[538] A domiciliary State, however, may tax the excess of market value of outstanding capital stock over the value of real and personal property and certain indebtedness of a domestic corporation even though this "corporate excess" arose from property located and business done in another State and was there taxable. Moreover, this result follows whether the tax is considered as one on property or on the franchise.[539] Also a domiciliary State, which imposes no franchise tax on a stock fire insurance corporation, validly may assess a tax on the full amount of its paid-in capital stock and surplus, less deductions for liabilities, notwithstanding that such domestic corporation concentrates its executive, accounting, and other business offices in New York, and maintains in the domiciliary State only a required registered office at which local claims are handled. Despite "the vicissitudes which the so-called 'jurisdiction-to-tax' doctrine has encountered * * *," the presumption persists that intangible property is taxable by the State of origin.[540] But a property tax on the capital stock of a domestic company which includes in the appraisement thereof the value of coal mined in the taxing State but located in another State awaiting sale deprives the corporation of its property without due process of law.[541] Also void for the same reason is a State tax on the franchise of a domestic ferry company which includes in the valuation thereof the worth of a franchise granted to the said company by another State.[542]

(2) Privilege Taxes Measured by Corporate Stock.—Since the tax is levied not on property but on the privilege of doing business in corporate form, a domestic corporation may be subjected to a privilege tax graduated according to paid up capital stock, even though the latter represents [Pg 1051] capital not subject to the taxing power of the State.[543] By the same token, the validity of a franchise tax, imposed on a domestic corporation engaged in foreign maritime commerce and assessed upon a proportion of the total franchise value equal to the ratio of local business done to total business, is not impaired by the fact that the total value of the franchise was enhanced by property and operations carried on beyond the limits of the State.[544] However, a State, under the guise of taxing the privilege of doing an intrastate business, cannot levy on property beyond its borders; and, therefore, as applied to foreign corporations, a license tax based on authorized capital stock is void,[545] even though there be a maximum to the fee,[546] unless apportioned according to some method, as, for example, a franchise tax based on such proportion of outstanding capital stock as is represented by property owned and used in business transacted in the taxing State.[547] An entrance fee, on the other hand, collected only once as the price of admission to do an intrastate business, is distinguishable from a tax and accordingly may be levied on a foreign corporation on the basis of a sum fixed in relation to the amount of authorized capital stock (in this instance, a $5,000 fee on an authorized capital of $100,000,000).[548]

(3) Privilege Taxes Measured by Gross Receipts.—A municipal license tax imposed as a percentage of the receipts of a foreign corporation derived from the sales within and without the State of goods manufactured in the city is not a tax on business transactions or property outside the city and therefore does not violate the due process clause.[549] But a State is wanting in jurisdiction to extend its privilege tax to the gross receipts of a foreign contracting corporation for work done outside the taxing State in fabricating equipment later installed in the taxing State. Unless the activities which are the subject of the tax are carried on within its territorial limits, a State is not competent to impose such a privilege tax.[550]

(4) Taxes on Tangible Personal Property.—When rolling stock is permanently located and employed [Pg 1052] in the prosecution of a business outside the boundaries of a domiciliary State, the latter has no jurisdiction to tax the same.[551] Vessels, however, inasmuch as they merely touch briefly at numerous ports, never acquire a taxable situs at any one of them, and are taxable by the domicile of their owners or not at all;[552] unless, of course, the ships operate wholly on the waters within one State, in which event they are taxable there and not at the domicile of the owners.[553] Only recently airplanes have been treated in a similar manner for tax purposes. Noting that the entire fleet of airplanes of an interstate carrier were "never continuously without the [domiciliary] State during the whole tax year," that such airplanes also had their "home port" in the domiciliary State, and that the company maintained its principal office therein, the Court sustained a personal property tax applied by the domiciliary State to all the airplanes owned by the taxpayer. No other State was deemed able to accord the same protection and benefits as the taxing State in

which the taxpayer had both its domicile and its business situs; and the doctrines of Union Refrigerator Transit Co. *v.* Kentucky,[554] as to the taxability of permanently located tangibles, and that of apportionment, for instrumentalities engaged in interstate commerce[555] were held to be inapplicable.[556]

Conversely, a nondomiciliary State, although it may not tax property belonging to a foreign corporation which has never come within its borders, may levy on movables which are regularly and habitually used and employed therein. Thus, while the fact that cars are loaded and reloaded at a refinery in a State outside the owner's domicile does not fix the situs of the entire fleet in such State, the latter may nevertheless tax the number of cars which on the average are found to be present within its borders.[557] Moreover, in assessing that part of a railroad within its limits, a State need not treat it as an independent line, disconnected from the part without, and place upon the property within the State only a value which could be given to it if operated separately from the balance of the road. The State may ascertain the value of the whole line as a single [Pg 1053] property and then determine the value of the part within on a mileage basis, unless there be special circumstances which distinguish between conditions in the several States.[558] But no property of an interstate carrier can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State.[559] Also, a State property tax on railroads, which is measured by gross earnings apportioned to mileage, is not unconstitutional in the absence of proof that it exceeds what would be legitimate as an ordinary tax on the property valued as part of a going concern or that it is relatively higher than taxes on other kinds of property.[560] The tax reaches only revenues derived from local operations, and the fact that the apportionment formula does not result in mathematical exactitude is not a constitutional defect.[561]

Income and Other Taxes

Individual Incomes.—Consistently with due process of law, a State annually may tax the entire net income of resident individuals from whatever source received,[562] and that portion of a nonresident's net income derived from property owned, and from any business, trade, or profession carried on, by him within its borders.[563] Jurisdiction, in the case of residents, is founded upon the rights and privileges incident to domicile; that is, the protection afforded the recipient of income in his person, in his right to receive the income, and in his enjoyment of it when received, and, in the case of nonresidents, upon dominion over either the receiver of the income or the property or activity from which it is derived, and upon the obligation to contribute to the support of a government which renders secure the collection of such income. Accordingly, a State may tax residents on income from rents of land located outside the State and from interest on bonds physically without the State and secured by mortgage upon lands similarly situated;[564] and the income received by a resident beneficiary from securities held by a trustee in a trust created and administered in another State, and not directly taxable to the trustee.[565] Nor does the fact that another State has lawfully taxed identical income in the hands of trustees operating therein necessarily destroy a domiciliary State's right to tax the receipt of said income [Pg 1054] by a resident beneficiary. "The taxing power of a State is restricted to her confines and may not be exercised in respect of subjects beyond them."[566] Likewise, even though a nonresident does no business within a State, the latter may tax the profits realized by the nonresident upon his sale of a right appurtenant to membership in a stock exchange within its borders.[567]

Incomes of Foreign Corporations.—A tax based on the income of a foreign corporation may be determined by allocating to the State a proportion of the total income which the tangible property in the State bears to the total.[568] However, such a basis may work an unconstitutional result if the income thus attributed to the State is out of all appropriate proportion to the business there transacted by the corporation. Evidence may always be submitted which tends to show that a State has applied a method which, albeit fair on its face, operates so as to reach profits which are in no sense attributable to transactions within its jurisdiction.[569] Nevertheless, a foreign corporation is in error when it contends that due process is denied by a franchise tax measured by income, which is levied, not upon net income from intrastate business alone, but on net income justly attributable to all classes of business done within the State, interstate and foreign, as well as intrastate business.[570] Inasmuch as the privilege granted by a State to a foreign corporation of carrying on local business supports a tax by that State on the income derived from that business, it follows that the Wisconsin privilege dividend tax, consistently with the due process clause, may be applied to a Delaware corporation, having its principal offices in New York, holding its meetings and voting its dividends in New York, and drawing its dividend checks on New York bank accounts. The tax is imposed on the "privilege of declaring and receiving dividends" out of income derived from property located and business transacted in the State, equal to a specified percentage of such dividends, the corporation being required to deduct the tax from dividends payable to resident and nonresident shareholders and pay it over to the State.[571]

Chain Store Taxes.—A tax on chain stores, at a rate per store determined by the number of stores [Pg 1055] both within and without the State, is not unconstitutional as a tax in part upon things beyond the jurisdiction of the State.[572]

Insurance Company Taxes.—A privilege tax on the gross premiums received by a foreign life insurance company at its home office for business written in the State does not deprive the company of property without due process;[573] but a tax is bad when the company has withdrawn all its agents from the State and has ceased to do business, merely continuing to be bound to policyholders resident therein and receiving at its home office the renewal premiums.[574] Distinguishable therefrom is the following tax which was construed as having been levied, not upon annual premiums nor upon the privilege merely of doing business during the period that the company actually was within the State, but upon the privilege of entering and engaging in business, the percentage "on the annual premiums *to be paid throughout the life of the policies issued*." By reason of this difference a State may continue to collect such tax even after the company's withdrawal from the State.[575]

A State which taxes the insuring of property within its limits may lawfully extend its tax to a foreign insurance company which contracts with an automobile sales corporation in a third State to insure its customers against loss of cars purchased through it, so far as the cars go into possession of purchasers within the taxing State.[576] On the other hand, a foreign corporation admitted to do a local business, which insures its property with insurers in other States who are not authorized to do business in the taxing State, cannot constitutionally be subjected to a 5% tax on the amount of premiums paid for such coverage.[577] Likewise a Connecticut life insurance corporation, licensed to do business in California, which negotiated reinsurance contracts in Connecticut, received payment of premiums thereon in Connecticut, and was there liable for [Pg 1056] payment of losses claimed thereunder, cannot be subjected by California to a privilege tax measured by gross premiums derived from such contracts, notwithstanding that the contracts reinsured other insurers authorized to do business in California and protected policies effected in California on the lives of residents therein. The tax cannot be sustained whether as laid on property, business done, or transactions carried on, within California, or as a tax on a privilege granted by that State.[578]

When policy loans to residents are made by a local agent of a foreign insurance company, in the servicing of which notes are signed, security taken, interest collected, and debts are paid within the State, such credits are taxable to the company, notwithstanding that the promissory notes evidencing such credits are kept at the home office of the insurer.[579] But when a resident policyholder's loan is merely charged against the reserve value of his policy, under an arrangement for extinguishing the debt and interest thereon by deduction from any claim under the policy, such credit is not taxable to the foreign insurance company.[580] Premiums due from residents on which an extension has been granted by foreign companies also are credits on which the latter may be taxed by the State of the debtor's domicile;[581] and the mere fact that the insurers charge these premiums to local agents and give no credit directly to policyholders does not enable them to escape this tax.[582]

PROCEDURE IN TAXATION

In General

Exactly what due process requires in the assessment and collection of general taxes has never been decided by the Supreme Court. While it was held that "notice to the owner at some stage of the proceedings, as well as an opportunity to defend, is essential" for imposition of special taxes, it has also ruled that laws for assessment and collection of general taxes stand upon a different footing and are to be construed with the utmost liberality, even to the extent of acknowledging that no notice whatever is necessary.[583] Due process of law as applied to taxation does not mean judicial process;[584] neither does it require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain.[585] If a taxpayer is given an opportunity to test the validity of a tax at any time before it is final, whether the proceedings for review take place before a board having a quasi-judicial character, [Pg 1057] or before a tribunal provided by the State for the purpose of determining such questions, due process of law is not denied.[586]

Notice and Hearing in Relation to General Taxes

"Of the different kinds of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and generally, specific taxes on things, or persons, or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question, that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard, or bushel, or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind, or at a particular place, such as keeping a hotel or a restaurant, or selling liquors, or cigars, or clothes, he has only to pay the amount required by law and go into

the business. There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the State, or on domestic corporations for franchises, if the parties desire the privilege, they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it."[587]

Notice and Hearing in Relation to Assessments

"But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially; and in most of the States provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments. The law in prescribing the time when such complaints [Pg 1058] will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law."[588]

Nevertheless, it has never been considered necessary to the validity of a tax that the party charged shall have been present, or had an opportunity to be present, in some tribunal when he was assessed.[589] Where a tax board has its time of sitting fixed by law and where its sessions are not secret, no obstacle prevents the appearance of any one before it to assert a right or redress a wrong; and in the business of assessing taxes, this is all that can be reasonably asked.[590] Nor is there any constitutional command that notice of an assessment as well as an opportunity to contest it be given in advance of the assessment. It is enough that all available defenses may be presented to a competent tribunal during a suit to collect the tax and before the demand of the State for remittance becomes final.[591] A hearing before judgment, with full opportunity to submit evidence and arguments being all that can be adjudged vital, it follows that rehearings and new trials are not essential to due process of law.[592] One hearing is sufficient to constitute due process;[593] and the requirements of due process are also met if a taxpayer, who had no notice of a hearing, does receive notice of the decision reached thereat, and is privileged to appeal the same and, on appeal, to present evidence and be heard on the valuation of his property.[594]

Notice and Hearing in Relation to Special Assessments

However, when assessments are made by a political subdivision, a taxing board or court, according to special benefits, the property owner is entitled to be heard as to the amount of his assessments and upon all questions properly entering into that determination.[595] The hearing need not amount to a judicial inquiry,[596] but a mere opportunity to submit objections in writing, without the right of personal appearance, is not sufficient.[597] If an assessment for a local improvement is made in accordance with a fixed rule prescribed by legislative act, the property owner is not entitled to be heard in advance on the question of benefits.[598] On the other hand, if the area of the assessment district was not determined by the legislature, a landowner does have the right to be heard respecting benefits to his property before it can be included in the [Pg 1059] improvement district and assessed; but due process is not denied if, in the absence of actual fraud or bad faith, the decision of the agency vested with the initial determination of benefits is made final.[599] The owner has no constitutional right to be heard in opposition to the launching of a project which may end in assessment; and once his land has been duly included within a benefit district, the only privilege which he thereafter enjoys is to a hearing upon the apportionment; that is, the amount of the tax which he has to pay.[600] Nor can he rightfully complain because the statute renders conclusive, after said hearing, the determination as to apportionment by the same body which levied the assessment.[601]

More specifically, where the mode of assessment resolves itself into a mere mathematical calculation, there is no necessity for a hearing.[602] Statutes and ordinances providing for the paving and grading of streets, the cost thereof to be assessed on the front foot rule, do not, by their failure to provide for a hearing or review of assessments, generally deprive a complaining owner of property without due process of law.[603] In contrast, when an attempt is made to cast upon particular property a certain proportion of the construction cost of a sewer not calculated by any mathematical formula, the taxpayer has a right to be heard.[604]

Sufficiency and Manner of Giving Notice [Pg 1060]

Notice, insofar as it is required, may be either personal, or by publication, or by statute fixing the time and place of hearing.[605] A State statute, consistently with due process, may designate a corporation as the agent of a nonresident stockholder to receive notice and to represent him in proceedings for correcting assessments.[606] Also "where the State * * * [desires] to sell land for taxes upon proceedings to enforce a lien for the payment thereof, it may proceed directly against the land within the jurisdiction of the Court, and a notice which permits all interested, who are 'so minded,' to ascertain that it is to be subjected to sale to answer for taxes, and to appear and

be heard, whether to be found within the jurisdiction or not, is due process of law within the Fourteenth Amendment * * *."[607] A description, even though it not be technically correct, which identifies the land will sustain an assessment for taxes and a notice of sale therefor when delinquent. If the owner knows that the property so described is his, he is not, by reason of the insufficient description, deprived of his property without due process. Where tax proceedings are *in rem*, owners are bound to take notice thereof, and to pay taxes on their property, even if assessed to unknown or other persons; and if an owner stands by and sees his property sold for delinquent taxes, he is not thereby wrongfully deprived of his property.[608]

Sufficiency of Remedy

When no other remedy is available, due process is denied by a judgment of a State court withholding a decree in equity to enjoin collection of a discriminatory tax.[609] Requirements of due process are similarly violated by a statute which limits a taxpayer's right to challenge an assessment to cases of fraud or corruption,[610] and by a State tribunal which prevents a recovery of taxes imposed in violation of the Constitution and laws of the United States by invoking a State law limiting suits to recover taxes alleged to have been assessed illegally to taxes paid at the time and in the manner provided by said law.[611]

Laches

[Pg 1061]

Persons failing to avail themselves of an opportunity to object and be heard, cannot thereafter complain of assessments as arbitrary and unconstitutional.[612] Likewise a car company, which failed to report its gross receipts as required by statute, has no further right to contest the State comptroller's estimate of those receipts and his adding thereto the 10% penalty permitted by law.[613]

Collection of Taxes

To reach property which has escaped taxation, a State may tax the estates of decedents for a period anterior to death and grant proportionate deductions for all prior taxes which the personal representative can prove to have been paid.[614] Collection of an inheritance tax also may be expedited by a statute requiring the sealing of safe deposit boxes for at least ten days after the death of the renter and obliging the lessor to retain assets found therein sufficient to pay the tax that may be due the State.[615] Moreover, with a view to achieving a like result in the case of gasoline taxes, a State may compel retailers to collect such taxes from consumers and, under penalty of a fine for delinquency, to remit monthly the amounts thus collected.[616] Likewise, a tax on the tangible personal property of a nonresident owner may be collected from the custodian or possessor of such property, and the latter, as an assurance of reimbursement, may be granted a lien on such property.[617] In collecting personal income taxes, however, most States require employers to deduct and withhold the tax from the wages of only nonresident employees; but the duty thereby imposed on the employer has never been viewed as depriving him of property without due process of law, nor has the adjustment of his system of accounting and paying salaries which withholding entails been viewed as an unreasonable regulation of the conduct of his business.[618]

As a State may provide in advance that taxes shall bear interest from the time they become due, it may with equal validity stipulate that taxes which have become delinquent shall bear interest from the time the delinquency commenced. Likewise, a State may adopt new remedies for the collection of taxes and apply these remedies to taxes already delinquent.[619] After liability of a taxpayer has been fixed by appropriate procedure, collection of a tax by distress and seizure of his person does not deprive him of liberty without due process of law.[620] Nor is a foreign insurance company denied due process of law when its personal property is distrained to satisfy unpaid taxes.[621]

[Pg 1062]

The requirements of due process are fulfilled by a statute which, in conjunction with affording an opportunity to be heard, provides for the forfeiture of titles to land for failure to list and pay taxes thereon for certain specified years.[622] No less constitutional, as a means of facilitating collection, is an *in rem* proceeding, to which the land alone is made a party, whereby tax liens on land are foreclosed and all pre-existing rights or liens are eliminated by a sale under a decree in said proceeding.[623] On the other hand, while the conversion of an unpaid special assessment into both a personal judgment therefor against the owner as well as a charge on the land is consistent with the Fourteenth Amendment,[624] a judgment imposing personal liability against a nonresident taxpayer over whom the State court acquired no jurisdiction is void.[625] Apart from such restraints, however, a State is free to adopt new remedies for the collection of taxes and even to apply new remedies to taxes already delinquent.[626]

EMINENT DOMAIN

Historical Development

"Prior to the adoption of the Fourteenth Amendment," the power of eminent domain, which is deemed to inhere in every State and to be essential to the performance of its functions,[627] "was unrestrained by any federal authority."[628] An express prohibition against the taking of private property for public use without just compensation was contained in the Fifth Amendment; but an effort to extend the application thereof to the States had been defeated by the decision, in 1833, in Barron *v.* Baltimore.[629] The most nearly comparable provision included in the Fourteenth Amendment, was the prohibition against a State depriving a person of property without due process of law. The Court was accordingly confronted with the task of determining whether this restraint on State action, minus the explicit provision for just compensation found in the Fifth Amendment, afforded property owners the same measure of protection as did the latter in its operation as a limitation on the Federal Government. The Court's initial answer to this question, as set forth in Davidson *v.* New Orleans,[630] decided in 1878, was in the negative; and on the ground of the omission of the clause found in the Fifth Amendment from the terms of the [Pg 1063] Fourteenth, it refused to equate the just compensation with due process. Within less than a decade thereafter, however, the Court modified its position, and in Chicago, B. & Q.R. Co. *v.* Chicago,[631] seven Justices unequivocally rejected the contention, obviously based on the Davidson Case that "the question as to the amount of compensation to be awarded to the railroad company was one of local law merely, and [insofar as] that question was determined in the mode prescribed by the Constitution and [State] law, the [property owner] appearing and having full opportunity to be heard, the requirement of due process of law was observed." On the contrary, the seven Justices maintained that although a State "legislature may prescribe a form of procedure to be observed in the taking of private property for public use, * * * it is not due process of law if provision be not made for compensation * * * The mere form of the proceeding instituted against the owner, * * *, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."

Public Use

While acknowledging that agreement was virtually nonexistent as to "what are public uses for which the right of compulsory taking may be employed," the Court, until 1946, continued to reiterate "the nature of the uses, whether public or private, is ultimately a judicial question."[632] But because of proclaimed willingness to defer to local authorities, especially "the highest court of the State" in resolving such an issue,[633] the Court, as early as 1908, was obliged to admit that, notwithstanding its retention of the power of judicial review, "no case is recalled where this Court has condemned as a violation of the Fourteenth Amendment a taking upheld by the State court as a taking for public uses * * *"[634] In 1946, however, without endeavoring to ascertain whether "the scope of the judicial power to determine what is a 'public use' in Fourteenth Amendment controversies, * * *" is the same as under the Fifth Amendment, a majority of the [Pg 1064] Justices, in a decision involving the Federal Government, declared that "it is the function of * * * [the legislative branch] to decide what type of taking is for a public use * * *"[635]

Necessity for a Taking

"Once it is admitted or judicially determined that a proposed condemnation is for a public purpose and within the statutory authority, a political or judicially nonreviewable question may emerge, to wit, the necessity or expediency of the condemnation of the particular property."[636] The necessity and expediency of the taking are legislative questions to be determined by such agency and in such mode as the State may designate.[637]

What Constitutes a Taking For a Public Use

To constitute a public use within the law of eminent domain, it is not essential that an entire community should directly participate in or enjoy an improvement, and, in ascertaining whether a use is public, not only present demands of the public but those which may be fairly anticipated in the future may be considered.[638] Moreover, it is also not necessary that property should be absolutely taken, in the narrowest sense of the word, to bring the case within the protection of this constitutional provision, but there may be such serious interruption to the common and necessary use of property as will be equivalent to a taking. "It would be * * * [an] unsatisfactory result, if * * *, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can in effect, subject it to total destruction without making any [Pg 1065] compensation, because, in the narrowest sense of that word, it [has] not [been] taken for the public use."[639]

Takings for a purpose that is public hitherto have been held to comprise the following: a privately owned water supply system formerly operated under contract with the municipality effecting the taking;[640] a right of way across a neighbor's land for the enlargement of an irrigation ditch therein to enable the taker to obtain water for irrigating land that would otherwise remain valueless;[641] a right of way across a placer mining claim for the aerial bucket line of a mining corporation;[642] land, water, and water rights for the production of electric power by a public utility;[643] water rights by an interurban railway company for the production of power in excess

of current needs;[644] places of historical interest;[645] land taken for the purpose of exchange with a railroad company for a portion of its right of way, required for widening a highway;[646] land by a railway for a spur track;[647] establishment by a municipality of a public hack stand upon the driveway maintained by a railroad upon its own terminal grounds to afford ingress and egress to its patrons.[648] Likewise, damages for which compensation must be paid are sustained by an upper riparian proprietor by reason of the erection of a dam by a lower mill owner under authority of a "mill act."[649] On the other hand, even when compensation is tendered, an owner of property cannot be compelled to assent to its taking by the State for the private use of another. Such a taking is prohibited, by the due process clause. Thus, a State, by law, could not require a railroad corporation, which had permitted the erection of two grain elevators by private citizens on its right of way, to grant upon like terms, a location to another group of farmers desirous of erecting a third grain elevator for their own benefit.[650]

Just Compensation [Pg 1066]

"When * * * [the] power [of eminent domain] is exercised it can only be done by giving the party whose property is taken or whose use and enjoyment of such property is interfered with, full and adequate compensation, not excessive or exorbitant, but just compensation."[651] However, "there must be something more than an ordinary honest mistake of law in the proceedings for compensation before a party can make out that the State has deprived him of his property unconstitutionally."[652] Unless, by its rulings of law, the State court prevented a complainant from obtaining substantially any compensation, its findings as to the amount of damages will not be overturned on appeal, even though as a consequence of error therein the property owner received less than he ought.[653] Accordingly, when a State court, expressly recognizing a right of recovery for any substantial damage, found that none had been shown by the proof, its award of only $1 as nominal damages was held to present no question for review.[654] "All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the Federal Constitution."[655]

"The general rule is that compensation 'is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may be reasonably expected in the immediate future,' * * * [but] 'mere possible or imaginary uses, or the speculative schemes of its proprietor, are to be excluded.'"[656] Damages are measured by the loss to the owner, not by the gain to the taker;[657] and attorneys' fees and expenses are not embraced therein.[658] "When the public faith and credit are pledged to a reasonably prompt ascertainment and payment, and there is adequate provision for enforcing the [Pg 1067] pledge, * * * the requirement of just compensation is satisfied."[659]

Uncompensated Takings

"It is well settled that 'neither a natural person nor a corporation can claim damages on account of being compelled to render obedience to a police regulation designed to secure the common welfare.' * * * Uncompensated obedience to a regulation enacted for the public safety under the police power of the State is not a taking or damaging without just compensation of private property, * * *"[660] Thus, the flooding of lands consequent upon private construction of a dam under authority of legislation enacted to subserve the drainage of lowlands was not a taking which required compensation to be made, especially since such flooding could have been prevented by raising the height of dikes around the lands. "The rule to be gathered from these cases is that where there is a practical destruction, or material impairment of the value of plaintiff's lands, there is a taking, which demands compensation, but otherwise where, as in this case, plaintiff is merely put to some extra expense in warding off the consequences of the overflow."[661] Similarly, when a city, by condemnation proceedings, sought to open a street across the tracks of a railroad, it was not obligated to pay the expenses that the railroad would incur in planking the crossing, constructing gates, and posting gatemen at the crossing. The railway was presumed to have "laid its tracks subject to the condition necessarily implied that their use could be so regulated by competent authority as to insure the public safety."[662] Also, one who leased oyster beds in Hampton Roads from Virginia for $1 per acre under guaranty of an "absolute right" to use and occupy them was held to have acquired such rights subject to the superior power of Virginia to authorize Newport News to discharge its sewage into the sea; and, hence could not successfully contend that the resulting pollution of his oysters constituted an uncompensated taking without due process of law.[663]

Consequential Damages

"Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the due process clause."[664] Accordingly, consequential damages to abutting property caused by an obstruction in a street resulting from the authorization of a [Pg 1068] railroad to erect tracks, sheds, and fences over a portion thereof have been held to effect no unconstitutional deprivation of property.[665] Likewise, the erection over a street of an elevated

viaduct, intended for general public travel and not devoted to the exclusive use of a private transportation corporation, has been declared to be a legitimate street improvement equivalent to a change in grade; and, as in the case of a change of grade, the owner of land abutting on the street has been refused damages for impairment of access to his land and the lessening of the circulation of light and air over it.[666]

Limits to the Above Rule.—There are limits however, to the amount of destruction or impairment of the enjoyment or value of private property which public authorities or citizens acting in their behalf may occasion without the necessity of paying compensation therefor. Thus, in upholding zoning regulations limiting the height of buildings which may be constructed in a designated zone, the Court has warned that similar regulations, if unreasonable, arbitrary, and discriminatory, may be held to deprive an owner of the profitable use of his property and hence to amount to a taking sufficient to require compensation to be paid for such invasion of property rights.[667] Similarly, in voiding a statute forbidding mining of coal under private dwellings or streets or cities in places where such right to mine has been reserved in a conveyance, Justice Holmes, speaking for his associates, declared if a regulation restricting the use of private property goes too far, it will be recognized as a taking for which compensation must be made. "Some values are enjoyed under an implied limitation, and must yield to the police power. But obviously the implied limitation must have its limits, * * * One fact for consideration in determining such limits is the extent of the diminution. * * * The damage [here] is not common or public. * * * The extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land."[668]

Due Process in Eminent Domain

[Pg 1069]

(1) Notice.—If the owner of property sought to be condemned is a nonresident, personal notice is not requisite and service may be effected by publication.[669] In fact, "it has been uniformly held that statutes providing for * * * condemnation of land may adopt a procedure summary in character, and that notice of such proceedings may be indirect, provided only that the period of notice of the initiation of proceedings and the method of giving it are reasonably adapted to the nature of the proceedings and their subject matter." Insofar as reasonable notice is deemed to be essential, that requirement was declared to have been satisfied by a statute providing that notice of initiation of proceedings for establishment of a county road be published on three successive weeks in three successive issues of a paper published in the county, and that all meetings of the county condemning agency be public and published in a county newspaper.[670]

(2) Hearing.—The necessity and expediency of a taking being legislative questions irrespective of who may be charged with their decision, a hearing thereon need not be afforded;[671] but the mode of determining the compensation payable to an owner must be such as to furnish him with an opportunity to be heard. Among several admissible modes is that of causing the amount to be assessed by viewers, or by a jury, generally without a hearing, but subject to the right of the owner to appeal for a judicial review thereof at which a trial on the evidence may be had. Through such an appeal the owner obtains the hearing to which he is entitled;[672] and the fact that after having been adequately notified of the determination by the condemning authorities, the former must exercise his right of appeal within a limited period thereafter, such as 30 days, has been held not so arbitrary as to deprive him of property without due process of law.[673] Nor is there any "denial of due process in making the findings of fact by the triers of fact, whether commissioners or a jury, final as to such facts [that is, conclusive as to the mere value of the property], and leaving open to the courts simply the inquiry as to whether there was any erroneous basis adopted by the triers in their appraisal, * * *"[674]

(3) Occupation in Advance of Condemnation.—Due process does require that condemnation precede occupation by the condemning authority so long as the opportunity for a hearing as to the value of the land is guaranteed during the condemnation proceedings. Where the statute contains an adequate provision for assured payment of compensation without unreasonable delay, the taking may precede compensation.[675]

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DUE PROCESS OF LAW IN CIVIL PROCEEDINGS

Some General Criteria

What is due process of law depends on the circumstances.[676] It varies with the subject matter and the necessities of the situation. By due process of law is meant one which, following the forms of law, is appropriate to the case, and just to the parties affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and whenever necessary to the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. Any legal proceeding enforced by public authority, whether sanctioned by age or custom or newly devised in the discretion of the legislative power, which regards and preserves these principles of liberty and justice, must be held to be due process of law.[677]

Ancient Usage and Uniformity.—What is due process of law may be ascertained in part by an examination of those settled usages and modes of proceedings existing in the common and

statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. If it can show the sanction of settled usage both in England and in this country, a process of law which is not otherwise forbidden may be taken to be due process of law. In other words, the antiquity of a procedure is a fact of weight in its behalf. However, it does not follow that a procedure settled in English law at the time of the emigration and brought to this country and practiced by our ancestors is, or remains, an essential element of due process of law. If that were so, the procedure of the first half of the seventeenth century would be fastened upon American jurisprudence like a strait jacket, only to be unloosed by constitutional amendment. Fortunately, the States are not tied down by any provision of the Constitution to the practice and procedure which existed at the common law, but may avail themselves of the wisdom gathered by [Pg 1071] the experience of the country to make changes deemed to be necessary.[678]

Equality.—If due process is to be secured, the laws must operate alike upon all, and not subject the individual to the arbitrary exercise of governmental power unrestrained by established principles of private rights and distributive justice. Where a litigant has the benefit of a full and fair trial in the State courts, and his rights are measured, not by laws made to affect him individually, but by general provisions of law applicable to all those in like condition, he is not deprived of property without due process of law, even if he can be regarded as deprived of his property by an adverse result.[679]

Due Process and Judicial Process.—Due process of law does not always mean a proceeding in court.[680] Proceedings to raise revenue by levying and collecting taxes are not necessarily judicial, neither are administrative and executive proceedings, yet their validity is not thereby impaired.[681] Moreover, the due process clause has been interpreted as not requiring that the judgment of an expert commission be supplanted by the independent view of judges based on the conflicting testimony, prophecies, and impressions of expert witnesses when judicially reviewing a formula of a State regulatory commission for limiting daily production in an oil field and for proration among the several well owners.[682]

Nor does the Fourteenth Amendment prohibit a State from conferring upon nonjudicial bodies certain functions that may be called judicial, or from delegating to a court powers that are legislative in nature. For example, State statutes vesting in a parole board certain judicial functions,[683] or conferring discretionary power upon administrative boards to grant or withhold permission to carry on a trade,[684] or vesting in a probate court authority to appoint park commissioners and establish park districts[685] are not in conflict with the due process clause and present no federal question. Whether legislative, executive, and judicial powers of a State shall be kept altogether distinct and separate, or whether they should in some particulars be merged is for the determination of the State.[686]

Jurisdiction [Pg 1072]

In General.—Jurisdiction may be defined as the power to create legal interests; but if a State attempts to exercise such power with respect to persons or things beyond its borders, its action is in conflict with the Fourteenth Amendment and is void within as well as without its territorial limits. The foundation of jurisdiction is therefore physical power capable of being exerted over persons through *in personam* actions and over things, generally through actions *in rem*.[687] In proceedings *in personam* to determine liability of a defendant, no property having been subjected by such litigation to the control of the Court, jurisdiction over the defendant's person is a condition prerequisite to the rendering of any effective decree.[688] That condition is fulfilled; that is, a State is deemed capable of exerting jurisdiction over an individual if he is physically present within the territory of the State, if he is domiciled in the State although temporarily absent therefrom, or if he has consented to the exercise of jurisdiction over him. In actions *in rem*, however, a State validly may proceed to settle controversies with regard to rights or claims against property within its borders, notwithstanding that control of the defendant is never obtained. Accordingly, by reason of its inherent authority over titles to land within its territorial confines, a State may proceed through its courts to judgment respecting the ownership of such property, even though it lacks the constitutional competence to reach claimants of title who reside beyond its borders.[689] By the same token, probate[690] and garnishment or foreign attachment[691] proceedings, being in the nature of *in rem* actions for the disposition of property, may be prosecuted to conclusion without requirement of the presence of all parties in interest.[692]

How Perfected: By Voluntary Appearance or Service of Process.—It is not enough, however, that a State be potentially capable of exercising control over persons and property. Before a State legitimately can exercise such power to alter private interests, its jurisdiction must be perfected [Pg 1073] by the employment of an appropriate mode of serving process deemed effective to acquaint all parties of the institution of proceedings calculated to affect their rights; for the interest of no one constitutionally may be impaired by a decree resulting from litigation concerning which he was afforded neither notice nor an opportunity to participate.[693] Voluntary appearance, on the other hand, may enable a State not only to obtain jurisdiction over a person who was otherwise beyond the reach of its process; but also, as in the case of a person who was within the scope of its jurisdiction, to dispense with the necessity of personal service. When a party voluntarily appears

in a cause and actively conducts his defense, he cannot thereafter claim that he was denied due process merely because he was not served with process when the original action was commenced.[694]

Service of Process in Actions in Personam: Individuals, Resident and Nonresident.—The proposition being well established that no person can be deprived of property rights by a decree in a case in which he neither appeared, nor was served or effectively made a party, it follows, by way of illustration that to subject property of individual citizens of a municipality, by a summary proceeding in equity, to the payment of an unsatisfied judgment against the municipality would be a denial of due process of law.[695] Similarly, in a suit against a local partnership, in which the resident partner was duly served with process and the nonresident partner was served only with notice, a judgment thus obtained is binding upon the firm and the resident partner, but is not a personal judgment against the nonresident and cannot be enforced by execution against his individual property.[696] That the nonresident partner should have been so protected is attributable to the fact the process of a court of one State cannot run into another and summon a party there domiciled to respond to proceedings against him, when neither his person nor his property is within the jurisdiction of the Court rendering the judgment.[697] In the case of a resident, however, absence alone will not defeat the processes of courts in the State of his domicile; for domicile is deemed to be sufficient to keep him within reach of the State courts for purposes of a personal judgment, whether obtained by means of appropriate, substituted service, or by actual personal service on the resident at a point outside the State. Amenability to such suit even during sojourns outside is viewed as an "incident of domicile."[698] However, if the defendant, although technically domiciled therein, has left the State with no intention to return, service by publication; that is, by advertisement in a local newspaper, as compared to a summons left at his last and usual place of abode where his family continued to reside, is inadequate [Pg 1074] inasmuch as it is not reasonably calculated to give him actual notice of the proceedings and opportunity to be heard.[699]

In the case of nonresident individuals who are domiciled elsewhere, jurisdiction in certain instances may be perfected by requiring such persons, as a condition to entering the State, to designate local agents to accept service of process. Although a State does not have the power to exclude individuals until such formal appointment of an agent has been made,[700] it may, for example, declare that the use of its highways by a nonresident is the equivalent of the appointment of the State Registrar as agent for receipt of process in suits growing out of motor vehicle accidents. However, a statute designating a State official as the proper person to receive service of process in such litigation must, to be valid, contain a provision making it reasonably probable that a notice of such service will be communicated to the person sued. If the statute imposed "either on the plaintiff himself, or upon the official" designated to accept process "or some other, the duty of communicating by mail or otherwise with the defendant" this requirement is met; but if the act exacts no more than service of process on the local agent, it is unconstitutional, notwithstanding that the defendant may have been personally served in his own State. Not having been directed by the statute, such personal service cannot supply constitutional validity to the act or to service under it.[701]

Suits *in Personam*.—Restating the constitutional principles currently applicable for determining [Pg 1075] whether individuals, resident and nonresident, are suable in *in personam* actions, the Supreme Court in International Shoe Co. *v.* Washington,[702] recently declared that: "Historically the jurisdiction of courts to render judgments *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. * * * But now * * *, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"

Suability of Foreign Corporations.—Until the enunciation in 1945 in International Shoe Co. *v.* Washington[703] of a "fair play and substantial justice" doctrine, the exact scope of which cannot yet be ascertained, the suability of foreign corporations had been determined by utilization of the "presence" doctrine. Defined in terms no less abstract than its alleged successor and capable therefore of acquiring meaning only in cases of specific application, the "presence" doctrine was stated by Justice Brandeis as follows: "In the absence of consent, a foreign corporation is amenable to process to enforce a personal liability only if it is doing business within the State in such manner and to such extent as to warrant the inference that it is present there".[704] In a variety of cases the Court has considered the measure of "presence" sufficient to confer jurisdiction and a representative sample of the classes thereof is set forth below.

With rare exceptions,[705] even continuous activity of some sort by a foreign corporation within a State did not in the past suffice to render it amenable to suits therein unrelated to that activity. Without the protection of such a rule, it was maintained, foreign corporations would be exposed to the manifest hardship and inconvenience of defending in any State in which they happen to be carrying on business suits for torts wherever committed and claims on contracts wherever made. Thus, an Indiana insurance corporation, engaging, without formal admission, in the business of selling life insurance in Pennsylvania, was held not to be subject in the latter State to a suit filed by a Pennsylvania resident upon an insurance policy executed and delivered in Indiana.[706] Similarly, a Virginia railway corporation, doing business in New Orleans, was declared not to be

within the jurisdiction of Louisiana for the purposes of a negligence action instituted against it by a Louisiana citizen and based upon injuries suffered in Alabama.[707] Also, an Iowa railway company soliciting freight and passenger business in Philadelphia through a local agent was viewed as exempt therein from suit brought by a Pennsylvania resident to recover damages for personal injuries sustained on one of the carrier's trains in Colorado.[708] On the other hand, when a Missouri statute, accepted by a foreign insurance company and requiring it to designate the State superintendent of insurance as its agent for service of process, was construed by Missouri courts to apply to suits on contracts executed outside Missouri, with the result that the company had to defend in Missouri a suit on a policy issued in Colorado and covering property therein, the Court was unable to discern any denial of due process. The company was deemed to have consented to such interpretation when it complied with the statute.[709] Moreover, even when the cause of action arose in the forum State and suit was instituted by a corporation chartered therein, a foreign company retailing clothing in Oklahoma was held immune from service of process on its president when the latter visited New York on one of his periodic trips there for the purchase of merchandise. Notwithstanding that such business trips were made at regular intervals, the Oklahoma corporation was considered not to be doing business in New York "in such manner and to such extent as to warrant the inference that it was present there," especially in view of its having never applied for a license to do business in New York or consented to suit being brought against it there, or established therein an office or appointed a resident agent.[710] [Pg 1076]

Nor would the mere presence within its territorial limits of an agent, officer, or stockholder, upon whom service might readily be had, be effective without more to enable a State to acquire jurisdiction over a foreign corporation. Consequently, service of process on the president of a foreign corporation in a State where he was temporarily and casually present and where the corporation did no business and had no property was fruitless.[711] Likewise, service on a New York director of a Virginia corporation was not sufficient to bring the corporation into the New York courts when, at the time of service, the corporation was not doing business in New York, and the director was not there officially representing the corporation in its business.[712] On occasion, an officer of a corporation may temporarily be in a State or even temporarily reside therein; but if he is not there for the purpose of transacting business for the corporation, or vested with authority by the corporation to transact business in such State, his presence affords no basis for the exercise of jurisdiction over such nonresident employer, and any decree resulting from service upon such officer is violative of due process.[713] However, a foreign insurance corporation which had ceased to sell insurance in Tennessee but which had sent a special agent there to adjust a loss under a policy previously issued in that State could not, it was held, constitutionally object when a judgment on that claim was obtained by service on that agent.[714] [Pg 1077]

Inasmuch as a State need not permit a foreign corporation to do domestic business within its borders, it may condition entry upon acceptance by the corporation of service of process upon its agents or upon a person to be designated by the corporation or, failing such designation, upon a State officer designated by law.[715] Service on a State officer, however, is no more effective than service upon an agent in the employ of a foreign corporation when, as has already been noted, such corporation is not subject to the jurisdiction of the State; that is, has not engaged in activities sufficient to render it "present" within the State, or is subjected to a cause of action unrelated to such activities and originating beyond the forum State. Thus, a foreign insurance company which, after revocation of its entry license, continued to collect premiums on policies formerly issued to citizens of the forum State was in fact continuing to do business in that State sufficiently to render service on it through the insurance commissioner adequate to bind it as defendant in a suit by a citizen of said State on a policy therein issued to him.[716] Furthermore, a foreign corporation which, after leaving a State and subsequently dissolving, failed to obey a statutory requirement of that State that it maintain therein a resident agent until the period of limitations shall have run, or, in default thereof, that it consent to service on it through the Secretary of State, could not complain of any denial of due process because that statute did not oblige the Secretary of State to notify it of the pendency of an action. The burden was on the corporation to make such arrangement for notice as was thought desirable.[717]

To what extent these aforementioned holdings have been undermined by the recent opinion in International Shoe Co. *v.* Washington[718] cannot yet be determined. In the latter case, a foreign corporation, which had not been issued a license to do business in Washington, but which systematically and continuously employed a force of salesmen, residents thereof, to canvass for orders therein, was held suable in Washington for unpaid unemployment compensation contributions in respect to such salesmen. Service of the notice of assessment personally upon one of its local sales solicitors plus the forwarding of a copy thereof by registered mail to the corporation's principal office in Missouri was deemed sufficient to apprize the corporation of the proceeding. [Pg 1078]

To reach this conclusion the Court not only overturned prior holdings to the effect that mere solicitation of patronage does not constitute doing of business in a State sufficient to subject a foreign corporation to the jurisdiction thereof,[719] but also rejected the "presence" test as begging "the question to be decided. * * * The terms 'present' or 'presence,'" according to Chief Justice Stone, "are used merely to symbolize those activities of the corporation's agent within the State which courts will deem to be sufficient to satisfy the demands of due process. * * * Those

demands may be met by such contacts of the corporation with the State of the forum as make it reasonable, in the context of our federal system * * *, to require the corporation to defend the particular suit which is brought there; [and] * * * that the maintenance of the suit does not offend 'traditional notices of fair play and substantial justice' * * * An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection."[720] As to the scope of application to be accorded this "fair play and substantial justice" doctrine, the Court, at least verbally, conceded that "* * * so far as * * * [corporate] obligations arise out of or are connected with activities within the State, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue."[721] Read literally, these statements coupled with the terms of the new doctrine may conceivably lead to a reversal of former decisions which: (1) nullified the exercise of jurisdiction by the forum State over actions arising outside said State and brought by a resident plaintiff against a foreign corporation doing business therein without having been legally admitted and without having consented to service of process on a resident agent; and (2) exempted a foreign corporation, which has been licensed by the forum State to do [Pg 1079] business therein and has consented to the appointment of a local agent to accept process, from suit on an action not arising in the forum State and not related to activities pursued therein.

By an extended application of the logic of the last mentioned case, a majority of the Court, in Travelers Health Assn. *v.* Virginia[722] ruled that, notwithstanding that it solicited business in Virginia solely through recommendations of existing members and was represented therein by no agents whatsoever, a foreign mail order insurance company had through its policies developed such contacts and ties with Virginia residents that the State, by forwarding notice to the company by registered mail only, could institute enforcement proceedings under its Blue Sky Law leading to a decree ordering cessation of business pending compliance with that act. The due process clause was declared not to "forbid a State to protect its citizens from such injustice" of having to file suits on their claims at a far distant home office of such company, especially in view of the fact that such suits could be more conveniently tried in Virginia where claims of loss could be investigated.[723]

Service of Process [Pg 1080]

Actions in Rem—Proceedings Against Land.—For the purpose of determining the extent of a nonresident's title to real estate within its limits, a State may provide any reasonable means of imparting notice.[724] Precluded from going beyond its boundaries and serving nonresident owners personally, States in such cases of necessity have had recourse to constructive notice or service by publications. This they have been able to do because of their inherent authority over titles to lands within their borders. Owners, nonresident as well as resident, are charged with knowledge of laws affecting demands of the State pertinent to property and of the manner in which such demands may be enforced.[725] Accordingly, only so long as the property affected has been brought under control of the Court, will a judgment obtained thereto without personal notice to a nonresident defendant be effective. Insofar as jurisdiction is thus required over a nonresident, it does not extend beyond the property involved.[726] Consistently with such principles, San Francisco, after the earthquake of 1906, had destroyed nearly all records, permitted titles to be reestablished by parties in possession by posting summons on the property, serving them on known claimants, and publishing them against unknown claimants in newspapers for two weeks.[727]

Actions in Rem—Attachment Proceedings.—In fulfillment of the protection which a State owes to its [Pg 1081] citizens, it may exercise its jurisdiction over real and personal property situated within its borders belonging to a nonresident and permit an appropriation of the same in attachment proceedings to satisfy a debt owed by the nonresident to one of its citizens or to settle a claim for damages founded upon a wrong inflicted on the citizen by the nonresident. Being neither present within the State nor domiciled therein, the nonresident defendant cannot be served personally; and consequently any judgment in money obtained against him would be void and could not thereafter be satisfied either by execution on the nonresident's property subsequently found within the State or by suit and execution thereon in another State. In such instances, the citizen-plaintiff may recover, if at all, only by an *in rem* proceeding involving a levy of a writ of attachment on the local property of the defendant, of which proceeding the nonresident need be notified merely by publication of a notice within the forum State. However, any judgment rendered in such proceedings can have no consequence beyond the property attached. If the attached property be insufficient to pay the claim, the plaintiff cannot thereafter sue on such judgment to collect an unpaid balance; and if property owned by the defendant cannot be found within the State, the attachment proceedings are, of course, summarily concluded.[728]

Actions in Rem—Corporations, Estates, Trusts, Etc.—Probate administration, being in the nature of a proceeding *in rem*, is one to which all the world is charged with notice.[729] Thus, in a proceeding against an estate involving a suit against an administratrix to foreclose a mortgage executed by the decedent, the heir, notwithstanding that the suit presents an adverse claim the disposition of which may be destructive of his title to land deriving from the decedent, may properly be represented by the administratrix and is not entitled to personal notification or summons.[730] For like reasons, a statutory proceeding whereunder a special administrator, having charge of an estate pending a contest as to the validity of the will, is empowered to have a [Pg 1082]

final settlement of his accounts without notice to the distributees, is not violative of due process. The executor, or administrator c.t.a., has an opportunity to contest the final settlement of the special administrator before giving the latter an acquittance; and since the former represents all claiming under the will, it cannot be said the absence of notice to the distributees of the settlement deprives them of their rights without due process of law.[731]

In litigation to determine succession to property by proceedings in escheat, due process is afforded by personal service of summons upon all known claimants and constructive notice by publication to all claimants who are unknown.[732] Whether a proceeding by the State to compel a bank to turn over to it unclaimed deposits in *quasi in rem* or strictly *in rem*, the essentials of jurisdiction over the deposit are that there be a seizure of the *res* at the commencement of the suit and reasonable notice and opportunity to be heard. These requirements are met by personal service on the bank and publication of summons to depositors and of notice to all other claimants. The fact that no affidavit of impracticability of personal service on claimants is required before publication of such notices does not render the latter unreasonable inasmuch as they are used only in cases where the depositor is not known to the bank officers to be alive.[733] Similarly, a Kentucky statute requiring banks to turn over to the State deposits long inactive is not violative of due process where, although the deposits are taken over upon published notice only, without any judicial decree of actual abandonment, they are to be held by the State for the depositor until such determination and for five years thereafter.[734] However, a procedure is at least partly defective whereby a bank managing a common trust fund in favor of nonresident as well as resident beneficiaries may, by a petition, the only notice of which is by publication in a local paper, obtain a judicial settlement of accounts which is conclusive on all having an interest in the [Pg 1083] common fund or in any participating trust. Such notice by publication is sufficient as to beneficiaries whose interests or addresses are unknown to the bank, since there are no other more practicable means of giving them notice; but is inadequate as a basis for adjudication depriving of substantial rights persons whose whereabouts are known, inasmuch as it is feasible to make serious efforts to notify them at least by mail to their addresses on record with said bank.[735] On the other hand, failure to make any provision for notice to majority stockholders of a suit by dissenting shareholders, under a statute which provided that, on a sale or other disposition of all or substantially all of corporate assets, a dissenting shareholder shall have the right, after six months, to be paid the amount demanded, if the corporation makes no counter offer or does not abandon the sale, does not deny due process; for the majority stockholders are sufficiently represented by the corporation.[736]

Actions in Rem—Divorce Proceedings.—The jurisdictional requirements for rendering a valid decree in divorce proceedings are considered under the full faith and credit clause. *See* pp. 662-670.

Misnomer of Defendant—False Return, Etc.—An unattainable standard of accuracy is not imposed by the due process clause. If a defendant within the jurisdiction is served personally with process in which his name is misspelled, he cannot safely ignore it on account of the misnomer. If he fails to appear and plead the misnomer in abatement, the judgment binds him. In a published notice intended to reach absent or nonresident defendants, where the name is a principal means of identifying the person concerned, somewhat different considerations obtain. The general rule, in case of constructive service of process by publication, tends to strictness. However, published notice to "Albert Guilfuss, Assignee," in a suit to partition land, was adequate to render a judgment binding on "Albert B. Geilfuss, Assignee," the latter not having appeared.[737]

Foreclosure of a mortgage made upon process duly issued but which the sheriff falsely returned as having been duly served, and of which the owner had no notice, does not deprive said owner of property without due process of law. A purchaser of the land at the sheriff's sale has a right to rely on such return; otherwise judicial proceedings could never be relied upon. The mortgagor must seek his remedy against the sheriff upon his bond.[738]

Notice and Hearing [Pg 1084]

Legislative Proceedings.—While due notice and a reasonable opportunity to be heard to present one's claim or defense have been declared to be two fundamental conditions almost universally prescribed in all systems of law established by civilized countries,[739] there are certain proceedings appropriate for the determination of various rights in which the enjoyment of these two privileges has not been deemed to be constitutionally necessary. Thus the Constitution does not require legislative assemblies to discharge their functions in town meeting style; and it would be manifestly impracticable to accord every one affected by a proposed rule of conduct a voice in its adoption. Advanced notice of legislation accordingly is not essential to due process of law; nor need legislative bodies preface their enactment of legislation by first holding committee hearings thereon. It follows therefore that persons adversely affected by a specific law can never challenge its validity on the ground that they were never heard on the wisdom or justice of its provisions.[740]

Administrative Proceedings.—To what extent notice and hearing are deemed essential to due process in administrative proceedings, encompassing as they do the formulation and issuance of general regulations, the determination of the existence of conditions which have the effect of bringing such regulations into operation, and the issuance of orders of specific, limited application, entails a balancing of considerations as to the desirability of speed in law

enforcement and protection of individual interests. When an administrative agency engages in a legislative function, as, for example, when, in pursuance of statutory authorization, it drafts regulations of general application affecting an unknown number of people, it need not, any more than does a legislative assembly, afford a hearing prior to promulgation. On the other hand, if a regulation, sometimes described as an order or action of an administrative body, is of limited application; that is, affects the property or interests of specific, named individuals, or a relatively small number of people readily identifiable by their relation to the property or interests affected, the question whether notice and hearing is prerequisite and, if so, whether it must precede such action, becomes a matter of greater urgency.

But while a distinction readily may be made, for example, between a regulation establishing a schedule of rates for all carriers in a State, and one designed to control the charges of only one or two specifically named carriers, the cases do not consistently sustain the withholding of [Pg 1085] advance notice and hearing in the first class of regulations and insist upon its provision in the latter. In fact, the observation has been made that the judicial disposition to exact the protection of notice and hearing rises in direct proportion to the extent to which a regulation affects the finances of business establishments covered thereunder. Accordingly, if a regulation bears only indirectly upon income and expenses, as for example, a regulation altering insurance policy forms, less concern for such procedural protection is likely to be expressed than in the case of the formulation of a minimum wage schedule, even though the regulations involved in both illustrations are general and not limited in operation. Moreover, if regulations, which are general in their application, may be readily subjected to judicial challenge after their promulgation, or if the parties to which they apply are affected only when they endeavor to comply in the future, advance notice and hearing is less likely to be viewed as essential to due process.[741]

As to that portion of administrative activity pertaining to the making of determinations or the issuance of orders of limited or individual application, the obligation to afford notice and hearing is reasonably clear; but controversy has been protracted on the question whether this procedural safeguard, in every instance, must be granted in advance of such activity. The most frequently litigated types of administrative action embracing the latter issue have been determinations to withhold issuance of, or to revoke, an occupational license, or to impound or destroy property believed to be dangerous to public health, morals, or safety. Apparently in recognition of the fact that few occupations today can be pursued without a license, the trend of decisions is toward sustaining a requirement of a hearing before refusal to issue a license and away from the view that inasmuch as no one is entitled as of right to engage in a specific profession, the issue of a [Pg 1086] practitioner's license applicable thereto is in the nature of a gift as to the granting or withholding of which procedural protection is unnecessary. Revocation, or refusal to renew a license, however, has been distinguished from issuance of a license; and where a license is construed to confer something in the nature of a property right rather than a mere privilege terminable at will, such property right, the Courts have maintained, ought not to be destroyed summarily by revocation without prior notice and hearing. Whether an occupational license is to be treated as a privilege revocable without a hearing, or as conferring a property right deserving of greater protection, depends very largely on prevailing estimates of the social desirability of a calling. Thus, if a business is susceptible of being viewed as injurious to public health, morals, safety, and convenience, as, for example, saloons, pool rooms, and dance halls, the licensee is deemed to have entered upon such line of endeavor with advance knowledge of the State's right to withdraw his license therefor summarily. Prompt protection of the public in such instances is said to outweigh the advantages of a slower procedure, retarded by previous notice and hearing, and to require that the person adversely affected seek his remedy from the Court via a petition to review or to enjoin the decision of the licensing authorities.[742]

For like reasons, the owner of property about to be impounded or destroyed by officers acting in furtherance of the police power may justifiably be relegated to post mortem remedies in the form of a suit for damages against the officer effecting the seizure or destruction, or, if time permits, a bill in equity for an injunction. Thus, due process of law is not denied the custodian of food in cold storage by enforcement of a city ordinance under which such food, when unfit for human consumption, may summarily be seized, condemned, and destroyed without a preliminary hearing. "If a party cannot get his hearing in advance of the seizure and destruction he has the right to have it afterward, * * * in an action brought for the destruction of his property, and in that action those who destroyed it can only successfully defend if the jury shall find the fact of unwholesomeness as claimed by them."[743] Similarly, if the owner of liquor, possession of which has been made unlawful, can secure a hearing by instituting injunction proceedings, he is not denied due process by the failure to grant him a hearing before seizure and destruction of his property.[744] Indeed, even when no emergency exists, such as is provided by a conflagration or threatened epidemic, and the property in question is not intrinsically harmful, mere use in violation of a valid police power regulation has been held to justify summary destruction. Thus, in the much criticized case of Lawton *v.* Steele,[745] the destruction, without prior notice and hearing, of fishing nets set in violation of a conservation law defining them to be a nuisance was [Pg 1087] sustained on the ground that the property was not "of great value." Conceding that "it is not easy to draw the line between cases where property illegally used may be destroyed summarily and where judicial proceedings are necessary for its condemnation," the Court acknowledged that "if the property were of great value, as, for instance, if it were a vessel employed for smuggling or other illegal purposes, it would be * * * dangerous * * * to permit * * * [an officer] to sell or destroy it as a public nuisance, * * * But where the property is of trifling value, * * * we think it is

within the power of the legislature to order its summary abatement."[746]

Statutory Proceedings.—"It is not an indispensable requirement of due process that every procedure affecting the ownership or disposition of property be exclusively by judicial proceeding. Statutory proceedings affecting property rights, which, by later resort to the courts, secure to adverse parties an opportunity to be heard, suitable to the occasion, do not deny due process."[747] Thus, a procedure under which a State banking superintendent, after having taken over a closed bank and issued notices to stockholders of their assessment, may issue execution for the amounts due, subject to the right of each stockholder, by affidavit of illegality, to contest his liability for such an assessment, does not in effect authorize an execution and creation of a lien before and without any judicial proceeding. The fact that the execution is issued in the first instance by an agent of the State and not from a court, followed by personal notice and a right to take the case into court, is open to no objection. The statute authorizing this procedure is itself notice to stockholders that on becoming such they assumed the liability on which they are to be held.[748]

Judicial Proceedings.—Consistently with the due process clause, a State may not enforce a judgment against a party named in the proceedings without an opportunity to be heard at sometime before final judgment is entered.[749] As to the presentation of every available defense, however, the requirements of due process do not entail affording an opportunity to do so before entry of judgment. A hearing by an appeal may suffice. Accordingly, a surety company, objecting to the entry of a judgment against it on a supersedeas bond, without notice and an opportunity of a hearing on the issue of liability thereon, was not denied due process where the State practice [Pg 1088] provided the opportunity for such hearing by an appeal from the judgment so entered. Nor could the company found its claim of denial upon the fact that it lost this opportunity for a hearing by inadvertently pursuing the wrong procedure in the State courts.[750] On the other hand, where a State Supreme Court reversed a trial court and entered a final judgment for the defendant, a plaintiff who had never had an opportunity to introduce evidence in rebuttal to certain testimony which the trial court deemed immaterial but which the appellate court considered material, was held to have been deprived of his rights without due process of law.[751]

Sufficiency of Notice and Hearing.—Although the Supreme Court has wavered on the question whether the granting of notice in administrative proceedings, in cases in which the authorizing statute does not expressly provide therefor, will satisfy the requirements of due process,[752] in judicial proceedings it has almost consistently declared that notice must be provided as an essential part of the statutory provision and not as a mere matter of favor or grace.[753] Also, the notice afforded must be adequate for the purpose. Thus, a Texas statute providing for service of process by giving five days' notice was held to be an insufficient notice to a Virginian who would (at that time) have required four days' traveling to reach the place where the court was held. Nor would this insufficiency of notice on a nonresident be cured by the fact that under local practice there would be several additional days before the case would be called for trial or that the court would probably set aside a default judgment and permit a defense when the nonresident arrived.[754] On the other hand, a statute affording ten days' notice of the time for settlement of the account of a personal representative in probate proceedings is not wanting in due process of law as to a nonresident.[755] Adequacy, moreover, is no less an essential attribute of a hearing than it is of notice; and, as the preceding discussion has shown, unless a person involved in administrative as well as judicial proceedings has received a hearing that is both sufficient and fair and has been subjected to rulings amply supported by the evidence introduced thereat, he will not be considered to have been accorded due process.[756]

POWER OF STATES TO REGULATE PROCEDURE [Pg 1089]

Generally

The due process clause of the Fourteenth Amendment does not control mere forms of procedure in State courts or regulate practice therein.[757] A State "is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[758] Pursuant to such plenary power, States have regulated the manner in which rights may be enforced and wrongs remedied,[759] and, in connection therewith, have created courts and endowed them with such jurisdiction as, in the judgment of their legislatures, seemed appropriate.[760] Whether legislative action in such matters is deemed to be wise or proves efficient, whether it works a particular hardship on a particular litigant, or perpetuates or supplants ancient forms of procedure are issues which can give rise to no conflict with the Fourteenth Amendment; for the latter's function is negative rather than affirmative and in no way obligates the States to adopt specific measures of reform.[761]

Pleading and Practice

Commencement Of Actions.—A State may impose certain conditions on the right to institute litigation. Thus, access to the courts may be denied to persons instituting stockholders' derivative actions unless reasonable security for the costs, and fees incurred by the corporation is first [Pg 1090]

tendered. Nor is the retroactive application of this statutory requirement to actions pending at the time of its adoption violative of due process as long as no new liability for expenses incurred before enactment is imposed thereby, and the only effect thereof is to stay such proceedings until the security is furnished.[762] Moreover, when a nonresident files suit in a local court, the State, as the price of opening its tribunals to such plaintiff, may exact the condition that the former stand ready to answer all cross-actions filed and accept any *in personam* judgments obtained by a resident defendant through service of process or appropriate pleading upon the plaintiff's attorney of record.[763] For similar reasons, the requirements, without excluding other evidence, of a chemical analysis as a condition precedent to a suit to recover damages resulting to crops from allegedly deficient fertilizers is not deemed to be arbitrary or unreasonable.[764]

Pleas in Abatement.—State legislation which forbids a defendant to come into court and challenge the validity of service upon him in a personal action without thereby surrendering himself to the jurisdiction of the Court, but which does not restrain him from protecting his substantive rights against enforcement of a judgment rendered without service of process, is constitutional and does not deprive him of property without due process of law. Such a defendant, if he please, may ignore the proceedings as wholly ineffective, and set up the invalidity of the judgment if and when an attempt is made to take his property thereunder. However, if he desires to contest the validity of the proceedings in the court in which it is instituted, so as to avoid even semblance of a judgment against him, it is within the power of a State to declare that he shall do this subject to the risk of being obliged to submit to the jurisdiction of the Court to hear and determine the merits, if the objection raised by him as to its jurisdiction over his person shall be overruled.[765]

Defenses.—Just as the State may condition the right to institute litigation, so may it establish its terms for the interposition of certain defenses. Thus, by statute a State validly may provide that one sued in a possessory action cannot bring an action to try title until after judgment shall have been rendered in the possessory action, and until he shall have paid the judgment, if the decision shall have so awarded.[766] Likewise, a nonresident defendant in a suit begun by foreign attachment, even though he has no resources or credit other than the property attached, cannot successfully challenge the validity of a statute which requires him to give bail or security for the [Pg 1091] discharge of the seized property before permitting him an opportunity to appear and defend. "The condition imposed has a reasonable relation to the conversion of a proceeding *quasi in rem* into an action *in personam*; [and] ordinarily * * * is not difficult to comply with—* * *"[767]

Amendments and Continuances.—Amendment of pleadings is largely within the discretion of the trial court, and unless a gross abuse of discretion is shown, there is no ground for reversal; accordingly, where the defense sought to be interposed is without merit, a claim that due process would be denied by rendition of a foreclosure decree without leave to file a supplementary answer is utterly without foundation.[768]

Costs, Damages, and Penalties.—What costs are allowed by law is for the court to determine; and an erroneous judgment of what the law allows does not deprive a party of his property without due process of law.[769] Nor does a statute providing for the recovery of reasonable attorney's fees in actions on small claims subject unsuccessful defendants to any unconstitutional deprivation.[770] Equally consistent with the requirements of due process is a statutory procedure whereby a prosecutor of a case is adjudged liable for costs, and committed to jail in default of payment thereof, whenever the court or jury, after according him an opportunity to present evidence of good faith, finds that he instituted the prosecution without probable cause and from malicious motives.[771] Also, as a reasonable incentive for prompt settlement without suit of just demands of a class admitting of special legislative treatment, such as common carriers and insurance companies together with their patrons, a State through the exercise of its police power may permit harassed litigants to recover penalties in the form of attorney's fees or damages.[772] Similarly, to deter careless destruction of human life, a State by law may allow punitive damages to be assessed in actions against employers for deaths caused by the negligence of their employees.[773] Likewise, by virtue of its plenary power to prescribe the character of the sentence which shall be awarded against those found guilty of crime, a State may provide that a [Pg 1092] public officer embezzling public money shall, notwithstanding that he has made restitution, suffer not only imprisonment but also pay a fine equal to double the amount embezzled, which shall operate as a judgment for the use of persons whose money was embezzled. Whatever this fine be called, whether it be a penalty, or punishment, or civil judgment, it comes to the convict as the result of his crime.[774]

Statutes of Limitation

A statute of limitations does not deprive one of property without due process of law, unless, in its application to an existing right of action, it unreasonably limits the opportunity to enforce that right by suit. By the same token, a State may shorten an existing period of limitation, provided a reasonable time is allowed for bringing an action after the passage of the statute and before the bar takes effect. What is a reasonable period, however, is dependent on the nature of the right and particular circumstances.[775]

Thus, an interval of only one year is not so unreasonable as to be wanting in due process when applied to bar actions relative to the property of an absentee in instances when the receiver for

such property has not been appointed until 13 years after the former's disappearance.[776] Likewise, when a State, by law, suddenly prohibits, unless brought within six months after its passage, all actions to contest tax deeds which have been of record for two years, no unconstitutional deprivation is effected.[777] No less valid is a statute, applicable to wild lands, which provides that when a person has been in possession under a recorded deed continuously for 20 years, and had paid taxes thereon during the same, the former owner in that interval paying nothing, no action to recover such land shall be entertained unless commenced within 20 years, or before the expiration of five years following enactment of said provision.[778] Similarly, an amendment to a workmen's compensation act, limiting to three years the time within which a case may be reopened for readjustment of compensation on account of aggravation of a disability, does not deny due process to one who sustained his injury at a time when the statute contained no limitation. A limitation is deemed to affect the remedy only, and the period of its operation in this instance was viewed as neither arbitrary nor oppressive.[779] [Pg 1093]

Moreover, as long as no agreement of the parties is violated, a State may extend as well as shorten the time in which suits may be brought in its courts and may even entirely remove a statutory bar to the commencement of litigation. As applied to actions for personal debts, a repeal or extension of a statute of limitations effects no unconstitutional deprivation of property of a debtor-defendant in whose favor such statute had already become a defense. "A right to defeat a just debt by the statute of limitation * * * [not being] a vested right," such as is protected by the Constitution, accordingly no offense against the Fourteenth Amendment is committed by revival, through an extension or repeal, of an action on an implied obligation to pay a child for the use of her property,[780] or a suit to recover the purchase price of securities sold in violation of a Blue Sky Law,[781] or a right of an employee to seek, on account of the aggravation of a former injury, an additional award out of a State administered fund.[782] However, as respects suits to recover real and personal property, when the right of action has been barred by a statute of limitations and title as well as real ownership have become vested in the defendant, any later act removing or repealing the bar would be void as attempting an arbitrary transfer of title.[783] Also unconstitutional is the application of a local statute of limitation declaring invalid any contractual limitation of the right to sue to a period shorter than two years to an insurance contract made and to be performed outside the forum State and containing a stipulation that suit thereon must be brought within one year from the date of loss. "When the parties to a contract have expressly agreed upon a time limit on their obligation, a statute which invalidates * * * [said] agreement and directs enforcement of the contract after * * * [the agreed] time has expired * * *" unconstitutionally imposes a burden in excess of that contracted.[784]

Evidence and Presumptions

The establishment of presumptions and rules respecting the burden of proof is clearly within the domain of State governments.[785] As long as a presumption is not unreasonable and is not [Pg 1094] conclusive of the rights of the person against whom raised, it does not violate the due process clause. Legislative fiat may not take the place of fact, however, in the determination of issues involving life, liberty, or property, and a statute creating a presumption which is entirely arbitrary and which operates to deny a fair opportunity to repel it or to present facts pertinent to one's defense is void. On the other hand, if there is a rational connection between what is proved and what is to be inferred, legislation declaring that the proof of one fact or group of facts shall constitute *prima facie* evidence of a main or ultimate fact will be sustained.[786]

On the ground that the connection between the fact proven and that presumed was not sufficient and that reasoning did not lead from one to the other, the following statutory presumptions have been voided. Thus, a statute which treated a breach of a contract to labor as *prima facie* evidence of an intent to defraud an employer of money paid by him in advance was found to be constitutionally defective because the trial court was permitted to disregard evidence rationally bearing upon fraud and to decide upon evidence pertaining to an unrelated breach of contract, with the consequence that an adequate hearing upon fraud was not afforded.[787] Also, since "inference of crime and guilt may not reasonably be drawn from mere inability [of a bank] to pay demand deposits and other debts as they mature," a statute making proof of insolvency *prima facie* evidence of fraud on the part of bank directors was deemed wholly arbitrary.[788] Similarly, negligence by one or all the participants in a grade crossing collision not being inferable from the latter occurrence, the Court voided a Georgia statute which declared that a railroad shall be liable in damages to person or property by the running of trains unless the company shall make it appear that its agents exercised ordinary diligence, the presumption in all cases being against the company, and which was construed by State courts as permitting said presumption of evidence to be weighed against opposing testimony and to prevail unless such testimony is found by a jury to be preponderant.[789] On the other hand, a South Carolina statute which raised a presumption of negligence against a railroad upon proof of failure to give prescribed warning signals was sustained because the presumption therein established gave rise merely to a [Pg 1095] temporary inference which might be rebutted by contrary evidence and which is thereafter to be excluded in determining proximate cause.[790]

Presumptions sustained as constitutionally tenable include those set out in statutes providing that when distillery apparatus is found upon the premises of an individual, such discovery shall

be *prima facie* evidence of actual knowledge of the presence of the same;[791] that the flowing, release, or escape of natural gas into the air shall constitute *prima facie* evidence of prohibited waste,[792] and that prior conviction of a felony shall be conclusive evidence of bad character justifying refusal to issue a license to practice medicine.[793] Upheld, consistently with the former, were two sections of the California alien land law; one, which specified that the taking of title in the name of a person eligible to hold land, where the consideration is furnished by one ineligible to acquire agricultural land, shall raise a *prima facie* presumption that the conveyance is made to evade the law;[794] and a second, which cast upon a Japanese defendant the burden of proving citizenship by birth after the State endeavored to prove that he belonged to a race ineligible for naturalization.[795] In contrast with the latter result, however, is a subsequent decision of the Court holding unconstitutional another section of the same California law providing that when an indictment alleges alienage and ineligibility to United States citizenship of a defendant, the burden of proving citizenship or eligibility thereto shall devolve upon the defendant.[796] As a basis for distinguishing these last two decisions the Court observed that while "the decisions are manifold that within [the] limits" of fairness[797] and reason the burden of proof may be shifted to the defendant even in criminal prosecutions, nevertheless, to be justified, "the evidence held to be inculpatory * * * [must have had] at least a sinister significance * * *, or if this at times be lacking, there must be in any event a manifest disparity in convenience of proof and opportunity for knowledge, * * *" Whereas, accordingly, under the terms of the section previously upheld, the defendant could prove his citizenship without trouble, and the State, if forced to disprove his claim, could be relatively helpless, the background of the accused party being known probably only to himself and close relatives, the alleged Japanese defendant, in the last mentioned case, would have suffered hardship and injustice if compelled to prove non-Japanese origin, especially since ineligibility renders criminal conduct otherwise lacking in "sinister significance" (occupation of land under lease from an American codefendant).[798] On the other hand, it was held in a recent case, that Oregon was entitled to require that one [Pg 1096] pleading insanity as a defense against a criminal charge should prove same beyond a reasonable doubt, and to make "morbid propensity" no defense.[799]

Jury Trials: Dispensing With Jury Trials

Trial by jury has not been considered essential to due process, and since the Fourteenth Amendment guarantees no particular form or method of procedure, States have been free to retain or abolish juries.[800] Conformably to the Constitution, States, in devising their own procedures, eliminated juries in proceedings to enforce liens,[801] inquiries for contempt,[802] mandamus[803] and quo warranto actions,[804] and in eminent domain[805] and equity proceedings.[806] States are equally free to adopt innovations respecting the selection and number of jurors. Verdicts rendered by ten out of twelve jurors may be substituted for the requirement of a unanimous verdict,[807] and petit juries containing eight rather than the conventional twelve members may be established.[808]

DUE PROCESS IN CRIMINAL PROCEEDINGS

General

In the following pages the requirements of the due process clause of Amendment XIV in criminal cases will be dealt with in approximately the order in which questions regarding them arise in the course of a prosecution.

Indefinite Statutes: Right of Accused to Knowledge of Offense [Pg 1097]

"A statute so vague and indefinite, in form and as interpreted, * * * [as to fail] to give fair notice of what acts will be punished, * * *, violates an accused's rights under procedural due process * * * [A penal statute must set up] ascertainable standards of guilt. [So that] men of common intelligence * * * [are not] required to guess at * * * [its] meaning," either as to persons within the scope of the act or as to applicable tests to ascertain guilt.[809]

Defective by these tests and therefore violative of due process is a statute providing that any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or any other State, is a gangster and subject to fine or imprisonment. Pointing to specific shortcomings of this act, the Supreme Court observed that "* * * neither [at] common law, * * * nor anywhere in the language of the law is there [to be found any] definition of the word, * * * 'gang'." The State courts, in adopting dictionary definitions of that term, were not to be viewed as having intended to give "gangster" a meaning broad enough to include anyone who had not been convicted of a specified crime or of disorderly conduct as set out in the statute, or to limit its meaning to the field covered by the words that they found in a dictionary ("roughs, thieves, criminals"). Application of the latter interpretation would include some obviously not within the statute and would exclude some plainly covered by it. Moreover, the expression, "known to be a member," is ambiguous; and not only permits a doubt as to whether actual or putative association is meant, but also fails to indicate what constitutes

membership or how one may join a gang. In conclusion, the Supreme Court declared that if on its face a challenged statute is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it; for it is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. [810] In contrast, the Court sustained as neither too vague nor indefinite a State law which provided for commitment of a psychopathic personality by probate action akin to a lunacy proceeding, and which was construed by the State court as including those persons who, by habitual course of misconduct in sexual matters, have evidenced utter lack of power to control their sexual impulses and are likely to inflict injury. The underlying conditions, i.e., habitual course of misconduct in sex matters and lack of power to control impulses, and likelihood of attack on others, were viewed as calling for evidence of past conduct pointing to probable consequences and as being as susceptible of proof as many of the criteria constantly applied in criminal prosecutions.[811] [Pg 1098]

Abolition of the Grand Jury

An indictment or presentment by a grand jury, as known to the common law of England, is not essential to due process of law even when applied to prosecutions for felonies. Substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution is due process of law.[812] Furthermore, due process does not require that the information filed by the prosecuting attorney should have been preceded by the arrest or preliminary examination of the accused.[813] Even when an information is filed pending an investigation by the coroner, due process has not been violated.[814] But when the grand jury is retained it must be fairly constituted. Thus, in the leading case, an indictment by a grand jury in a county of Alabama in which no member of a considerable Negro population had ever been called for jury service, was held void, although the Alabama statute governing the matter did not discriminate between the two races.[815]

The Right to Counsel

Whatever previously may have been recognized as constituting the elements of procedural due process in criminal cases, it was not until 1932[816] that the Supreme Court acknowledged that the right "to have the assistance of counsel for * * * [one's] defense," guaranteed as against the National Government by the Sixth Amendment, was of such fundamental character as to be embodied in the concept of due process of law as set forth in the Fourteenth Amendment. Later in 1937, it effected this incorporation by way of expansion of the term, "liberty," rather than, "due process," and conceded that the right to counsel was "implicit in the concept of ordered liberty." [817]

For want of adequate enjoyment of the right to counsel, the Court, in Powell *v.* Alabama,[818] overturned the conviction of Negroes who had received sentences of death for rape, and asserted that, at least in capital cases, where the defendant is unable to employ counsel and is incapable adequately of making his own defense because of ignorance, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of Law. The duty is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in preparation and trial of the case. Under certain circumstances (e.g., ignorance and illiteracy of defendants, their youth, public hostility, imprisonment and close surveillance by military forces, fact that friends and families are in other States, and that they stand in deadly peril of their lives), the necessity of counsel is so vital and imperative that the failure of a trial court to make an effective appointment of counsel is a denial of due process of law.[819] [Pg 1099]

By its explicit refusal in Powell *v.* Alabama to consider whether denial of counsel in criminal prosecutions for less than capital offenses or under other circumstances[820] was equally violative of the due process clause, the Court left undefined the measure of the protection available to defendants; and its first two pertinent decisions rendered thereafter, contributed virtually nothing to correct that deficiency. In Avery *v.* Alabama,[821] a State trial court was sustained in its refusal to continue a murder case upon request of defense counsel appointed by said court only three days before the trial, who contended that they had not had sufficient time to prepare a defense, and in its subsequent rejection of a motion for a new trial which was grounded in part on the contention that the denial of the continuance was a deprivation of the prisoner's rights under the Fourteenth Amendment. Apart from an admission that "where denial of the constitutional right to assistance of counsel is asserted, its peculiar sacredness demands that we scrupulously review the record," a unanimous Court proffered only the following vague appraisal of the application of the Fourteenth Amendment: "In determining whether petitioner has been denied his constitutional right * * *, we must remember that the Fourteenth Amendment does not limit the power of the States to try and deal with crimes committed within their borders, and was not intended to bring to the test of a decision of this Court every ruling made in the course of a State trial. Consistently with the preservation of constitutional balance between State and federal sovereignty, this Court must respect and is reluctant to interfere with the States' determination of local social policy."[822] One year later, the Court made another inconclusive observation in

Smith *v.* O'Grady,[823] in which it stated that if true, allegations in a petition for *habeas corpus* showing that the petitioner, although an uneducated man and without prior experience in court, [Pg 1100] was tricked into pleading guilty to a serious crime of burglary, and was tried without the requested aid of counsel would void the judgment under which he was imprisoned.

Conceding that the above mentioned opinions "lend color to the argument," though they did not actually so rule, that "in every case, whatever the circumstances, one charged with crime, who is unable to obtain counsel, must be furnished counsel by the State," the Court, in Betts *v.* Brady, [824] decided in 1942, not only narrowed the scope of the right of the accused to the "assistance of counsel," but also set at rest any question as to the constitutional source from which the right was derived. Offering State courts the following vague guide for determining when provision of counsel is constitutionally required, the Court declared that "the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel * * * Asserted denial of due process is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial."[825] Accordingly, an indigent farm laborer was deemed not to have been denied due process of law when he was convicted of robbery by a Maryland county court, sitting without a jury, which was not required by statute[826] to honor his request for counsel and whose "practice," in fact was to afford counsel only in murder and rape cases. Finally, the Court emphatically rejected the notion, suggested, however faintly by the older decisions, that the Fourteenth Amendment "incorporates the specific guarantees found in the Sixth Amendment, [Pg 1101] although it recognized that a denial of the rights stipulated in the latter Amendment may in a given case amount to a deprivation of due process."[827]

Having thus construed the due process clause of the Fourteenth Amendment as not inclusive of the Sixth Amendment and as requiring no more than a fair trial which, on occasion, may necessitate the protection of counsel, the Court, in succeeding decisions rendered during the interval, 1942-1946, proceeded to subject Betts *v.* Brady to the "silent treatment." In Williams *v.* Kaiser[828] and Tomkins *v.* Missouri[829] two defendants pleaded guilty without counsel to the commission in Missouri of capital offenses, one, to robbery with a deadly weapon, and the second, to murder. Defendant, Williams contended that, notwithstanding his request, the trial court did not appoint counsel, whereas defendant, Tomkins alleged that he was ignorant of his right to demand counsel under the Missouri statute. In ruling that the defendants' petitions for *habeas corpus* should not have been rejected by Missouri courts without a hearing, the Supreme Court relied almost entirely upon the quotations from Powell *v.* Alabama[830] previously set forth herein; and reiterated that the right to counsel in felony cases being protected by the Fourteenth Amendment, the failure of a State court to appoint counsel is a denial of due process. "A layman," the Court added, "is usually no match for the skilled prosecutor whom he confronts in the court room. He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment."[831]

Nor was Betts *v.* Brady mentioned in the following pertinent decisions. In House *v.* Mayo,[832] the Supreme Court held that the action of a trial court in compelling a defendant to plead to an [Pg 1102] information charging burglary without opportunity to consult with his counsel is a denial of the constitutional right to counsel; and in Hawk *v.* Olson[833] the Court repeated this assertion, in connection with the denial to a defendant accused of a murder of the same opportunity during the critical period between his arraignment and the impaneling of the jury. Both these opinions cited with approval the two previously discussed Williams and Tomkins Cases; and in House *v.* Mayo the Court declared without any explanation: "Compare Betts *v.* Brady with Williams *v.* Kaiser and Tomkins *v.* Missouri."[834] A similar performance by the Court is also discernible in Rice *v.* Olson,[835] in which it ruled that a defendant, who pleads guilty to a charge of burglary, is incapable adequately of making his own defense, and does not understandingly waive counsel; he is entitled to the benefit of legal aid, and a request therefor is not necessary. Also, on the basis of unchallenged facts contradicting a prisoner's allegation that he had been denied counsel; namely, that after his arraignment and plea of guilty to a charge of robbery, counsel had noted an appearance for him two days before the date of sentencing and had actively intervened in his behalf on the latter date, a majority of the Court, in Canizio *v.* New York,[836] ruled that the right to counsel had not been withheld.

Without mentioning Betts *v.* Brady by name, the Court, in 1946, returned to the fair trial principle enunciated therein when it held that no deprivation of the constitutional right to the aid of counsel was disclosed by the record in Carter *v.* Illinois.[837] That record included only the indictment, the judgment on the plea of guilty to a charge of murder, the minute entry bearing on the sentence, and the sentence, together with a lengthy recital in the judgment to the effect that when the defendant expressed a desire to plead guilty the Court explained to him the consequence of such plea, his rights in the premises, especially, his rights to have a lawyer appointed to defend him and to be tried before a jury, and the degree of proof required for an acquittal under a not guilty plea, but that the defendant persisted in his plea of guilty.

Emphasizing that this record was entirely wanting in facts bearing upon the maturity or capacity of comprehension of the prisoner, or upon the circumstances under which the plea of guilty was tendered and accepted, the Supreme Court concluded that no inference of lack of understanding, or ability to make an intelligent waiver of counsel, could be drawn from the fact that the trial [Pg 1103] court did assign counsel when it came to sentencing.[838] Applying the same doctrine, and on this occasion at least citing Betts *v.* Brady, the Court, in De Meerleer *v.* Michigan,[839] unanimously declared that the arraignment, trial, conviction of murder, and sentence to life imprisonment, all on the same day, of a seventeen-year old boy who was without legal assistance, and was never advised of his right to counsel, who received from the trial court no explanation of the consequences of his plea of guilty, and who never subjected the State's witnesses to cross-examination, effected a denial of constitutional "rights essential to a fair hearing."

Even more conclusive evidence of the revival of the fair trial doctrine of Betts *v.* Brady is to be found in the majority opinions contained in Foster *v.* Illinois[840] and Gayes *v.* New York.[841] In the former the Court ruled that where it appears that the trial court, before accepting pleas of guilty to charges of burglary and larceny by defendants, aged 34 and 58 respectively, advised each of his rights of trial and of the consequences of such a plea, the fact that the record reveals no express offer of counsel would not suffice to show that the accused were deprived of rights essential to the fair hearing required by the due process clause. Reiterating that the absolute right to counsel accorded by the Sixth Amendment does not apply in prosecutions in State courts, five of the Justices declared that all the due process clause of the Fourteenth Amendment "exacts from the States is a conception of fundamental justice" which is neither "satisfied by merely formal procedural correctness, nor * * * confined by any absolute rule such as that which the Sixth Amendment contains in securing to an accused [in the federal courts] 'the Assistance of Counsel for his defense.'"[842] On the same day, four Justices, with Justice Burton concurring only in the result, held in Gayes *v.* New York,[843] that one sentenced in 1941 as a second offender under a charge of burglary was not entitled to vacation of a judgment rendered against him in [Pg 1104] 1938, when charged with the first offense, on the ground that when answering in the negative the trial court's inquiry as to whether he desired the aid of counsel, he did not understand his constitutional rights. On his subsequent conviction in 1941, which took into account his earlier sentence of 1938, the defendant was deemed to have had full opportunity to contest the constitutionality of his earlier sentence. Consistently with these two cases, the Court in Marino *v.* Ragen,[844] decided later in the same year, held that the absence of counsel, in conjunction with the following set of facts, operated to deprive a defendant of due process. In this latter decision, the accused, an 18-year-old Italian immigrant, unable to understand the English language, was convicted of murder and sentenced to life imprisonment on a plea of guilty when, notwithstanding a recital in the record that he was arraigned in open court and advised through interpreters, one of whom was the arresting officer, of the meaning and effect of a "guilty" plea, and that he signed a statement waiving a jury trial and pleading guilty, the waiver was not in fact signed by him and no plea of guilty actually had been entered.

In disposing of more recent cases embracing right to counsel as an issue, the Court, either with or without citation of Betts *v.* Brady, has consistently applied the fair trial doctrine. Thus, the absence of counsel competent to advise a 15-year-old Negro boy of his rights was one of several factors operating in Haley *v.* Ohio[845] to negative the propriety of admitting in evidence a confession to murder and contributing to the conclusion that the boy's conviction had resulted from proceedings that were unfair. Dividing again on the same issues in which they were in disagreement in Foster *v.* Illinois;[846] namely, the applicability of Amendment Six to State criminal prosecutions and the merits of the fair trial doctrine as expounded in Betts *v.* Brady, five [Pg 1105] Justices in Bute *v.* Illinois[847] ruled that the due process clause of the Fourteenth Amendment does not require a State court to tender assistance of counsel, before accepting a plea of guilty to a charge of indecent liberties with female children, the maximum penalty for which is 20 years, from a 57-year-old man who was not a lawyer and who received from the Court an explanation of the consequences and penalties resulting from such plea. Unanimity was subsequently regained in Wade *v.* Mayo[848] in which the Justices had before them the plight of an 18-year-old boy, convicted on the charge of breaking and entering, who was described by a federal district court as not a stranger in court, having been convicted of prior offenses, but as still unfamiliar with court procedure and not capable of representing himself adequately. On the strength of these and other findings, the Supreme Court held that where one charged with crime is by reason of age, ignorance, or mental incapacity incapable of defending himself, even in a prosecution of a relatively simple nature, the refusal of a State trial court to appoint counsel at his request is a denial of due process, even though the law of the State does not require such appointment.

Dissents were again registered in the following brace of decision which a minority of the Justices [Pg 1106] declared their inability to reconcile. In the first, Gryger *v.* Burke,[849] the Court held that when one, sentenced to life imprisonment as a fourth offender under a State habitual criminal act, had been arrested eight times for crimes of violence, followed by pleas of guilty or conviction, and in two of such former trials had been represented by counsel, the State's failure to offer or to provide counsel for him on his plea to a charge of being a fourth offender does not render his conviction and sentence as such invalid, even though the Court may have misconstrued the statute as making a life sentence mandatory rather than discretionary. Emphasizing that there were "no exceptional circumstances * * * present," the majority asserted that "it rather overstrains our credulity to believe that [such a defendant would be ignorant] of his right [to

request and] to engage counsel." In the second, Townsend *v.* Burke,[850] the Supreme Court declared that although failure of a State court to offer or to assign counsel to one charged with the noncapital offenses of burglary and robbery, or to advise him of his right to counsel before accepting a plea of guilty may not render his conviction invalid for lack of due process, the requirement is violated when, while disadvantaged by lack of counsel who might have corrected the court's errors, defendant is sentenced on the basis of materially untrue assumptions concerning his criminal record.[851]

Concordant as to the results reached, if not always as to the reasoning supporting them, are the Court's latest rulings. In Uveges *v.* Pennsylvania,[852] it was held that inasmuch as the record showed that a State court did not attempt to make a 17-year-old youth understand the consequences of his plea of guilty to four separate indictments charging burglary, for which he [Pg 1107] could be given sentences aggregating 80 years, and that the youth was neither advised of his right to counsel nor offered counsel at any time between arrest and conviction, due process was denied him. Likewise, in Gibbs *v.* Burke[853] was overturned, as contrary to due process, the conviction for larceny of a man in his thirties who conducted his own defense, having neither requested, nor having been offered counsel. On the authority of the Uveges Case, accused's failure to request counsel, since it could be attributed to ignorance of his right thereto, was held not to constitute a waiver. Moreover, had the accused been granted the protection of counsel, the latter might have been able to prevent certain prejudicial rulings; namely, the introduction without objection of considerable hearsay testimony, the error of the trial judge in converting a prosecution witness into a defense witness, and finally, the injection of biased statements into the judge's comments to the jury. And of the same general pattern is the holding in Palmer *v.* Ashe, [854] another Pennsylvania case, involving a petitioner who alleged that, as a youth and former inmate at a mental institution, he was railroaded into prison for armed robbery without benefit of counsel, on the representation that he was charged only with breaking and entering. Reversing the State court's denial of petitioner's application for a writ of habeas corpus, the Court remanded the case, asserting that if petitioner's allegations were proven, he was entitled to counsel. On the other hand, it was held in Quicksall *v.* Michigan,[855] a State in which capital punishment does not exist, that a defendant who had received a life sentence on a plea of guilty entered without benefit of counsel, had "failed to sustain the burden of proving such disregard of fundamental fairness * * * as alone would * * * invalidate his sentence," not having convinced the State court that he was ignorant of his right to counsel, or that he had requested same, or that the consequences of his plea had been misrepresented to him. Also, in Gallegos *v.* Nebraska,[856] in which the petitioner had been convicted of manslaughter on a homicide charge, a similar conclusion was reached in the face of the petitioner's claim that the confession on the strength of which he was convicted had been obtained from him by mistreatment, prior to the assignment of counsel to him. Said the Court: "The Federal Constitution does not command a State to furnish defendants counsel as a matter of course. * * * Lack of counsel at State noncapital trials denies federal constitutional protection only when the absence results in a denial to accused of the essentials of justice."[857]

By way of summation, the Court in Uveges *v.* Pennsylvania[858] offered the following comment on [Pg 1108] the conflicting views advanced by its members on this issue of right to counsel. "Some members [minority] of the Court think that where serious offenses are charged, failure of a court to offer counsel in State criminal trials deprives an accused of rights under the Fourteenth Amendment. They are convinced that the services of counsel to protect the accused are guaranteed by the Constitution in every such instance. *See* Bute *v.* Illinois, 333 U.S. 640, dissent, 677-679. Only when the accused refuses counsel with an understanding of his rights can the Court dispense with counsel.[859] Others of us [majority] think that when a crime subject to capital punishment is not involved, each case depends on its own facts. *See* Betts *v.* Brady, 316 U.S. 455, 462. Where the gravity of the crime and other factors—such as the age and education of the defendant,[860] the conduct of the court or the prosecuting officials,[861] and the complicated nature of the offense charged and the possible defenses thereto[862]—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair, the latter group [majority] holds that the accused must have legal assistance under the amendment whether he pleads guilty or elects to stand trial, whether he requests counsel or not. Only a waiver of counsel, understandingly made, justifies trial without counsel. The philosophy behind both of these views is that the due process clause of the Fourteenth Amendment * * * requires counsel for all persons charged with serious crimes, when necessary for their adequate defense, in order that such persons may be advised how to conduct their trials. The application of the rule varies * * *" It would appear nevertheless that the statement quoted in the previous paragraph from the Gallegos Case weakens this doctrine somewhat. Nor is the Court's reply to the contention that such variation in application "leaves the State prosecuting authorities uncertain as to whether to offer counsel to all accused who are without adequate funds and under serious charges," very reassuring: "We cannot offer a panacea for the difficulty. * * * The due process clause is not susceptible of reduction to a mathematical formula."[863]

Right to Trial by Jury [Pg 1109]

The contention that a right to trial by a common law jury of twelve men in criminal cases was guaranteed by Amendment XIV was first rejected in Maxwell *v.* Dow[864] on the basis of Hurtado

v. California,[865] where it was denied that the due process clause itself incorporated all the rules of procedural protection having their origin in English legal history. Accordingly, so long as all persons are made liable to be proceeded against in the same manner, a state statute dispensing with unanimity,[866] or providing for a jury of eight instead of twelve, in noncapital criminal cases[867] is not unconstitutional; nor is one eliminating employment of a jury when the defendant pleads guilty to no less than a capital offense;[868] or permitting a defendant generally to waive trial by jury.[869] In short, jury trials are no longer viewed as essential to due process, even in criminal cases, and may be abolished altogether.[870]

[Pg 1110]

Inasmuch as "the purpose of criminal procedure is not to enable the defendant to select jurors, but to secure an impartial jury," a trial of a murder charge by a "struck" jury, chosen in conformity with a statute providing that the court may select from the persons qualified to serve as jurors 96 names, from which the prosecutor and defendant may each strike 24, and that the remainder of which shall be put in the jury box, out of which the trial jury shall be drawn in the usual way, is not violative of due process. Such a method "is certainly a fair and reasonable way of securing an impartial jury," which is all that the defendant constitutionally may demand.[871] Likewise, the right to challenge being the right to reject, not to select, a juror, a defendant who is subjected at a single trial to two indictments, each charging murder, cannot complain when the State limits the number of his peremptory challenges to ten on each indictment instead of the twenty customarily allowed at a trial founded upon a single indictment.[872] Also, a defendant who has been convicted by a special, or "blue ribbon," jury cannot validly contend that he was thereby denied due process of law.[873] In ruling that the defendant had failed to sustain his contention that such a jury was defective as to its composition, the Court conceded that "a system of exclusions could be so manipulated as to call a jury before which defendants would have so little chance of a decision on the evidence that it would constitute a denial of due process" and would result in a trial which was a "sham or pretense." A defendant is deemed entitled, however, to no more than "a neutral jury" and "has no constitutional right to friends on the jury."[874] In fact, the due process clause does not prohibit a State from excluding from the jury certain occupational groups such as lawyers, preachers, doctors, dentists, and enginemen and firemen of railroad trains. Such exclusions may be justified on the ground that the continued attention to duty by members of such occupations is beneficial to the community.[875]

Self-Incrimination—Forced Confessions

[Pg 1111]

In 1908, in Twining *v.* New Jersey,[876] the Court ruled that neither the historical meaning nor the current definition of the due process clause of the Fourteenth Amendment included protection against self-incrimination, which was viewed as unworthy of being rated "an immutable principle of justice" or as a "fundamental right." The Fifth Amendment embodying this privilege was held to operate to restrain only the Federal Government; whereas the due process clause of the Fourteenth Amendment was deemed to permit a State even to go so far as to substitute the criminal procedure of the Civil Law, in which the privilege against self-incrimination is unknown, for that of the Common Law. Accordingly, New Jersey was within her rights in permitting a trial judge, in a criminal proceeding, to instruct a jury that they might draw an unfavorable inference from the failure of a defendant to comment on the prosecutor's evidence.

[Pg 1112]

Apart from a recent ineffectual effort of a minority of the Justices to challenge the interpretation thus placed upon the due process clause of the Fourteenth Amendment, the Court has yet to register any departure from its ruling in Twining *v.* New Jersey.[877] In two subsequent opinions the Court reasserted *obiter* that "the privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the State." No "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental"[878] is violated by abolition of such privilege; nor is its complete destruction likely to outrage students of our penal system, many of whom "look upon * * * [this] immunity as a mischief rather than a benefit, * * *" [879]

In subsequently disposing of similarly challenged State criminal proceedings, the Court has applied almost exclusively the Fair Trial doctrine. With only casual consideration of the intention of the framers of the Fourteenth Amendment, or of the rejected proposition that the due process clause thereof had imposed upon the States all the restraints which the Bill of Rights had imposed upon the Federal Government, the Court has simply endeavored to ascertain whether the accused enjoyed all the privileges essential to a fair trial. Thus, without even admitting that the privilege against self-incrimination was involved, all the Justices agreed, in Brown *v.* Mississippi,[880] that the use of a confession extorted by brutality and violence (undenied strangulation and whipping by the sheriff aided by a mob) was a denial of due process, even though coercion was not established until after the confession had been admitted in evidence and defense counsel did not thereafter move for its exclusion. Although compulsory processes of justice may be used to call the accused as a witness and to require him to testify, "compulsion by torture to extort a confession is a different matter. * * * The rack and torture chamber may not be substituted for the witness stand."[881] Again, in Chambers *v.* Florida[882] the Court, with no mention of the privilege against self-incrimination, proclaimed that due process is denied when convictions of murder are obtained in State courts by the use of confessions extorted under the

following conditions: dragnet methods of arrest on suspicion without warrant and protracted questioning (on the last day, from noon until sunset) in a fourth floor jail where the prisoners were without friends or counselors, and under circumstances calculated to break the strongest nerves and stoutest resistance. Affirming that the Supreme Court is not concluded by the finding of a jury in a State court that a confession in a murder trial was voluntary, but determines that question for itself from the evidence, the Justices unanimously declared that the Constitution proscribes lawless means irrespective of the end, and rejected the argument that the thumbscrew, the wheel, solitary confinement, protracted questioning, and other ingenious means of entrapment are necessary to uphold our laws.[883] Procuring a conviction for a capital crime by use of a confession extracted by protracted interrogation conducted in a similar manner was, on the authority of Chambers *v.* Florida, condemned in White *v.* Texas;[884] and in Lisenba *v.* California,[885] a case rendered inconclusive by conflicting testimony, the Court remarked, by way of dictum, that "the concept of due process would void a trial in which, by threats or promises in the presence of court and jury, a defendant was induced to testify against himself," or in which a confession is used which is "procured * * * by fraud, collusion, trickery and subornation or perjury." [Pg 1113]

In conformity with these rulings, the Court, in Ward *v.* Texas,[886] set aside a conviction based upon a confession obtained, by methods of coercion and duress, from a defendant who had been arrested illegally, without warrant, by the sheriff of another county, and removed to a county more than a hundred miles away, and who for three days, while being driven from county to county, was questioned continuously by various officers and falsely informed by them of threats of mob violence. Similarly, in Ashcraft *v.* Tennessee,[887] the use in a State court of a confession obtained near the end of a 36-hour period of practically continuous questioning, under powerful electric lights, by relays of officers, experienced investigators, and highly trained lawyers was held to be violative of constitutional right by reason of the inherently coercive character of such interrogation. Justice Jackson, joined by Justices Frankfurter and Roberts, dissented on the ground that the accused not only denied that the protracted questioning "had the effect of forcing an involuntary confession from him" but that he had ever confessed at all, a contention which reputable witnesses contradicted. Referring to Justice Holmes's warning against "the ever increasing scope given to the Fourteenth Amendment in cutting down * * * the constitutional rights of the States."[888] Justice Jackson protested that "interrogation *per se* is not, * * *, an outlaw"; and that inasmuch as all questioning is "'inherently coercive' * * *, the ultimate question * * * [must be] whether the confessor was in possession of his own will and self-control at the time of [his] confession."[889] [Pg 1114]

This dissent was not without effect. In June 1944, in Lyons *v.* Oklahoma,[890] the Court finally handed down a ruling calculated definitely to arrest the suspicion that had been developing that the use of any confession made after arrest would render a trial constitutionally defective. Here, six Justices refused to overturn a holding of the Oklahoma Criminal Court of Appeals which labelled as voluntary and usable a second confession obtained by other than coercive means within twelve hours after the defendant had made a confession admittedly under duress. The vice of coerced confessions, these Justices asserted, was that they offended "basic standards of justice, not because the victim had a legal grievance against the police, but because declarations procured by torture are not premises from which a civilized forum will infer guilt."[891] In Malinski *v.* New York,[892] however, although in the opinion of four Justices there was conflicting evidence as to the involuntary character of the confessions used, the Court nevertheless overturned a conviction sustained by New York tribunals.[893] Without finding it necessary to determine whether succeeding oral and written confessions were the product of the coercion "admittedly" applied in extracting an initial oral confession,[894] the Court held that, even though other evidence might have sufficed to convict the accused and notwithstanding the fact that the initial oral confession was never put in evidence, the repeated indirect reference to its content at the trial plus the failure to warn the jury not to consider it as evidence[895] invalidated the proceeding giving rise to the verdict.[896]

Of the remaining cases involving the issue of self-incrimination, Adamson *v.* California[897] is especially significant because it represents the high water mark of dissent in support of the contention that the Bill of Rights, originally operative only against the Federal Government, became limitations on State action by virtue of their inclusion within the due process clause of the Fourteenth Amendment. Here, the Court, speaking through Justice Reed, declared that the California law which provides that if an accused elects to take the witness stand and testify, he must then be prepared to undergo impeachment of his testimony, through disclosure of his previous convictions, and which also permits him to avoid such disclosure by remaining silent, subject to comment on his failure to testify by the Court and prosecuting counsel, does not involve such a denial of due process as to invalidate a conviction in a State court. Inasmuch as California law "does not involve any presumption, rebuttable or irrebuttable, either of guilt or of the truth of any fact," and does not alter the burden of proof, which rests upon the State, nor the presumption of innocence in favor of the accused, it does not prevent the accused from enjoying a fair trial, which is all that the due process clause of the Fourteenth Amendment guarantees. Relying upon Twining *v.* New Jersey[898] and Palko *v.* Connecticut,[899] the Court reiterated that the "due process clause of the Fourteenth Amendment, however, does not draw all the rights of the federal Bill of Rights under its protection."[900] [Pg 1115] [Pg 1116]

In a concurring opinion concerning the scope of the protection afforded by this clause of the Fourteenth Amendment, Justice Frankfurter contended that further argument thereon is foreclosed by Twining *v.* New Jersey, a precedent, on which he commented as follows: "Decisions of this Court do not have equal intrinsic authority. The *Twining* Case shows the judicial process at its best—comprehensive briefs and powerful arguments on both sides, followed by long deliberation, resulting in an opinion by Mr. Justice Moody which at once gained and has ever since retained recognition as one of the outstanding opinions in the history of the Court. After enjoying unquestioned prestige for forty years, the *Twining* Case should not now be diluted, even unwittingly, either in its judicial philosophy or in its particulars. As the surest way of keeping the *Twining* Case intact, I would affirm this case on its authority."

In dismissing as historically untenable the position adopted by Justice Black, Justice Frankfurter further declared that: "The notion that the Fourteenth Amendment was a covert way of imposing upon the States all the rules which it seemed important to Eighteenth Century statesmen to write into the Federal Amendments, was rejected by judges who were themselves witnesses of the process by which the Fourteenth Amendment became part of the Constitution. Arguments that may now be adduced to prove that the first eight Amendments were concealed within the historic phrasing of the Fourteenth Amendment were not unknown at the time of its adoption. A surer estimate of their bearing was possible for judges at the time than distorting distance is likely to vouchsafe. Any evidence of design or purpose not contemporaneously known could hardly have influenced those who ratified the Amendment. Remarks of a particular proponent of the Amendment, no matter how influential, are not to be deemed part of the Amendment. What was [Pg 1117] submitted for ratification was his proposal, not his speech. * * * The Due Process Clause of the Fourteenth Amendment has an independent potency, precisely as does the Due Process Clause of the Fifth Amendment in relation to the Federal Government. It ought not to require argument to reject the notion that due process of law meant one thing in the Fifth Amendment and another in the Fourteenth. The Fifth Amendment specifically prohibits prosecution of an 'infamous crime' except upon indictment; it forbids double jeopardy; it bars compelling a person to be a witness against himself in any criminal case; it precludes deprivation of 'life, liberty, or property, without due process of law * * *' Are Madison and his contemporaries in the framing of the Bill of Rights to be charged with writing into it a meaningless clause? To consider 'due process of law' as merely a shorthand statement of other specific clauses in the same amendment is to attribute to the authors and proponents of this Amendment ignorance of, or indifference to, a historic conception which was one of the great instruments in the arsenal of constitutional freedom which the Bill of Rights was to protect and strengthen." Warning that "a construction which * * * makes of" the due process clause of the Fourteenth Amendment "a summary of specific provisions of the Bill of Rights would, * * *, tear up by the roots much of the fabric of the law in the several States," Justice Frankfurter, in conclusion, offers his own appraisal of this clause. To him, the due process clause "expresses a demand for civilized standards of law, [and] it is thus not a stagnant formulation of what has been achieved in the past but a standard for judgment in the progressive evolution of the institutions of a free society." Accordingly "judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and * * * [should] not be based upon the idiosyncrasies of a merely personal judgment. * * * An important safeguard against such merely individual judgment is an alert deference to the judgment of the State court under review."[901]

In dissenting Justice Black, who was supported by Justice Douglas, attached to his opinion "an appendix which contains * * * [his] resume, * * *, of the Amendment's history." It is his judgment "that history conclusively demonstrates that the language of the first section of the Fourteenth Amendment, taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no State could deprive its citizens of the privileges and protections of the Bill of Rights." A majority of the Court, he acknowledges resignedly, has declined, however, "to appraise the relevant historical evidence of the intended scope of the first section of the Amendment." In the instant [Pg 1118] case, the majority opinion, according to Justice Black, "reasserts a constitutional theory spelled out in Twining *v.* New Jersey, * * * that this Court is endowed by the Constitution with boundless power under 'natural law' periodically to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes 'civilized decency' and 'fundamental liberty and justice.' * * * [This] 'natural law' formula, [he further contends] * * * should be abandoned as an incongruous excrescence on our Constitution. * * * [The] formula [is] itself a violation of our Constitution, in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power." In conclusion, Justice Black expresses his fears as to "the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights * * *"[902]

In all but one of the remaining cases, the Court sided with the accused and supported his contention that the confession on which his conviction was based had been procured by methods contrary to the requirements of due process. The conviction of murder of a Negro boy of fifteen was reversed by five Justices in Haley *v.* Ohio[903] on the ground that his confession, which contributed to the verdict, was involuntary, having been obtained by the police after several hours of questioning immediately after the boy was arrested, during which interval the youth was without friends or legal counsel. After having had his confession reduced to writing, the boy continued to be held *incommunicado* for three days before being arraigned. "The age of petitioner, the [midnight] hours when he was grilled, the duration of his quizzing, the fact that he

had no friend or counsel to advise him, the callous attitude of the police towards his rights combine to convince us," the Court declared, "that this was a confession wrung from a child by means which the law should not sanction."[904] The application of duress being indisputed, a unanimous Court, in Lee *v.* Mississippi,[905] citing as authority all the preceding cases beginning with Brown *v.* Mississippi, held that "a conviction resulting from such use of a coerced confession, however, is no less void because the accused testified at some point in the proceeding that he had never in fact confessed, voluntarily or involuntarily. * * *, inconsistent testimony as to the confession * * * cannot preclude the accused from raising * * * the issue * * * [that] the Fourteenth Amendment * * * [voids a] conviction grounded * * * upon a confession which is the product of other than reasoned and voluntary choice." In Taylor *v.* Alabama,[906] however, a majority of the Justices sustained the denial by a State appellate court, in which a conviction had been affirmed, of leave to file in a trial court a petition for a writ of error *coram nobis* grounded upon the contention that confessions and admissions introduced into evidence at the trial had been obtained by coercion.[907] Five Justices declared that such denial was not such arbitrary action as in itself to amount to a deprivation of due process of law where the circumstances tended to show that the petitioner's allegations of mistreatment, none of which were submitted during the trial or the appeal,[908] were highly improbable.[909]

[Pg 1119]

Finally, in three decisions rendered on June 27, 1949, the Court reversed three convictions of murder on the ground that they had been founded entirely upon coerced confessions. The defendant in the first case, Watts *v.* Indiana,[910] was held without arraignment, without the aid of counsel or friends, and without advice as to his constitutional rights from Wednesday until the following Friday, when he confessed. During this interval, he was held much of the time in solitary confinement in a cell with no place to sit or sleep except the floor, and was subjected to interrogation daily, Sunday excepted, by relays of police officers for periods ranging in duration from three to nine and one-half hours. His incarceration without a prompt preliminary hearing also was a violation of Indiana law. Similarly in conflict with State law was the arrest without warrant and detention without arraignment for five days of the accused in Turner *v.* Pennsylvania,[911] the second case. During this period, Turner was not permitted to see friends, relatives, or counsel, was never informed of his right to remain silent, and was interrogated daily, though for briefer intervals than in the preceding case. At his trial, the prosecuting attorney "admitted that a hearing was withheld until interrogation had produced a confession." In the third and last case of this group, Harris *v.* South Carolina,[912] the defendant, an illiterate Negro, was apprehended in Tennessee on a Friday on a warrant alleging no more than a theft of a pistol, and taken to South Carolina on a Sunday. Without being informed of the contents of the warrant or of the charge of murder on which he was being held, without arraignment or advice as to his rights and without access to family or counsel, the defendant was questioned daily by officers for periods as long as 12 hours. In addition, he was warned that his mother also might be arrested for handling stolen property.

[Pg 1120]

In each of these cases there was dissent, and in none was the majority able to record its views in a single opinion. Justice Murphy and Justice Rutledge joined Justice Frankfurter, who filed a separate opinion in all three cases, in declaring that "a confession by which life becomes forfeit must be the expression of free choice. * * * When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal. * * * if * * * [his confession] is the product of sustained pressure by the police it does not issue from a free choice."[913] On the authority of Chambers *v.* Florida[914] and Ashcraft *v.* Tennessee,[915] Justice Black supported the judgments reached in all three cases; but Justice Douglas, in concurring, advocated the disposition of these cases in conformity with a broader rule; namely that, "any confession obtained during * * * [a] period of * * * unlawful detention"; that is during a period of custody between arrest and arraignment, should be outlawed.[916] Justice Jackson, who wrote an opinion applicable to all three cases, concurred in the result in Watts *v.* Indiana, presumably on the basis of that part of Justice Frankfurter's opinion therein which was founded "on the State's admissions as to the treatment of Watts."[917] Emphasizing the merit of deferring to the findings of trial court and jury on the issue of the "voluntariness" of confessions on the ground that they have "the great advantage of hearing and seeing the confessor and also the officers whose conduct and bearing toward him is in question," Justice Jackson dissented in Turner *v.* Pennsylvania[918] and Harris *v.* South Carolina.[919] "If the right of interrogation be admitted," he declared, "then * * * we must leave it to trial judges and juries and State appellate courts to decide individual cases, unless they show some want of proper standards of decision."[920] Without explanatory opinion, Chief Justice Vinson and Justices Burton and Reed dissented in all three cases.

[Pg 1121]

Unreasonable Searches and Seizures

In National Safe Deposit Co. *v.* Stead,[921] decided in 1914, the Court unequivocally declared that an unreasonable search and seizure committed by State and local officers presented no federal question, inasmuch as the Fourth Amendment does not apply to the States. Prior to that date, the Court has passed upon this question obliquely in only a few decisions,[922] in one of which it conceded for the sake of argument, but without so deciding, that the due process clause of the Fourteenth Amendment embraces in its generic terms a prohibition against unreasonable searches. In two of these earlier cases the Court sustained as consistent with due process the

power of a State, in investigating the conduct of corporations doing business within its limits, to demand the production of corporate books and papers. The call for such papers was deemed not to have been rendered unreasonable because, at the time of the demand therefor, the corporation affected either temporarily or permanently kept such documents in another jurisdiction. Nor was the validity of the order to produce such materials viewed as having been impaired by the fact that it sought to elicit proof not only as to the liability of the corporation but also, evidence in its possession relevant to its defense. [Pg 1122]

In its most recent opportunity to review the question whether the due process clause of the Fourteenth Amendment precludes admission in a State court of relevant evidence obtained by an unreasonable search and seizure,[923] the Court apparently ruled in the negative; but Justice Frankfurter, speaking for the majority, did not limit himself to a repetition of the conclusions stated by him in Adamson *v.* California;[924] namely, that the due process clause of the Fourteenth Amendment did not incorporate the first eight Amendments of the Constitution, and, conformably to Palko *v.* Connecticut,[925] exacts no more from a State than is "implicit in 'the concept of ordered liberty.'" He also proclaimed that: "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the due process clause."[926] Such language appears to effect the very absorption into the Fourteenth Amendment which Justice Frankfurter rejects in the Adamson case; but he concluded by adding that as long as "a State [does not] affirmatively * * * sanction * * * [arbitrary] police incursion into privacy"; that is, as long as its police are deterred from making searches without authority of law by virtue of such internal discipline as an alert public opinion may induce and by reason of the statutory or common law remedies which the victims of such illegal searches may invoke, a State, without running counter to the due process clause, may employ at a trial incriminating evidence obtained by unlawful search and seizure. The fact that most of the English-speaking world, including 30 States and the British Commonwealth of Nations, does not regard the exclusion of evidence thus obtained, as vital to the protection of the right of privacy is interpreted by the Justice as lending abundant support to the merit of his position.[927]

Without departing from his previously adopted position which he restated in his dissenting opinion in Adamson *v.* California;[928] namely, that the due process clause of the Fourteenth Amendment embraces the Fourth Amendment's prohibition of unreasonable searches and seizures, Justice Black concurred in the result on the ground that the exclusionary rule, whereby evidence procured in an illegal search and seizure is not admissible in a federal court, is "not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate."[929] Justices Douglas, Murphy, and Rutledge, in separate dissenting opinions, all declared that the Fourth Amendment was applicable to the States and that "evidence obtained in violation of it must be excluded in State prosecutions as well as in federal prosecutions, * * *." [930] Attacking Justice Frankfurter's method of approach, Justice Murphy declared that the Court should not "decide due process questions by simply taking a poll of the rules in various jurisdictions, * * *" and agreed with Justice Rutledge that unless illegally obtained evidence is excluded, no effective sanction "exists to deter violations of the search and seizure clause." [Pg 1123]

In two recent cases, both argued the same day, a nearly unanimous Court reached opposite results.[931] In the first the outcome of the Wolf case was repeated. The Court, speaking by Justice Frankfurter, refused to enjoin the use, in State criminal proceedings against them in New Jersey of evidences claimed to have been obtained by unlawful search by State police. Said Justice Frankfurter, "If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law —with its far flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum * * *"[932] The facts in the second case were as follows: state officers, on the basis of "some information" that petitioner was selling narcotics, entered his home and forced their way into his wife's bedroom. When asked about two capsules lying on a bedroom table, petitioner put them into his mouth and swallowed them. He was then taken to a hospital, where an emetic was forced into his stomach with the result that he vomited them up. Later they were offered in evidence against him. Again Justice Frankfurter spoke for the Court, while reiterating his preachments regarding the tolerance claimable by the States under the Fourteenth Amendment[933] he held that methods offensive to human dignity were ruled out by the due process clause.[934] Justices Black and Douglas concurred in opinions in which they seized the opportunity to reiterate once more their position in Adamson *v.* California.[935] [Pg 1124]

Conviction Based on Perjured Testimony

When a conviction is obtained by the presentation of testimony known to the prosecuting authorities to have been perjured, the constitutional requirement of due process is not satisfied. That requirement "cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance * * * is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."[936] This principle, as originally announced, was no more than a dictum uttered by the Court in disposing

of Tom Mooney's application for a writ of *habeas corpus*, filed almost eighteen years after his conviction, and founded upon the contention that the verdict of his guilt was made possible solely by perjured testimony knowingly employed by the prosecutor who "deliberately suppressed evidence which would have impeached and refuted the testimony thus given against him."[937]

On the authority of the preceding case, and without qualification, the Court subsequently applied [Pg 1125] this principle in Hysler *v.* Florida,[938] Pyle *v.* Kansas[939] and White *v.* Ragen.[940] In the first case, the Supreme Court concurred in the judgment of the Florida appellate court denying a petition for leave to apply to a trial court for a writ of *coram nobis*. Supporting the petition filed by Hysler, the accused, were affidavits signed by one of two codefendants on the eve of his execution for participation in the same crime and stating that the two codefendants had testified falsely against Hysler because they had been "'coerced, intimidated, beaten, threatened with violence and otherwise abused and mistreated' by the police and were 'promised immunity from the electric chair' by the district attorney." Having made "an independent examination of the affidavits upon which * * * [Hysler's] claim was based," a majority of the Justices concluded that the Florida appellate court's finding that Hysler's proof was insubstantial and did not make out a *prima facie* case was justified. "That in the course of * * * years witnesses die or disappear, that memories fade, that a sense of responsibility may become attenuated, that [recantation] * * * on the eve of execution * * * [is] not unfamiliar as a means of relieving others or as an irrational hope for self * * * are relevant" to the determination by the Florida court that "such a belated disclosure" did not spring "from the impulse for truth-telling" and was "the product of self-delusion * * * [and] artifice prompted by the instinct of self-preservation."[941]

Relying largely on the failure of the State to answer allegations in a prisoner's application for a [Pg 1126] write of *habeas corpus*, which application recited that persons named in supporting affidavits and documents were coerced to testify falsely, and that testimony of certain other persons material to the prisoner's defense was suppressed under threat and coercion by the State, the Court, in Pyle *v.* Kansas[942] reversed the Kansas court's refusal to issue the writ. Inasmuch as the record of the prisoner's conviction did "not controvert the charges that perjured evidence was used, and that favorable evidence was suppressed with the knowledge" of the authorities, the case was remanded in order that the prisoner might enjoy that to which he was entitled; namely, a determination of the verity of his allegations. Similarly, in White *v.* Ragen,[943] the Court declared that since a prisoner's petition to a State court for release on *habeas corpus* had been dismissed without requiring the State to answer allegations supporting the petition; namely, that the conviction was obtained by the use of false testimony procured by bribery of two witnesses by the prosecutor, must be assumed to be true. Accordingly, the petitioner's contentions were deemed sufficient to make out a *prima facie* case of violation of constitutional rights and adequate to entitle him to invoke corrective process in a State court.

Confrontation; Presence of the Accused; Public Trial

On the issue whether the privileges of presence, confrontation and cross-examination face to face, assured to a defendant in a federal trial by the Sixth Amendment, are also guaranteed in State criminal proceedings, the Court thus far has been unable to formulate an enduring and unequivocal answer. At times it has intimated, as in the following utterance, that the enjoyment of all these privileges is essential to due process. "The personal presence of the accused, from the beginning to the end of a trial for felony, involving life or liberty, as well as at the time final judgment is rendered against him, may be, and must be assumed to be, vital to the proper conduct of his defence, and cannot be dispensed with."[944] Notwithstanding this early assumption, the Supreme Court, fourteen years later, sustained a Kentucky court which approved [Pg 1127] the questioning, in the absence of the accused and his counsel, of a juror whose discharge before he was sworn had been demanded.[945] Inasmuch as no injury to substantial rights of the defendant was deemed to have been inflicted by his occasional absence during a trial, no denial of due process was declared to have resulted from the acceptance by the State court of the defendant's waiver of his right to be present. In harmony with the latter case is Felts *v.* Murphy, [946] which contains additional evidence of an increasing inclination on the part of the Court to treat as not fundamental the rights of presence, confrontation, and cross-examination face to face. The defendant in Felts *v.* Murphy proved to be so deaf that he was unable to hear any of the testimony of witnesses, and had never had the evidence repeated to him. While regretting that the trial court has not had the testimony read or repeated to the accused, the Supreme Court held that a deaf person is not deprived of due process of law because he had not heard a word of the evidence. It also did not overlook the fact the defendant "made no objection, asked for nothing, and permitted his counsel to take his own course."

That the presence of the accused may be dispensed with at various stages of criminal proceedings was further conceded by the Court in Frank *v.* Mangum,[947] wherein it held that the presence of the defendant when the verdict is rendered is not essential, and, accordingly, that a rule of practice allowing the accused to waive it and which bound him by that waiver did not effect any unconstitutional deprivation. Enumerating many departures from common law procedure respecting jury trials, including provisions waiving the presence of an accused during portions of a trial, the Court emphasized that none of these changes had been construed as conflicting with the Fourteenth Amendment. More recently, the Court, sustained, by only a five-to-four vote, however, a conviction for murder where the trial court rejected the defendant's request that he be present at a view of the scene of the murder to which the jury had been taken.

[948] Acknowledging that it had never squarely held, though it now assumed, that "the privilege to confront one's accusers and cross-examine them face to face" in State court prosecutions "is reinforced by the Fourteenth Amendment," the majority devised the following standard for disposing of similar cases in the future. "In a prosecution for a felony," five Justices declared, "the [Pg 1128] defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge. * * * The Fourteenth Amendment does not assume to a defendant the privilege to be present [when] * * * presence would be useless, or the benefit but a shadow. * * * The presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." Employing this standard of appraisal, the majority therefore concluded that no harm or damage had been done to the accused by reason of his failure to be present when the jury viewed the site of the murder.[949]

To what extent, consistently with due process, States may authorize the conduct, after conviction and sentence, of nonadversary proceedings from which the accused has been excluded and denied the privilege of confrontation and cross-examination, has been examined by the Court in two recent cases. In Williams *v.* New York,[950] the Supreme Court rejected the contention that the due process clause requires that a person convicted of murder be permitted to cross-examine probation officers as to his prior criminal record when the trial judge, in the exercise of discretion vested in him by law, considers such information, obtained outside the courtroom, in determining whether to abide by a jury's recommendation of life imprisonment or to impose a death sentence. Emphasizing the distinction between evidentiary rules applicable to the conduct of criminal trials, which are confined to the narrow issue of guilt, and sentencing procedures which pertain to the determination of the type and extent of punishment after the issue of guilt has been decided, the Court disposed of the petitioner's appeal by declaring that, "modern concepts individualizing punishment have made it all the more necessary that a sentencing judge [Pg 1129] not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial."[951] By a similar process of reasoning, in Solesbee *v.* Balkcom,[952] the Court sustained a Georgia statutory procedure granting the governor discretionary authority, with the aid of physicians appointed by himself, to determine, without opportunity for an adversary hearing or for judicial review, whether a condemned convict has become insane and, if so, whether he should be committed to an insane asylum. Likening the function thus vested in the governor to the power of executive clemency, the Supreme Court reiterated that "trial procedure safeguards are not applicable to the process of sentencing," and concluded with the observation that the Georgia procedure is amply supported by "the universal common-law principle that upon a suggestion of insanity after sentence, the tribunal charged with responsibility must be vested with broad discretion in deciding whether evidence shall be heard. * * * The heart of the common-law doctrine has been that a suggestion of insanity after sentence is an appeal to the conscience and sound wisdom of the particular tribunal which is asked to postpone sentence."[953]

When employed in the conduct of the trial, however, summary procedures such as those examined in the preceding two decisions invariably elicit judicial condemnation. Thus, when a Michigan judge proceeding as a one-man grand jury concluded that a witness had given false and evasive testimony, not on the basis of anything inherent in the testimony itself, but at least in part upon its inconsistency with other testimony given by a preceding witness, and immediately thereupon suspended his investigation, and committed the witness to jail for contempt, such summary commitment, in the absence of a showing that it was necessary to prevent demoralization of the judge's authority, was held to constitute a denial of due process. The guaranty of that clause forbids the sentencing of an accused person to prison without a public trial; that is, without a day in court, reasonable notice of the charges, and an opportunity to be heard in one's defense by cross-examining other witnesses, or by summoning witnesses to refute [Pg 1130] the charges against him.[954]

On the other hand, when the alleged contempt is committed, not within the confines of a secret grand jury proceeding, but in open court, is readily observable by the presiding judge, and constitutes an open and immediate threat to orderly judicial procedure and to the court's authority, the offended tribunal is constitutionally empowered summarily to punish without notice, testimony, or hearing. Thus in Fisher *v.* Pace,[955] albeit with the concurrence of only five Justices, the Court sustained a Texas court's conviction for contempt, with progressive increase of penalty from a $25 to $50 to $100 fine plus three days in jail, of a trial attorney who, despite judicial admonition, persisted in conveying to the jury, in a workmen's compensation case, information not for their consideration. Conceding that "there must be adequate facts to support an order for contempt," the majority declared that the Texas appellate court's finding in the affirmative, after evaluation of the facts, should not be overturned inasmuch as the Supreme Court, in examining the transcript of the record, could not derive therefrom an adequate picture of the courtroom scene nor discern therein "such elements of misbehavior as expression, manner of speaking, bearing, and attitude of * * * [the attorney]." The fact that the bench was guilty of "mildly provocative language" was deemed insufficient to excuse the conduct of the attorney.[956]

Trial by Impartial Tribunal [Pg 1131]

Inasmuch as due process implies a tribunal both impartial and mentally competent to afford a hearing, it follows that the subjection of a defendant's liberty or property to the decision of a

court, the judge of which has a direct, personal, substantial pecuniary interest in rendering a verdict against him, is violative of the Fourteenth Amendment.[957] Compensating an inferior judge for his services only when he convicts a defendant may have been a practice of long-standing, but such a system of remuneration, the Court declared, never became "so embedded by custom in the general practice either at common law or in this country that it can be regarded as due process of law. * * *"[958] However, a conviction before a mayor's court does not become constitutionally defective by reason of the fact that the fixed salary of the mayor is paid out of the fund to which the fines imposed by him contribute.[959]

Obviously, the attribute of impartiality is lacking whenever the judge and jury are dominated by a mob. "If the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law. * * *"[960] But "if * * * the whole proceeding is a mask—* * * [if the] counsel, jury and judge * * * [are] swept to the fatal end by an irresistible wave of public passion, and * * * [if] the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent" intervention by the Supreme Court to secure the constitutional rights of the defendant.[961]

Insofar as a criminal trial proceeds with a jury, it is part of the American tradition to contemplate not only an impartial jury but one drawn from a cross-section of the community. This has been construed as requiring that prospective jurors be selected by court officials without systematic and intentional exclusion of any group, even though it is not necessary that every jury contain representatives of all the economic, social, religious, racial, political, and geographical groups of the community.[962]

Other Attributes of a Fair Trial

[Pg 1132]

"Due process of law," the Supreme Court has observed, "requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. * * * What is fair in one set of circumstances may be an act of tyranny in others."[963] Conversely, "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. In order to declare a denial of it * * * [the Court] must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial."[964] And on another occasion the Court remarked that "the due process clause," as applied in criminal trials "requires that action by a State through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, [and] which not infrequently are designated as 'the law of the land.'"[965]

Basic to the very idea of free government and among the immutable principles of justice which no State of the Union may disregard is the necessity of due "notice of the charge and an adequate opportunity to be heard in defense of it."[966] Consequently, when a State appellate court affirms a conviction on the ground that the information charged, and the evidence showed a violation of Sec. 1 of a penal law of the State, notwithstanding that the language of the information and the construction placed upon it at the trial clearly show that an offense under Sec. 2 of such law was charged, that the trial judge's instructions to the jury were based on Sec. 2, and that on the whole case it was clear that the trial and conviction in the lower court were for the violation of Sec. 2, not Sec. 1, such appellate court in effect is convicting the accused of a charge on which he was never tried, which is as much a violation of due process as a conviction upon a charge that was never made.[967] On the other hand, a prisoner who, after having been indicted on a charge of receiving stolen goods, abides by the prosecutor's suggestion and pleads guilty to the lesser offense of attempted second degree grand larceny, cannot later contend that a judgment of guilty of the latter offense was lacking in due process in that it amounted to a conviction of a crime for which he had never been indicted. In view of the "close kinship between the offense of larceny and that of receiving stolen property * * *, when related to the same stolen goods, the two crimes may fairly be said 'to be connected with the same transaction.'" It would be therefore, the Court concluded, "an exaltation of technical precision to an unwarranted degree to say that [Pg 1133] the indictment here did not inform the petitioner that he was charged with the substantial elements of the crime of larceny." Under these circumstances he must be deemed to have been given "reasonable notice and information of the specific charge against him and a fair hearing in open court."[968]

Excessive Bail, Cruel and Unusual Punishment, Sentence

The commitment to prison of a person convicted of crime, without giving him an opportunity pending an appeal, to furnish bail, does not violate the due process clause of the Fourteenth Amendment.[969] Likewise, a State, notwithstanding the limitations of that clause, retains a wide discretion in prescribing penalties for violation of its laws. Accordingly, a sentence of fourteen years' imprisonment for the crime of perjury has not been viewed as excessive nor as effecting any unconstitutional deprivation of the defendant's liberty;[970] nor has the imposition of successively heavier penalties upon "repeaters" been considered as partaking of a "cruel and unusual punishment."[971]

In an older decision, Ex parte Kemmler,[972] rendered in 1890, the Supreme Court rejected the suggestion that the substance of the Eighth Amendment had been incorporated into the due process clause of the Fourteenth Amendment, but did intimate that the latter clause would invalidate punishments which would involve "torture or a lingering death," such "as burning at the stake, crucifixion, breaking on the wheel, and the like." Holding that the infliction of the death penalty by electrocution was comparable to none of the latter, the Court refused to interfere with the judgment of the State legislature that such a method of executing the judgment of a court was humane. More recently, in Louisiana ex rel. Francis *v.* Resweber,[973] five members of the Court reached a similar conclusion as to the restraining effect of the due process clause of the Fourteenth Amendment when, assuming, "but without so deciding" that violations of the Eighth Amendment as to cruel and unusual punishments would also be violative of that clause, they upheld a subsequent proceeding to execute a sentence of death by electrocution after an accidental failure of equipment had rendered an initial attempt unsuccessful.[974] [Pg 1134]

Double Jeopardy [Pg 1135]

In none of the pertinent cases considered prior to 1937 was the Supreme Court able to discern the existence of any factual situation amounting to double jeopardy, and accordingly it was never confronted with the necessity of determining whether the guarantee that no person be put twice in jeopardy of life or limb, expressed in the Fifth Amendment as a limitation against the Federal Government, had been absorbed in the due process clause of the Fourteenth Amendment. Thus, in Dreyer *v.* Illinois,[975] after declaring that a retrial after discharge of a hung jury did not subject a defendant to double jeopardy, the Court concluded as follows: If "* * * what was said in United States *v.* Perez [(9 Wheat. 579 (1824)) embracing a similar set of facts], * * * is adverse to the contention of the accused that he was put twice in jeopardy," then "we need not now express an opinion" as to whether the Fourteenth Amendment embraces the guarantee against double jeopardy. Similarly, in Murphy *v.* Massachusetts[976] and Shoener *v.* Pennsylvania[977] the Court held that where the original conviction of the prisoner was, on appeal, construed by the State tribunal to be legally defective and therefore a nullity, a subsequent trial, conviction, and sentence of the accused deprived him of no constitutional right, notwithstanding the fact that under the invalidated original conviction, the defendant had spent time in prison. In both instances the Court found it unnecessary to discuss "any question of a federal nature." With like dispatch, "the propriety of inflicting severer punishment upon old offenders" was sustained on the ground that they were not being "punished * * * [a] second time for the earlier offense, but [that] the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted."[978]

In Palko *v.* Connecticut,[979] however, the Court appeared to have been presented with issues, the disposition of which would preclude further avoidance of a decision as to whether the double jeopardy provision of the Fifth Amendment had become operable as a restraint upon the States by reason of its incorporation into the due process clause of the Fourteenth Amendment. By the terms of the Connecticut statute at issue, the State was privileged to appeal any question of law arising out of a criminal prosecution, and did appeal a conviction of second degree murder and sentence to life imprisonment of one Palko, who had been charged with first degree murder. Obtaining a reversal, the State prosecuted Palko a second time and won a conviction of first degree murder and sentence to death. In response to the petitioner's contentions that a retrial under one indictment would subject him to double jeopardy in violation of the Fifth Amendment, if the prosecution were one on behalf of the United States and "that whatever is forbidden by the Fifth Amendment is forbidden by the Fourteenth also,"[980] eight Justices[981] replied that the State statute did not subject him to double jeopardy "so acute and shocking that our polity will not endure it"; nor did "it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political' institutions.'" Consistently with past behavior, the Court thus refused to assert that the defendant had been subjected to treatment of the type prohibited by the double jeopardy clause of the Fifth Amendment; nor did it, on the other hand, repudiate the possibility of situations in which the Fourteenth Amendment would prevent the States from inflicting double jeopardy. Whether a State is prohibited by the latter amendment, after a trial free from error, from trying the accused over again or from wearing out the accused "by a multitude of cases with accumulated trials" were questions which the Court reserved for future disposition. Subsequently, in Louisiana ex rel. Francis *v.* Resweber,[982] a majority of the Court assumed, "but without so deciding, that violation of the principles of the Fifth Amendment * * *, as to double jeopardy * * *, would be violative of the due process clause of the Fourteenth Amendment," and then concluded that the Palko case was decisive, there being "no difference from a constitutional point of view between a new trial for error of law at the instance of the State that results in a death sentence instead of imprisonment for life and an execution" by electrocution that follows after "an accidental failure in equipment had rendered a previous attempt at execution ineffectual." [Pg 1136]

Rights of Prisoners [Pg 1137]

Access to the Courts.—A State prison regulation requiring that all legal papers sought to be filed in court by inmates must first be submitted to the institution for approval and which was applied so as to obstruct efforts of a prisoner to petition a federal court for a writ of *habeas corpus* is void. Whether a petition for such writ is properly drawn and what allegations it must contain are

questions which a federal court alone determines.[983] Equally subject to condemnation is the practice of the warden of a State penitentiary who denied prisoners access to the courts unless they procured counsel to represent them.[984]

Appeals; Corrective Process.—Rehearing, new trials, and appeals are not considered to be essential to due process; and a State is forbidden by no provision of the Constitution from vesting in one tribunal the final determination of legal questions. Consequently, a review by an appellate court of a final judgment in a criminal case, irrespective of the gravity of the offense, is wholly within the discretion of the State to allow or not to allow;[985] and, if granted, may be accorded by the State upon such terms as in its wisdom may be deemed proper.[986] "Wide discretion must be left to the States for the manner of adjudicating a claim that a conviction is unconstitutional; * * * and so long as the rights under the * * * Constitution may be pursued, it is for a State and not for * * * [the Supreme] Court [of the United States] to define the mode by which they may be vindicated. * * * A State may decide whether to have direct appeals * * *, and if so under what circumstances * * * may provide that the protection of [constitutional] rights * * * be sought [Pg 1138] through the writ of *habeas corpus* or *coram nobis*, [or] * * * may afford remedy by a simple motion brought either in the Court of original conviction or at the place of detention."[987]

However, if the tribunal of first instance fails to accord due process such as occurs when the Court in which a conviction is obtained is dominated by a mob, the State must supply corrective process. Moreover, when such process is made available, the corrective proceedings in the reviewing or appellate tribunal being no less a part of the process of law under which a defendant is held in custody, become subject to scrutiny on the occasion of any determination of an alleged unconstitutional deprivation of life or liberty.[988] Such examination may lead unavoidably to substantial federal intervention in State judicial proceedings, and sensitive, no doubt, to the propriety thereof,[989] the Supreme Court, almost until Brown *v.* Mississippi,[990] decided in 1936, manifested an unusual reluctance to indulge in an adverse appraisal of the adequacy of a State's corrective process.

Prior to the latter date, the Court was content to assume as it did in Frank *v.* Mangum,[991] decided in 1915, that inasmuch as the proceedings in the State appellate court formally appeared to be sufficient to correct errors committed by a trial court alleged to have been intimidated by a mob, the conclusion by that appellate court that the trial court's sentence of execution should be affirmed was ample assurance that life would not be forfeited without due process of law. Apparently in observance of a principle of comity, whereunder a State appellate court's holding, though acknowledged as not binding, was deemed entitled to utmost respect, the Court persisted in its refusal to make an independent examination of allegations of a denial of due process. Eight years later, in Moore *v.* Dempsey,[992] a case involving similar allegations of mob domination, the Court, on this occasion speaking through Justice Holmes who had dissented in the preceding decision, ordered the federal district court, in which the defendants had petitioned for a writ of *habeas corpus* and which had sustained the State of Arkansas's demurrer thereto, to make an [Pg 1139] independent investigation of the facts, notwithstanding that the Arkansas appellate court had ruled that, in view of the legally sufficient evidence on which the verdict was based and the competent counsel defending the accused, the allegations of mob domination did not suffice to void the trial.

Indubitably, Moore *v.* Dempsey marked the abandonment of the Supreme Court's deference, founded upon considerations of comity, to decisions of State appellate tribunals on issues of constitutionality and the proclamation of its intention no longer to treat as virtually conclusive pronouncements by the latter that proceedings in a trial court were fair. However, the enduring character of this precedent was depreciated by the Court's insistence that Moore *v.* Dempsey was decided consistently[993] with Frank *v.* Mangum; and it was not until the later holding in Brown *v.* Mississippi in 1936 and the numerous decisions rendered conformably thereto in the decade following that all uncertainty was dispelled as to the Supreme Court's willingness to engage in its own independent examination of the constitutional adequacy of trial court proceedings.

DUE PROCESS: MISCELLANEOUS

Appeals

In every case a point is reached where litigation must cease; and what that point is can best be determined by the State legislature. The power to render a final judgment must be lodged somewhere; and there is no provision in the Federal Constitution which forbids a State from granting to a tribunal, whether called a court or an administrative board, the final determination of a legal question. Neither in administrative nor judicial proceedings does the due process clause require that the participants be entitled as of right to rehearings, new trials, or appeals.[994]

Federal Review of State Procedure [Pg 1140]

The Fourteenth Amendment does not impair the authority of the States to determine finally, according to their settled usages and established modes of procedure, issues which do not involve any right secured by the Constitution, an act of Congress, or a treaty. As long as a local tribunal acts in consonance with the Constitution, laws and procedure of its own State and as

long as said Constitution and laws are so interpreted as not to violate due process, it is only in exceptional circumstances that the Supreme Court would feel justified in intervening. Neither by intention nor by result has the Fourteenth Amendment transformed the Supreme Court into a court of general review to which questions of general justice or equitable consideration arising out of the taking of property may be brought for final determination.[995]

Insofar as mere irregularities or errors in matters of practice under State procedure do not affect constitutional right,[996] they are matters solely for consideration by the appropriate State tribunal.[997] The Constitution does not guarantee that the decisions of State courts shall be free from error;[998] nor does the due process clause give the Supreme Court jurisdiction to review mere mistakes of law concerning nonfederal matters alleged to have been committed by a State court.[999] Accordingly, when statutes authorizing the form of the indictment used are not obviously violative of fundamental constitutional principles, any question as to the sufficiency of the indictment employed is for a State court to determine.[1000] Likewise, the failure of a State to establish a county appellate court as required by the State constitution cannot support any appeal founded upon a denial of due process.[1001] Moreover, if a State court errs in deciding what the common law is, without, however, denying any constitutional right, the litigant adversely affected is not deprived of any liberty or property without due process of law.[1002] Also, whenever a wrong judgment is rendered, property is taken when it should not have been; yet whatever the ground may be, if the mistake is not so gross as to be impossible in a rational administration of justice, it is no more than the imperfection of man, not a denial of constitutional rights.[1003] In conclusion, the decision of a State court upon a question of local law, however wrong, is not an infraction of the Fourteenth Amendment merely because it is wrong. It is not for the Supreme Court to determine whether there has been an erroneous construction of a State statute or the common law; nor does the Constitution impose any impediment to the correction or [Pg 1141] modification by a State court of erroneous or older constructions of local law embraced in previous decisions.[1004]

Equal Protection of the Laws

DEFINITIONS OF TERMS

What Constitutes State Action

The inhibition against denial of equal protection of the laws has exclusive reference to State action. It means that no agency of the State, legislative, executive or judicial,[1005] no instrumentality of the State, and no person, officer or agent exerting the power of the State shall deny equal protection to any person within the jurisdiction of the State. The clause prohibits "discriminating and partial legislation * * * in favor of particular persons as against others in like condition."[1006] But it also has reference to the way the law is administered. "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."[1007] This was said in a case where a Chinese subject had been convicted of operating a laundry in violation of a municipal ordinance which made it unlawful to engage in such business (except in a building constructed of brick or stone) without the consent of the board of supervisors. Permission had been withheld from petitioner and 200 other Chinese subjects but had been granted to 80 others to carry on the same business under similar conditions. This discrimination solely on the basis of nationality was held illegal. For an unlawful administration of a valid statute to constitute a violation of constitutional rights, purposeful discrimination must be shown. An erroneous performance of a statutory duty, although a violation of the statute, is not without more a denial of equal protection of the laws.[1008] This clause is also violated by the withholding of equal access to the courts, [1009] or by inequality of treatment in the courts.[1010] In Shelley *v.* Kraemer[1011] the use of [Pg 1142] judicial power to enforce private agreements of a discriminatory character was held unconstitutional. Holding that restrictive covenants prohibiting the sale of homes to Negroes could not be enforced in the courts, Chief Justice Vinson said: "These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing."[1012] The action of the curators of a state university in refusing admission to an applicant on account of race is regarded as State action.[1013] A State cannot avoid the impact of the clause by the delegation of responsibility to a private body. After a period of vacillation, the Supreme Court has determined that the action of a political party in excluding Negroes from membership is unlawful when such membership is an essential qualification for voting in a primary conducted pursuant to State law.[1014]

"Persons"

In the case in which it was first called upon to interpret this clause the Court expressed doubt 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." [1015] That view was soon abandoned. In 1877 it took jurisdiction of a series of cases, popularly known as the Granger cases, in which railroad corporations sought protection under the due process and equal protection clauses.[1016] Although every case was decided against the corporations on its merits, there was no expression of any doubt that the corporations were entitled to invoke the protection of the amendment. Nine years later the issue was settled definitely by an announcement from the bench by Chief Justice Waite that the Court would not [Pg 1143] hear argument on the question whether the equal protection clause applies to corporations, adding: "We are all of opinion that it does."[1017] At the same term the Court gave the broadest possible meaning to the word "person"; it held that: "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; * * *"[1018] The only qualification of the meaning of "person" is that introduced by subsequent decisions holding that a municipal corporation cannot invoke the amendment against its State.[1019]

"Within Its Jurisdiction"

It is persons "within its jurisdiction" that are entitled to equal protection from a State. Largely because article IV, section 2, has from the beginning entitled "Citizens of each State" to the "Privileges and Immunities of Citizens in the several States," the Court has never construed the phrase, "within its jurisdiction," in relation to natural persons.[1020] The cases interpretive of this expression consequently all concern corporations. In 1898, the Court laid down the rule that a foreign corporation not doing business in a State under conditions that subjected it to process issuing from the courts of the State at the instance of suitors was not "within the jurisdiction," and could not complain of the preference granted resident creditors in the distribution of the assets of an insolvent corporation.[1021] That principle was subsequently qualified, over the dissent of Justices Brandeis and Holmes, by a holding that a foreign corporation which sued in a court of a State in which it was not licensed to do business to recover possession of property wrongfully taken from it in another State was "within the jurisdiction" and could not be subjected to unequal burdens in the maintenance of the suit.[1022] The test of amenability to service of process within the State was ignored in a recent case dealing with discriminatory assessment of property belonging to a nonresident individual. In holding that a federal court had jurisdiction to [Pg 1144] entertain a suit for a declaratory judgment to invalidate the tax, the Supreme Court specifically mentioned the equal protection clause as the source of the federal right, but took no account of the plaintiff's status as a nonresident, beyond a passing reference to the existence of diversity of citizenship.[1023] When a State has admitted a foreign corporation to do business within its borders, that corporation is entitled to equal protection of the laws, but not necessarily to identical treatment with domestic corporations.[1024] A foreign corporation licensed to do business within a State upon payment of an annual license tax is subject to the power of the State to change at any time the conditions of admission for the future. If it fails to pay an increased license tax as a prerequisite to doing business, it is not "within the jurisdiction" and unequal burdens may be laid upon it as compared with other foreign corporations.[1025]

"Equal Protection of the Laws"

Equal protection of the laws means the protection of equal laws.[1026] It forbids all invidious discrimination but does not require identical treatment for all persons without recognition of differences in relevant circumstances. It requires "that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."[1027] The Amendment was not "designed to interfere with the power of the State, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity * * * Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to [Pg 1145] promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions." [1028] The due process and equal protection clauses overlap but the spheres of protection they offer are not coterminous. The due process clause "tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty, and property,

which the Congress or the legislature may not withhold. * * * The guaranty [of equal protection] was aimed at undue favor and individual or class privilege, on the other hand, and at hostile discrimination or the oppression of inequality, on the other."[1029]

Legislative Classifications

Although the equal protection clause requires laws of like application to all similarly situated, the legislature is allowed wide discretion in the selection of classes.[1030] Classification will not render a State police statute unconstitutional so long as it has a reasonable basis;[1031] its validity does not depend on scientific or marked differences in things or persons or in their relations. It suffices if it is practical.[1032] While a State legislature may not arbitrarily select certain individuals for the operation of its statutes, a selection is obnoxious to the equal protection clause only if it is clearly and actually arbitrary and not merely possibly so.[1033] A substantial difference, in point of harmful results, between two methods of operation, justifies a classification and the burden is on the attacking party to prove it unreasonable.[1034] There is a strong presumption that discriminations in State legislation are based on adequate grounds.[1035] Every state of facts sufficient to sustain a classification which can reasonably be conceived of as having existed when the law was adopted will be assumed.[1036]

There is no doctrinaire requirement that legislation should be couched in all-embracing terms.[1037] A police statute may be confined to the occasion for its existence.[1038] The equal protection clause does not mean that all occupations that are called by the same name must be treated in the same way.[1039] The legislature is free to recognize degrees of harm; a law which hits the evil where it is most felt will not be overthrown because there are other instances to which it might have been applied.[1040] The State may do what it can to prevent what is deemed an evil and stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rules laid down were made mathematically exact.[1041] Exceptions of specified classes will not render the law unconstitutional unless there is no fair reason for the law that would not equally require its extension to the excepted classes.[1042] Incidental individual inequality does not violate the Fourteenth Amendment.[1043] One who is not discriminated against cannot attack a statute because it does not go further; and if what it commands of one it commands of all others in the same class, that person cannot complain of matter which the statute does not cover.[1044]

[Pg 1146]

TAXATION

At the outset, the Court did not regard the equal protection clause as having any bearing on taxation.[1045] Before long, however, it took jurisdiction of cases assailing specific tax laws under this provision.[1046] In 1890 it conceded cautiously that "clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, *might* be obnoxious to the constitutional prohibition."[1047] In succeeding years the clause has been invoked but sparingly to invalidate State levies. In the field of property taxation, inequality has been condemned only in two classes of cases: (1) intentional discrimination in assessments; and (2) discrimination against foreign corporations. In addition, there are a handful of cases invalidating, because of inequality, State laws imposing income, gross receipts, sales and license taxes.

Classifications for the Purpose of Taxation

[Pg 1147]

The power of the State to classify for purposes of taxation is "of wide range and flexibility."[1048] The Constitution does not prevent it "from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature, * * *"[1049] A State may adjust its taxing system in such a way as to favor certain industries or forms of industry,[1050] and may tax different types of taxpayers differently, despite the fact that they compete.[1051] It does not follow that because "some degree of inequality from the nature of things must be permitted, gross inequality must also be allowed."[1052] Classification may not be arbitrary; it must be based on a real and substantial difference,[1053] but the difference need not be great or conspicuous;[1054] but there must be no discrimination in favor of one as against another of the same class.[1055] Also, discriminations of an unusual character are scrutinized with especial care.[1056] A gross sales tax graduated at increasing rates with the volume of sales,[1057] a heavier license tax on each unit in a chain of stores where the owner has stores located in more than one county,[1058] and a gross receipts tax levied on corporations operating taxicabs, but not on individuals,[1059] have been held to be repugnant to

the equal protection clause. But it is not the function of the Court to consider the propriety or justness of the tax, to seek for the motives and criticize the public policy which prompted the adoption of the statute.[1060] If the evident intent and general operation of the tax legislation is to adjust the burden with a fair and reasonable degree of equality, the constitutional requirement is satisfied.[1061] One not within the class claimed to be discriminated against cannot raise the question of constitutionality of a statute on the ground that it denies equal protection of the law.[1062] If a tax applies to a class which may be separately taxed, those within the class may not [Pg 1148] complain because the class might have been more aptly defined, nor because others, not of the class, are taxed improperly.[1063]

Foreign Corporations

[Pg 1149]

The equal protection clause does not require identical taxes upon all foreign and domestic corporations in every case.[1064] In 1886, a Pennsylvania corporation previously licensed to do business in New York challenged an increased annual license tax imposed by that State in retaliation for a like tax levied by Pennsylvania against New York corporations. This tax was held valid on the ground that the State, having power to exclude entirely, could change the conditions of admission for the future, and could demand the payment of a new or further tax, as a license fee.[1065] Later cases whittled down this rule considerably. The Court decided that "after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind,"[1066] and that where it has acquired property of a fixed and permanent nature in a State, it cannot be subjected to a more onerous tax for the privilege of doing business than domestic corporations.[1067] A State statute taxing foreign corporations writing fire, marine, inland navigation and casualty insurance on net receipts, including receipts from casualty business was held invalid under the equal protection clause where foreign companies writing only casualty insurance were not subject to a similar tax.[1068] Recently, the doctrine of Fire [Pg 1150] Asso. of Philadelphia *v.* New York was revived to sustain an increased tax on gross premiums which was exacted as an annual license fee from foreign but not from domestic corporations.[1069] Even though the right of a foreign corporation to do business in a State rests on a license, yet the equal protection clause is held to insure it equality of treatment, at least so far as *ad valorem* taxation is concerned.[1070]

Income Taxes

A State law which taxes the entire income, including that derived without the State, of domestic corporations which do business in the State, while exempting entirely the income received outside the State by domestic corporations which do no local business, is arbitrary and invalid.[1071] In taxing the income of a nonresident, there is no denial of equal protection in limiting the deduction of losses to those sustained within the State, although residents are permitted to deduct all losses, wherever incurred.[1072] A retroactive statute imposing a graduated tax at rates different from those in the general income tax law, on dividends received in a prior year which were deductible from gross income under the law in effect when they were received, is not obnoxious to the equal protection clause.[1073]

Inheritance Taxes

In inheritance taxation, there is no denial of equal protection in prescribing different treatment for lineal relations, collateral kindred and strangers of the blood, or in increasing the proportionate burden of the tax progressively as the amount of the benefit increases.[1074] A tax on life estates where the remainder passes to lineal heirs is valid despite the exemption of life estates where the remainder passes to collateral heirs;[1075] there is no arbitrary classification in taxing the transmission of property to a brother or sister, while exempting that to a son-in-law or a daughter-in-law.[1076] Vested and contingent remainders may be treated differently.[1077] The exemption of property bequeathed to charitable or educational institutions may be limited to those within the State.[1078] In computing the tax collectible from a nonresident decedent's property within the State, a State may apply the pertinent rates to the whole estate wherever [Pg 1151] located, and take that proportion thereof which the property within the State bears to the total; the fact that a greater tax may result than would be assessed on an equal amount of property if owned by a resident,[1079] does not invalidate the result.

Motor Vehicle Taxes

In demanding compensation for the use of highways, a State may exempt certain types of vehicles, according to the purpose for which they are used, from a mileage tax on carriers.[1080] A State maintenance tax act, which taxes vehicle property carriers for hire at greater rates than similar vehicles carrying property not for hire is reasonable, since the use of roads by one hauling not for hire generally is limited to transportation of his own property as an incident to his occupation and is substantially less than that of one engaged in business as a common carrier.[1081] A property tax on motor vehicles used in operating a stage line that makes constant and unusual use of the highways may be measured by gross receipts and be assessed at a higher rate

than taxes on property not so employed.[1082] Common motor carriers of freight operating over regular routes between fixed termini may be taxed at higher rates than other carriers, common and private.[1083] A fee for the privilege of transporting motor vehicles on their own wheels over the highways of the State for purpose of sale, does not violate the equal protection clause as applied to cars moving in caravans.[1084] The exemption from a tax for a permit to bring cars into the State in caravans of cars moved for sale between zones in the State is not an unconstitutional discrimination where it appears that the traffic subject to the tax places a much more serious burden on the highways than that which is exempt.[1085] The exemption of small vehicles from graduated registration fees on carriers for hire,[1086] and of persons whose vehicles haul passengers and farm products between points not having railroad facilities or hauling farm and dairy products for a producer from a vehicle license tax on private motor carriers, has been upheld.[1087]

Poll Taxes

[Pg 1152]

A poll tax statute exempting women, the aged and minors, does not make an arbitrary classification[1088].

Property Taxes

The State's latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemption on the grounds of policy,[1089] whether the exemption results from the terms of the statute or the conduct of a State official under it.[1090] A provision for the forfeiture of land for nonpayment of taxes is not invalid because the conditions to which it applies exist only in a part of the State.[1091] Intentional and systematic undervaluation by State officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property;[1092] but mere errors in judgment resulting in unequal overvaluation or undervaluation, not intentional or systematic, will not support a claim of discrimination.[1093] Differences in the basis of assessment are not invalid where the person or property affected might properly be placed in a separate class for purposes of taxation.[1094] An owner aggrieved by discrimination is entitled to have his assessment reduced to the common level.[1095] Equal protection is denied if a State does not itself remove the discrimination; it cannot impose upon the person against whom the discrimination is directed the burden of seeking an upward revision of the assessment of other members of the class.[1096] A corporation whose valuations were accepted by the assessing commission cannot complain that it was taxed disproportionately, as compared with others, if the commission did not act fraudulently.[1097]

Special Assessment

A special assessment is not discriminatory because apportioned on an *ad valorem* basis, nor does its validity depend upon the receipt of some special benefit as distinguished from the general benefit to the community.[1098] Railroad property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of [Pg 1153] individual owners as necessarily to produce manifest inequality.[1099] A special highway assessment against railroads based on real property, rolling stock and other personal property is unjustly discriminatory when other assessments for the same improvement are based on real property alone.[1100] A law requiring the franchise of a railroad to be considered in valuing its property for apportionment of a special assessment, is not invalid where the franchises were not added as a separate personal property value to the assessment of the real property.[1101] In taxing railroads within a levee district on a mileage basis, it is not necessarily arbitrary to fix a lower rate per mile for those having less than 25 miles of main line within the district than for those having more.[1102]

POLICE POWER

Classification

Justice Holmes once called the equal protection clause the "usual last refuge of constitutional arguments."[1103] When State action is attacked under the due process clause, the assailant usually charges also that he is denied the equal protection of the laws. Except where discrimination on the basis of race or nationality is shown, few police regulations have been found unconstitutional on this ground.[1104] The Court has condemned a statute which forbade stock insurance companies to act through agents who were their salaried employees, but permitted mutual companies to operate in this manner.[1105] A law which required private motor vehicle carriers to obtain certificates of convenience and necessity and to furnish security for the protection of the public was held invalid by reason of the exemption of carriers of fish, farm and dairy products.[1106] Discrimination among milk dealers without well advertised trade names, giving those who entered business before a specified date the benefit of a price differential

denied to those who commenced operations thereafter, is arbitrary and unlawful.[1107] A statute providing for the sterilization of defectives in State institutions was sustained;[1108] but a similar act applicable to triple offenders was held void.[1109]

Administrative Discretion [Pg 1157]

A municipal ordinance which vests in supervisory authorities a naked and arbitrary power to grant or withhold consent to the operation of laundries in wooden buildings, without consideration of the circumstances of individual cases, constitutes a denial of equal protection of the law when consent is withheld from certain persons solely on the basis of nationality.[1110] But a city council may reserve to itself the power to make exceptions from a ban on the operation of a dairy within the city,[1111] or from building line restrictions.[1112] Written permission of the mayor or president of the city council may be required before any person shall move a building on a street.[1113] The Mayor may be empowered to determine whether an applicant has a good character and reputation and is a suitable person to receive a license for the sale of cigarettes.[1114] In a recent case[1115] the Court held that the unfettered discretion of officer river pilots to select their apprentices, which was almost invariably exercised in favor of their relatives and friends, was not a denial of equal protection to persons not selected despite the fact that such apprenticeship was requisite for appointment as a pilot.

Alien Laws

The Fourteenth Amendment prohibits purely arbitrary discrimination against aliens.[1116] Where alien race and allegiance bear a reasonable relation to a legitimate object of legislation, it may be made the basis of classification. Thus, legislation has been upheld under which aliens were forbidden to conduct pool rooms[1117] or to take game or possess shotguns.[1118] A discrimination between citizens and aliens in the matter of employment on public works is not unconstitutional.[1119] A State cannot, however, deny to aliens the right to earn a living in ordinary occupations. Consequently, a statute requiring that employers of more than five workers employ not less than eighty percent qualified electors or natural born citizens denies equal protection of the law.[1120] Likewise a State law forbidding the issuance of commercial fishing licenses to aliens ineligible for citizenship has been held void.[1121] State laws forbidding aliens to own real estate, have been upheld in the past.[1122] A less sympathetic attitude toward such legislation was indicated in Oyama *v.* California, in 1948.[1123] There the State of California sought to escheat land owned by an American-born son of a Japanese father under a provision of its Alien Land Law which made payment by an alien of the consideration for a transfer of land to a third person *prima facie* evidence of intent to evade the statute. The Court held that the burden of proof imposed upon the son, an American citizen, by reason of his parent's country of origin, was an unlawful [Pg 1158] discrimination, but it did not pass upon the constitutionality of the Alien Land Law itself. In concurring opinions four Justices took the position that the law was incompatible with the Fourteenth Amendment.[1124]

Labor Relations

Objections to labor legislation on the ground that the limitation of particular regulations to specified industries was obnoxious to the equal protection clause, have been consistently overruled. Statutes limiting hours of labor for employees in mines, smelters,[1125] mills, factories,[1126] or on public works[1127] have been sustained. So also was a statute forbidding persons engaged in mining and manufacturing to issue orders for payment of labor unless redeemable at face value in cash.[1128] The exemption of mines employing less than ten persons from a law pertaining to measurement of coal to determine a miner's wages is not unreasonable.[1129] All corporations,[1130] or public service corporations,[1131] may be required to issue to employees who leave their service letters stating the nature of the service and the cause of leaving even though other employers are not.

Industries may be classified in a workmen's compensation act according to the respective hazards of each;[1132] the exemption of farm laborers and domestic servants does not render such an act invalid.[1133] A statute providing that no person shall be denied opportunity for employment because he is not a member of a union does not offend the equal protection clause.[1134]

Women, or particular classes of women, may be singled out for special treatment, in the exercise [Pg 1159] of the State's protective power, without violation of the Fourteenth Amendment. Classification may be based on differences either in their physical characteristics or in the social conditions which surround their employment. Restrictions on conditions of employment in particular occupations are not invalid because the law might have been made broader.[1135] One of the earliest pieces of social legislation to be sustained was a ten-hour law for women employed in laundries.[1136] A law limiting hours of labor for women in hotels is not rendered unconstitutional by reason of the exemption of certain railroad restaurants.[1137] Night work by women in restaurants may be prohibited.[1138] Reversing earlier decisions, the Supreme Court upheld a

minimum wage law for women in 1937, saying that their unequal bargaining position justified a law applicable only to them.[1139]

Women may be forbidden to engage in an occupation where their employment may create special moral and social problems. A State statute forbidding women to act as bartenders, but making an exception in favor of wives and daughters of the male owners of liquor establishments was sustained over the objection, which three Justices found persuasive, that the act denied the equal protection of the law to female owners of such establishments.[1140] Said Justice Frankfurter for the majority: "The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic. * * * The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards."[1141]

Monopolies

[Pg 1160]

On the principle that the law may hit the evil where it is most felt, State Antitrust Laws applicable to corporations but not to individuals,[1142] or to vendors of commodities but not to vendors of labor,[1143] have been upheld. Contrary to its earlier view, the Court now holds that an Antitrust Act which exempts agricultural products in the hands of the producer is valid.[1144] Diversity with respect to penalties also has been sustained. Corporations violating the law may be proceeded against by bill in equity, while individuals are indicted and tried.[1145] A provision, superimposed upon the general Antitrust Law, for revocation of the licenses of fire insurance companies which enter into illegal combinations, does not violate the equal protection clause.[1146] A grant of monopoly privileges, if otherwise an appropriate exercise of the police power, is immune to attack under that clause.[1147]

Punishment for Crime

Equality of protection under the law implies that in the administration of criminal justice no person shall be subject to any greater or different punishment than another in similar circumstances.[1148] Comparative gravity of criminal offenses is a matter for the State to determine, and the fact that some offenses are punished with less severity than others does not deny equal protection.[1149] Heavier penalties may be imposed upon habitual criminals for like offenses,[1150] even after a pardon for an earlier offense,[1151] and such persons may be made ineligible for parole.[1152] A State law doubling the sentence on prisoners attempting to escape does not deny equal protection in subjecting prisoners who attempt to escape together to different sentences depending on their original sentences.[1153] Infliction of the death penalty for assaults with intent to kill by life term convicts is not unconstitutional because not applicable to convicts serving lesser terms.[1154] The Fourteenth Amendment does not preclude the commitment of persons who, by an habitual course of misconduct, have evidenced utter lack of power to control sexual impulses, and are likely to inflict injury.[1155] A statute prohibiting a white person and a Negro from living together in adultery or fornication is not invalid because it prescribes penalties more severe than those to which the parties would be subject were they both of the same race.[1156] The equal protection clause does not prevent the execution of a prisoner after the accidental failure of the first attempt.[1157] It does, however, render invalid a statute requiring sterilization of persons convicted of various offenses, including larceny by fraud, but exempting embezzlers.[1158]

[Pg 1161]

Segregation

Laws designed to segregate persons of different races in the location of their homes, in the public schools and on public conveyances have been a prolific source of litigation under the equal protection clause. An ordinance intended to segregate the homes of white and colored races is invalid.[1159] Private covenants forbidding the transfer of real property to persons of a certain race or color have been held lawful,[1160] but the enforcement of such agreements by a State through its courts would constitute a denial of equal protection of the laws.[1161] A statute providing for separate but equal accommodations on railroads for white and colored persons has been held not to deny equal protection of the law,[1162] but a separate coach law which permits carriers to provide sleeping and dining cars only for white persons, is invalid notwithstanding recognition by the legislature that there would be little demand for them by colored persons.[1163] Fifty years ago the action of a local board of education in suspending temporarily for economic reasons a high school for colored children was held not to be a sufficient reason for restraining the board from maintaining an existing high school for white children, when the evidence did not indicate that the board had proceeded in bad faith or had acted in hostility to the colored race.[1164] A child of Chinese ancestry, who is a citizen of the United States, is not denied equal protection of law by being assigned to a public school provided for colored children, when equal facilities for education are offered to both races.[1165]

Although the principle that separate but equal facilities satisfy constitutional requirements has not been reversed, the Court in recent years has been inclined to review more critically the facts of cases brought before it to ascertain whether equality has, in fact, been offered. In Missouri *v.* Canada[1166] it held that the State was denying equal protection of the law in failing to provide a legal education within the State for Negroes comparable to that afforded white students. Pursuant to a policy of segregating Negro and white students, the State had established a law school at the State university for white applicants. In lieu of setting up one at its Negro university, it authorized the curators thereof to establish such a school whenever in their opinion it should be necessary and practicable to do so, and pending such development, to arrange and pay for the legal education of the State's Negroes at schools in other States. This was found insufficient; the obligation of the State to afford the protection of equal law can be performed only where its laws operate, that is to say, within its own jurisdiction. It is there that equality of rights must be maintained. In a later case the Court held that the State of Oklahoma was obliged to provide legal education for a qualified Negro applicant as soon as it did for applicants of any other group.[1167] To comply with this mandate a State court entered an order requiring in the alternative the admission of a Negro to the state-maintained law school or non-enrollment of any other applicant until a separate school with equal educational facilities should be provided for Negroes. Over the objection of two Justices the Supreme Court held this order did not depart from its mandate.[1168] After a close examination of the facts, the Court concluded, in Sweatt *v.* Painter,[1169] that the legal education offered in a separate law school for Negroes was inferior to that afforded by the University of Texas Law School and hence that the equal protection clause required that a qualified applicant be admitted to the latter. In McLaurin *v.* Oklahoma State Regents[1170] the Court held that enforced segregation of a Negro student admitted to a State university was invalid because it handicapped him in the pursuit of effective graduate instruction. [Pg 1162]

POLITICAL RIGHTS [Pg 1163]

In conjunction with the Fifteenth Amendment the equal protection clause has played an important role in cases involving various expedients devised to deprive Negro citizens of the right of suffrage. Attempts have also been made, but thus far without success, to invoke this clause against other forms of political inequality. The principal devices employed to prevent voting by Negroes have been grandfather clauses, educational qualifications, registration requirements and restrictions on membership in a political party. Grandfather clauses exempting persons qualified as electors before 1866 and their descendants from requirements applicable to other voters, were held to violate the Fifteenth Amendment.[1171] Educational qualifications which did not on their face discriminate between white and Negro voters were sustained in the absence of a showing that their actual administration was evil.[1172] In 1903 in a suit charging that the registration procedure prescribed by statute was fraudulently designed to prevent Negroes from voting, the Court, in an opinion written by Justice Holmes, refused to order the registration of an allegedly qualified Negro, on the whimsical ground that to do so would make the Court a party to the fraudulent plan.[1173] The opinion was careful to state that "we are not prepared to say that an action at law could not be maintained on the facts alleged in the bill." [Pg 1164] Such an action was brought some years later in Oklahoma under a registration law enacted after its "grandfather" statute had been held unconstitutional. Registration was not necessary for persons who had voted at the previous election under the invalid statute. Other persons were required to register during a twelve day period or be forever disfranchised. A colored citizen who was refused the right to vote in 1934 because of failure to register during the prescribed period in 1916, was held to have a cause of action for damages against the election officials under the Civil Rights Act of 1871. In the opinion of the Court reversing a judgment for the defendants, Justice Frankfurter said:[1174] "The Amendment nullifies sophisticated as well as simple minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race."

As the selection of candidates by primary elections became general, the denial of the right to vote in the primary assumed dominant importance. For many years the Court hesitated to hold that party primaries were elections within the purview of the Constitution. During that period the equal protection clause was relied upon to invalidate discrimination against Negroes. Under the clause, it is necessary to find that inequality is perpetrated by the State.[1175] The Court had no difficulty in holding that a State statute which forbade voting by Negroes in a party primary was obnoxious to the Fourteenth Amendment.[1176] The same conclusion was reached with respect to exclusion by action of a party executive committee pursuant to authority conferred by statute.[1177] But at first it refused to extend this rule to a restriction on membership imposed without statutory authority by the State convention of a party.[1178] The latter case was soon overruled; having, in the meanwhile, decided that a primary is an integral part of the electoral machinery,[1179] the Court ruled in Smith *v.* Allwright,[1180] that a restriction on party membership imposed by a State convention was invalid under the Fifteenth Amendment, where such membership was a prerequisite for voting in the primary.

Failure has attended the few attempts which have been made to strike down other alleged discriminations in election laws or in their administration. Nearly fifty years ago the Court rejected a claim that an act forbidding the registration of a voter until one year after his intent to [Pg 1165]

become a legal voter shall have been recorded was a denial of equal protection.[1181] In Snowden *v.* Hughes,[1182] it held that an alleged erroneous refusal of a State Primary Canvassing Board to certify a person as a successful candidate in a party primary was not, in the absence of a showing of purposeful discrimination, a denial of a constitutional right which would justify a suit for damages against members of the Board. Three recent attacks on inequalities in the effective voting power of persons residing in different geographical areas were likewise unsuccessful. The Court refused, in Colegrove *v.* Green,[1183] to interfere to prevent the election of Representatives in Congress by districts in Illinois, because of unequal apportionment. Two years later, in MacDougall *v.* Green[1184] it held that a State law requiring candidates of a new political party to obtain a minimum number of signatures on their nominating petitions in each of 50 counties did not withhold equal justice from the overwhelming majority of the voters who resided in the 49 most populous counties. Over the dissent of Justices Black and Douglas it affirmed the action of a federal district court in dismissing a complaint challenging the validity of Georgia's county unit election system, under which the votes of residents of the most populous county have on the average but one-tenth the weight of those in other counties.[1185]

PROCEDURE

General Doctrine

The equal protection clause does not exact uniformity of procedure. State legislatures may classify litigation and adopt one type of procedure for one class and a different type for another. The procedure followed in condemnation suits brought by a State need not be the same as in a suit started by a private corporation.[1186] Procedural rules may vary in different geographic subdivisions of the State; the State may be given a larger number of peremptory challenges to jurors in capital cases in cities having more than 100,000 inhabitants than in other areas.[1187] A State may require that disputes on the amount of loss under fire insurance policies be submitted to arbitration.[1188] It may prescribe the evidence which shall be received and the effect which shall be given it; proof of one fact, or of several facts taken collectively, may be made *prima facie* [Pg 1166] evidence of another fact, so long as it is not a mere arbitrary mandate and does not discriminate invidiously between different persons in substantially the same situations.[1189] A plaintiff in a stockholder's derivative suit may be required to give security if he does not own a specified amount of stock; the size of his financial interest may reasonably be considered as some measure of his good faith and responsibility in bringing the suit.[1190]

Access to Courts

The legislature may provide for diversity in the jurisdiction of its several courts, both as to subject matter and finality of decision, if all persons within the territorial limits of the respective jurisdiction have an equal right in like cases to resort to them for redress.[1191] There is no denial of equal protection of the law by reason of the fact that in one district the State is allowed an appeal and in another district it is not.[1192] The legislative discretion to grant or withhold equitable relief in any class of cases must, under the equal protection clause, be so exercised as not to grant equitable relief to one, and to deny it to another under like circumstances and in the same territorial jurisdiction. A State law forbidding injunctions in labor disputes is invalid where injunctive relief is available in other similar controversies.[1193] The action of prison officials in suppressing a prisoner's appeal documents during the statutory period for appeal constitutes a denial of equal protection by refusing him privileges of appeal that were available to others.[1194]

Corporations

A statute permitting suits against domestic corporations to be brought in any county in which the cause of action arose, is not void as denying equal protection.[1195] Neither is a statute applicable only to corporations requiring the production of books and papers upon notice, with punishment for contempt upon neglect or refusal to comply.[1196] Where, however, actions against domestic corporations may be brought only in counties where they may have places of business or where a [Pg 1167] chief officer resides, a statute authorizing action against a foreign corporation in any county is discriminatory and invalid.[1197] So also is a statute, applicable only to foreign corporations, which requires the corporation, as a condition precedent to maintenance of an action, to send its officer into the State, with papers and books bearing on the matter in controversy, for examination before trial, where nonresident individuals, as well as individuals and corporations within the State, were subject to less onerous requirements.[1198]

Expenses of Litigation

A statute which directs that life and health insurance companies who default in payments of their policies shall pay 12 per cent damages, together with reasonable attorney's fees, does not deny the equal protection of the law in failing to impose the same conditions on fire, marine, and inland insurance companies, and on mutual benefit and relief associations.[1199] Costs may be allowed to a person who has been subjected to malicious prosecution, with provision for

commitment of the prosecutor until paid.[1200] Statutes providing for recovery of reasonable attorney's fees in action on small claims against all classes of defendants, individual and corporate,[1201] in mandamus proceedings,[1202] or in actions against railroads for damages caused by fires[1203] have been upheld. But a statute, applicable only to railway corporations, providing for recovery of attorney's fees and costs in actions for certain small claims was found to be repugnant to the equal protection clause.[1204]

Selection of Jury

Exercising the authority conferred by section 5 of the Fourteenth Amendment, Congress has expressly forbidden the exclusion of any citizen from service as a grand or petit juror in any federal or State court, on the ground of race or color.[1205] Jury commissioners are under the duty "not to pursue a course of conduct in the administration of their office which would operate to discriminate in the selection of jurors on racial grounds."[1206] An accused does not, however, have a legal right to a jury composed in whole or in part of members of his own race.[1207] Mere [Pg 1168] inequality in the numbers of persons selected from different races is not conclusive; discrimination is unlawful only if it is purposeful and systematic.[1208] But where it appeared that no Negro had served on a grand or petit jury for thirty years in a county in which 35 per cent of the adult population was colored, the inference of systematic exclusion was not repelled by a showing that few Negroes fulfilled the requirement that a juror must be a qualified elector.[1209]

To what extent, if at all, the equal protection clause prevents the exclusion from jury service of any class of persons on any basis other than race or color is a still unsettled problem of constitutional interpretation. The selection of jurors may be confined to males, to citizens, to qualified electors, to persons within certain ages, or to persons having prescribed educational qualifications.[1210] Certain occupational groups, such as lawyers, preachers, ministers, doctors, dentists, and engineers and firemen of railroad trains may be excluded from jury service.[1211] An issue of even greater consequence is raised by differentiation in the qualifications of persons selected to try different kinds of cases. This was the question on which the Supreme Court divided five to four in Fay *v.* New York[1212] where it upheld a conviction by a "blue ribbon" jury. In that case defendants, officials of certain labor unions, were convicted of extortion, by collecting large sums from contractors for assisting them in avoiding labor troubles. From a "blue ribbon" jury certain categories of persons qualified for ordinary jury duty are excluded; and on this ground defendants claimed that in being tried by such a jury they had been denied "equal protection of the law" and deprived of "due process of law," but especially the former, alleging that such juries had a higher record of conviction than ordinary juries and that their sympathies were "conservative." The Court, speaking by Justice Jackson, answered that "a state is not required to try all offenses to the same forum," but conceded that "a discretion, even if vested in the court, to shunt a defendant before a jury so chosen as greatly to lessen his chances while others accused of a like offense are tried by a jury so drawn as to be more favorable to them, would hardly be 'equal protection of the laws.'"[1213] However, he asserted that the New York statute authorizing "blue ribbon" juries "does not exclude, or authorize the clerk to exclude, any person or class because of race, creed, color or occupation. It imposes no qualification of an economic nature beyond that imposed by the concededly valid general panel statute. Each of the [Pg 1169] grounds of elimination is reasonably and closely related to the juror's suitability for the kind of service the special panel requires or to his fitness to judge the kind of cases for which it is most frequently utilized. Not all of the grounds of elimination would appear relevant to the issues of the present case. But we know of no right of defendants to have a specially constituted panel which would include all persons who might be fitted to hear their particular and unique case." [1214] He held further that defendants had failed to shoulder the necessary burden of proof in support of their allegations of discrimination, and added: "At most, the proof shows lack of proportional representation and there is an utter deficiency of proof that this was the result of a purpose to discriminate against this group as such. The uncontradicted evidence is that no person was excluded because of his occupation or economic status. All were subjected to the same tests of intelligence, citizenship and understanding of English. The state's right to apply these tests is not open to doubt even though they disqualify, especially in the conditions that prevail in New York, a disproportionate number of manual workers. A fair application of literacy, intelligence and other tests would hardly act with proportional equality on all levels of life. The most that the evidence does is to raise, rather than answer, the question whether there was an unlawful disproportionate representation of lower income groups on the special jury."[1215] Then, as to the due process clause, he pointed out that the jury had had a long and varied history in the course of which it has assumed many forms, and that for that matter the Court "* * * has construed it to be inherent in the independent concept of due process that condemnation shall be rendered only after a trial, in which the hearing is a real one, not a sham or pretense. * * * Trial must be held before a tribunal not biased by interest in the event. * * * Undoubtedly a system of exclusions could be so manipulated as to call a jury before which defendants would have so little chance of a decision on the evidence that it would constitute a denial of due process. A verdict on the evidence, however, is all an accused can claim; he is not entitled to a set-up that will give a chance of escape after he is properly proven guilty. Society also has a right to a fair trial. The defendant's right is a neutral jury. He has no constitutional right to friends on the jury."[1216]

[Pg 1170]

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. [Pg 1171]

In General

The effect of this section in relation to Negroes was indicated in Elk *v.* Wilkins.[1217] "Slavery having been abolished, and the persons formerly held as slaves made citizens, this clause fixing the apportionment of representatives has abrogated so much of * * * [Article I, § 2, cl. 3] of the * * * original Constitution as counted only three-fifths of such persons."

"Indians Not Taxed"

Although one authority on the legal status of the American Indian observed that this "* * * phrase [was] never * * * more explicitly defined, but probably * * * [meant] * * * Indians resident on reservations, that is, on land not taxed by the States,"[1218] the United States Attorney General, in 1940, commented as follows upon the difficulty of arriving at any satisfactory construction of these words: "Whether the phrase 'Indians not taxed' refers (1) to Indians not actually paying taxes or only to those who are not subject to taxation and (2) to Indians not taxed or subject to taxation by any taxing authority or only to those not taxed or subject to taxation by the States in which they reside * * * [presents] questions * * * [which have] been discussed in a number of court decisions but the issue has never been squarely raised in any of the decided cases. Some of the cases and some statements appearing in the debates in the Constitutional Convention lend support to the view that since all Indians are now subject to the Federal income-tax laws [Superintendent *v.* Commissioner, 295 U.S. 418 (1935)] there are no longer any Indians not taxed within the meaning of the constitutional phrase. On the other hand, other decided cases and other statements appearing in the debates in the Convention equally support the contrary view. * * *, the answer to * * * [these questions] is not free from doubt."[1219]

As to the latest construction which Congress has given to this phrase in apportioning seats in the House of Representatives, it is pertinent to note that the Apportionment Act of 1929, at last amended in 1941,[1220] excludes "Indians not taxed" from the computation of the total population of each State. However, in reliance on the above-mentioned decision that all Indians are now subject to federal income taxation, the Director of the Census included all Indians in the 1940 tabulation of total population in each State, and Congress took no action to alter the effects which such inclusion had upon the number of seats distributed to the several States.[1221] [Pg 1172]

Right to Vote

The right to vote intended to be protected refers to the right to vote as established by the laws and constitution of the State; subject, however, to the limitation that the Constitution, in article I, section 2, adopts as qualifications for voting for members of Congress those qualifications established by the States for voting for the most numerous branch of their legislatures.

To the latter extent the right to vote for members of Congress has been declared to be fundamentally based upon the Constitution and as never having been intended to be left within the exclusive control of the States.[1222]

Reduction of State's Representation

"Questions relating to the apportionment of representatives among the several States are political in their nature and reside exclusively within the determination of Congress * * *" Consequently, a United States District Court was obliged to dismiss an action for damages against the Virginia Secretary of State for the latter's refusal to certify the plaintiff as candidate for the office of Congressman at large, inasmuch as the plaintiff's case rested on the theory that the apportionment act of Congress and the Redistricting Act of Virginia, by failing to take into account the disenfranchisement of 60% of the voters occasioned by the poll tax, were both invalid, and that Virginia accordingly was entitled to only four instead of nine Congressmen, which four were to be elected at large.[1223] "It is well known that the elective franchise has been limited or denied to citizens in various States of the union in past years, but no serious attempt has been made by Congress to enforce the mandate of the second section of the Fourteenth Amendment, and it is noteworthy that there are no instances in which the courts have attempted

to revise the apportionment of Representatives by Congress."[1224]

[Pg 1173]

DISQUALIFICATION OF OFFICERS

> 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.

In General

The right to remove disabilities imposed by this section was exercised by Congress at different times on behalf of enumerated individuals—notably by act of December 14, 1869 (16 Stat. 607). In 1872, the disabilities were removed, by a blanket act, from all persons "except Senators and Representatives of the Thirty-sixth and Thirty-seventh Congresses, officers in the judicial military, and naval service of the United States, heads of departments, and foreign ministers of the United States" (17 Stat. 142). Twenty-six years later, on June 6, 1898 (30 Stat. 432), Congress enacted briefly that "the disability imposed by section 3 * * * incurred heretofore [prior to June 6, 1898], is hereby removed."[1225]

[Pg 1174]

PUBLIC DEBT, ETC.

> 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.

Although section four "was undoubtedly inspired by the desire to put beyond question the obligations of the Government issued during the Civil War, its language indicates a broader connotation. * * * 'the validity of the public debt' * * * [embraces] whatever concerns the integrity of the public obligations," and applies to government bonds issued after as well as before adoption of the Amendment.[1226]

[Pg 1175]

ENFORCEMENT

> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Scope of the Provision

"* * * until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity: * * * The legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which, by the amendment, they are prohibited from committing or taking."[1227]

Conversely, Congress may enforce the provisions of the amendment whenever they are disregarded by either the legislative, the executive, or the judicial department of the State. The mode of the enforcement is left to its discretion. It may secure the right, that is, enforce its recognition, by removing the case from a State court, in which it is denied, into a federal court where it will be acknowledged.[1228] Similarly, Congress may provide that "no citizen, possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, * * *"[1229] However, the Supreme Court declined to sustain Congress when, under the guise of enforcing the Fourteenth Amendment by appropriate legislation, it enacted a statute which was not limited to take effect only in case a State should abridge the privileges of United States citizens, but

applied no matter how well the State might have performed its duty, and would subject to punishment private individuals who conspired to deprive anyone of the equal protection of the laws.[1230]

Whether its powers of enforcement enable Congress constitutionally to punish State officers who abuse their authority and act in violation of their State's laws is a question on which the Justices only recently have divided. Five Justices ruled in Screws *v.* United States[1231] that section 20 of the Criminal Code[1232] which provides "whoever, under the color of any law, statute, ordinance, * * *, willfully subjects, * * *, any inhabitant of any State, * * * to the deprivation of any rights, * * * protected by the Constitution and laws of the United States, * * *" could be the basis of a prosecution of Screws, a Georgia sheriff, and others, on charges of having, in the course of arresting a Negro, brutally beaten him to death and deprive him of "the right not to be deprived of life without due process of law."[1233] Holding that, "abuse of State power" does not create "immunity to federal power" these five Justices concluded that Ex parte Virginia[1234] and United States *v.* Classic[1235] had rejected for all time the defense that action by state officers in excess of their powers did not constitute state action "under color of law" and therefore was punishable, if at all, only as a crime against the State.[1236] The conviction of Screws was, however, reversed on the ground that the jury should have been instructed to say whether the accused had had the "specific intent" to deprive their victim of his constitutional rights, since in the absence of such a finding § 20 failed for indefiniteness.[1237] But this construction of the word "willfully" appears subsequently to have been abandoned, or at least considerably watered down. In Williams *v.* United States,[1238] decided in April 1951, the Court ruled, by a bare majority, that a conviction under § 20 was not subject to objection on the ground of the vagueness of the statute where the indictment made it clear that the constitutional right violated by the defendant was immunity from the use of force and violence to obtain a confession, and this meaning was also made clear by the trial judge's charge to the jury.[1239] To the same effect is the later case of Koehler *v.* United States[1240] in which the Court denied certiorari in a case closely resembling that of Screws, although the trial judge, while charging the jury that it must find specific intent, nevertheless went on to say:"'The color of the act determines the complexion of the intent. The intent to injure or defraud is presumed when the unlawful act, which results in loss or injury, is proved to have been knowingly committed. It is a well settled rule, which the law applies to both criminal and civil cases, that the intent is presumed and inferred from the result of the action.'" [1241]

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Notes

[1] As to the other categories, see Art. I, § 8, cl. 4, Naturalization (*see* pp. 254-256).

[2] Scott *v.* Sandford, 19 How. 393 (1897).

[3] Ibid. 404-406, 417-418, 419-420.

[4] By the Civil Rights Act of April 9, 1866 (14 Stat. 27), enacted two years prior to the Fourteenth Amendment, "All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; * * *"

[5] 169 U.S. 649 (1898).—Thus, a person who was born in the United States of Swedish parents then naturalized here did not lose her citizenship and was therefore not subject to deportation because of her removal to Sweden during her minority, it appearing that her parents resumed their citizenship in that country, but that she returned here on attaining majority with intention to retain and maintain her citizenship.—Perkins *v.* Elg, 307 U.S. 325 (1939).

[6] 169 U.S. 682.

[7] In re Look Tin Sing, 21 F. 905 (1884).

[8] Lam Mow *v.* Nagle, 24 F. (2d) 316 (1928).

[9] United States *v.* Gordon, Fed. Cas. No. 15,231 (1861). The term, United States, is defined in the recently enacted Immigration and Nationality Act as follows: "The term, 'United States', except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States." 66 Stat. 165, § 101 (38). Whether the expression is used in the same sense in Amendment XIV may be questionable.

[10] Slaughter-House Cases, 16 Wall. 36, 74 (1873).

[11] Arver *v.* United States (Selective Draft Law Cases), 245 U.S. 366, 377, 388-389 (1918).

[12] Insurance Co. *v.* New Orleans, Fed. Cas. No. 7,052 (1870).—Not being citizens of the United States, corporations accordingly have been declared unable "to claim the protection of that clause of the Fourteenth Amendment

which secures the privileges and immunities of citizens of the United States against abridgment or impairment by the law of a State."—Orient Ins. Co. *v.* Daggs, 172 U.S. 557, 561 (1899). This conclusion was in harmony with the earlier holding in Paul *v.* Virginia, 8 Wall. 168 (1869) to the effect that corporations were not within the scope of the privileges and immunities clause of state citizenship set out in article 4, section 2. *See also* Selover, Bates & Co. *v.* Walsh, 226 U.S. 112, 126 (1912); Berea College *v.* Kentucky, 211 U.S. 45 (1908); Liberty Warehouse Co. *v.* Burley Tobacco Growers' Co-op. Marketing Asso., 276 U.S. 71, 89 (1928); Grosjean *v.* American Press Co., 297 U.S. 233, 244 (1936).

[13] 16 Wall. 36, 71, 77-79 (1873).

[14] Ibid. 78-79.

[15] Ibid. 79, citing Crandall *v.* Nevada, 6 Wall. 35 (1868). Decided before ratification of the Fourteenth Amendment.

[16] 211 U.S. 78, 97.

[17] Crandall *v.* Nevada, 6 Wall. 35 (1868). This case has been cited as supporting the claim that "the right to pass freely from State to State" is "among the rights and privileges of National citizenship" (Twining *v.* New Jersey, 211 U.S. 78, 97 (1908)); but it was pointed out in United States *v.* Wheeler, 254 U.S. 281, 299 (1920), that the statute involved in the Crandall Case was held to burden directly the performance by the United States of its governmental functions. In Williams *v.* Fears, 179 U.S. 270, 274 (1900), a law taxing the business of hiring persons to labor outside the State was upheld on the ground that it affected freedom of egress from the State "only incidentally and remotely."

[18] United States *v.* Cruikshank, 92 U.S. 542 (1876).

[19] Ex parte Yarbrough, 110 U.S. 651 (1884); Wiley *v.* Sinkler, 179 U.S. 58 (1900).

[20] United States *v.* Waddell, 112 U.S. 76 (1884).

[21] Logan *v.* United States, 144 U.S. 263 (1892).

[22] Re Quarles, 158 U.S. 532 (1895).

[23] Crutcher *v.* Kentucky, 141 U.S. 47, 57 (1891).

[24] 307 U.S. 496.

[25] Concurring in the result, Justice Stone contended that the case should have been disposed of by reliance upon the due process, rather than the privileges and immunities, clause, inasmuch as the record disclosed that the complainants had not invoked the latter clause and the evidence failed to indicate that any of the complainants were in fact citizens or that any relation between citizens and the Federal Government was involved.—Ibid. 525-527.

[26] 314 U.S. 160, 177-183 (1941).

[27] Justices Douglas, Black, Murphy and Jackson.

[28] 6 Wall. 35 (1868).

[29] 279 U.S. 245, 251 (1929).

[30] 296 U.S. 404.

[31] *See* Madden *v.* Kentucky, 309 U.S. 83, 93.

[32] 296 U.S. 404, 444, 445-446.

[33] 332 U.S. 633, 645, 640.

[34] Ibid. 640.

[35] Holden *v.* Hardy, 169 U.S. 366, 380 (1898).

[36] Williams *v.* Fears, 179 U.S. 270, 274 (1900).

[37] Wilmington Star Min. Co. *v.* Fulton, 205 U.S. 60, 74 (1907).

[38] Heim *v.* McCall, 239 U.S. 175 (1915); Crane *v.* New York, 239 U.S. 195 (1915).

[39] Missouri P.R. Co. *v.* Castle, 224 U.S. 541 (1912).

[40] Western U. Teleg. Co. *v.* Commercial Milling Co., 218 U.S. 406 (1910).

[41] Bradwell *v.* Illinois, 16 Wall. 130, 139 (1873); Re Lockwood, 154 U.S. 116

(1894).

[42] Kirtland *v.* Hotchkiss, 100 U.S. 491, 499 (1879).

[43] Bartemeyer *v.* Iowa, 18 Wall. 129 (1874); Mugler *v.* Kansas, 123 U.S. 623 (1887); Crowley *v.* Christensen, 137 U.S. 86, 91 (1890); Giozza *v.* Tiernan, 148 U.S. 657 (1893).

[44] Ex parte Kemmler, 136 U.S. 436 (1890).

[45] Minor *v.* Happersett, 21 Wall. 162 (1875).

[46] Pope *v.* Williams, 193 U.S. 621 (1904).

[47] Ferry *v.* Spokane, P. & S.R. Co., 258 U.S. 314 (1922).

[48] Walker *v.* Sauvinet, 92 U.S. 90 (1876).

[49] Presser *v.* Illinois, 116 U.S. 252, 267 (1886).

[50] Maxwell *v.* Dow, 176 U.S. 581, 596, 597-598 (1900).

[51] Twining *v.* New Jersey, 211 U.S. 78, 91-98 (1908). Reaffirmed in Adamson *v.* California, 332 U.S. 46, 51-53 (1947).

[52] New York ex rel. Bryant *v.* Zimmerman, 278 U.S. 63, 71 (1928).

[53] Palko *v.* Connecticut, 302 U.S. 319 (1937).

[54] Breedlove *v.* Suttles, 302 U.S. 277 (1937).

[55] Madden *v.* Kentucky, 309 U.S. 83, 92-93 (1940); overruling Colgate *v.* Harvey, 296 U.S. 404, 430 (1935).

[56] Snowden *v.* Hughes, 321 U.S. 1 (1944).

[57] MacDougall *v.* Green, 335 U.S. 281 (1948)

[58] Hibben *v.* Smith, 191 U.S. 310, 325 (1903).

[59] Carroll *v.* Greenwich Ins. Co., 199 U.S. 401, 410 (1905). *See also* French *v.* Barber Asphalt Paving Co., 181 U.S. 324, 328 (1901).

[60] Scott *v.* Sandford, 19 How. 393, 450 (1857), is the exception. *See* pp. 963-964.

[61] 16 Wall. 36 (1873).

[62] Ibid. 80-81.

[63] 94 U.S. 113 (1877).

[64] Ibid. 134.

[65] 96 U.S. 97 (1878).

[66] Ibid. 103-104.

[67] 110 U.S. 516 (1884).

[68] Ibid. 528, 532, 536.

[69] 94 U.S. 113, 141-148 (1877).

[70] 123 U.S. 623, 661.

[71] 16 Wall. 36, 113-114, 116, 122 (1873).

[72] Savings & Loan Association *v.* Topeka, 20 Wall. 655, 663 (1875).—"There are * * * rights in every free government beyond the control of the State. * * * There are limitations on [governmental 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, * * *"

[73] "Rights to life, liberty, and the pursuit of happiness are equivalent to the rights of life, liberty, and property. These are the fundamental rights which can only be taken away by due process of law, and which can only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all; * * * This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right. * * * A law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law."—Slaughter-House Cases, 16 Wall. 36, 116, 122 (Justice Bradley).

[74] 143 U.S. 517, 551.

[75] *See* Fletcher *v.* Peck, 6 Cr. 87, 128 (1810).

[76] 94 U.S. 113, 123, 132 (1877).

[77] Ibid. 132.

[78] 123 U.S. 623 (1887).

[79] Ibid. 662.—"We cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact, * * *, that * * * pauperism, and crime * * * are, in some degree, at least, traceable to this evil."

[80] 127 U.S. 678 (1888).

[81] Ibid. 685.

[82] 169 U.S. 366 (1898).

[83] 198 U.S. 45 (1905).

[84] 127 U.S. 678 (1888).

[85] 123 U.S. 623 (1887).

[86] 169 U.S. 366, 398.

[87] 198 U.S. 45, 58-59 (1905).

[88] 198 U.S. 45, 71-74.

[89] 198 U.S. 45, 75-76.

[90] 243 U.S. 426 (1917.)

[91] 208 U.S. 412 (1908).

[92] Ibid.

[93] Adkins *v.* Children's Hospital, 261 U.S. 525 (1923); Stettler *v.* O'Hara, 243 U.S. 629 (1917); Morehead *v.* New York ex rel. Tipaldo, 298 U.S. 587 (1936); overruled by West Coast Hotel Co. *v.* Parrish, 300 U.S. 379 (1937).

[94] West Coast Hotel Co. *v.* Parrish, 300 U.S. 379 (1937). Thus the National Labor Relations Act was declared not to "interfere with the normal exercise of the right of the employer to select its employees or to discharge them." However, restraint of the employer for the purpose of preventing an unjust interference with the correlative right of his employees to organize was declared not to be arbitrary.—National Labor Relations Board *v.* Jones & Laughlin, 301 U.S. 1, 44, 45-46 (1937).

[95] *See* especially Howard Jay Graham, "The 'Conspiracy Theory' of the Fourteenth Amendment", *Selected Essays on Constitutional Law*, I, 236-267 (1938).

[96] 94 U.S. 113.—In a case arising under the Fifth Amendment, decided almost at the same time, the Court explicitly declared the United States "equally with the States * * * are prohibited from depriving persons or corporations of property without due process of law." Sinking Fund Cases, 99 U.S. 700, 718-719 (1878).

[97] Smyth *v.* Ames, 169 U.S. 466, 522, 526 (1898); Kentucky Finance Corp. *v.* Paramount Auto Exch. Corp., 262 U.S. 544, 550 (1923); Liggett (Louis K.) Co. *v.* Baldridge, 278 U.S. 105 (1928).

[98] Northwestern Nat. L. Ins. Co. *v.* Riggs, 203 U.S. 243, 255 (1906); Western Turf Assoc. *v.* Greenberg, 204 U.S. 359, 363 (1907); Pierce *v.* Society of the Sisters, 268 U.S. 510, 535 (1925). Earlier, in 1904, in Northern Securities Co. *v.* United States, (193 U.S. 197, 362), a case interpreting the federal antitrust law, Justice Brewer, in a concurring opinion, had declared that "a corporation, * * *, is not endowed with the inalienable rights of a natural person."

[99] Grosjean *v.* American Press Co., 297 U.S. 233, 244 (1936).

[100] Yick Wo *v.* Hopkins, 118 U.S. 356 (1886); Terrace *v.* Thompson, 263 U.S. 197, 216 (1923).

[101] Columbus & G.R. Co. *v.* Miller, 283 U.S. 96 (1931); Pennie *v.* Reis, 132 U.S. 464 (1889); Taylor *v.* Beckham (No. 1), 178 U.S. 548 (1900); Straus *v.* Foxworth, 231 U.S. 162 (1913); Tyler *v.* Judges of the Court of Registration, 179 U.S. 405, 410 (1900).

[102] Pawhuska *v.* Pawhuska Oil Co., 250 U.S. 394 (1919); Trenton *v.* New Jersey, 262 U.S. 182 (1923); Williams *v.* Baltimore, 289 U.S. 36 (1933).

[103] Boynton *v.* Hutchinson Gas Co., 291 U.S. 656 (1934); South Carolina Highway Dept. *v.* Barnwell Bros., 303 U.S. 177 (1938).

The converse is not true, however; and "the interest of a State official in vindicating the Constitution * * * gives him no legal standing to attack the constitutionality of a State statute in order to avoid compliance with it.—Smith *v.* Indiana, 191 U.S. 138 (1903); Braxton County Ct. *v.* West Virginia, 208 U.S. 192 (1908); Marshall *v.* Dye, 231 U.S. 250 (1913); Stewart *v.* Kansas City, 239 U.S. 14 (1915). *See also* Coleman *v.* Miller, 307 U.S. 433, 437-446 (1939)."

[104] Bacon *v.* Walker, 204 U.S. 311 (1907); Chicago, B. & Q.R. Co. *v.* Illinois ex rel. Grimwood, 200 U.S. 561, 592 (1906); California Reduction Co. *v.* Sanitary Reduction Works, 199 U.S. 306, 318 (1905); Eubank *v.* Richmond, 226 U.S. 137 (1912); Schmidinger *v.* Chicago, 226 U.S. 578 (1913); Sligh *v.* Kirkwood, 237 U.S. 52, 58-59 (1915); Nebbia *v.* New York, 291 U.S. 502 (1934); Nashville C. & St. L.R. Co. *v.* Walters, 294 U.S. 405 (1935).

[105] Hadacheck *v.* Sebastian, 239 U.S. 394 (1915); Hall *v.* Geiger-Jones Co., 242 U.S. 539 (1917); Sligh *v.* Kirkwood, 237 U.S. 52, 58-59 (1915); Eubank *v.* Richmond, 226 U.S. 137, 142 (1912); Erie R. Co. *v.* Williams, 233 U.S. 685, 699 (1914); Panhandle Eastern Pipe Line Co. *v.* State Highway Commission, 294 U.S. 613, 622 (1935); Hudson County Water Co. *v.* McCarter, 209 U.S. 349 (1908).

[106] Atlantic Coast Line R. Co. *v.* Goldsboro, 232 U.S. 548, 558 (1914).

[107] Treigle *v.* Acme Homestead Asso., 297 U.S. 189, 197 (1933); Liggett (Louis K.) Co. *v.* Baldridge, 278 U.S. 105, 111-112 (1928).

[108] Pennsylvania Coal Co. *v.* Mahon, 260 U.S. 393 (1922). *See also* Welch *v.* Swasey, 214 U.S. 91, 107 (1909).

[109] Noble State Bank *v.* Haskell, 219 U.S. 104, 110 (1911).

[110] Erie R. Co. *v.* Williams, 233 U.S. 685, 700 (1914).

[111] New Orleans Public Service Co. *v.* New Orleans, 281 U.S. 682, 687 (1930).

[112] Abie State Bank *v.* Bryan, 282 U.S. 765, 770 (1931).

[113] Meyer *v.* Nebraska, 262 U.S. 300, 399 (1923).

[114] Jacobson *v.* Massachusetts, 197 U.S. 11 (1905); Zucht *v.* King, 260 U.S. 174 (1922).

[115] Buck *v.* Bell, 274 U.S. 200 (1927).

[116] Minnesota *v.* Probate Court, 309 U.S. 270 (1940).

[117] Lanzetta *v.* New Jersey, 306 U.S. 451 (1939).

[118] 262 U.S. 390 (1923).

[119] 268 U.S. 510 (1925).

[120] Ibid. 534. Even this statement was a dictum. Inasmuch as only corporations and no parents were party litigants, the Court in fact disposed of the case on the ground that the corporations were being deprived of their "property" without due process of law.

[121] Waugh *v.* Mississippi University, 237 U.S. 589, 596-597 (1915).

[122] Hamilton *v.* University of California, 293 U.S. 245, 262 (1934). *See also* p. 768.

[123] 16 Wall. 36 (1873).

[124] 165 U.S. 578, 589.—Herein liberty of contract was defined as follows: "The liberty mentioned in that [Fourteenth] Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

[125] 236 U.S. 1, 14 (1915).

[126] Chicago, B. & Q.R. Co. *v.* McGuire, 219 U.S. 549, 567, 570 (1911); Wolff Packing Co. *v.* Court of Industrial Relations, 262 U.S. 522, 534 (1923).

[127] Holden *v.* Hardy, 169 U.S. 366 (1898).

[128] Miller *v.* Wilson, 236 U.S. 373 (1915); Bosley *v.* McLaughlin, 236 U.S. 385 (1915). *See also* Muller *v.* Oregon, 208 U.S. 412 (1908); Riley *v.* Massachusetts, 232 U.S. 671 (1914); Hawley *v.* Walker, 232 U.S. 718 (1914).

[129] Bunting *v.* Oregon, 243 U.S. 426 (1917).

[130] Atkin *v.* Kansas, 191 U.S. 207 (1903).

[131] Consolidated Coal Co. *v.* Illinois, 185 U.S. 203 (1902).

[132] Wilmington Star Min. Co. *v.* Fulton, 205 U.S. 60 (1907).

[133] Barrett *v.* Indiana, 299 U.S. 26 (1913).

[134] Plymouth Coal Co. *v.* Pennsylvania, 232 U.S. 531 (1914).

[135] Booth *v.* Indiana, 237 U.S. 391 (1915).

[136] Sturges & B. Mfg. Co. *v.* Beauchamp, 231 U.S. 320 (1914).

[137] Knoxville Iron Co. *v.* Harbison, 183 U.S. 13 (1901); Dayton Coal & I. Co. *v.* Barton, 183 U.S. 23 (1901); Keokee Consol. Coke Co. *v.* Taylor, 234 U.S. 224 (1914).

[138] Erie R. Co. *v.* Williams, 233 U.S. 685 (1914).

[139] St. Louis, I.M. & S.R. Co. *v.* Paul, 173 U.S. 404 (1899).

[140] Rail & River Coal Co. *v.* Yaple, 236 U.S. 338 (1915). *See also* McClean *v.* Arkansas, 211 U.S. 539 (1909).

[141] West Coast Hotel Co. *v.* Parrish, 300 U.S. 379 (1937), overruling Adkins *v.* Children's Hospital, 261 U.S. 255 (1923) (a Fifth Amendment case); Morehead *v.* New York ex rel. Tipaldo, 298 U.S. 587 (1936).

[142] Day-Brite Lighting, Inc. *v.* Missouri, 342 U.S. 421, 423 (1952).

[143] Ibid., 424-425.

[144] New York C.R. Co. *v.* White, 243 U.S. 188, 200 (1917).

[145] Arizona Copper Co. *v.* Hammer (Arizona Employers' Liability Cases), 250 U.S. 400, 419-420 (1919).

[146] In determining what occupations may be brought under the designation of "hazardous," the legislature may carry the idea to the "vanishing point."—Ward & Gow *v.* Krinsky, 259 U.S. 503, 520 (1922).

[147] New York C.R. *v.* White, 243 U.S. 188 (1917); Mountain Timber Co. *v.* Washington, 243 U.S. 219 (1917).

[148] Arizona Copper Co. *v.* Hammer (Arizona Employers' Liability Cases), 250 U.S. 400, 419-420 (1919).

[149] Hawkins *v.* Bleakly, 243 U.S. 210 (1917).

[150] Chicago, B. & Q.R. Co. *v.* McGuire, 219 U.S. 549 (1911).

[151] Alaska Packers Asso. *v.* Industrial Commission, 294 U.S. 532 (1935).

[152] Thornton *v.* Duffy, 254 U.S. 361 (1920).

[153] Booth Fisheries Co. *v.* Industrial Commission, 271 U.S. 208 (1920).

[154] Staten Island R.T.R. Co. *v.* Phoenix Indemnity Co., 281 U.S. 98 (1930).

[155] Sheehan Co. *v.* Shuler, 265 U.S. 371 (1924); New York State R. Co. *v.* Shuler, 265 U.S. 379 (1924).

[156] New York C.R. Co. *v.* Bianc, 250 U.S. 596 (1919).—Attorneys are not deprived of property or their liberty of contract by restriction imposed by the State on the fees which they may charge in cases arising under the workmen's compensation law.—Yeiser *v.* Dysart, 267 U.S. 540 (1925).

[157] Justice Black in Lincoln Union *v.* Northwestern Co., 335 U.S. 525, 535 (1949). *See also* pp. 141, 977-979, 985.

In his concurring opinion, contained in the companion case of American Federation of Labor *v.* American Sash Co., 335 U.S. 538, 543-544 (1949), Justice Frankfurter summarized as follows the now obsolete doctrines employed by the Court to strike down State laws fostering unionization. "* * *

unionization encountered the shibboleths of a premachine age and these were reflected in juridical assumptions that survived the facts on which they were based. Adam Smith was treated as though his generalizations had been imparted to him on Sinai and not as a thinker who addressed himself to the elimination of restrictions which had become fetters upon initiative and enterprise in his day. Basic human rights expressed by the constitutional conception of 'liberty' were equated with theories of *laissez faire*. The result was that economic views of confined validity were treated by lawyers and judges as though the Framers had enshrined them in the Constitution. * * * The attitude which regarded any legislative encroachment upon the existing economic order as infected with unconstitutionality led to disrespect for legislative attempts to strengthen the wage-earners' bargaining power. With that attitude as a premise, Adair *v.* United States, 208 U.S. 161 (1908), and Coppage *v.* Kansas, 236 U.S. 1 (1915), followed logically enough; not even Truax *v.* Corrigan, 257 U.S. 312 (1921), could be considered unexpected."

On grounds of unconstitutional impairment of freedom of contract, or more particularly, of the unrestricted right of the employer to hire and fire, a federal and a State statute attempting to outlaw "yellow dog" contracts whereby, as a condition of obtaining employment, a worker had to agree not to join or to remain a member of a union, were voided in Adair *v.* United States and Coppage *v.* Kansas, respectively. In Truax *v.* Corrigan, a majority of the Court held that an Arizona statute which operated, in effect, to make remediless [by forbidding the use of injunction] injury to an employer's business by striking employees and others, through concerted action in picketing, displaying banners advertising the strike, denouncing the employer as unfair to union labor, appealing to customers to withdraw their patronage, and circulating handbills containing abusive and libelous charges against employers, employees, and patrons, and intimidations of injury to future patrons, deprives the owner of the business and the premises of his property without due process of law.

In Wolff Packing Co. *v.* Industrial Court, 262 U.S. 522 (1923); 267 U.S. 552 (1925) and in Dorchy *v.* Kansas, 264 U.S. 286 (1924), the Court had also ruled that a statute compelling employers and employees to submit their controversies over wages and hours of labor to State arbitration was unconstitutional as part of a system compelling employers and employees to continue in business on terms not of their own making.

[158] 301 U.S. 468 (1937).

[159] Prudential Ins. Co. *v.* Cheek, 259 U.S. 530 (1922). In conjunction with its approval of this statute, the Court also sanctioned judicial enforcement by a State court of a local rule of policy which rendered illegal an agreement of several insurance companies having a monopoly of a line of business in a city that none would employ within two years any man who had been discharged from, or left, the service of any of the others.

[160] Chicago, R.I. & P.R. Co. *v.* Perry, 259 U.S. 548 (1922).

[161] Dorchy *v.* Kansas, 272 U.S. 306 (1926).

[162] 301 U.S. 468, 479 (1937).

[163] *See* p. 1141.

[164] Cases disposing of the contention that restraints on picketing amount to a denial of freedom of speech and constitute therefore a deprivation of liberty without due process of law have been set forth under Amendment I.

[165] 326 U.S. 88 (1945).

[166] Ibid. 94. Justice Frankfurter, concurring, declared that "the insistence by individuals on their private prejudices * * *, in relations like those now before us, ought not to have a higher constitutional sanction than the determination of a State to extend the area of nondiscrimination beyond that which the Constitution itself exacts." Ibid. 98.

[167] 335 U.S. 525 (1949).

[168] 335 U.S. 538 (1949).

[169] 335 U.S. 525, 534, 537. In a lengthy opinion, in which he registered his concurrence with both decisions, Justice Frankfurter set forth extensive statistical data calculated to prove that labor unions not only were possessed of considerable economic power but by virtue of such power were no longer dependent on the closed shop for survival. He would therefore leave to the legislatures the determination "whether it is preferable in the public interest that trade unions should be subjected to State intervention or left to the free play of social forces, whether experience has disclosed 'union unfair labor

practices,' and, if so, whether legislative correction is more appropriate than self-discipline and pressure of public opinion—* * *." 335 U.S. 538, 549-550.

[170] 336 U.S. 245 (1949).

[171] Ibid. 253.

[172] 336 U.S. 490 (1949). Other recent cases regulating picketing are treated under Amendment I, *see* p. 781.

[173] 94 U.S. 113 (1877).

[174] Chicago, M. & St. P.R. Co. *v.* Minnesota, 134 U.S. 418 (1890).

[175] Wolff Packing Co. *v.* Court of Industrial Relations, 262 U.S. 522, 535-536 (1923).

[176] Munn *v.* Illinois, 94 U.S. 113 (1877); Budd *v.* New York, 143 U.S. 517, 546 (1802); Brass *v.* North Dakota ex rel. Stoeser, 153 U.S. 391 (1894).

[177] Cotting *v.* Godard, 183 U.S. 79 (1901).

[178] Townsend *v.* Yeomans, 301 U.S. 441 (1937).

[179] German Alliance Ins. Co. *v.* Lewis, 233 U.S. 389 (1914); Aetna Ins. Co. *v.* Hyde, 275 U.S. 440 (1928).

[180] O'Gorman & Young *v.* Hartford F. Ins. Co., 282 U.S. 251 (1931).

[181] Williams *v.* Standard Oil Co., 278 U.S. 235 (1929).

[182] Tyson & Bros.—United Theatre Ticket Offices *v.* Banton, 273 U.S. 418 (1927).

[183] New State Ice Co. *v.* Liebmann, 285 U.S. 262 (1932).

[184] Nebbia *v.* New York, 291 U.S. 502, 531-532, 535-537, 539 (1934). In reaching this conclusion the Court might be said to have elevated to the status of prevailing doctrine the views advanced in previous decisions by dissenting Justices. Thus, Justice Stone, dissenting in Ribnik *v.* McBride, 277 U.S. 350, 350-360 (1928) had declared: "Price regulation is within the State's power whenever any combination of circumstances seriously curtails the regulative force of competition so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that a legislature might reasonably anticipate serious consequences to the community as a whole." In his dissenting opinion in New State Ice Co. *v.* Liebmann, 285 U.S. 202, 302-303 (1932), Justice Brandeis had also observed that: "The notion of a distinct category of business 'affected with a public interest' employing property 'devoted to a public use' rests upon historical error. In my opinion the true principle is that the State's power extends to every regulation of any business reasonably required and appropriate for the public protection. I find in the due process clause no other limitation upon the character or the scope of regulation permissible."

[185] Justice McReynolds, speaking for the dissenting Justices, labelled the controls imposed by the challenged statute as a "fanciful scheme to protect the farmer against undue exactions by prescribing the price at which milk disposed of by him at will may be resold." Intimating that the New York statute was as efficacious as a safety regulation which required "householders to pour oil on their roofs as a means of curbing the spread of a neighborhood fire," Justice McReynolds insisted that "this Court must have regard to the wisdom of the enactment," and must determine "whether the means proposed have reasonable relation to something within legislative power."—291 U.S. 502, 556, 558 (1934).

[186] 313 U.S. 236, 246 (1941).

[187] 277 U.S. 350 (1928).

[188] 94 U.S. 113 (1877). *See also* Peik *v.* Chicago & N.W.R. Co., 94 U.S. 164 (1877).

[189] Rate-making is deemed to be one species of price fixing. Power Comm'n *v.* Pipeline Co., 315 U.S. 575, 603 (1942).

[190] Nebbia *v.* New York, 291 U.S. 502 (1934).

[191] 96 U.S. 97 (1878). *See also* Chicago, B. & Q.R. Co. *v.* Chicago, 166 U.S. 226 (1897).

[192] 116 U.S. 307 (1886).

[193] Dow *v.* Beidelman, 125 U.S. 680 (1888).

[194] 134 U.S. 418, 458 (1890).

[195] 143 U.S. 517 (1892).

[196] 154 U.S. 362, 397 (1894).

[197] Ibid 397. Insofar as judicial intervention resulting in the invalidation of legislatively imposed rates has involved carriers, it should be noted that the successful complainant invariably has been the carrier, not the shipper.

[198] 169 U.S. 466 (1898).—Of course the validity of rates prescribed by a State for services wholly within its limits, must be determined wholly without reference to the interstate business done by a public utility. Domestic business should not be made to bear the losses on interstate business, and vice versa. Thus a State has no power to require the hauling of logs at a loss or at rates that are unreasonable, even if a railroad receives adequate revenues from the intrastate long haul and the interstate lumber haul taken together. On the other hand, in determining whether intrastate passenger railway rates are confiscatory, all parts of the system within the State (including sleeping, parlor, and dining cars) should be embraced in the computation; and the unremunerative parts should not be excluded because built primarily for interstate traffic or not required to supply local transportation needs.—*See:* Minnesota Rate Cases (Simpson *v.* Shepard), 230 U.S. 352, 434-435 (1913); Chicago, M. & St. P.R. Co. *v.* Public Utilities Commission, 274 U.S. 344 (1927); Groesbeck *v.* Duluth, S.S. & A.R. Co., 250 U.S. 607 (1919). The maxim that a legislature cannot delegate legislative power is qualified to permit creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the State. To prevent the conferring upon an administrative agency of authority to fix rates for public service from being a mere delegation of legislative power, and therefore void, the legislature must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its functions, with which the agency must substantially comply to validate its action. Wichita Railroad & L. Co. *v.* Public Utilities Commission, 260 U.S. 48 (1922).

[199] Reagan *v.* Farmers' Loan & Trust Company, 154 U.S. 362, 397 (1894).

[200] Interstate Commerce Commission *v.* Illinois C.R. Co., 215 U.S. 452, 470 (1910).

[201] 231 U.S. 298, 310-313 (1913).

[202] Des Moines Gas Co. *v.* Des Moines, 238 U.S. 153 (1915).

[203] Minnesota Rate Cases (Simpson *v.* Shepard), 230 U.S. 352, 452 (1913).

[204] Knoxville *v.* Water Company, 212 U.S. 1 (1909).

[205] Smith *v.* Illinois Bell Teleph. Co., 270 U.S. 587 (1926).

[206] Willcox *v.* Consolidated Gas Co., 212 U.S. 19 (1909).

[207] 174 U.S. 739, 750, 754 (1899). *See also* Minnesota Rate Cases (Simpson *v.* Shepard), 230 U.S. 352, 433 (1913).

[208] San Diego Land & Town Co. *v.* Jasper, 189 U.S. 439, 441, 442 (1903). *See also* Van Dyke *v.* Geary, 244 U.S. 39 (1917); Georgia Ry. *v.* R.R. Comm., 262 U.S. 625, 634 (1923).

[209] For its current position, *see* Crowell *v.* Benson, 285 U.S. 22 (1932).

[210] 222 U.S. 541, 547-548 (1912). *See also* Interstate Comm. Comm. *v.* Illinois C.R., 215 U.S. 452, 470 (1910).

[211] 253 U.S. 287, 293-294 (1920).

[212] Ibid. 289. In injunctive proceedings, evidence is freshly introduced whereas in the cases received on appeal from State courts, the evidence is found within the record.

[213] 231 U.S. 298 (1913).

[214] 253 U.S. 287, 291, 295 (1920).

[215] 94 U.S. 113 (1877).

[216] 315 U.S. 575, 586.

[217] 320 U.S. 591, 602.—Although this and the previously cited decision arose out of controversies involving the Natural Gas Act of 1938 (52 Stat. 821), the principles laid down therein are believed to be applicable to the review of rate orders of State commissions, except insofar as the latter operate in obedience to laws containing unique standards or procedures.

[218] 253 U.S. 287 (1920).

[219] In Federal Power Commission *v.* Nat. Gas Pipeline Co., 315 U.S. 575, 599, Justices Black, Douglas, and Murphy, in a concurring opinion, proposed to travel the road all the way back to Munn *v.* Illinois, and deprive courts of the power to void rates simply because they deem the latter to be unreasonable. In a concurring opinion, written earlier in 1939 in Driscoll *v.* Edison Co., 307 U.S. 104, 122, Justice Frankfurter temporarily adopted a similar position; for therein he declared that "the only relevant function of law * * * [in rate controversies] is to secure observance of those procedural safeguards in the exercise of legislative powers, which are the historic foundations of due process." However, in his dissent in the Hope Gas Case (320 U.S. 591, 625), he disassociated himself from this proposal, and asserted that "it was decided [more than fifty years ago] that the final say under the Constitution lies with the judiciary."

[220] Federal Power Commission *v.* Hope Gas Co., 320 U.S. 591, 602 (1944).

[221] Federal Power Comm. *v.* Hope Gas Co., 320 U.S. 591, 603 (1944), citing Chicago & Grand Trunk Ry. Co. *v.* Wellman, 143 U.S. 339, 345-346 (1892); Missouri ex rel. Southwestern Bell Teleph. Co. *v.* Public Service Commission, 262 U.S. 276, 291 (1923).

[222] For this reason there is presented below a survey of the formulas, utilization of which was hitherto deemed essential if due process requirements were to be satisfied.

(1) Fair Value.—On the premise that a utility is entitled to demand a rate schedule that will yield a "fair return upon the value" of the property which it employs for public convenience, the Court in 1898, in Smyth *v.* Ames (169 U.S. 466, 546-547), held that determination of such value necessitated consideration of at least such factors as "the original cost of construction, the amount expended in permanent improvements, the amount and market value of * * * [the utility's] bonds and stock, the present as compared with the original cost of construction, [replacement cost], the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses."

(2) Reproduction Cost.—Prior to the demise in 1944 of the Smyth *v.* Ames fair value formula, two of the components thereof were accorded special emphasis, with the second quickly surpassing the first in terms of the measure of importance attributed to it. These were: (1) the actual cost of the property ("the original cost of construction together with the amount expended in permanent improvements") and (2) reproduction cost ("the present as compared with the original cost of construction"). If prices did not fluctuate through the years, the controversy which arose over the application of reproduction cost in preference to original cost would have been reduced to a war of words; for results obtained by reliance upon either would have been identical. The instability in the price structure, however, presented the courts with a dilemma. If rate-making is attempted at a time of declining prices, valuation on the basis of present or reproduction cost will advantage the consumer or user, and disadvantage the utility. On the other hand, if the original cost of construction is employed, the benefits are redistributed, with the consumer becoming the loser. Similarly, when rates are fixed at a time of rising prices, reliance upon reproduction cost to the exclusion of original cost will produce results satisfactory to the utility and undesirable to the public, and vice versa.

Notwithstanding the admonition of Smyth *v.* Ames that original cost, no less than reproduction cost, was to be considered in determining value, the Court, in the years which intervened between 1898 and 1944, wavered only slightly in its preference for the reproduction cost formula, and moderated its application thereof only in part whenever periods of rising or sustained high prices appeared to require such deviation in behalf of consumer interests. As examples of the varied application by the Court of the reproduction cost formula, the following cases are significant: San Diego Land and Town Co. *v.* National City, 174 U.S. 739, 757 (1899); San Diego Land & Town Co. *v.* Jasper, 189 U.S. 439, 443 (1903); Willcox *v.* Consolidated Gas Co., 212 U.S. 19, 52 (1909); Minnesota Rate Cases, 230 U.S. 352 (1913); Galveston Electric Co. *v.* Galveston, 258 U.S. 388, 392 (1922); Missouri ex rel. Southwestern Bell Teleph. Co. *v.* Public Service Commission, 262 U.S. 276 (1923); Bluefield Waterworks & Improv. Co. *v.* Pub. Serv. Comm., 262 U.S. 679 (1923); Georgia R. & Power Co. *v.* Railroad Comm., 262 U.S. 625, 630 (1923); McCardle *v.* Indianapolis Water Co., 272 U.S. 400 (1926); St. Louis & O'Fallon Ry. *v.* United States, 279 U.S. 461 (1929).

(3) Prudent Investment (versus Reproduction Cost).—This method of valuation, which was championed by Justice Brandeis in a separate opinion filed in Southwestern Bell Teleph. Co. *v.* Pub. Serv. Comm. (262 U.S. 276, 291-292,

302, 306-307 (1923)), was defined by him as follows: "The compensation which the Constitution guarantees an opportunity to earn is the reasonable cost of conducting the business. Cost includes not only operating expenses, but also capital charges. Capital charges cover the allowance, by way of interest, for the use of the capital, * * *; the allowance for the risk incurred; and enough more to attract capital. * * * Where the financing has been proper, the cost to the utility of the capital, required to construct, equip and operate its plant, should measure the rate of return which the Constitution guarantees opportunity to earn." Advantages to be derived from "adoption of the amount prudently invested as the rate base and the amount of the capital charge as the measure of the rate of return" would, according to Justice Brandeis, be nothing less than the attainment of a "basis for decision which is certain and stable. The rate base would be ascertained as a fact, not determined as a matter of opinion. It would not fluctuate with the market price of labor, or materials, or money. * * *"

As a method of valuation, the prudent investment theory was not accorded any acceptance until the depression of the 1930's. The sharp decline in prices which occurred during this period doubtless contributed to the loss of affection for reproduction cost; and in Los Angeles Gas Co. *v.* R.R. Comm'n., 289 U.S. 287 (1933) and R.R. Comm'n. *v.* Pacific Gas Co., 302 U.S. 388, 399, 405 (1938) the Court upheld respectively a valuation from which reproduction cost had been excluded and another in which historical cost served as the rate base. Later, in 1942, when in Power Comm'n. *v.* Nat. Gas Pipeline Co., 315 U.S. 575, the Court further emphasized its abandonment of the reproduction cost factor, there developed momentarily the prospect that prudent investment might be substituted. This possibility was quickly negatived, however, by the Hope Gas Case (320 U.S. 591 (1944)) which dispensed with the necessity of relying upon any formula for the purpose of fixing valid rates.

(4) Depreciation.—No less indispensable to the determination of the fair value mentioned in Smyth *v.* Ames was the amount of depreciation to be allowed as a deduction from the measure of cost employed, whether the latter be actual cost, reproduction cost, or any other form of cost determination. Although not mentioned in Smyth *v.* Ames, the Court gave this item consideration in Knoxville *v.* Knoxville Water Co., 212 U.S. 1, 9-10 (1909); but notwithstanding its early recognition as an allowable item of deduction in determining value, depreciation continued to be the subject of controversy arising out of the difficulty of ascertaining it and of computing annual allowances to cover the same. Indicative of such controversy has been the disagreement as to whether annual allowances granted shall be in such amount as will permit the replacement of equipment at current costs; i.e., present value, or at original cost. In the Hope Gas Case, 320 U.S. 591, 606 (1944), the Court reversed United R. & Electric Co. *v.* West, 280 U.S. 234, 253-254 (1930), insofar as the latter holding rejected original cost as the basis of annual depreciation allowances.

(5) Going Concern Value and Good Will.—Whether or not intangibles were to be included in valuation was not passed upon in Smyth *v.* Ames; but shortly thereafter, in Des Moines Gas Co. *v.* Des Moines, 238 U.S. 153, 165 (1915), the Court declared it to be self-evident "that there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, * * * [and that] this element of value is a property right, and should be considered in determining the value of the property, upon which the owner has a right to make a fair return * * *." Generally described as going concern value, this element has never been precisely defined by the Court, and the latter has accordingly been plagued by the difficulty of determining its worth. In its latest pronouncement on the subject, uttered in Power Comm'n. *v.* Nat. Gas Pipeline Co., 315 U.S. 575, 589 (1942), the Court denied that there is any "constitutional requirement that going concern value, even when it is an appropriate element to be included in a rate base, must be separately stated and appraised as such * * * valuations for rate purposes of a business assembled as a whole * * * [have often been] sustained without separate appraisal of the going concern element. * * * When that has been done, the burden rests on the regulated company to show that this item has neither been adequately covered in the rate base nor recouped from prior earnings of the business." Franchise value and good will, on the other hand, have been consistently excluded from valuation; the latter presumably because a utility invariably enjoys a monopoly and consumers have no choice in the matter of patronizing it. The latter proposition has been developed in the following cases: Willcox *v.* Consolidated Gas Co., 212 U.S. 19 (1909); Des Moines Gas Co. *v.* Des Moines, 238 U.S. 153, 163-164 (1915); Galveston Electric Co. *v.* Galveston, 258 U.S. 388 (1922); Los Angeles Gas & E. Corp. *v.* Railroad Commission, 289 U.S. 287, 313 (1933).

(6) Salvage Value.—It is not constitutional error to disregard theoretical reproduction cost for a plant which "no responsible person would think of reproducing." Accordingly, where, due to adverse conditions, a street-surface railroad has lost all value except for scrap or salvage, it was permissible for a commission, as the Court held in Market St. R. Co. *v.* Comm'n., 324 U.S. 548, 562, 564 (1945), to use as a rate base the price at which the utility offered to sell its property to a citizen. Moreover, the Commission's order was not invalid even though under the prescribed rate the utility would operate at a loss; for the due process cannot be invoked to protect a public utility against business hazards, such as the loss of, or failure to obtain, patronage. On the other hand, in the case of a water company whose franchise has expired (Denver *v.* Denver Union Water Co., 246 U.S. 178 (1918)), but where there is no other source of supply, its plant should be valued as actually in use rather than at what the property would bring for some other use in case the city should build its own plant.

(7) Past Losses And Gains.—"The Constitution [does not] require that the losses of * * * [a] business in one year shall be restored from future earnings by the device of capitalizing the losses and adding them to the rate base on which a fair return and depreciation allowance is to be earned." Power Comm'n. *v.* Nat. Gas Pipeline Co., 315 U.S. 575, 590 (1942). Nor can past losses be used to enhance the value of the property to support a claim that rates for the future are confiscatory (Galveston Electric Co. *v.* Galveston, 258 U.S. 388 (1922)), any more than profits of the past can be used to sustain confiscatory rates for the future (Newton *v.* Consolidated Gas Co., 258 U.S. 165, 175 (1922); Public Utility Commissioners *v.* New York Teleg. Co., 271 U.S. 23, 31-32 (1926)).

[223] Atlantic Coast Line R. Co. *v.* North Carolina Corp. Commission, 206 U.S. 1, 19 (1907), citing Chicago, B.& Q.R. Co. *v.* Iowa, 94 U.S. 155 (1877). *See also* Prentis *v.* Atlantic Coast Line Co., 211 U.S. 210 (1908); Denver & R.G.R. Co. *v.* Denver, 250 U.S. 241 (1919).

[224] Chicago & G.T.R. Co. *v.* Wellman, 143 U.S. 339, 344 (1892); Mississippi R. Commission *v.* Mobile & O.R. Co., 244 U.S. 388, 391 (1917). *See also* Missouri P.R. Co. *v.* Nebraska, 217 U.S. 196 (1910); Nashville, C. & St. L.R. Co. *v.* Walters, 294 U.S. 405, 415 (1935).

[225] Cleveland Electric Ry. Co. *v.* Cleveland, 204 U.S. 116 (1907).

[226] Detroit United Railway Co. *v.* Detroit, 255 U.S. 171 (1921). *See also* Denver *v.* New York Trust Co., 229 U.S. 123 (1913).

[227] Los Angeles *v.* Los Angeles Gas & Electric Corp., 251 U.S. 32 (1919).

[228] Newburyport Water Co. *v.* Newburyport, 193 U.S. 561 (1904). *See also* Skaneateles Waterworks Co. *v.* Skaneateles, 184 U.S. 354 (1902); Helena Waterworks Co. *v.* Helena, 195 U.S. 383 (1904); Madera Waterworks *v.* Madera, 228 U.S. 454 (1913).

[229] Western Union Teleg. Co. *v.* Richmond, 224 U.S. 160 (1912).

[230] Pierce Oil Corp. *v.* Phoenix Ref Co., 259 U.S. 125 (1922).

[231] Atlantic Coast Line R. Co. *v.* Goldsboro, 232 U.S. 548, 558 (1914). *See also* Chicago, B. & Q.R. Co. *v.* Chicago, 166 U.S. 226, 255 (1897); Chicago, B. & Q.R. Co. *v.* Illinois ex rel. Grimwood, 200 U.S. 561, 591-592 (1906); New Orleans Public Service, Inc. *v.* New Orleans, 281 U.S. 682 (1930).

[232] Consumers' Co. *v.* Hatch, 224 U.S. 148 (1912).

[233] Panhandle Eastern Pipe Line Co. *v.* State Highway Commission, 294 U.S. 613 (1935).

[234] New Orleans Gas Light Co. *v.* Drainage Commission, 197 U.S. 453 (1905).

[235] Norfolk & S. Turnpike Co. *v.* Virginia, 225 U.S. 264 (1912).

[236] International Bridge Co. *v.* New York, 254 U.S. 126 (1920).

[237] Chicago, B. & Q.R. Co. *v.* Nebraska, 170 U.S. 57 (1898).

[238] Chicago, B. & Q.R. Co. *v.* Illinois ex rel. Grimwood, 200 U.S. 561 (1906); Chicago & A.R. Co. *v.* Tranbarger, 238 U.S. 67 (1915); Lake Shore & M.S.R. Co. *v.* Clough, 242 U.S. 375 (1917).

[239] Pacific Gas & Electric Co. *v.* Police Ct., 251 U.S. 22 (1919).

[240] Chicago, St. P., M. & O.R. Co. *v.* Holmberg, 282 U.S. 162 (1930).

[241] Nashville, C. & St. L.R. Co. *v.* Walters, 294 U.S. 405 (1935). *See also* Lehigh Valley R. Co. *v.* Public Utility Comrs., 278 U.S. 24 (1928).

[242] United Fuel Gas Co. *v.* Railroad Commission, 278 U.S. 300, 308-309 (1929). *See also* New York ex rel. Woodhaven Gas Light Co. *v.* Public Service Commission, 269 U.S. 244 (1925); New York ex rel. New York & O. Gas Co. *v.* McCall, 245 U.S. 345 (1917).

[243] Missouri P.R. Co. *v.* Kansas ex rel. Taylor, 216 U.S. 262 (1910); Chesapeake & O.R. Co. *v.* Public Service Commission, 242 U.S. 603 (1917); Ft. Smith Light & Traction Co. *v.* Bourland, 267 U.S. 330 (1925).

[244] Chesapeake & O.R. Co. *v.* Public Service Commission, 242 U.S. 603, 607 (1917); Brooks-Scanlon Co. *v.* Railroad Commission, 251 U.S. 396 (1920); Railroad Commission *v.* Eastern Texas R. Co., 264 U.S. 79 (1924); Broad River Power Co. *v.* South Carolina ex rel. Daniel, 281 U.S. 537 (1930).

[245] Atchison, T. & S.F.R. Co. *v.* Railroad Commission, 283 U.S. 380, 394-395 (1931).

[246] Minneapolis & St. L.R. Co. *v.* Minnesota ex rel. Railroad & W. Commission, 193 U.S. 53 (1904).

[247] Gladson *v.* Minnesota, 166 U.S. 427 (1897).

[248] Missouri P.R. Co. *v.* Kansas ex rel. Taylor, 216 U.S. 262 (1910).

[249] Chesapeake & O.R. Co. *v.* Public Service Commission, 242 U.S. 603 (1917).

[250] Lake Erie & W.R. Co. *v.* State Public Utilities Commission ex rel. Cameron, 249 U.S. 422 (1919); Western & A.R. Co. *v.* Georgia Public Service Commission, 267 U.S. 493 (1925).

[251] Alton R. Co. *v.* Illinois Comm'n, 305 U.S. 548 (1939).

[252] Missouri P.R. Co. *v.* Nebraska, 217 U.S. 196 (1910).

[253] Chesapeake & O.R. Co. *v.* Public Service Commission, 242 U.S. 603, 607 (1917).

[254] Great Northern R. Co. *v.* Minnesota ex rel. Railroad & Warehouse Commission, 238 U.S. 340 (1915); Great Northern R. Co. *v.* Cahill, 253 U.S. 71 (1920).

[255] Chicago, M. & St. P.R. Co. *v.* Wisconsin, 238 U.S. 491 (1915).

[256] Washington ex rel. Oregon R. & N. Co. *v.* Fairchild, 224 U.S. 510, 528-529 (1912). *See also* Michigan C.R. Co. *v.* Michigan Railroad Commission, 236 U.S. 615 (1915); Seaboard Air Line R. Co. *v.* Railroad Commission, 240 U.S. 324, 327 (1916).

[257] Louisville & N.R. Co. *v.* Central Stockyards Co., 212 U.S. 132 (1909).

[258] Michigan C.R. Co. *v.* Michigan Railroad Commission, 236 U.S. 615 (1915).

[259] Chicago, M. & St. P.R. Co. *v.* Iowa, 233 U.S. 334 (1914).

[260] Chicago, M. & St. P.R. Co. *v.* Minneapolis C. & C. Asso., 247 U.S. 490 (1918). Nor are railroads denied due process when they are forbidden to exact a greater charge for a shorter distance than for a longer distance. Louisville & N.R. Co. *v.* Kentucky, 183 U.S. 503, 512 (1902); Missouri P.R. Co. *v.* McGrew Coal Co., 244 U.S. 191 (1917).

[261] Wadley Southern R. Co. *v.* Georgia, 235 U.S. 651 (1915).

[262] Richmond, F. & P.R. Co. *v.* Richmond, 96 U.S. 521 (1878).

[263] Atlantic Coast Line R. Co. *v.* Goldsboro, 232 U.S. 548 (1914).

[264] Great Northern R. Co. *v.* Minnesota ex rel. Clara City, 246 U.S. 434 (1918).

[265] Denver & R.G.R. Co. *v.* Denver, 250 U.S. 241 (1919).

[266] Nashville, C. & St. L.R. Co. *v.* White, 278 U.S. 456 (1929).

[267] Nashville, C. & St. L.R. Co. *v.* Alabama, 128 U.S. 96 (1888).

[268] Chicago, R.I. & P.R. Co. *v.* Arkansas, 219 U.S. 453 (1911); St. Louis, I.M. & S.R. Co. *v.* Arkansas, 240 U.S. 518 (1916); Missouri P.R. Co. *v.* Norwood, 283 U.S. 249 (1931).

[269] Atlantic Coast Line R. Co. *v.* Georgia, 234 U.S. 280 (1914).

[270] Erie R. Co. *v.* Solomon, 237 U.S. 427 (1915).

[271] New York, N.H. & H.R. Co. *v.* New York, 165 U.S. 628 (1897).

[272] Chicago & N.W.R. Co. *v.* Nye Schneider Fowler Co., 260 U.S. 35 (1922). *See also* Yazoo & M.V.R. Co. *v.* Jackson Vinegar Co., 226 U.S. 217 (1912); *Cf.*

Adams Express Co. *v.* Croninger, 226 U.S. 491 (1913).

[273] Atlantic Coast Line R. Co. *v.* Glenn, 239 U.S. 388 (1915).

[274] St. Louis & S.F.R. Co. *v.* Mathews, 165 U.S. 1 (1897).

[275] Chicago & N.W.R. Co. *v.* Nye Schneider Fowler Co., 260 U.S. 35 (1922).

[276] Kansas City Southern R. Co. *v.* Anderson, 233 U.S. 325 (1914).

[277] St. Louis, I.M. & S.R. Co. *v.* Wynne, 224 U.S. 354 (1912).

[278] Chicago, M. & St. P.R. Co. *v.* Polt, 232 U.S. 165 (1914).

[279] Missouri P.R. Co. *v.* Tucker, 230 U.S. 340 (1913).

[280] St. Louis, I.M. & S.R. Co. *v.* Williams, 251 U.S. 63, 67 (1919).

[281] Missouri P.R. Co. *v.* Humes, 115 U.S. 512 (1885); Minneapolis & St. L.R. Co. *v.* Beckwith, 129 U.S. 26 (1889).

[282] Chicago, B. & Q.R. Co. *v.* Cram, 228 U.S. 70 (1913).

[283] Southwestern Teleg. & Teleph. Co. *v.* Danaher, 238 U.S. 482 (1915).

[284] New Orleans Debenture Redemption Co. *v.* Louisiana, 180 U.S. 320 (1901).

[285] Lake Shore & M.S.R. Co. *v.* Smith, 173 U.S. 684, 698 (1899).

[286] National Council *v.* State Council, 203 U.S. 151 (1906).

[287] Munday *v.* Wisconsin Trust Co., 252 U.S. 499 (1920).

[288] State Farm Ins. Co. *v.* Duel, 324 U.S. 154 (1945).

[289] Asbury Hospital *v.* Cass County, 326 U.S. 207 (1945).

[290] Nebbia *v.* New York, 291 U.S. 502, 527-528 (1934).

[291] Smiley *v.* Kansas, 196 U.S. 447 (1905). *See* Waters-Pierce Oil Co. *v.* Texas, 212 U.S. 86 (1909); National Cotton Oil Co. *v.* Texas, 197 U.S. 115 (1905), also upholding antitrust laws.

[292] International Harvester Co. *v.* Missouri, 234 U.S. 199 (1914). *See also* American Seeding Machine Co. *v.* Kentucky, 236 U.S. 660 (1915).

[293] Grenada Lumber Co. *v.* Mississippi, 217 U.S. 433 (1910).

[294] Aikens *v.* Wisconsin, 195 U.S. 194 (1904).

[295] Central Lumber Co. *v.* South Dakota, 226 U.S. 157 (1912).

[296] Fairmont Creamery Co. *v.* Minnesota, 274 U.S. 1 (1927).

[297] Old Dearborn Distributing Co. *v.* Seagram-Distillers Corp., 299 U.S. 183 (1936); The Pep Boys *v.* Pyroil Sales Co., 299 U.S. 198 (1936).

[298] Schmidinger *v.* Chicago, 226 U.S. 578, 588 (1913), citing McLean *v.* Arkansas, 211 U.S. 539, 550 (1909).

[299] Merchants Exch. *v.* Missouri ex rel. Barker, 248 U.S. 365 (1919).

[300] Hauge *v.* Chicago, 299 U.S. 387 (1937).

[301] Lemieux *v.* Young, 211 U.S. 489 (1909); Kidd, D. & P. Co. *v.* Musselman Grocer Co., 217 U.S. 461 (1910).

[302] Pacific States Box & Basket Co. *v.* White, 296 U.S. 176 (1935).

[303] Schmidinger *v.* Chicago, 226 U.S. 578 (1913).

[304] Burns Baking Co. *v.* Bryan, 264 U.S. 504 (1924).

[305] Petersen Baking Co. *v.* Bryan, 290 U.S. 570 (1934).

[306] Armour & Co. *v.* North Dakota, 240 U.S. 510 (1916).

[307] Heath & M. Mfg. Co. *v.* Worst, 207 U.S. 338 (1907); Corn Products Ref. Co. *v.* Eddy, 249 U.S. 427 (1919); National Fertilizer Asso. *v.* Bradley, 301 U.S. 178 (1937).

[308] Advance-Rumely Thresher Co. *v.* Jackson, 287 U.S. 283 (1932).

[309] Hall *v.* Geiger-Jones Co., 242 U.S. 539 (1917); Caldwell *v.* Sioux Falls Stock Yards Co., 242 U.S. 559 (1917); Merrick *v.* Halsey & Co., 242 U.S. 568 (1917).

[310] Booth *v.* Illinois, 184 U.S. 425 (1902).

[311] Otis *v.* Parker, 187 U.S. 606 (1903).

[312] Brodnax *v.* Missouri, 219 U.S. 285 (1911).

[313] House *v.* Mayes, 219 U.S. 270 (1911).

[314] Rast *v.* Van Deman & L. Co., 240 U.S. 342 (1916); Tanner *v.* Little, 240 U.S. 369 (1916); Pitney *v.* Washington, 240 U.S. 387 (1916).

[315] Noble State Bank *v.* Haskell, 219 U.S. 104 (1911); Shallenberger *v.* First State Bank, 219 U.S. 114 (1911); Assaria State Bank *v.* Dolley, 219 U.S. 121 (1911); Abie State Bank *v.* Bryan, 282 U.S. 765 (1931).

[316] Provident Inst. for Savings *v.* Malone, 221 U.S. 660 (1911); Anderson National Bank *v.* Luckett, 321 U.S. 233 (1944).

When a bank conservator appointed pursuant to a new statute has all the functions of a receiver under the old law, one of which is the enforcement on behalf of depositors of stockholders' liability, which liability the conservator can enforce as cheaply as could a receiver appointed under the pre-existing statute, it cannot be said that the new statute, in suspending the right of a depositor to have a receiver appointed, arbitrarily deprives a depositor of his remedy or destroys his property without due process of law. The depositor has no property right in any particularly form of remedy.—Gibbes *v.* Zimmerman, 290 U.S. 326 (1933).

[317] Doty *v.* Love, 295 U.S. 64 (1935).

[318] Farmers & M. Bank *v.* Federal Reserve Bank, 262 U.S. 649 (1923).

[319] Griffith *v.* Connecticut, 218 U.S. 563 (1910).

[320] Mutual Loan Co. *v.* Martell, 222 U.S. 225 (1911).

[321] La Tourette *v.* McMaster, 248 U.S. 465 (1919); Stipcich *v.* Metropolitan L. Ins. Co., 277 U.S. 311, 320 (1928).

[322] German Alliance Ins. Co. *v.* Lewis, 233 U.S. 389 (1914).

[323] O'Gorman and Young *v.* Hartford Insur. Co., 282 U.S. 251 (1931).

[324] Nutting *v.* Massachusetts, 185 U.S. 553, 556 (1902), distinguishing Allgeyer *v.* Louisiana, 165 U.S. 578 (1897). *See also* Hooper *v.* California, 155 U.S. 648 (1895).

[325] Daniel *v.* Family Ins. Co., 336 U.S. 220 (1949).

[326] Osborn *v.* Ozlin, 310 U.S. 53, 68-69 (1940). Dissenting from the conclusion, Justice Roberts declared that the plain effect of the Virginia law is to compel a nonresident to pay a Virginia resident for services which the latter does not in fact render.

[327] California Auto. Assn. *v.* Maloney, 341 U.S. 105 (1951).

[328] Allgeyer *v.* Louisiana, 165 U.S. 578 (1897).

[329] New York L. Ins. Co. *v.* Dodge, 246 U.S. 357 (1918).

[330] National Union F. Ins. Co. *v.* Wanberg, 260 U.S. 71 (1922).

[331] Hartford Acci. & Indem. Co. *v.* Nelson (N.O.) Mfg. Co., 291 U.S. 352 (1934).

[332] Merchants Mut. Auto Liability Ins. Co. *v.* Smart, 267 U.S. 126 (1925).

[333] Orient Ins. Co. *v.* Daggs, 172 U.S. 557 (1899).

[334] Hoopeston Canning Co. *v.* Cullen, 318 U.S. 313 (1943).

[335] German Alliance Ins. Co. *v.* Hale, 219 U.S. 307 (1911). *See also* Carroll *v.* Greenwich Ins. Co., 199 U.S. 401 (1905).

[336] Life & C. Ins. Co. *v.* McCray, 291 U.S. 566 (1934).

[337] Northwestern Nat. L. Ins. Co. *v.* Riggs, 203 U.S. 243 (1906).

[338] Whitfield ex rel. Hadley *v.* Aetna L. Ins. Co., 205 U.S. 489 (1907).

[339] Polk *v.* Mutual Reserve Fund Life Association, 207 U.S. 310 (1907).

[340] Neblett *v.* Carpenter, 305 U.S. 297 (1938).

[341] Brazee *v.* Michigan, 241 U.S. 340 (1916).—With four Justices dissenting, the Court, in Adams *v.* Tanner, 244 U.S. 590 (1917), "struck down a State law absolutely prohibiting maintenance of private employment agencies." Commenting on the "constitutional philosophy" thereof in Lincoln Union *v.* Northwestern Co., 335 U.S. 525, 535 (1949), Justice Black stated that Olsen *v.* Nebraska, 313 U.S. 236 (1941), (*see* p. 997) "clearly undermined Adams *v.* Tanner."

[342] Liggett (Louis K.) Co. *v.* Baldridge, 278 U.S. 105 (1928).

[343] McNaughton *v.* Johnson, 242 U.S. 344, 349 (1917). *See also* Dent *v.* West Virginia, 129 U.S. 114 (1889); Hawker *v.* New York, 170 U.S. 189 (1898); Reetz *v.* Michigan, 188 U.S. 505 (1903); Watson *v.* Maryland, 218 U.S. 173 (1910).

[344] Collins *v.* Texas, 223 U.S. 288 (1912); Hayman *v.* Galveston, 273 U.S. 414 (1927).

[345] Semler *v.* Oregon State Dental Examiners, 294 U.S. 608, 611 (1935). *See also* Douglas *v.* Noble, 261 U.S. 165 (1923); Graves *v.* Minnesota, 272 U.S. 425, 427 (1926).

[346] Olsen *v.* Smith, 195 U.S. 332 (1904).

[347] Nashville, C. &. St. L.R. Co. *v.* Alabama, 128 U.S. 96 (1888).

[348] Smith *v.* Texas, 233 U.S. 630 (1914).

[349] Western Turf Asso. *v.* Greenberg, 204 U.S. 359 (1907).

[350] Cargill (W.W.) Co. *v.* Minnesota ex rel. Railroad & W. Commission, 180 U.S. 452 (1901).

[351] Lehon *v.* Atlanta, 242 U.S. 53 (1916).

[352] Gundling *v.* Chicago, 177 U.S. 183, 185 (1900).

[353] Bourjois, Inc. *v.* Chapman, 301 U.S. 183 (1937).

[354] Weller *v.* New York, 268 U.S. 319 (1925).

[355] Packer Corp. *v.* Utah, 285 U.S. 105 (1932).

[356] Halter *v.* Nebraska, 205 U.S. 34 (1907).

[357] McCloskey *v.* Tobin, 252 U.S. 107 (1920).

[358] Natal *v.* Louisiana, 139 U.S. 621 (1891).

[359] Murphy *v.* California, 225 U.S. 623 (1912).

[360] Rosenthal *v.* New York, 226 U.S. 260 (1912).

[361] Thompson *v.* Consolidated Gas Utilities Corp., 300 U.S. 55, 76-77 (1937), citing Ohio Oil Co. *v.* Indiana (No. 1), 177 U.S. 100 (1900); Lindsley *v.* Natural Carbonic Gas Co., 220 U.S. 61 (1911); Oklahoma *v.* Kansas Natural Gas Co., 221 U.S. 229 (1911).

[362] Champlin Ref. Co. *v.* Corporation Commission, 286 U.S. 210 (1932).

[363] Railroad Commission *v.* Oil Co., 310 U.S. 573 (1940). *See also* R.R. Commission *v.* Oil Co., 311 U.S. 570 (1941); R.R. Commission *v.* Humble Oil & Refining Co., 311 U.S. 578 (1941).

[364] Thompson *v.* Consolidated Gas Utilities Corp., 300 U.S. 55 (1937).

[365] Cities Service Co. *v.* Peerless Co., 340 U.S. 179 (1950); Phillips Petroleum Co. *v.* Oklahoma, ibid., 190 (1950).

[366] Walls *v.* Midland Carbon Co., 254 U.S. 300 (1920). *See also* Henderson Co. *v.* Thompson, 300 U.S. 258 (1937).

[367] Bandini Petroleum Co. *v.* Superior Ct., 284 U.S. 8 (1931).

[368] Gant *v.* Oklahoma City, 289 U.S. 98 (1933).

[369] Pennsylvania Coal Co. *v.* Mahon, 260 U.S. 393 (1922).

[370] Hudson County Water Co. *v.* McCarter, 209 U.S. 349, 356-357 (1908).

[371] Miller *v.* Schoene, 276 U.S. 272, 277, 279 (1928).

[372] Sligh *v.* Kirkwood, 237 U.S. 52 (1915).

[373] Bayside Fish Flour Co. *v.* Gentry, 297 U.S. 422, 426 (1936).

[374] Manchester *v.* Massachusetts, 139 U.S. 240 (1891); Geer *v.* Connecticut, 161 U.S. 519 (1896).

[375] Miller *v.* McLaughlin, 281 U.S. 261, 264 (1930).

[376] Bayside Fish Flour Co. *v.* Gentry, 297 U.S. 422 (1936).

[377] Geer *v.* Connecticut, 161 U.S. 519 (1896).

[378] Silz *v.* Hesterberg, 211 U.S. 31 (1908).

[379] Reinman *v.* Little Rock, 237 U.S. 171 (1915).

[380] Hadacheck *v.* Sebastian, 239 U.S. 394 (1915).

[381] Fischer *v.* St. Louis, 194 U.S. 361 (1904).

[382] Reinman *v.* Little Rock, 237 U.S. 171 (1915).

[383] Bacon *v.* Walker, 204 U.S. 311 (1907).

[384] Northwestern Laundry Co. *v.* Des Moines, 239 U.S. 486 (1916). For a case embracing a rather special set of facts, *see* Dobbins *v.* Los Angeles, 195 U.S. 223 (1904).

[385] Welch *v.* Swasey, 214 U.S. 91 (1909).

[386] Euclid *v.* Ambler Realty Co., 272 U.S. 365 (1926); Zahn *v.* Board of Public Works, 274 U.S. 325 (1927); Nectaw *v.* Cambridge, 277 U.S. 183 (1928); Cusack (Thomas) Co. *v.* Chicago, 242 U.S. 526 (1917); St. Louis Poster Advertising Co. *v.* St. Louis, 249 U.S. 269 (1919).

[387] Washington ex rel. Seattle Title Trust Co. *v.* Roberage, 278 U.S. 116 (1928).

[388] Eubank *v.* Richmond, 226 U.S. 137 (1912).

[389] Gorieb *v.* Fox, 274 U.S. 603 (1927).

[390] Buchanan *v.* Warley, 245 U.S. 60 (1917).

[391] Pierce Oil Corp. *v.* Hope, 248 U.S. 498 (1919).

[392] Standard Oil Co. *v.* Marysville, 279 U.S. 582 (1929).

[393] Barbier *v.* Connolly, 113 U.S. 27 (1885); Soon Hing *v.* Crowley, 113 U.S. 703 (1885).

[394] Maguire *v.* Reardon, 255 U.S. 271 (1921).

[395] Queenside Hills Co. *v.* Saxl, 328 U.S. 80 (1946).

[396] Compagnie Francaise de Navigation à Vapeur *v.* Louisiana State Board of Health, 186 U.S. 380 (1902).

[397] Jacobson *v.* Massachusetts, 197 U.S. 11 (1905); New York ex rel. Lieberman *v.* Van De Carr, 199 U.S. 552 (1905).

[398] Perley *v.* North Carolina, 249 U.S. 510 (1919).

[399] California Reduction Co. *v.* Sanitary Reduction Works, 199 U.S. 306 (1905).

[400] Hutchinson *v.* Valdosta, 227 U.S. 303 (1913).

[401] Sligh *v.* Kirkwood, 237 U.S. 52, 59-60 (1915).

[402] Powell *v.* Pennsylvania, 127 U.S. 678 (1888); Magnano (A.) Co. *v.* Hamilton, 292 U.S. 40 (1934).

[403] North American Cold Storage Co. *v.* Chicago, 211 U.S. 306 (1908).

[404] Adams *v.* Milwaukee, 228 U.S. 572 (1913).

[405] Baccus *v.* Louisiana, 232 U.S. 334 (1914).

[406] Roschen *v.* Ward, 279 U.S. 337 (1929).

[407] Minnesota ex rel. Whipple *v.* Martinson, 256 U.S. 41, 45 (1921).

[408] Hutchinson Ice Cream Co. *v.* Iowa, 242 U.S. 153 (1916).

[409] Hebe Co. *v.* Shaw, 248 U.S. 297 (1919).

[410] Price *v.* Illinois, 238 U.S. 446 (1915).

[411] Sage Stores *v.* Kansas, 323 U.S. 32 (1944).

[412] Weaver *v.* Palmer Bros Co., 270 U.S. 402 (1926).

[413] Ah Sin *v.* Wittman, 198 U.S. 500 (1905).

[414] Marvin *v.* Trout, 199 U.S. 212 (1905).

[415] Stone *v.* Mississippi ex rel. Harris, 101 U.S. 814 (1880); Douglas *v.* Kentucky, 168 U.S. 488 (1897).

[416] L'Hote *v.* New Orleans, 177 U.S. 587 (1900).

[417] Petit *v.* Minnesota, 177 U.S. 164 (1900).

[418] Boston Beer Co. *v.* Massachusetts, 97 U.S. 25, 33 (1878); Mugler *v.* Kansas,

123 U.S. 623 (1887); Kidd *v.* Pearson, 128 U.S. 1 (1888); Purity Extract & Tonic Co. *v.* Lynch, 226 U.S. 192 (1912); James Clark Distilling Co. *v.* Western Maryland R. Co., 242 U.S. 311 (1917); Barbour *v.* Georgia, 249 U.S. 454 (1919).

[419] Mugler *v.* Kansas, 123 U.S. 623, 671 (1887).

[420] Hawes *v.* Georgia, 258 U.S. 1 (1922); Van Oster *v.* Kansas, 272 U.S. 465 (1926).

[421] Stephenson *v.* Binford, 287 U.S. 251 (1932).

[422] Stanley *v.* Public Utilities Commission, 295 U.S. 76 (1935).

[423] Stephenson *v.* Binford, 287 U.S. 251 (1932).

[424] Michigan Public Utilities Commission *v.* Duke, 266 U.S. 570 (1925).

[425] Frost *v.* Railroad Commission, 271 U.S. 583 (1926); Smith *v.* Cahoon, 283 U.S. 553 (1931).

[426] Bradley *v.* Pub. Util. Comm'n., 289 U.S. 92 (1933).

[427] Sproles *v.* Binford, 286 U.S. 374 (1932).

[428] Railway Express *v.* New York, 336 U.S. 106 (1949).

[429] Reitz *v.* Mealey, 314 U.S. 33 (1941).

[430] Young *v.* Masci, 289 U.S. 253 (1933).

[431] Ex parte Poresky, 290 U.S. 30 (1933). *See also* Packard *v.* Banton, 264 U.S. 140 (1924); Sprout *v.* South Bend, 277 U.S. 163 (1928); Hodge Drive-It-Yourself Co. *v.* Cincinnati, 284 U.S. 335 (1932); Continental Baking Co. *v.* Woodring, 286 U.S. 352 (1932).

[432] Irving Trust Co. *v.* Day, 314 U.S. 556, 564 (1942).

[433] Demorest *v.* City Bank Co., 321 U.S. 36, 47-48 (1944).

[434] Connecticut Ins. Co. *v.* Moore, 333 U.S. 541 (1948). Justice Jackson and Douglas dissented on the ground that New York is attempting to escheat unclaimed funds not located either actually or constructively in New York and which are the property of beneficiaries who may never have been citizens or residents of New York.

[435] 341 U.S. 428 (1951).

[436] Snowden *v.* Hughes, 321 U.S. 1 (1944).

[437] Angle *v.* Chicago, St. P.M. & O.R. Co., 151 U.S. 1 (1894).

[438] Coombes *v.* Getz, 285 U.S. 434, 442, 448 (1932).

[439] Gibbes *v.* Zimmerman, 290 U.S. 326, 332 (1933).

[440] Shriver *v.* Woodbine Sav. Bank, 285 U.S. 467 (1932).

[441] Chase Securities Corp. *v.* Donaldson, 325 U.S. 304, 315-316 (1945).

[442] Sentell *v.* New Orleans & C.R. Co., 166 U.S. 698 (1897).

[443] Soliah *v.* Heskin, 222 U.S. 522 (1912).

[444] Trenton *v.* New Jersey, 262 U.S. 182 (1923).

[445] Chicago *v.* Sturges, 222 U.S. 313 (1911).

[446] Louisiana ex rel. Folsom Bros. *v.* New Orleans, 109 U.S. 285, 289 (1883).

[447] Attorney General ex rel. Kies *v.* Lowrey, 199 U.S. 233 (1905).

[448] Hunter *v.* Pittsburgh, 207 U.S. 161 (1907).

[449] Stewart *v.* Kansas City, 239 U.S. 14 (1915).

[450] Tonawanda *v.* Lyon, 181 U.S. 389 (1901); Cass Farm Co. *v.* Detroit, 181 U.S. 396 (1901).

[451] Southwestern Oil Co. *v.* Texas, 217 U.S. 114, 119 (1910).

[452] Citizens' Sav. & L. Asso. *v.* Topeka, 20 Wall. 655 (1875); Jones *v.* Portland, 245 U.S. 217 (1917); Green *v.* Frazier, 253 U.S. 233 (1920); Carmichael *v.* Southern Coal & Coke Co., 300 U.S. 644 (1937).

[453] Milheim *v.* Moffat Tunnel Improv. Dist., 262 U.S. 710 (1923).

[454] Jones *v.* Portland, 245 U.S. 217 (1917).

[455] Green *v.* Frazier, 253 U.S. 233 (1920).

[456] Nicchia *v.* New York, 254 U.S. 228 (1920).

[457] Milheim *v.* Moffat Tunnel Improv. Dist, 262 U.S. 710 (1923).

[458] Cochran *v.* Louisiana State Bd. of Ed., 281 U.S. 370 (1930).

[459] Carmichael *v.* Southern Coal & Coke Co., 300 U.S. 644 (1937).

[460] Fox *v.* Standard Oil Co., 294 U.S. 87, 99 (1935).

[461] Stewart Dry Goods Co. *v.* Lewis, 294 U.S. 550 (1935). *See also* Chapman *v.* Zobelein, 237 U.S. 135 (1915); Kelly *v.* Pittsburgh, 104 U.S. 78 (1881).

[462] Nashville, C. & St. L.R. Co. *v.* Wallace, 288 U.S. 249 (1933); Carmichael *v.* Southern Coal & Coke Co., 300 U.S. 644 (1937). A taxpayer therefore cannot contest the imposition of an income tax on the ground that, in operation, it returns to his town less income tax than he and its other inhabitants pay.—Dane *v.* Jackson, 256 U.S. 589 (1921).

[463] Stebbins *v.* Riley, 268 U.S. 137, 140, 141 (1925).

[464] Cahen *v.* Brewster, 203 U.S. 543 (1906).

[465] Keeney *v.* New York, 222 U.S. 525 (1912).

[466] Salomon *v.* State Tax Commission, 278 U.S. 484 (1929).

[467] Orr *v.* Gilman, 183 U.S. 278 (1902); Chanler *v.* Kelsey, 205 U.S. 466 (1907).

[468] Nickel *v.* Cole, 256 U.S. 222, 226 (1921).

[469] Coolidge *v.* Long, 282 U.S. 582 (1931).

[470] Binney *v.* Long, 299 U.S. 280 (1936).

[471] Whitney *v.* State Tax Com., 309 U.S. 530, 540(1940).

[472] Welch *v.* Henry, 305 U.S. 134, 147 (1938).

[473] Hoeper *v.* Tax Commission, 284 U.S. 206 (1931).

[474] Welch *v.* Henry, 305 U.S. 134, 147-150 (1938).

[475] Puget Sound Power & Light Co. *v.* Seattle, 291 U.S. 619 (1934).

[476] New York, P. & N. Teleg. Co. *v.* Dolan, 265 U.S. 96 (1924).

[477] Barwise *v.* Sheppard, 299 U.S. 33 (1936).

[478] Nashville, O. & St. L. Ky. *v.* Browning, 310 U.S. 362 (1940).

[479] Paddell *v.* New York, 211 U.S. 446 (1908).

[480] Hagar *v.* Reclamation District, 111 U.S. 701 (1884).

[481] Butters *v.* Oakland, 263 U.S. 162 (1923).

[482] Missouri P.R. Co. *v.* Western Crawford Road Improv. Dist., 266 U.S. 187 (1924). *See also* Roberts *v.* Richland Irrig. Co., 289 U.S. 71 (1933) in which it was also stated that an assessment to pay the general indebtedness of an irrigation district is valid, even though in excess of the benefits received.

[483] Houck *v.* Little River Drainage Dist, 239 U.S. 254 (1915).

[484] Road Improv. Dist. *v.* Missouri P.R. Co., 274 U.S. 188 (1927).

[485] Kansas City Southern R. Co. *v.* Road Improv. Dist., 266 U.S. 379 (1924).

[486] Louisville & N.R. Co. *v.* Barber Asphalt Pav. Co., 197 U.S. 430 (1905).

[487] Myles Salt Co. *v.* Iberia & St. M. Drainage Dist., 239 U.S. 478 (1916).

[488] Wagner *v.* Leser, 239 U.S. 207 (1915).

[489] Charlotte Harbor & N.R. Co. *v.* Welles, 260 U.S. 8 (1922).

[490] Union Refrigerator Transit Co. *v.* Kentucky, 199 U.S. 194, 204 (1905). *See also* Louisville & J. Ferry Co. *v.* Kentucky, 188 U.S. 385 (1903).

[491] Carstairs *v.* Cochran, 193 U.S. 10 (1904); Hannis Distilling Co. *v.* Baltimore, 216 U.S. 285 (1910); Frick *v.* Pennsylvania, 268 U.S. 473 (1925); Blodgett *v.* Silberman, 277 U.S. 1 (1928).

[492] New York ex rel. New York, C. & H.R.R. Co. *v.* Miller, 202 U.S. 584 (1906).

[493] Wheeling Steel Corp *v.* Fox, 298 U.S. 193, 209-210 (1936); Union Refrigerator Transit Co. *v.* Kentucky, 199 U.S. 194, 207 (1905); Johnson Oil Ref. Co. *v.*

Oklahoma ex rel. Mitchell, 290 U.S. 158 (1933).

[494] Robert L. Howard, State Jurisdiction to Tax Intangibles: A Twelve Year Cycle, 8 Missouri Law Review 155, 160-162 (1943); Ralph T. Rawlins, State Jurisdiction to Tax Intangibles: Some Modern Aspects, 18 Texas Law Review 296, 314-315 (1940).

[495] Kirtland *v.* Hotchkiss, 100 U.S. 491, 498 (1879).

[496] Savings & L. Soc. *v.* Multnomah County, 169 U.S. 421 (1898).

[497] Bristol *v.* Washington County, 177 U.S. 133, 141 (1900).

[498] Fidelity & C. Trust Co. *v.* Louisville, 245 U.S. 54 (1917).

[499] Rogers *v.* Hennepin County, 240 U.S. 184 (1916).

[500] Citizens Nat. Bank *v.* Durr, 257 U.S. 99, 109 (1921).

[501] Hawley *v.* Maiden, 232 U.S. 1, 12 (1914).

[502] First Bank Stock Corp. *v.* Minnesota, 301 U.S. 234, 241 (1937).

[503] Schuylkill Trust Co. *v.* Pennsylvania, 302 U.S. 506 (1938).

[504] Harvester Co. *v.* Dept. of Taxation, 322 U.S. 435 (1944).

[505] Wisconsin Gas Co. *v.* United States, 322 U.S. 526 (1944).

[506] New York ex rel. Hatch *v.* Reardon, 204 U.S. 152 (1907).

[507] Graniteville Mfg. Co. *v.* Query, 283 U.S. 376 (1931).

[508] Buck *v.* Beach, 206 U.S. 392 (1907).

[509] Brooke *v.* Norfolk, 277 U.S. 27 (1928).

[510] Greenough *v.* Tax Assessors, 331 U.S. 486, 496-497 (1947).

[511] 277 U.S. 27 (1928).

[512] 280 U.S. 83 (1929).

[513] Senior *v.* Braden, 295 U.S. 422 (1985).

[514] Stebbins *v.* Riley, 268 U.S. 137, 140-141 (1925).

[515] 199 U.S. 194 (1905).—In dissenting in State Tax Commission *v.* Aldrich, 316 U.S. 174, 185 (1942), Justice Jackson asserted that a reconsideration of this principle had become timely.

[516] 268 U.S. 473 (1925). *See also* Treichler *v.* Wisconsin, 338 U.S. 251 (1949); City Bank Farmers Trust Co. *v.* Schnader, 293 U.S. 112 (1934).

[517] 240 U.S. 625, 631 (1916).—A decision rendered in 1920 which is seemingly in conflict was Wachovia Bank & Trust Co. *v.* Doughton, 272 U.S. 567, in which North Carolina was prevented from taxing the exercise of a power of appointment through a will executed therein by a resident, when the property was a trust fund in Massachusetts created by the will of a resident of the latter State. One of the reasons assigned for this result was that by the law of Massachusetts the property involved was treated as passing from the original donor to the appointee. However, this holding was overruled in Graves *v.* Schmidlapp, 315 U.S. 657 (1942).

[518] 233 U.S. 434 (1914).

[519] Rhode Island Hospital Trust Co. *v.* Doughton, 270 U.S. 69 (1926).

[520] 277 U.S. 1 (1928).

[521] First National Bank *v.* Maine, 284 U.S. 312, 330-331 (1932).

[522] 280 U.S. 204 (1930).

[523] 188 U.S. 189 (1903).

[524] 281 U.S. 586 (1930).—In dissenting, Justice Holmes observed that Wheeler *v.* Sohmer, 233 U.S. 434 (1914), previously mentioned, apparently joined Blackstone *v.* Miller on the "Index Expurgatorius."

[525] 282 U.S. 1 (1930).

[526] 284 U.S. 312 (1932).

[527] 316 U.S. 174 (1942).

[528] 307 U.S. 357, 363, 366-368, 372 (1939).

[529] 308 U.S. 313 (1939).

[530] 307 U.S. 383 (1939).

[531] Ibid. 386.

[532] 315 U.S. 657, 660, 661 (1942).

[533] 4 Wheat. 316, 429 (1819).

[534] 319 U.S. 94 (1943).

[535] 306 U.S. 398 (1939).

[536] Wheeling Steel Corp. *v.* Fox, 298 U.S. 193 (1936). *See also* Memphis Gas Co. *v.* Beeler, 315 U.S. 649, 652 (1942).

[537] Adams Express Co. *v.* Ohio State Auditor, 165 U.S. 194 (1897).

[538] Alpha Portland Cement Co. *v.* Massachusetts, 268 U.S. 203 (1925).

[539] Cream of Wheat Co. *v.* Grand Forks County, 253 U.S. 325 (1920).

[540] Newark Fire Ins. Co. *v.* State Board, 307 U.S. 313, 318, 324 (1939). Although the eight judges affirming this tax were not in agreement as to the reasons to be assigned in justification of this result, the holding appears to be in line with the dictum uttered by the late Chief Justice Stone in Curry *v.* McCanless (307 U.S. at 368) to the effect that the taxation of a corporation by a State where it does business, measured by the value of the intangibles used in its business there, does not preclude the State of incorporation from imposing a tax measured by all its intangibles.

[541] Delaware L. & W.R. Co. *v.* Pennsylvania, 198 U.S. 341 (1905).

[542] Louisville & J. Ferry Co. *v.* Kentucky, 188 U.S. 385 (1903).

[543] Kansas City Ry. *v.* Kansas, 240 U.S. 227 (1916); Kansas City, M. & B.R. Co. *v.* Stiles, 242 U.S. 111 (1916).

[544] Schwab *v.* Richardson, 263 U.S. 88 (1923).

[545] Western U. Teleg. Co. *v.* Kansas ex rel. Coleman, 216 U.S. 1 (1910); Pullman Co. *v.* Kansas ex rel. Coleman, 216 U.S. 56 (1910); Looney *v.* Crane Co., 245 U.S. 178 (1917); International Paper Co. *v.* Massachusetts, 246 U.S. 135 (1918).

[546] Cudahy Packing Co. *v.* Hinkle, 278 U.S. 460 (1929).

[547] St. Louis S.W.R. Co. *v.* Arkansas ex rel. Norwood, 235 U.S. 350 (1914).

[548] Atlantic Refining Co. *v.* Virginia, 302 U.S. 22 (1937).

[549] American Mfg Co. *v.* St. Louis, 250 U.S. 459 (1919). Nor does a State license tax on the production of electricity violate the due process clause because it may be necessary, to ascertain, as an element in its computation, the amounts delivered in another jurisdiction.—Utah Power & Light Co. *v.* Pfost, 286 U.S. 165 (1932).

[550] James *v.* Dravo Contracting Co. 302 U.S. 134 (1937).

[551] Union Refrigerator Transit Co. *v.* Kentucky, 199 U.S. 194 (1905).

[552] Southern Pacific Co. *v.* Kentucky, 222 U.S. 63 (1911).

[553] Old Dominion Steamship Co. *v.* Virginia, 198 U.S. 299 (1905).

[554] 199 U.S. 194 (1905).

[555] Pullman's Palace Car Co. *v.* Pennsylvania, 141 U.S. 18 (1891).

[556] Northwest Airlines *v.* Minnesota, 322 U.S. 292, 294-297, 307 (1944).—The case was said to be governed by New York Central Railroad *v.* Miller, 202 U.S. 584, 596 (1906). As to the problem of multiple taxation of such airplanes, which had in fact been taxed proportionately by other States, the Court declared that the "taxability of any part of this fleet by any other State than Minnesota, in view of the taxability of the entire fleet by that State, is not now before us." Justice Jackson, in a concurring opinion, would treat Minnesota's right [to tax as] exclusive of any similar right elsewhere.

[557] Johnson Oil Ref. Co. *v.* Oklahoma ex rel. Mitchell, 290 U.S. 158 (1933).

[558] Pittsburgh, C.C. & St. L.R. Co. *v.* Backus, 154 U.S. 421 (1894).

[559] Wallace *v.* Hines, 253 U.S. 66 (1920).—For example, the ratio of track mileage within the taxing State to total track mileage cannot be employed in evaluating that portion of total railway property found in said State when the

cost of the lines in the taxing State was much less than in other States and the most valuable terminals of the railroad were located in other States. *See also* Fargo *v.* Hart, 193 U.S. 490 (1904); Union Tank Line *v.* Wright, 249 U.S. 275 (1919).

[560] Great Northern R. Co. *v.* Minnesota, 278 U.S. 503 (1929).

[561] Illinois Cent. R. Co. *v.* Minnesota, 309 U.S. 157 (1940).

[562] Lawrence *v.* State Tax Commission, 286 U.S. 276 (1932).

[563] Shaffer *v.* Carter, 252 U.S. 37 (1920); Travis *v.* Yale & T. Mfg. Co., 252 U.S. 60 (1920).

[564] New York ex rel. Cohn *v.* Graves, 300 U.S. 308 (1937).

[565] Maguire *v.* Trefry, 253 U.S. 12 (1920).

[566] Guaranty Trust Co. *v.* Virginia, 305 U.S. 19, 23 (1938).

[567] Whitney *v.* Graves, 299 U.S. 366 (1937).

[568] Underwood Typewriter Co. *v.* Chamberlain, 254 U.S. 113 (1920); Bass, Ratcliff & Gretton *v.* State Tax Commission, 266 U.S. 271 (1924).

[569] Hans Rees' Sons *v.* North Carolina, 283 U.S. 123 (1931).

[570] Matson Nav. Co. *v.* State Board, 297 U.S. 441 (1936).

[571] Wisconsin *v.* J.C. Penney Co., 311 U.S. 435, 448-449 (1940). Dissenting, Justice Roberts, along with Chief Justice Hughes and Justices McReynolds and Reed, stressed the fact that the use and disbursement by the corporation at its home office of income derived from operations in many States does not depend on, and cannot be controlled by, any law of Wisconsin. The act of disbursing such income as dividends, he contended, is "one wholly beyond the reach of Wisconsin's sovereign power, one which it cannot effectively command, or prohibit or condition." The assumption that a proportion of the dividends distributed is paid out of earnings in Wisconsin for the year immediately preceding payment is arbitrary and not borne out by the facts. Accordingly, "if the exaction is an income tax in any sense it is such upon the stockholders [many of whom are nonresidents] and is obviously bad."—*See also* Wisconsin *v.* Minnesota Mining Co., 311 U.S. 452 (1940).

[572] Great A. & P. Tea Co. *v.* Grosjean, 301 U.S. 412 (1937).

[573] Equitable L. Assur. Soc. *v.* Pennsylvania, 238 U.S. 143 (1915).

[574] Provident Sav. Life Assur. Soc. *v.* Kentucky, 239 U.S. 103 (1915).

[575] Continental Co. *v.* Tennessee, 311 U.S. 5, 6 (1940), (Emphasis supplied).

[576] Palmetto F. Ins. Co. *v.* Connecticut, 272 U.S. 295 (1926).

[577] St. Louis Cotton Compress Co. *v.* Arkansas, 260 U.S. 346 (1922).

[578] Connecticut General Co. *v.* Johnson, 303 U.S. 77 (1938).

[579] Metropolitan L. Ins. Co. *v.* New Orleans, 205 U.S. 395 (1907).

[580] Board of Assessors *v.* New York L. Ins. Co., 216 U.S. 517 (1910).

[581] Liverpool & L. & G. Ins. Co. *v.* Board of Assessors, 221 U.S. 346 (1911).

[582] Orient Ins. Co. *v.* Board of Assessors, 221 U.S. 358 (1911).

[583] Turpin *v.* Lemon, 187 U.S. 51, 58 (1902); Glidden *v.* Harrington, 189 U.S. 255 (1903).

[584] McMillen *v.* Anderson, 95 U.S. 37, 42 (1877).

[585] Bell's Gap R. Co. *v.* Pennsylvania, 134 U.S. 232, 239 (1890).

[586] Hodge *v.* Muscatine County, 196 U.S. 276 (1905).

[587] Hagar *v.* Reclamation Dist. No. 108, 111 U.S. 701, 709-710 (1884).

[588] Hagar *v.* Reclamation Dist. No. 108, 111 U.S. 701, 710 (1884).

[589] McMillen *v.* Anderson, 95 U.S. 37, 42 (1877).

[590] Taylor *v.* Secor, (State Railroad Tax Cases), 92 U.S. 575, 610 (1876).

[591] Nickey *v.* Mississippi, 292 U.S. 393, 396 (1934). *See also* Clement Nat. Bank *v.* Vermont, 231 U.S. 120 (1914).

[592] Pittsburgh, C.C. & St. L.R. Co. *v.* Backus, 154 U.S. 421 (1894).

[593] Michigan C.R. Co. *v.* Powers, 201 U.S. 245, 302 (1906).

[594] Pittsburgh, C.C. & St. L.R. Co. *v.* Board of Public Works, 172 U.S. 32, 45 (1898).

[595] St. Louis & K.C. Land Co. *v.* Kansas City, 241 U.S. 419, 430 (1916); Paulson *v.* Portland, 149 U.S. 30, 41 (1893); Bauman *v.* Ross, 167 U.S. 548, 590 (1897).

[596] Tonawanda *v.* Lyon, 161 U.S. 389, 391 (1901).

[597] Londoner *v.* Denver, 210 U.S. 373 (1908).

[598] Withnell *v.* Ruecking Constr. Co., 249 U.S. 63, 68 (1919); Browning *v.* Hooper, 269 U.S. 396, 405 (1926). Likewise, the committing to a board of county supervisors of authority to determine, without notice or hearing, when repairs to an existing drainage system are necessary cannot be said to deny due process of law to landowners in the district, who, by statutory requirement, are assessed for the cost thereof in proportion to the original assessments.—Breiholz *v.* Pocahontas County, 257 U.S. 118 (1921).

[599] Fallbrook Irrig. District *v.* Bradley, 164 U.S. 112, 168, 175 (1896); Browning *v.* Hooper, 269 U S. 396, 405 (1926).

[600] Utley *v.* St. Petersburg, 292 U.S. 106, 109 (1934); French *v.* Barber Asphalt Paving Co., 181 U.S. 324, 341 (1901). *See also* Soliah *v.* Heskin, 222 U.S. 522 (1912).

[601] Hibben *v.* Smith, 191 U.S. 310, 321 (1903).

[602] Hancock *v.* Muskogee, 250 U.S. 454, 488 (1919).—Likewise, a taxpayer does not have a right to a hearing before a State board of equalization preliminary to issuance by it of an order increasing the valuation of all property in a city by 40%.—Bi-Metallic Invest. Co. *v.* State Bd. of Equalization, 239 U.S. 441 (1915).

[603] Detroit *v.* Parker, 181 U.S. 399 (1901).

[604] Paulsen *v.* Portland, 149 U.S. 30, 38 (1893).

[605] Londoner *v.* Denver, 210 U.S. 373 (1908). *See also* Cincinnati, N.O. & T.P.R. Co. *v.* Kentucky (Kentucky Railroad Tax Cases), 115 U.S. 321, 331 (1885); Winona & St. P. Land Co. *v.* Minnesota, 159 U.S. 526, 537 (1895); Merchants' & Mfgrs. Nat. Bank *v.* Pennsylvania, 167 U.S. 461, 466 (1897); Glidden *v.* Harrington, 189 U.S. 255 (1903).

[606] Corry *v.* Baltimore, 196 U.S. 466, 478 (1905).

[607] Leigh *v.* Green, 193 U.S. 79, 92-93 (1904).

[608] Ontario Land Co. *v.* Yordy, 212 U.S. 152 (1909). *See also* Longyear *v.* Toolan, 209 U.S. 414 (1908).

[609] Brinkerhoff-Faris Trust & Sav. Co. *v.* Hill, 281 U.S. 673 (1930).

[610] Central of Georgia R. Co. *v.* Wright, 207 U.S. 127 (1907).

[611] Carpenter *v.* Shaw, 280 U.S. 363 (1930). *See also* Ward *v.* Love County, 253 U.S. 17 (1920).

[612] Farncomb *v.* Denver, 252 U.S. 7 (1920).

[613] Pullman Co. *v.* Knott, 235 U.S. 23 (1914).

[614] Bankers Trust Co. *v.* Blodgett, 260 U.S. 647 (1923).

[615] National Safe Deposit Co. *v.* Stead, 232 U.S. 58 (1914).

[616] Pierce Oil Corp. *v.* Hopkins, 264 U.S. 137 (1924).

[617] Carstairs *v.* Cochran, 193 U.S. 10 (1904); Hannis Distilling Co. *v.* Baltimore, 216 U.S. 285 (1910).

[618] Travis *v.* Yale & T. Mfg. Co., 252 U.S. 60, 75-76 (1920).

[619] League *v.* Texas, 184 U.S. 156 (1902).

[620] Palmer *v.* McMahon, 133 U.S. 660, 669 (1890).

[621] Scottish Union & Nat. Ins. Co. *v.* Bowland, 196 U.S. 611 (1905).

[622] King *v.* Mullins, 171 U.S. 404 (1898); Chapman *v.* Zobelein, 237 U.S. 135 (1915).

[623] Leigh *v.* Green, 193 U.S. 79 (1904).

[624] Davidson *v.* New Orleans, 96 U.S. 97, 107 (1878).

[625] Dewey *v.* Des Moines, 173 U.S. 193 (1899).

[626] League *v.* Texas, 184 U.S. 156, 158 (1902). *See also* Straus *v.* Foxworth, 231 U.S. 162 (1913).

[627] Exercisable as to every description of property, tangibles and intangibles including choses in action, contracts, and charters, but only for a public purpose, the power of eminent domain may also be conferred by the State upon municipal corporations, public utilities, and even upon individuals. Like every other governmental power, the power of eminent domain cannot be surrendered by the State or its subdivisions either by contract or by any other means.—Long Island Water Supply Co. *v.* Brooklyn, 166 U.S. 685 (1897); Offield *v.* New York, N.H. & H.R. Co., 203 U.S. 372 (1906); Sweet *v.* Rechel, 159 U.S. 380 (1895); Clark *v.* Nash, 198 U.S. 361 (1905); Pennsylvania Hospital *v.* Philadelphia, 245 U.S. 20 (1917); Galveston Wharf Co. *v.* Galveston, 260 U.S. 473 (1923).

[628] Green *v.* Frazier, 253 U.S. 233, 238 (1920).

[629] 7 Pet. 243.

[630] 96 U.S. 97, 105.

[631] 166 U.S. 226, 233, 236-237 (1897); *see also* Sweet *v*: Rechel, 159 U.S. 380, 398 (1895).

[632] Hairston *v.* Danville & W.R. Co., 208 U.S. 598, 606 (1908).

[633] Green *v.* Frazier, 253 U.S. 233, 240 (1920); Cincinnati *v.* Vester, 281 U.S. 439, 446 (1930).

[634] Hairston *v.* Danville & W.R. Co., 208 U.S. 598, 607 (1908).

[635] United States ex rel. T.V.A. *v.* Welch, 327 U.S. 546, 551-552, 556-558 (1946), citing Case *v.* Bowles, 327 U.S. 92, 101 (1946), and New York *v.* United States, 326 U.S. 572 (1946)—Concurring in the result, Justice Frankfurter insisted that "the fact that the nature of the subject matter gives the legislative determination nearly immunity from judicial review does not mean that the power to review is wanting." Also concurring in the result, Justice Reed, for himself and Chief Justice Stone, dissented from that portion of the opinion which suggested that "there is no judicial review" of the question whether a "taking is for a public purpose."

[636] Justice Reed concurring in United States ex rel. T.V.A. *v.* Welch, 327 U.S. 546, 557 (1946).

[637] Bragg *v.* Weaver, 251 U.S. 57-59 (1919).—It is no longer open to question that the State legislature may confer upon a municipality the authority to determine such necessity for itself.—Joslin Mfg. Co. *v.* Providence, 262 U.S. 668, 678 (1923).

[638] Rindge Co. *v.* Los Angeles County, 262 U.S. 700 (1923).

[639] Pumpelly *v.* Green Bay Company, 13 Wall. 166, 177-178 (1872); Welch *v.* Swasey, 214 U.S. 91 (1909); Pennsylvania Coal Co. *v.* Mahon, 260 U.S. 393 (1922). *See also* comparable cases involving the Federal Government and discussed under the Fifth Amendment, United States *v.* Lynah, 188 U.S. 445 (1903); United States *v.* Cress, 243 U.S. 316 (1917); Portsmouth Harbor L. & H. Co. *v.* United States, 260 U.S. 327 (1922); United States *v.* Causby, 328 U.S. 256 (1946). *See also* the cases hereinafter discussed on the limitations on "uncompensated takings."

[640] Long Island Water Supply Co. *v.* Brooklyn, 166 U.S. 685 (1897)

[641] Clark *v.* Nash, 198 U.S. 361 (1905).

[642] Strickley *v.* Highland Boy Gold Mining Co., 200 U.S. 527 (1906).

[643] Mt. Vernon-Woodberry Cotton Duck Co. *v.*. Alabama Interstate Power Co., 240 U.S. 30 (1916).

[644] Hendersonville Light & Power Co. *v.*. Blue Ridge Interurban R. Co., 243 U.S. 563 (1917).

[645] Roe *v.* Kansas ex rel. Smith, 278 U.S. 191, 193 (1929).

[646] Dohany *v.* Rogers, 281 U.S. 362 (1930).

[647] Hairston *v.* Danville & W.R. Co., 208 U.S. 598 (1908).

[648] Delaware, L. & W.R. Co. *v.* Morristown, 276 U.S. 182 (1928).

[649] Otis Co. *v.* Ludlow Mfg. Co., 201 U.S. 140, 151, 153 (1906). *See also* Head *v.*

Amoskeag Mfg. Co., 113 U.S. 9, 20-21 (1885).

[650] Missouri P.R. Co. *v.* Nebraska ex rel. Board of Transportation, 164 U.S. 403, 416 (1896). The State court in this case was declared to have acknowledged that the taking was not for a public use. Hence, its reversal by the Supreme Court did not conflict with the later observation by the Court that "no case is recalled where this Court has condemned * * * a taking upheld by the State court as a taking for public uses in conformity with its laws."—*See* Hairston *v.* Danville & W.R. Co., 208 U.S. 598, 607 (1908).

[651] Backus (A.) Jr. and Sons *v.* Port Street Union Depot Co., 169 U.S. 557, 573, 575 (1898).

[652] McGovern *v.* New York, 229 U.S. 363, 370-371 (1913).

[653] Ibid. 371.

[654] Provo Bench Canal and Irrig. Co. *v.* Tanner, 239 U.S. 323 (1915); Appleby *v.* Buffalo, 221 U.S. 524 (1911).

[655] Backus (A.) Jr. and Sons *v.* Port Street Union Depot Co., 169 U.S. 557, 569 (1898).

[656] Chicago, B. & Q.R. Co. *v.* Chicago, 166 U.S. 226, 250 (1897); McGovern *v.* New York, 229 U.S. 363, 372 (1913).

[657] Roberts *v.* New York, 295 U.S. 264 (1935).

[658] Dohany *v.* Rogers, 281 U.S. 362 (1930).

[659] Joslin Mfg. Co. *v.* Providence, 262 U.S. 668, 677 (1923).

[660] Chicago, B. & Q.R. Co. *v.* Chicago, 166 U.S. 226, 255 (1897).

[661] Manigault *v.* Springs, 199 U.S. 473, 484-485 (1905).

[662] Chicago, B. & Q.R. Co. *v.* Chicago, 166 U.S. 226, 252 (1897).

[663] Darling *v.* Newport News, 249 U.S. 540 (1919).

[664] Northern Transportation Co. *v.* Chicago, 99 U.S. 635, 642 (1879). *See also* Marchant *v.* Pennsylvania Railroad Co., 153 U.S. 380 (1894).

[665] Meyer *v.* Richmond, 172 U.S. 82 (1898). For cases illustrative of the types of impairment or flooding consequent upon erection of dams or aids to navigation which have been deemed to amount to a taking for which compensation must be paid, *see* Pumpelly *v.* Green Bay Company, 13 Wall. 166 (1872); United States *v.* Lynah, 188 U.S. 445 (1903); United States *v.* Cress, 243 U.S. 316 (1917).

[666] Sauer *v.* New York, 206 U.S. 536 (1907).

[667] Welch *v.* Swasey, 214 U.S. 91 (1909).

[668] Pennsylvania Coal Co. *v.* Mahon, 260 U.S. 393, 413-414 (1922). For comparable cases involving the Federal Government *see* Portsmouth Harbor L. & H. Co. *v.* United States, 260 U.S. 327 (1922) and United States *v.* Causby, 328 U.S. 256 (1946).

[669] Georgia *v.* Chattanooga, 264 U.S. 472, 483 (1924).

[670] North Laramie Land Co. *v.* Hoffman, 268 U.S. 276, 283 (1925). *See also* Bragg *v.* Weaver, 251 U.S. 57 (1919).

[671] Bragg *v.* Weaver, 251 U.S. 57 (1919); Joslin Mfg. Co. *v.* Providence, 262 U.S. 668, 678 (1923).

[672] Bragg *v.* Weaver, 251 U.S. 57, 59 (1919); North Laramie Land Co. *v.* Hoffman, 268 U.S. 276 (1925).

[673] Bragg *v.* Weaver, 251 U.S. 57, 59 (1919).

[674] Long Island Water Supply Co. *v.* Brooklyn, 166 U.S. 685, 695 (1897).

[675] Hays *v.* Seattle, 251 U.S. 233, 238 (1920); Bailey *v.* Anderson, 326 U.S. 203, 205 (1945).

[676] The requirements of due process in tax and eminent domain proceedings are discussed in conjunction with the coverage of these topics. *See* pp. 1056-1062, 1069.

[677] Hagar *v.* Reclamation Dist., 111 U.S. 701, 708 (1884); Hurtado *v.* California, 110 U.S. 516, 537 (1884).

[678] Brown *v.* New Jersey, 175 U.S. 172, 175 (1899); Hurtado *v.* California, 110

U.S. 516, 529 (1884); Twining *v.* New Jersey, 211 U.S. 78, 101 (1908); Anderson Nat. Bank *v.* Luckett, 321 U.S. 233, 244 (1944).

[679] Marchant *v.* Pennsylvania R. Co., 153 U.S. 380, 386 (1894).

[680] Ballard *v.* Hunter, 204 U.S. 241, 255 (1907); Palmer v. McMahon, 133 U.S. 660, 668 (1890).

[681] McMillen *v.* Anderson, 95 U.S. 37, 41 (1877).

[682] R.R. Commission *v.* Oil Co., 311 U.S. 570 (1941). *See also* Railroad Commission *v.* Oil Co., 310 U.S. 573 (1940).

[683] Dreyer *v.* Illinois, 187 U.S. 71, 83-84 (1902).

[684] New York ex rel. Lieberman *v.* Van De Carr, 199 U.S. 552, 562 (1905).

[685] Ohio ex rel. Bryant *v.* Akron Metropolitan Park Dist, 281 U.S. 74, 79 (1930).

[686] Carfer *v.* Caldwell, 200 U.S. 293, 297 (1906).

[687] Scott *v.* McNeal, 154 U.S. 34, 46 (1894); Pennoyer *v.* Neff, 95 U.S. 714, 733 (1878).

[688] National Exchange Bank *v.* Wiley, 195 U.S. 257, 270 (1904); Iron Cliffs Co. *v.* Negaunee Iron Co., 197 U.S. 463, 471 (1905).

[689] Arndt *v.* Griggs, 134 U.S. 316, 321 (1890); Grannis *v.* Ordean, 234 U.S. 385 (1914); Pennington *v.* Fourth Nat. Bank, 243 U.S. 269, 271 (1917).

[690] Goodrich *v.* Ferris, 214 U.S. 71, 80 (1909).

[691] Pennington *v.* Fourth Nat. Bank, 243 U.S. 269, 271 (1917).

[692] The jurisdictional requirements for rendering a valid decree in divorce proceedings are considered under the full faith and credit clause, *supra*, pp. 662-670.

[693] Pennoyer *v.* Neff, 95 U.S. 714 (1878); Simon *v.* Southern R. Co., 236 U.S. 115, 122 (1915); Grannis *v.* Ordean, 234 U.S. 385, 392, 394 (1914).

[694] Louisville & N.R. Co. *v.* Schmidt, 177 U.S. 230 (1900); McDonald *v.* Mabee, 243 U.S. 90, 91, (1917). *See also* Adam *v.* Saenger, 303 U.S. 59 (1938).

[695] Rees *v.* Watertown, 19 Wall. 107 (1874); Coe *v.* Armour Fertilizer Works, 237 U.S. 413, 423 (1915); Griffin *v.* Griffin, 327 U.S. 220 (1946).

[696] Sugg *v.* Thornton, 132 U.S. 524 (1889).

[697] Riverside & Dan River Cotton Mills *v.* Menefee, 237 U.S. 189, 193 (1915); Hess *v.* Pawloski, 274 U.S. 352, 355 (1927). *See also* Harkness *v.* Hyde, 98 U.S. 476 (1879); Wilson *v.* Seligman, 144 U.S. 41 (1892).

[698] Milliken *v.* Meyer, 311 U.S. 457, 462-464 (1940).

[699] McDonald *v.* Mabee, 243 U.S. 90, 92 (1917).

[700] Thus, in an older decision rendered in 1919, the Court held that whereas "States could exclude foreign corporations * * *, and therefore establish * * * [appointment of such an agent] as a condition to letting them in," they had no power to exclude individuals; and as a consequence, a statute was ineffective which treated nonresident partners, by virtue of their having done business therein, as having consented to be bound by service of process on a person who was their employee when the transaction sued on arose but was not their agent at the time of service.—Flexner *v.* Farson, 248. U.S. 289, 293 (1919).

Because it might be construed to negative extension to nonresidents, other than motorists, of the statutory device upheld in Hess *v.* Pawloski, the doctrine of Flexner *v.* Farson, "that the mere transaction of business in a State by a nonresident natural person does not imply consent to be bound by the process of its courts," was recently condemned as inadequate "to cope with the increasing problem of practical responsibility of hazardous business conducted in absentia * * *"—Sugg *v.* Hendrix, 142 F. (2d) 740, 742 (1944).

[701] Hess *v.* Pawloski, 274 U.S. 352 (1927); Wuchter *v.* Pizzutti, 276 U.S. 13, 20, 24 (1928).

[702] 326 U.S. 310, 316 (1945).

[703] 326 U.S. 310.

[704] Philadelphia & Reading Ry. Co. *v.* McKibbin, 243 U.S. 264, 265 (1917).

[705] In a very few cases, "continuous operations within a State were thought to be so substantial and of such a nature as to justify suits against [a foreign

corporation] on causes of action arising from dealings entirely distinct from those" operations.—*See* St. Louis S.W.R. Co. *v.* Alexander, 227 U.S. 218 (1913); Missouri, K. & T.R. Co. *v.* Reynolds, 255 U.S. 565 (1921).

[706] Old Wayne Life Assn. *v.* McDonough, 204 U.S. 8, 21 (1907).

[707] Simon *v.* Southern R. Co., 236 U.S. 115, 129-130 (1915).—In neither this case, nor the preceding decision were the defendant corporations notified of the pendency of the action, service having been made only on the Insurance Commissioner or the Secretary of State.

[708] Green *v.* Chicago, B. & Q.R. Co., 205 U.S. 530 (1907). *See also* Davis *v.* Farmers Co-operative Co., 262 U.S. 312, 317 (1923).

[709] Pennsylvania F. Ins. Co. *v.* Gold Issue Min. & M. Co., 243 U.S. 93, 95-96 (1917).

[710] Rosenberg Bros. & Co. *v.* Curtis Brown Co., 260 U.S. 516, 517 (1923).

[711] Goldey *v.* Morning News, 156 U.S. 518 (1895).

[712] Conley *v.* Mathieson Alkali Works, 190 U.S. 406 (1903).

[713] Riverside Mills *v.* Menefee, 237 U.S. 189, 195 (1915).

[714] Mutual Life Insurance Co. *v.* Spratley, 172 U.S. 602 (1899).

[715] St. Clair *v.* Cox, 106 U.S. 350, 356 (1882). *See* St. Louis S.W.R. Co. *v.* Alexander, 227 U.S. 218 (1913).

[716] Mutual Reserve &c. Assn. *v.* Phelps, 190 U.S. 147, 156 (1903).

[717] Washington *v.* Superior Court, 289 U.S. 361, 365 (1933).

[718] 326 U.S. 310, 317-320 (1945).

[719] This departure was recognized by Justice Rutledge in a subsequent opinion in Nippert *v.* Richmond, 327 U.S. 416, 422 (1946).

The principle that solicitation of business alone is inadequate to confer jurisdiction for purposes of subjecting a foreign corporation to a suit *in personam* was established in Green *v.* Chicago, B. & Q.R. Co., 205 U.S. 530 (1907); but was somewhat qualified by the later holding in International Harvester Co. *v.* Kentucky, 234 U.S. 579 (1914) to the effect that when solicitation was connected with other activities (in the latter case, the local agents collected from the customers), a foreign corporation was then doing business within the forum State. Inasmuch as the International Shoe Company, in addition to having its agents solicit orders, also permitted them to rent quarters for the display of merchandise, the observation has been made that the Court, by applying the qualification of the International Harvester Case, could have decided International Shoe Co. *v.* Washington, 326 U.S. 310 (1945) as it did without abandoning the "presence" doctrine.

[720] 326 U.S. 310, 316-317.

[721] Ibid. 319.

[722] 339 U.S. 643 (1950).

[723] Ibid. 647-649.—Concerning the holding in Minnesota Ass'n. *v.* Benn, 261 U.S. 140 (1923), that a similar Minnesota mail order insurance company could not be viewed as doing business in Montana where the claimant-plaintiff lived, and that the circumstances under which its Montana contracts, executed and to be performed in Minnesota, were consummated could not support in implication that the foreign insurer had consented to be sued in Montana, the majority asserted that the "narrow grounds relied on by the Court in the Benn Case cannot be deemed controlling."

Declaring that what is necessary to sustain a suit by a policyholder in Virginia against a foreign insurer is not determinative when the State seeks to regulate solicitation within its borders, Justice Douglas, in a concurring opinion, emphasized that it is the nature of the State's action that determines the degree of activity in a State necessary for satisfying the requirements of due process, and that solicitation by existing members operates as though the insurer "had formally designated Virginia members as its agents."

Insisting that "an *in personam* judgment cannot be based upon service by registered letter on a nonresident corporation or a natural person, neither of whom has ever been" in Virginia, Justice Minton, with whom Justice Jackson was associated in a dissenting opinion, would have dismissed the appeal on the ground that "Virginia has not claimed the power to require [the insurer] * * * to appoint the Secretary of State as their agent for service of process,

nor have [its] courts rendered judgment in a suit where service was made in that manner." He would therefore let Virginia "go through this shadow-boxing performance in order to publicize the activities of" the insurer.—Justices Reed and Frankfurter joined this dissent on the merits.—Ibid. 655-656, 658, 659.

In Perkins *v.* Benguet Mining Co., 342 U.S. 437 (1952) it was held, that the State of Ohio was free either to open its courts, or to refuse to do so, to a foreign corporation owning gold and silver mines in the Philippine Islands, but temporarily (during Japanese occupation) carrying on a part of its general business in Ohio, including directors meetings, business correspondence, banking, etc. Two members of the Court dissented, contending that what it was doing was "giving gratuitously an advisory opinion to the Ohio Supreme Court. [They] would dismiss the writ [of certiorari] as improvidently granted." The case is obviously too atypical to offer much promise of importance as a precedent.

[724] Arndt *v.* Griggs, 134 U.S. 316, 321 (1890).

[725] Ballard *v.* Hunter, 204 U.S. 241, 254 (1907); Pennoyer *v.* Neff, 95 U.S. 714 (1878).

[726] Dewey *v.* Des Moines, 173 U.S. 193, 203 (1899); Pennoyer *v.* Neff, 95 U.S. 714 (1878).

[727] American Land Co. *v.* Zeiss, 219 U.S. 47 (1911).

[728] Pennoyer *v.* Neff, 95 U.S. 714 (1878); citing Boswell *v.* Otis, 9 How. 336 (1850); Cooper *v.* Reynolds, 10 Wall. 308 (1870). Such remedy, by way of example, is also available to a wife who is enabled thereby to impound local bank deposits of her absent husband for purposes of collecting unpaid instalments by him. Moreover, because of the antiquity of the procedure authorized, a statute permitting the impounding of property of an absconding father for the maintenance of his children is not in conflict with due process because it fails to provide for notice, actual or constructive, to the absconder. —Pennington *v.* Fourth Nat. Bank, 243 U.S. 269, 271 (1917); Corn Exch. Bank *v.* Coler, 280 U.S. 218, 222 (1930). Likewise, proceedings to attach wages in execution of a judgment for debt may be instituted without any notice or service on the judgment debtor. The latter, having had his day in court when the judgment was rendered, is not entitled to be apprized of what action the judgment creditor may elect to take to enforce collection.—Endicott Co. *v.* Encyclopedia Press, 266 U.S. 285, 288 (1924).

[729] Goodrich *v.* Ferris, 214 U.S. 71, 80 (1909).

[730] McCaughey *v.* Lyall, 224 U.S. 558 (1912).

[731] RoBards *v.* Lamb, 127 U.S. 58, 61 (1888). Inasmuch as it is within the power of a State to provide that one who has undertaken administration of an estate shall remain subject to the order of its courts until said administration is closed, it follows that there can be no question as to the validity of a judgment for unadministered assets obtained on service of publication plus service personally upon an executor in the State in which he had taken refuge and in which he had been adjudged incompetent.—Michigan Trust Co. *v.* Ferry, 228 U.S. 346 (1913). Also, when a mother petitions for her appointment as guardian, and no one but the mother and her infant son of tender years, are concerned, failure to serve notice of the petition upon the infant does not invalidate the proceedings resulting in her appointment.—Jones *v.* Prairie Oil & Gas Co., 273 U.S. 195 (1927). Also a Pennsylvania statute which establishes a special procedure for appointment of one to administer the estate of absentees, which procedure is distinct from that contained in the general law governing settlement of decedents' estates and provides special safeguards to protect the rights of absentees is not repugnant to the due process clause because it authorizes notice by publication after an absence of seven years.—Cunnius *v.* Reading School Dist., 198 U.S. 458 (1905).

[732] Hamilton *v.* Brown, 161 U.S. 256, 275 (1896).

[733] Security Sav. Bank *v.* California, 263 U.S. 282 (1923).

[734] Anderson Nat. Bank *v.* Luckett, 321 U.S. 233 (1944).

[735] Mullane *v.* Central Hanover Tr. Co., 339 U.S. 306 (1950).

[736] Voeller *v.* Neilston Co., 311 U.S. 531 (1941).

[737] Grannis *v.* Ordean, 234 U.S. 385, 395-396 (1914).

[738] Miedreich *v.* Lauenstein, 232 U.S. 236 (1914).

[739] Twining *v.* New Jersey, 211 U.S. 78, 110 (1908); Jacob *v.* Roberts, 223 U.S. 261, 265 (1912).

[740] Bi-Metallic Co. *v.* Colorado, 239 U.S. 441, 445 (1915); Bragg *v.* Weaver, 251 U.S. 57, 58 (1919). For the procedural requirements that must be observed in the passage of legislation levying special assessments or establishing assessment districts, *see* pp. 1058-1059.

[741] Pacific States Box & Basket Co. *v.* White, 296 U.S. 176 (1935); Western Union Telegraph Co. *v.* Industrial Com'n., 24 F. Supp. 370 (1938); Ralph F. Fuchs, Procedure in Administrative Rule-Making, 52 Harvard Law Review, 259 (1938).

Whether action of an administrative agency, which voluntarily affords notice and hearing in proceedings in which due process would require the same, is voided by the fact that the statute in pursuance of which it operates does not expressly provide such protection, is a question as to which the Supreme Court has developed no definitive answer. It appears to favor the doctrine enunciated by State courts to the effect that such statutes are to be construed as impliedly requiring notice and hearing, although, in a few instances, it has uttered comments rejecting this notice-by-implication theory.—*See* Toombs *v.* Citizens Bank, 281 U.S. 643 (1930); Paulsen *v.* Portland, 149 U.S. 30 (1893); Bratton *v.* Chandler, 260 U.S. 110 (1922); Cincinnati, N.O. & T.R. Co. *v.* Kentucky, 115 U.S. 321 (1885). *Contra*: Central of Georgia R. Co. *v.* Wright, 207 U.S. 127 (1907); Coe *v.* Armour Fertilizer Works, 237 U.S. 413 (1915); Wuchter *v.* Pizzutti, 276 U.S. 13 (1928).

[742] Bratton *v.* Chandler, 260 U.S. 110 (1922); Missouri ex rel. Hurwitz *v.* North, 271 U.S. 40 (1926).

[743] North American Cold Storage Co. *v.* Chicago, 211 U.S. 306, 315-316 (1908). For an exposition of the doctrine applicable for determining the tort liability of administrative officers, *see* Miller *v.* Horton, 152 Mass. 540 (1891).

[744] Samuels *v.* McCurdy, 267 U.S. 188 (1925).

[745] 152 U.S. 133 (1894).

[746] Ibid. 140-141.

[747] Anderson National Bank *v.* Luckett, 321 U.S. 233, 246-247 (1944).

[748] Coffin Bros. & Co. *v.* Bennett, 277 U.S. 29, 31 (1928).

[749] Postal Teleg. Cable Co. *v.* Newport, 247 U.S. 464, 476 (1918); Baker *v.* Baker, E. & Co., 242 U.S. 394, 403 (1917); Louisville & N.R. Co. *v.* Schmidt, 177 U.S. 230, 236 (1900).

[750] American Surety Co *v.* Baldwin, 287 U.S. 156, 168 (1932).

[751] Saunders *v.* Shaw, 244 U.S. 317 (1917).

[752] *See* footnote 1, p. 1085.

[753] Coe *v.* Armour Fertilizer Works, 237 U.S. 413, 424 (1915); Wuchter *v.* Pizzutti, 276 U.S. 13 (1928).

[754] Roller *v.* Holly, 176 U.S. 398, 407, 409 (1900).

[755] Goodrich *v.* Ferris, 214 U.S. 71, 80 (1909). One may, of course, waive a right to notice and hearing, as in the case of a debtor or surety who consents to the entry of a confessed judgment on the happening of certain conditions.—Johnson *v.* Chicago & P. Elevator Co., 119 U.S. 388 (1886); American Surety Co. *v.* Baldwin, 287 U.S. 156 (1932).

[756] *See* pp. 1084-1088.

[757] Holmes *v.* Conway, 241 U.S. 624, 631 (1916); Louisville & N.R. Co. *v.* Schmidt, 177 U.S. 230, 236 (1900).

[758] Snyder *v.* Massachusetts, 291 U.S. 97, 105 (1934); West *v.* Louisiana, 194 U.S. 258, 263 (1904); Chicago, B. & Q.R. Co. *v.* Chicago, 166 U.S. 226 (1897); Jordan *v.* Massachusetts, 225 U.S. 167, 176 (1912). The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them and to deny access to its courts, in the exercise of its right to regulate practice and procedure; is also subject to the restrictions imposed by the contract, full faith and credit, and privileges and immunities clauses of the Federal Constitution. Angel *v.* Bullington, 330 U.S. 183 (1947).

[759] Hardware Dealers Mut. F. Ins. Co. *v.* Glidden Co., 284 U.S. 151, 158 (1931); Iowa C.R. Co. *v.* Iowa, 160 U.S. 389, 393 (1896); Honeyman *v.* Hanan, 302 U.S. 375 (1937).

[760] Cincinnati Street R. Co. *v.* Snell, 193 U.S. 30, 36 (1904).

[761] Ownbey *v.* Morgan, 256 U.S. 94, 112 (1921). Thus, the Fourteenth Amendment does not constrain the States to accept modern doctrines of equity, or adopt a combined system of law and equity procedure, or dispense with all necessity for form and method in pleading, or give untrammeled liberty to make amendments.

[762] Cohen *v.* Beneficial Loan Corp., 337 U.S. 541 (1949).

[763] Young Co. *v.* McNeal-Edwards Co., 283 U.S. 398 (1931); Adam *v.* Saenger, 303 U.S. 59 (1938).

[764] Jones *v.* Union Guano Co., 264 U.S. 171 (1924).

[765] York *v.* Texas, 137 U.S. 15 (1890); Kauffman *v.* Wooters, 138 U.S. 285, 287 (1891).

[766] Grant Timber & Mfg. Co. *v.* Gray, 236 U.S. 133 (1915).

[767] Ownbey *v.* Morgan, 256 U.S. 94, 111 (1921).—Consistently, with due process, a State may provide that the doctrines of contributory negligence, assumption of risk, and fellow servant shall not bar recovery in actions brought against an employer for death or injury resulting from dangerous machinery improperly safeguarded. A person having no vested right to the defense of contributory negligence, a State may take it away altogether, or may provide that said defense, as well as that of assumption of risk, are questions of fact to be left to the jury.—Bowersock *v.* Smith, 243 U.S. 29, 34 (1917); Chicago, R.I. & P.R. Co. *v.* Cole, 251 U.S. 54, 55 (1919); Herron *v.* Southern P. Co., 283 U.S. 91 (1931).

[768] Sawyer *v.* Piper, 189 U.S. 154 (1903).

[769] Ballard *v.* Hunter, 204 U.S. 241, 259 (1907).

[770] Missouri K. & T.R. Co. *v.* Cade, 233 U.S. 642, 650 (1914).

[771] Lowe *v.* Kansas, 163 U.S. 81 (1896).

[772] Yazoo & M.V.R. Co. *v.* Jackson Vinegar Co., 226 U.S. 217 (1912); Chicago & N.W.R. Co. *v.* Nye Schneider Fowler Co., 260 U.S. 35, 43-44 (1922); Hartford L. Ins. Co. *v.* Blincoe, 255 U.S. 129, 139 (1921); Life & C. Ins. Co. *v.* McCray, 291 U.S. 566 (1934).

[773] Pizitz Dry Goods Co. *v.* Yeldell, 274 U.S. 112, 114 (1927).

[774] Coffey *v.* Harlan County, 204 U.S. 659, 663, 665 (1907).

[775] Wheeler *v.* Jackson, 137 U.S. 245, 258 (1890); Kentucky Union Co. *v.* Kentucky, 219 U.S. 140, 156 (1911).

[776] Blinn *v.* Nelson, 222 U.S. 1 (1911).

[777] Turner *v.* New York, 168 U.S. 90, 94 (1897).

[778] Soper *v.* Lawrence Bros. Co., 201 U.S. 359 (1906). Nor is a former owner who had not been in possession for five years after and fifteen years before said enactment thereby deprived of any property without due process.

[779] Mattson *v.* Department of Labor, 293 U.S. 151, 154 (1934).

[780] Campbell *v.* Holt, 115 U.S. 620, 623, 628 (1885).

[781] Chase Securities Corp. *v.* Donaldson, 325 U.S. 304 (1945).

[782] Gange Lumber Co. *v.* Rowley, 326 U.S. 295 (1945).

[783] Campbell *v.* Holt, 115 U.S. 620, 623 (1885). *See also* Stewart *v.* Keyes, 295 U.S. 403, 417 (1935).

[784] Home Ins. Co. *v.* Dick, 281 U.S. 397, 398 (1930).

[785] Hawkins *v.* Bleakly, 243 U.S. 210, 214 (1917); James-Dickinson Farm Mortg. Co. *v.* Harry, 273 U.S. 119, 124 (1927). An omission in a criminal trial of any reference to the presumption of innocence effects no denial of due process of law where the State appellate court ruled that such omission did not invalidate the proceedings. Howard *v.* Fleming, 191 U.S. 126, 136 (1903).

[786] Manley *v.* Georgia, 279 U.S. 1, 5 (1929); Western & A.R. Co. *v.* Henderson, 279 U.S. 639, 642 (1929); Bailey *v.* Alabama, 219 U.S. 219, 233 (1911); Mobile, J. & K.C.R. Co. *v.* Turnipseed, 219 U.S. 35, 42 (1910).

[787] Bailey *v.* Alabama, 219 U.S. 219, 233 (1911).

[788] Manley *v.* Georgia, 279 U.S. 1, 7 (1929).

[789] Western & A.R. Co. *v.* Henderson, 279 U.S. 639 (1929).

[790] Atlantic Coast Line R. Co. *v.* Ford, 287 U.S. 502 (1933). *See also* Mobile, J. & K.C.R. Co. *v.* Turnipseed, 219 U.S. 35 (1910).

[791] Hawes *v.* Georgia, 258 U.S. 1 (1922).

[792] Bandini Petroleum Co. *v.* Superior Ct., 284 U.S. 8, 19 (1931).

[793] Hawker *v.* New York, 170 U.S. 189 (1898).

[794] Cockrill *v.* California, 268 U.S. 258, 261 (1925).

[795] Morrison *v.* California, 288 U.S. 591 (1933).

[796] Morrison *v.* California, 291 U.S. 82 (1934).

[797] "The limits are in substance these, that the State shall have proved enough to make it just for the defendant to be required to repeal what has been proved * * *, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression."—Ibid. 88-89.

[798] Ibid. 87-91, 96-97.

[799] Leland *v.* Oregon, 343 U.S. 790 (1952).

[800] Walker *v.* Sauvinet, 92 U.S. 90 (1876); New York C.R. Co. *v.* White, 243 U.S. 188, 208 (1917); Snyder *v.* Massachusetts, 291 U.S. 97, 105 (1934).

[801] Marvin *v.* Trout, 199 U.S. 212, 226 (1905).

[802] Tinsley *v.* Anderson, 171 U.S. 101, 108 (1898); Eilenbecker *v.* District Court, 134 U.S. 31, 36, 39 (1890).

[803] Delgado *v.* Chavez, 140 U.S. 586, 588 (1891).

[804] Wilson *v.* North Carolina ex rel. Caldwell, 169 U.S. 586 (1898); Foster *v.* Kansas ex rel. Johnston, 112 U.S. 201, 206 (1884).

[805] Long Island Water Supply Co. *v.* Brooklyn, 166 U.S. 685, 694 (1897).

[806] Montana Company *v.* St. Louis Min. & Mill Co., 152 U.S. 160, 171 (1894); Church *v.* Kelsey, 121 U.S. 282 (1887).

[807] Jordan *v.* Massachusetts, 225 U.S. 167, 176 (1912).

[808] Maxwell *v.* Dow, 176 U.S. 581, 602 (1900).

[809] Winters *v.* New York, 333 U.S. 507, 509-510, 515 (1948). *See also* Cline *v.* Frink Dairy, 274 U.S. 445 (1927); Cole *v.* Arkansas, 338 U.S. 345, 354 (1949).

[810] Lanzetta *v.* New Jersey, 306 U.S. 451, 455 (1939).

[811] Minnesota *v.* Probate Court, 309 U.S. 270 (1940).

[812] Hurtado *v.* California, 110 U.S. 516, 520, 538 (1884); Brown *v.* New Jersey, 175 U.S. 172, 175 (1890); Maxwell *v.* Dow, 176 U.S. 581, 602 (1900); Graham *v.* West Virginia, 224 U.S. 616, 627 (1912); Jordan *v.* Massachusetts, 225 U.S. 167, 176 (1912).

[813] Lem Woon *v.* Oregon, 229 U.S. 586, 590 (1913).

[814] Gaines *v.* Washington, 277 U.S. 81, 86 (1928).

[815] Norris *v.* Alabama, 294 U.S. 587 (1935). *See also* Hale *v.* Kentucky, 303 U.S. 613 (1938); Pierre *v.* Louisiana, 306 U.S. 354 (1939); Smith *v.* Texas, 311 U.S. 128 (1940); Shepherd *v.* Florida, 341 U.S. 50 (1951).

[816] Powell *v.* Alabama, 287 U.S. 45, 66, 71 (1932).

[817] Palko *v.* Connecticut, 302 U.S. 319, 324-325 (1937).

[818] 287 U.S. 45 (1932).

[819] Ibid. 71.

[820] 287 U.S. 45, 71 (1932).—The Court presently seems to be holding that in capital cases, notwithstanding the absence even of other circumstances prejudicial to the defendant, the right to counsel is unqualified. *See* the later cases discussed herein, especially Tomkins *v.* Missouri, 323 U.S. 485 (1945); Williams *v.* Kaiser, 323 U.S. 471 (1945); Hawk *v.* Olson, 326 U.S. 271 (1945); and the Court's summary of its rulings in Uveges *v.* Pennsylvania, 335 U.S. 437 (1948), *supra*, p. 1108.

[821] 308 U.S. 444 (1940).

[822] Ibid. 446-447.

[823] 312 U.S. 329 (1941).—In a post mortem comment on this case appearing in the later decision of Betts *v.* Brady, 316 U.S. 455, 464 (1942), there is contained the intimation that the mere failure to appoint counsel, alone, in the absence of the proof of other facts tending to show that the whole trial was "a mere sham and a pretense," would not have sufficed to support a finding of a denial of due process.

[824] 316 U.S. 455, 462-463 (1942).

[825] Ibid. 462, 473.

[826] In Powell *v.* Alabama, 287 U.S. 45 (1932); Avery *v.* Alabama, 308 U.S. 444 (1940); and Smith *v.* O'Grady, 312 U.S. 329 (1941), a State law required the appointment of counsel.

[827] 316 U.S. 455, 461-462, 474-476 (1942).—Dissenting, Justice Black, with whom Justices Douglas and Murphy were in agreement, acknowledged regretfully that the view that the "Fourteenth Amendment made the Sixth applicable to the States * * * has never been accepted by a majority of this Court," and submitted a list of citations showing that by judicial decision, as well as by constitutional and statutory provision, a majority of States require that indigent defendants, in noncapital as well as capital cases, be provided with counsel on request. This evidence, he contended, supports the conclusion that "denial to the poor of a request for counsel in proceedings based on serious charges of crime," has "long been regarded throughout this country as shocking to the 'universal sense of justice.'"

[828] 323 U.S. 471 (1945).

[829] 323 U.S. 485 (1945).

[830] 287 U.S. 45, 69, 71 (1932).

[831] 323 U.S. 471, 476 (1945).

[832] 324 U.S. 42 (1945). *See also* White *v.* Ragen, 324 U.S. 760 (1945).

[833] 326 U.S. 271 (1945).

[834] 324 U.S. 42, 46 (1945).

[835] 324 U.S. 786 (1945).

[836] 327 U.S. 82 (1946). Justices Murphy and Rutledge dissented, the former contending that "the right to counsel means nothing unless it means the right to counsel at each and every step in a criminal proceeding."—Ibid. 89.

[837] 329 U.S. 173 (1946).

[838] Rice *v.* Olson, 324 U.S. 786 (1945), was distinguished on the ground that the record in the older case contained specific allegations bearing on the disabilities of the accused to stand prosecution without the aid of counsel and the complete absence of any uncontested finding, as in the instant case, of an intelligent waiver of counsel.

Dissenting for himself and Justices Black and Rutledge, Justice Douglas declared that, under the authority of Williams *v.* Kaiser, 323 U.S. 471, 476 (1945), "if * * * [the] defendant is not capable of making his own defense, it is the duty of the Court, at least in capital cases, to appoint counsel, whether requested so to do or not."—329 U.S. 173, 181 (1946). In a separate dissent, Justice Murphy observed that while "legal technicalities doubtless afford justification for our pretense of ignoring plain facts before us," facts which emphasize the absence of any intelligent waiver of counsel, "the result certainly does not enhance the high traditions of the judicial process."—Ibid. 183.

[839] 329 U.S. 663, 665 (1947).

[840] 332 U.S. 134 (1947).

[841] 332 U.S. 145 (1947).

[842] 332 U.S. 134, 136 (1947).—Acknowledging that the decision is in line with the precedent of Betts *v.* Brady, Justice Black, who was joined by Justices Douglas, Murphy, and Rutledge, lamented that the latter was a "kind of precedent [which he] had hoped that the Court would not perpetuate." Complaining of the loss of certainty occasioned by the Court's refusal to read into the Fourteenth Amendment the absolute right to counsel set out in the Sixth Amendment, Justice Black contends that the fair trial doctrine as enunciated in this and in the Adamson *v.* California case (*see* p. 1115) decided

on the same day is "another example of the consequences which can be produced by the substitution of this Court's day-to-day opinion of what kind of trial is fair and decent for the kind of trial which the Bill of Rights guarantees."—Ibid. 139, 140.—In a second dissenting opinion meriting the concurrence of Justices Black, Douglas, and Murphy, Justice Rutledge, who also is of the opinion that the absolute right to counsel granted by the Sixth Amendment should be enjoyed in State criminal trials, insisted that even under the fair trial doctrine, the accused had not been accorded due process.

[843] 332 U.S. 145 (1947).

[844] 332 U.S. 561 (1947).

[845] 332 U.S. 596 (1948).

[846] *See* p. 1103.

[847] 333 U.S. 640, 678, 680-682 (1948).—As against the assertion of the majority that the due process clause of the Fourteenth Amendment does not of its own force require appointment of counsel for one simply because he would have a constitutional right to the assistance of counsel in a comparable federal case, the minority, consisting of Justices Black, Murphy, and Rutledge speaking through Justice Douglas, declared that "the Bill of Rights is applicable to all courts at all times"; for, otherwise, "of what value is the constitutional guarantee of a fair trial if an accused does not have counsel to advise and defend him." Noting that all members of the Court were in accord on the requirement of counsel in capital offenses, the minority contended that the considerations inducing such unanimity were "equally germane [in noncapital cases] where liberty rather than life hangs in the balance." Conceding that "it might not be nonsense to draw the Betts *v.* Brady line somewhere between that case and the case of one charged with violation of a parking ordinance, and to say the accused is entitled to counsel in the former but not in the latter," the minority concluded as follows: "* * * to draw the line between this case and cases where the maximum penalty is death is to make a distinction which makes no sense in terms of the absence or presence of need for counsel. Yet it is the *need* for counsel that establishes the real standard for determining whether the lack of counsel rendered the trial unfair. And the need for counsel, even by Betts *v.* Brady standards, is not determined by the complexities of the individual case or the ability of the particular person who stands as an accused before the Court. That need is measured by the *nature* of the *charge* and the *ability* of the *average* man to face it alone, unaided by an expert in the law."

[848] 334 U.S. 672, 683 (1948).

[849] 334 U.S. 728, 730, 731 (1948).

[850] 334 U.S. 736 (1948).

[851] Ibid. 740.—The majority also observed that "trial court's facetiousness casts a somewhat somber reflection on the fairness of the proceeding * * *"

Although Chief Justice Vinson and Justices Reed and Burton dissented without an opinion in Townsend *v.* Burke, four Justices, Black, Douglas, and Murphy speaking through Justice Rutledge filed a vigorous dissent in Gryger *v.* Burke, 334 U.S. 728, 733, 736 (1948). Justice Rutledge declared his inability to "square * * * [this] decision in this case with that made in Townsend *v.* Burke. I find it difficult to comprehend that the [trial] court's misreading or misinformation concerning the facts of [the] record [Townsend *v.* Burke] vital to the proper exercise of the sentencing function is prejudicial * * *, but its misreading or misconception of the controlling statute, [Gryger *v.* Burke] in a matter so vital as imposing mandatory sentence or exercising discretion concerning it, has no such effect. Perhaps the difference serves only to illustrate how capricious are the results when the right to counsel is made to depend not upon the mandate of the Constitution, but upon the vagaries of whether judges, * * * will regard this incident or that in the course of particular criminal proceedings as prejudicial."

[852] 335 U.S. 437, 438-442 (1948).

[853] 337 U.S. 773, 780 (1949).

[854] 342 U.S. 184 (1951); *See also* Per Curiam opinion granting certiorari in Foulke *v.* Burke, 342 U.S. 881 (1951).

[855] 339 U.S. 660, 665 (1950).

[856] 342 U.S. 55 (1951).

[857] Ibid. 64.

[858] 335 U.S. 437, 440-441 (1948).

[859] Rice *v.* Olson, 324 U.S. 786, 788-789 (1945).

[860] Wade *v.* Mayo, 334 U.S. 672, 683-684 (1948); De Meerleer *v.* Michigan, 329 U.S. 663, 664-665 (1947); Betts *v.* Brady, 316 U.S. 455, 472 (1942); Powell *v.* Alabama, 287 U.S. 45, 51-52, 71 (1932).

[861] Townsend *v.* Burke, 334 U.S. 736, 739-741 (1948); De Meerleer *v.* Michigan, 329 U.S. 663, 665 (1947); Smith *v.* O'Grady, 312 U.S. 329, 332-333 (1941).

[862] Rice *v.* Olson, 324 U.S. 786, 789-791 (1945).

[863] Gibbs *v.* Burke, 337 U.S. 773, 780-781 (1949). Devotion to the Fair Trial doctrine has also created another problem for the Court, that of a burdensome increase in the volume of its business. Inasmuch as accurate appraisal of the effect of absence of counsel on the validity of a State criminal proceeding has been rendered more difficult by the vagueness of that doctrine as well as by the Court's acknowledged variation in the application thereof, innumerable State prisoners have been tempted to seek judicial reconsideration of their convictions. To reduce the number of such cases which it is obliged to examine on their merits, the Court had been compelled to have recourse to certain protective rules. Thus, when a State prisoner seeks to attack the validity of his conviction by way of *habeas corpus* proceedings begun in a lower federal court, application for that writ will be entertained only after all State remedies available, including all appellate remedies in State courts and in the Supreme Court by appeal or writ of certiorari, have been exhausted. This rule, however, will not be applied when no adequate State remedy is in fact available. Also when a prisoner's petition for release on the grounds of the unconstitutionally of his conviction has been rejected by a State court, a petition for certiorari addressed to the United States Supreme Court will be denied whenever it appears that the prisoner had not invoked the appropriate State remedy. Or stated otherwise, where the State court's conviction or refusal to grant writs of *habeas corpus* to those under State sentences may fairly be attributed to a rule of local procedure and is not exclusively founded on the denial of a federal claim, such as, right to counsel, the Supreme Court will refuse to intervene. As in the case of other legal rules, Justices of the Supreme Court have often found themselves in disagreement as to the manner of applying these aforementioned principles; and vigorous dissents arising out of this very issue were recorded in the cases of Marino *v.* Ragen, 332 U.S. 561 (1947); Wade *v.* Mayo, 334 U.S. 672 (1948); and Uveges *v.* Pennsylvania, 335 U.S. 437 (1948). Justice Frankfurter has frequently, albeit unsuccessfully contended, that "intervention by * * * [the Supreme Court] in the criminal process of States * * * should not be indulged in unless no reasonable doubt is left that a State denies, or has refused to exercise, means of correcting a claimed infraction of the United States Constitution. * * * After all, [it should be borne in mind that] this is the Nation's ultimate judicial tribunal, not a super-legal-aid bureau."

[864] 176 U.S. 581 (1900).

[865] 110 U.S. 516 (1884).

[866] Jordan *v.* Massachusetts, 225 U.S. 167, 176. (1912).

[867] Maxwell *v.* Dow, 176 U.S. 581 (1900).

[868] Hallinger *v.* Davis, 146 U.S. 314 (1892).

[869] Ibid. 318-320.

[870] Missouri *v.* Lewis, 101 U.S. 22 (1880); Maxwell *v.* Dow, 176 U.S. 581, 603 (1900); Jordan *v.* Massachusetts, 225 U.S. 167, 176 (1912); Snyder *v.* Massachusetts, 291 U.S. 97, 105 (1934).

[871] Brown *v.* New Jersey, 175 U.S. 172, 175, 176 (1899).

[872] Ashe *v.* United States ex rel. Valotta, 270 U.S. 424, 425 (1926).

[873] Fay *v.* New York, 332 U.S. 261, 288 (1947); Moore *v.* New York, 333 U.S. 585 (1948).—Both cases reject the proposition that the commandment of the Sixth Amendment, which requires a jury trial in criminal cases in the federal courts is picked up by the due process clause of the Fourteenth Amendment so as to become a limitation upon the States.

[874] Fay *v.* New York, 332 U.S. 261, 283-284 (1947).—Since Congress, by way of enforcing the guarantees contained in the Fourteenth Amendment, has, by statute [18 Stat. 336, 377 (1875); 8 U.S.C. 44], made it a crime to exclude a citizen from jury service only on account of race, color, or previous condition of servitude, the Supreme Court "never has interfered with the composition of

State court juries except in cases where this guidance of Congress was applicable." Without suggesting that "no case of discrimination in jury drawing except those involving race or color can carry such unjust consequences as to amount to a denial of * * * due process," the Court has nevertheless required that a defendant, alleging grounds not covered by that statute, "must comply with the exacting requirements of proving clearly" that the procedure in his case was destructive of due process.

These statements reflect the views of only five Justices. Speaking for the minority (Justices Black, Douglas, and Rutledge), Justice Murphy declared that "the vice lies in the very concept of 'blue ribbon' panels—the systematic and intentional exclusion of all but the 'best' or the most learned or intelligent of the general jurors. Such panels are completely at war with the democratic theory of our jury system, a theory formulated out of the experience of generations. One is constitutionally entitled to be judged by a fair sampling of all one's neighbors who are qualified, not merely those with superior intelligence or learning. Jury panels are supposed to be representative of all qualified classes. Within those classes, of course, are persons with varying degrees of intelligence, wealth, education, ability and experience. But it is from that welter of qualified individuals, who meet specified minimum standards, that juries are to be chosen. Any method that permits only the 'best' of these to be selected opens the way to grave abuses. The jury is then in danger of losing its democratic flavor and becoming the instrument of the select few." A "blue ribbon jury" is neither "a jury of the * * * [defendant's] peers," nor "a jury chosen from a fair cross-section of the community, * * *"—Moore *v.* New York, 333 U.S. 565, 569-570 (1948).

[875] Rawlins *v.* Georgia, 201 U.S. 638 (1906). The Supreme Court "has never entertained a defendant's objections to exclusions from the jury except when he was a member of the excluded class."—Fay *v.* New York, 332 U.S. 261, 287 (1947).

[876] 211 U.S. 78, 93, 106-107, 113; citing Missouri *v.* Lewis, 101 U.S. 22 (1880); and Holden *v.* Hardy, 169 U.S. 366, 387, 389 (1898).

[877] In several decisions the Court, assuming, but without deciding, that a State law requiring a witness to answer incriminating questions would violate the due process clause, has then proceeded to conclude, nevertheless, that a State antitrust law which grants immunity from local prosecution to a witness compelled to testify thereunder is valid even though testimony thus extracted may later serve as the basis of a federal prosecution for violation of federal antitrust laws.—Jack *v.* Kansas, 199 U.S. 372, 380 (1905).

[878] Snyder *v.* Massachusetts, 291 U.S. 97, 105 (1934).

[879] Palko *v.* Connecticut, 302 U.S. 319, 325-326 (1937).

[880] 297 U.S. 278, 285-286 (1936). For the significance of this decision as a precedent in favor of a more careful scrutiny by the Supreme Court of State trials in which a denial of constitutional rights allegedly occurred, see p. 1138.

[881] Ibid, 285-286.

[882] 309 U.S. 227 (1940).

[883] Ibid. 228-229, 237-241.

[884] 310 U.S. 530 (1940).

[885] 314 U.S. 219, 237 (1941). This dictum represents the closest approach which the Court thus far has made toward inclusion of the privilege against self-incrimination within the due process clause of the Fourteenth Amendment. In all but a few of the forced confession cases, however, the results achieved by application of the Fair Trial doctrine differ scarcely at all from those attainable by incorporation of the privilege within that clause.

[886] 316 U.S. 547 (1942).

[887] 322 U.S. 143 (1944).

[888] *See* Baldwin *v.* Missouri, 281 U.S. 586, 595 (1930).

[889] 322 U.S. 143, 160-162 (1944).—All members of the Court were in accord, however, in condemning, as no less a denial of due process, the admission at the second trial of Ashcraft [Ashcraft *v.* Tennessee, 327 U.S. 274 (1946)] of evidence uncovered in consequence of the written confession, acceptance of which at the first trial had led to the reversal of his prior conviction.

[890] 322 U.S. 596 (1944).

[891] Ibid. 602.—Of three Justices who dissented, Justice Murphy, with whom Justice Black was associated, declared that it was "inconceivable * * * that the second confession was free from the coercive atmosphere that admittedly impregnated the first one"; and added that previous decisions of this Court "in effect have held that the Fourteenth Amendment makes the prohibition [of the Fifth pertaining to self-incrimination] applicable to the States."—Ibid. 605-606.

[892] 324 U.S. 401 (1945).

[893] Chief Justice Stone, together with Justices Roberts, Reed, and Jackson, all of whom dissented, would have sustained the conviction.

[894] Justices Rutledge and Murphy dissented in part, assigning among their reasons therefor their belief that the "subsequent confessions, * * *, were vitiated with all the coercion which destroys admissibility of the first one." According to Justice Rutledge, "a stricter standard is necessary where the confession tendered follows a prior coerced one than in the case of a single confession * * *. Once a coerced confession has been obtained all later ones should be excluded from evidence, wherever there is evidence that the coerced one has been used to secure the later ones."—324 U.S. 401, 420, 428-429 (1945).

[895] In Lyons *v.* Oklahoma, 322 U.S. 596, 601 (1944), the Court stated that "when the State-approved instruction (to the jury) fairly raises the question of whether or not the challenged confession was voluntary, * * *, the requirements of due process, * * *, are satisfied and this Court will not require a modification of local practice to meet views that it might have as to * * * how specific an instruction * * * must be." In Malinski *v.* New York, the four dissenting Justices declared that "the trial court, * * *, instructed the jury that the evidence with respect to the first confession was adduced only to show that the second was coerced. And * * * that it could consider the second confession, only if it found it voluntary, and that it could convict in that case. In view of these instructions, we cannot say that the first confession was submitted to the jury, or that in the absence of any exception or request to charge more particularly, there was any error, of which the * * * [accused] can complain."—324 U.S. 401, 437 (1945).

[896] The coercive nature of the first oral confession was apparently acknowledged by the prosecuting attorney in his summation to the jury; for he declared that the accused "was not hard to break," and that the purpose of holding him *incommunicado* and unclothed in a hotel room from 8 a.m. to 6 p.m., when the confession was made, was to "let him think that he is going to get a shellacking (beating)."—324 U.S. 401, 407 (1945).

[897] 332 U.S. 46, 56 (1947).

[898] 211 U.S. 78 (1908).

[899] 302 U.S. 319 (1937).

[900] Adamson *v.* California, 332 U.S. 46, 50, 53, 56, 58 (1947).

[901] Adamson *v.* California, 332 U.S. 46, 59-60, 63-64, 66 (1947). *See also* Malinski *v.* New York, 324 U.S. 401, 414, 415, 417 (1945).

[902] Adamson *v.* California, 332 U.S. 46, 69, 74-75, 89 (1947).—Dissenting separately, Justice Murphy, together with Justice Rutledge, announced their agreement with Justice Black, subject to one reservation. While agreeing "that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment," they were "not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant * * * condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights."—Ibid. 124.

In a lengthy article based upon a painstaking examination of original data pertaining to the "understanding of the import of the * * * clauses of Section 1 of the Fourteenth Amendment at the time the Amendment was adopted"; that is, during the period 1866-1868, Professor Charles Fairman has marshalled a "mountain of evidence" calculated to prove conclusively the inaccuracy of Justice Black's reading of history.—Charles Fairman. Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding.—2 Stanford Law Review, 5-139 (1949).

[903] 332 U.S. 596 (1948).

[904] Ibid. 600-601.—In a dissenting opinion, in which Chief Justice Vinson and Justices Jackson and Reed concurred, Justice Burton remarked that inasmuch

as the issue of the voluntariness of the confession was one of fact, turning largely on the credibility of witnesses, the determination thereof by the trial judge and jury should not be overturned upon mere conjecture.—Ibid. 607, 615.

[905] 332 U.S. 742, 745 (1948).

[906] 335 U.S. 252 (1948).

[907] The Court also held that the procedure of Alabama, in requiring the accused to obtain permission from an appellate court before filing a petition in a trial court for a writ of error *coram nobis* was consistent with due process. Alabama was deemed to possess "ample machinery for correcting the Constitutional wrong of which the * * * [accused] complained."—Ibid. 254, 260-261.

[908] The accused, in his petition, neither denied his guilt nor any of the acts on which his conviction was based. He simply contended that because of fear generated by coercive police methods applied to him, he had concealed such evidence from his own counsel at the time of the trial and had informed the latter that his confessions were voluntary. His charges of duress were supported by affidavits of three associates in crime, none of whom claims to have seen the alleged beatings of the petitioner.—Ibid. 265-266.

[909] In a dissenting opinion, in which Justices Douglas and Rutledge concurred, Justice Murphy maintained that inasmuch as there was some evidence to substantiate the petitioner's claim, the latter should have been allowed a hearing in the trial court. According to Justice Murphy, a conviction based on a coerced confession is "void even though the confession is in fact true" and the petitioner is guilty. Justice Frankfurter criticized this dissenting opinion as having been "written as though this Court was a court of criminal appeals for revision of convictions in the State courts."—Ibid. 272, 275-276.

[910] 338 U.S. 49 (1949).

[911] 338 U.S. 62, 64 (1949).

[912] 338 U.S. 68 (1949).

[913] Watts *v.* Indiana, 338 U.S. 49, 53 (1949).

[914] 309 U.S. 227 (1940).

[915] 322 U.S. 143 (1944).

[916] Watts *v.* Indiana, 338 U.S. 49, 57 (1949); citing Malinski *v.* New York, 324 U.S. 401 (1945); Haley *v.* Ohio, 332 U.S. 596 (1948).

[917] 338 U.S. 49, 60 (1949).

[918] 338 U.S. 62 (1949).

[919] 338 U.S. 68 (1949).

[920] 338 U.S. 49, 61 (1949). In the 1949, 1950, and 1951 terms only one case arose which involved the forced confession issue in any significant way. This was Rochin *v.* California, 342 U.S. 165 (1952), which is discussed immediately below in another connection. *See also* Jennings *v.* Illinois, 342 U.S. 104 (1951); and Stroble *v.* California, 343 U.S. 181 (1952), in which diverse, but not necessarily conflicting, results were reached.

[921] 232 U.S. 58 (1914).

[922] Consolidated Rendering Co. *v.* Vermont, 207 U.S. 541, 552 (1908); Hammond Packing Co. *v.* Arkansas, 212 U.S. 322, 348 (1909).

[923] Wolf *v.* Colorado, 338 U.S. 25 (1949).

[924] 332 U.S. 46 (1947).

[925] 302 U.S. 319 (1937).

[926] 338 U.S. 25, 27-28 (1949).

[927] Ibid. 28-31.—In harmony with his views, as previously stated in Malinski *v.* New York, 324 U.S. 401 (1945) and Adamson *v.* California, 332 U.S. 46, 59-66 (1947), Justice Frankfurter amplified his appraisal of the due process clause as follows: "Due process of law * * * conveys neither formal nor fixed nor narrow requirements. It is the compendius expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of

what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits of the essentials of fundamental rights. To rely on a tidy formula for the easy determination of what is a fundamental right for purposes of legal enforcement may satisfy a longing for certainty but ignores the movements of a free society. * * * The real clue to the problem confronting the judiciary in the application of the Due Process Clause is not to ask where the line is once and for all to be drawn but to recognize that it is for the Court to draw it by the gradual and empiric process of 'inclusion and exclusion.'"—Ibid. 27.

[928] 332 U.S. 46, 68, 71-72 (1947).

[929] Wolf *v.* Colorado, 338 U.S. 25, 39-40 (1949).

[930] Ibid. 40, 41, 44, 46, 47.

[931] Stefanelli *v.* Minard, 342 U.S. 117 (1951); Rochin *v.* California, 342 U.S. 165 (1952).

[932] 342 U.S. 117, 123.

[933] 342 U.S. 105, 168, citing Malinski *v.* New York, 324 U.S. 401, 412, 418 (1945).

[934] Ibid., 174.

[935] 332 U.S. 46, 68-123 (1947). "Of course", said Justice Douglas, citing Holt *v.* United States, 218 U.S. 245, 252-253 (1910), "an accused can be compelled to be present at the trial, to stand, to sit, to turn this way or that, and to try on a cap or a coat." 342 U.S. at 179. *See* the Self-incrimination Clause of Amendment V.

[936] Mooney *v.* Holohan, 294 U.S. 103, 112 (1935).

[937] Ibid. 110.—Because judicial process adequate to correct this alleged wrong was believed to exist in California and had not been fully invoked by Mooney, the Court denied his petition. Subsequently, a California court appraised the evidence offered by Mooney and ruled that his allegations had not been established.—Ex parte Mooney, 10 Cal. (2d) 1, 73 P (2d) 554 (1937); certiorari denied, 305 U.S. 598 (1938). Mooney later was pardoned by Governor Olson.—New York Times, January 8, 1939.

[938] 315 U.S. 411 (1942).

[939] 317 U.S. 213 (1942).

[940] 324 U.S. 760 (1945). *See also* New York ex rel. Whitman *v.* Wilson, 318 U.S. 688 (1943); Ex parte Hawk, 321 U.S. 114 (1944).

[941] 315 U.S. 411, 413, 421-422 (1942).—Justice Black, together with Justices Douglas and Murphy, dissented on the ground that the Florida court, "with intimations of approval" by the majority, had never found it necessary to pass on the credibility of Hysler's allegations, but had erroneously declared that all his allegations, even if true and fully known to the trial court, would not have precluded a conviction.

In an earlier case, Lisenba *v.* California, 314 U.S. 219 (1941), the Court, without discussion of this principle relating to the use of perjured testimony, sustained a California appellate court's denial of a petition for *habeas corpus*. The accused, after having been convicted and sentenced to death for murder, filed his petition supported by affidavits of a codefendant, who, after pleading guilty and serving as a witness for the State had received a life sentence. The latter affirmed that his testimony at the trial of the petitioner "was obtained by deceit, fraud, collusion, and coercion, and was known to the prosecutor to be false." Even though the California court had denied the petition for *habeas corpus* without taking oral evidence and without requiring the State to answer, the Supreme Court upheld this action on the ground that there was no adequate showing of a corrupt bargain between the prosecution and the codefendant and that the appraisal of conflicting evidence was for the Court below. Even if latter's refusal to believe the codefendant's depositions were erroneous, such error, the Court added, would not amount to a denial of due process.

[942] 317 U.S. 213, 216 (1942).

[943] 324 U.S. 760 (1945). Certiorari was denied, however, for the reason that the State court's refusal to issue the writ of *habeas corpus* was based upon an adequate nonfederal ground.

[944] Schwab *v.* Berggren, 143 U.S. 442, 448 (1802).—This statement is a dictum,

however; for the issue presented by the accused's petition for a writ of *habeas corpus* was that the State appellate court had denied him due process in ruling on his appeal from his conviction in the absence of both the petitioner and his counsel and without notice to either as to the date of its decision. Insofar as a right to be present exists, its application, the Supreme Court maintained, is limited to courts of original jurisdiction trying criminal cases.

[945] Howard *v.* Kentucky, 200 U.S. 164 (1906).

[946] 201 U.S. 123, 130 (1906).

[947] 237 U.S. 309, 343 (1915).

[948] Snyder *v.* Massachusetts, 291 U.S. 97 (1934).

[949] Ibid. 105, 106, 107, 108, 118.—In a dissent, in which Justices Brandeis, Butler, and Sutherland concurred, Justice Roberts insisted that "it * * * [was] not a matter of assumption but a certainty * * * [that] * * * the * * * privilege of the accused to be present throughout his trial is of the very essence of due process," and, in that connection, "the great weight of authority is that" the view by the jury "forms part of the trial." Even if "the result would have been the same had the [accused] been present, still the denial of the constitutional right ought not to be condoned. * * * Nor ought this Court to convert the inquiry from one as to the denial of the right into one as to the prejudice suffered by the denial. To pivot affirmance on the question of the amount of harm done the accused is to beg the constitutional question involved. * * * The guarantee of the Fourteenth Amendment is not that a just result shall have been obtained, but that the result, whatever it be, shall be reached in a fair way."—Ibid. 130-131, 134, 136-137.

[950] 337 U.S. 241 (1949).

[951] Ibid. 246-247, 249-250.—Dissenting, Justice Murphy maintained that the use in a capital case of probation reports which "concededly [would] not have been admissible at the trial, and * * * [were] not subject to examination by the defendant, * * *" violated "the high commands of due process * * *"—Ibid. 253. Justice Rutledge dissented without an opinion.

[952] 339 U.S. 9 (1950).

[953] Ibid. 12-13.—Disagreeing, Justice Frankfurter contended that a State is "precluded by the due process clause from executing a man who has temporarily or permanently become insane"; and thus bereft of unlimited discretion as to "how it will ascertain sanity," a State "must afford rudimentary safeguards for establishing [that] fact."—Ibid. 16, 19, 21, 24-25.

[954] In re Oliver, 333 U.S. 257 (1948). On application for *habeas corpus*, the prisoner's commitment was reviewed by the Michigan appellate court in the light, not of the whole record, but only of fragmentary excerpts showing merely the testimony alleged to be false and evasive.

In a concurring opinion, Justice Rutledge advocated disposing of the case on the ground that the Michigan one-man grand jury system was in its entirety in conflict with the requirements of due process.

On the ground that the Michigan courts had not passed on the constitutionality of the procedure at issue, Justices Frankfurter and Jackson dissented and urged the remanding of the case. *See also* Gaines *v.* Washington, 277 U.S. 81, 85 (1928).

[955] 336 U.S. 155 (1949).

[956] Justice Douglas, with Justice Black concurring, dissented on the ground that even if "such elements of misbehavior as expression, manner of speaking, bearing, and attitude * * * [had] a contemptuous flavor. * * * freedom of speech should [not] be so readily sacrificed in a courtroom." Stressing that the trial judge penalized Fisher only for his forbidden comment and not for his behavior, and that it took a ruling of the Texas appellate court to settle the issue whether such comment was improper under Texas practice, Justice Douglas concluded that the record suggests only that "the judge picked a quarrel with this lawyer and used his high position to wreak vengeance." There having been no substantial obstruction of the trial, Justice Murphy believed that the trial judge's use of his power was inconsistent with due process; whereas Justice Rutledge, in dissenting, contended "there can be no due process in trial in the absence of calm judgment and action, untinged with anger, from the bench."—Ibid. 165-166, 167, 169.

[957] Tumey *v.* Ohio, 273 U.S. 510 (1927). *See also* Jordan *v.* Massachusetts, 225 U.S. 167, 176 (1912).

[958] "Unless the costs usually imposed are so small that they may be properly ignored as within the maxim *de minimis non curat lex*."—*See* Tumey *v.* Ohio, 273 U.S. 510, 523, 531 (1927).

[959] Dugan *v.* Ohio, 277 U.S. 61 (1928).

[960] Frank *v.* Mangum, 237 U.S. 309, 335 (1915).

[961] Moore *v.* Dempsey, 261 U.S. 86, 91 (1923).

[962] Thiel *v.* Southern Pacific Co., 328 U.S. 217 (1946). *See also* Fay *v.* New York, 332 U.S. 261 (1947), *supra* p. 1110.

[963] Snyder *v.* Massachusetts, 291 U.S. 97, 116, 117 (1934).

[964] Lisenba *v.* California, 314 U.S. 219, 236 (1941).

[965] Buchalter *v.* New York, 319 U.S. 427, 429 (1943). The Court also declared that the due process clause did "not draw to itself the provisions of State constitutions or State laws."

[966] Powell *v.* Alabama, 287 U.S. 45, 68 (1932); Snyder *v.* Massachusetts, 291 U.S. 97, 105 (1934).

[967] Cole *v.* Arkansas, 333 U.S. 196, 202 (1948). *See also* Williams *v.* North Carolina, 317 U.S. 287, 292 (1942), wherein the Court also stated that where a conviction in a criminal prosecution is based upon a general verdict that does not specify the ground on which it rests, and one of the grounds upon which it may rest is invalid under the Constitution, the judgment cannot be sustained.

[968] Paterno *v.* Lyons, 334 U.S. 314, 320-321 (1948).

[969] McKane *v.* Durston, 153 U.S. 684 (1894).—The prohibition of the requirement of excessive bail, expressed in the Eighth Amendment as a restraint against the Federal Government, has never been deemed to be applicable to the States by virtue of the due process clause of the Fourteenth Amendment. However, in a recent civil suit, a United States District Court judge asserted his belief, by way of dictum, that protection against "unreasonable searches and seizures, invasion of freedom of speech and press, unlawful and unwarranted incarcerations, arrests, and *failure to allow reasonable bail* would all be fundamental rights protected by [the Fourteenth] Amendment from State invasion."—International Union, Etc. *v.* Tennessee Copper Co., 31 F. Supp. 1015 (1940).

[970] Collins *v.* Johnston, 237 U.S. 502, 510 (1915).—In affirming a judgment obtained by Texas in a civil suit to recover penalties for violation of its antitrust law, the Supreme Court proffered the following vague standard for determining the validity of penalties levied by States. "The fixing of punishment for crime or penalties for unlawful acts against its laws is within the police power of the State. We can only interfere with such legislation and judicial action of the States enforcing it if the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law." However, a fine of $1,600,000 levied in this case against a corporation having assets of $40,000,000 and paying out dividends as high as 700%, and which was shown to have profited from its wrong doing was not considered to be excessive.—Waters-Pierce Oil Co. *v.* Texas, 212 U.S. 86, 111 (1909).

[971] Graham *v.* West Virginia, 224 U.S. 616, 623 (1912). *See also* Ughbanks *v.* Armstrong, 208 U.S. 481, 498 (1908).

[972] 136 U.S. 436, 447-448 (1890).

[973] 329 U.S. 459 (1947).

[974] Concurring in the result, Justice Frankfurter concentrated on the problem suggested by the proposed absorption of the Bill of Rights by the due process clause of the Fourteenth Amendment, and restated his previously disclosed position as follows: "Not until recently was it suggested that the Due Process Clause of the Fourteenth Amendment was merely a compendious reference to the Bill of Rights whereby the States were now restricted in devising and enforcing their penal code precisely as is the Federal Government by the first eight amendments. On this view, the States would be confined in the enforcement of their criminal codes by those views for safeguarding the rights of the individual which were deemed necessary in the eighteenth century. Some of these safeguards have perduring validity. Some grew out of transient experience or formulated remedies which time might well improve. The Fourteenth Amendment did not mean to imprison the States into the limited experience of the eighteenth century. It did mean to withdraw from the States the right to act in ways that are offensive to a decent respect for

the dignity of man, and heedless of his freedom.

"These are very broad terms by which to accommodate freedom and authority. As has been suggested * * *, they may be too large to serve as the basis for adjudication in that they allow much room for individual notions of policy. That is not our concern. The fact is that the duty of such adjudication on a basis no less narrow has been committed to this Court.

"In an impressive body of decisions this Court has decided that the Due Process Clause of the Fourteenth Amendment expresses a demand for civilized standards which are not defined by the specifically enumerated guarantees of the Bill of Rights. They neither contain the particularities of the first eight amendments nor are they confined to them. * * * Insofar as due process under the Fourteenth Amendment requires the States to observe any of the immunities 'that are as valid as against the Federal Government by force of the specific pledges of particular amendments' it does so because they 'have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the States,'" [citing Palko *v.* Connecticut, 302 U.S. 319, 324, 325 (1937).]—Ibid. 467-469.

Justice Burton, with whom Justices Murphy, Douglas, and Rutledge were associated, dissented on the grounds that "the proposed repeated, and at least second, application to the * * * [defendant] of an electric current sufficient to cause death is * * *, a cruel and unusual punishment violative of due process of law."—Ibid. 479.

In Solesbee *v.* Balkcom, 339 U.S. 9 (1950), the Court declined to intervene in case coming up from Georgia in which appellant, claiming that he had become insane following conviction and sentence of death, sought a postponement of execution from the governor of the State. Justice Frankfurter dissented, asserting that the due process clause of Amendment XIV prohibits a State from executing an insane convict.

[975] 187 U.S. 71, 86 (1902). *See also* Keerl *v.* Montana, 213 U.S. 135 (1909).

[976] 177 U.S. 155 (1900).

[977] 207 U.S. 188 (1907).

[978] Graham *v.* West Virginia, 224 U.S. 616, 623 (1912).

[979] 302 U.S. 319 (1937).

[980] In a lengthy dictum, Justice Cardozo, speaking for the Court, rejected the defendant's view that "Whatever would be a violation of the original bill of rights (Amendments One to Eight) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state." By a selective process of inclusion and exclusion, he conceded that "the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress, * * * or the like freedom of the press, * * * or the free exercise of religion, * * * or the right of peaceable assembly * * *, or the right of one accused of crime to the benefit of counsel." However, insofar as such "immunities, [which] are valid as against the Federal Government by force of the specific pledges of particular amendments, have become valid as against the States," that result is attributable, not to the absorption by the due process clause of the Fourteenth Amendment of particular provisions of the Bill of Rights, but to the fact that such immunities "have been found to be implicit in the concept of ordered liberty * * *" protected by that clause.—Ibid. 323, 324-325.

[981] Justice Butler dissented without an opinion.

[982] 320 U.S. 459, 462, 463 (1947).—In line with its former ruling in Graham *v.* West Virginia, 224 U.S. 616 (1912), the Court reiterated in Gryger *v.* Burke, 334 U.S. 728 (1948), that a life sentence imposed on a fourth offender under a State habitual criminal act is a stiffened penalty for his latest offense, which is considered to be an aggravated offense because a repetitive one, and is therefore not invalid as subjecting the offender to a new jeopardy.

[983] Ex parte Hull, 312 U.S. 546 (1941).

[984] White *v.* Ragen, 324 U.S. 760 n. 1 (1945).

[985] McKane *v.* Durston, 153 U.S. 684, 687 (1894); Andrews *v.* Swartz 156 U.S. 272, 275 (1895); Murphy *v.* Massachusetts, 177 U.S. 155, 158 (1900); Reetz *v.* Michigan, 188 U.S. 505, 508 (1903).

[986] Thus, where on the day assigned for hearing of a writ of error, it appeared

that the accused had escaped from jail, the Court, without denial of due process, could order that the writ be dismissed unless the accused surrender himself within 60 days or be captured.—Allen *v.* Georgia, 166 U.S. 138 (1897).

[987] Carter *v.* Illinois, 329 U.S. 173, 175-176 (1946).

[988] Frank *v.* Mangum, 237 U.S. 309 (1915).

[989] For rules of self-limitation formulated by the Court not only to minimize its opportunities for such interference but also to curtail the volume of litigation reaching it for final disposition, *see* p. 1109.

[990] 297 U.S. 278 (1936).

[991] 237 U.S. 309 (1915).

[992] 261 U.S. 86 (1923).

[993] Despite the court's contention that Moore *v.* Dempsey was disposed of in conformity with the principles enunciated in Frank *v.* Mangum, the two decisions are distinguishable not only by the different results reached therein, but by the fact that the State appellate court in Frank *v.* Mangum had ruled that the trial court had correctly concluded, on the basis of the evidence submitted, that the allegations of mob violence were unsubstantiated whereas the Arkansas appellate court, in Moore *v.* Dempsey, conceded a similar allegation to be correct but did not deem it sufficient to render the trial a nullity. Although in the later case, Arkansas demurred and thereby admitted the allegations supporting the *habeas corpus* petition to be true, that fact is a lesser significance, for even in Frank *v.* Mangum, the Supreme Court abided by the rule that the writ of *habeas corpus* relates to matters of substance and not of mere form, and declared that the petitioner's allegations should be treated as if conceded by the sheriff having custody of the petitioner.—237 U.S. 309, 332, 346 (1915).

[994] James *v.* Appel, 192 U.S. 129, 137 (1904); Pittsburgh, C.C. & St. L.R. Co. *v.* Backus, 154 U.S. 421 (1894); Standard Oil Co. *v.* Missouri ex rel. Hadley, 224 U.S. 270, 286 (1912); Baldwin *v.* Iowa State Traveling Men's Assoc., 283 U.S. 522, 524 (1931).

[995] Tracy *v.* Ginzberg, 205 U.S. 170 (1907); Allen *v.* Georgia, 166 U.S. 138, 140 (1897); Fallbrook Irrig. District *v.* Bradley, 164 U.S. 112, 157 (1896).

[996] Thorington *v.* Montgomery, 147 U.S. 490, 492 (1893).

[997] Cross *v.* North Carolina, 132 U.S. 131 (1889).

[998] Ballard *v.* Hunter, 204 U.S. 241, 258 (1907); Lyons *v.* Oklahoma, 322 U.S. 596 (1944); Gryger *v.* Burke, 334 U.S. 728 (1948).

[999] McDonald *v.* Oregon R. & Nav. Co., 233 U.S. 665, 670 (1914).

[1000] Caldwell *v.* Texas, 137 U.S. 691, 692, 698 (1891); Bergemann *v.* Backer, 157 U.S. 655, 656 (1895).

[1001] Rogers *v.* Peck, 199 U.S. 425, 435 (1905).

[1002] West *v.* Louisiana, 194 U.S. 258 (1904).

[1003] Chicago L. Ins. Co. *v.* Cherry, 244 U.S. 25, 30 (1917).

[1004] Standard Oil Co. *v.* Missouri ex rel. Hadley, 224 U.S. 270, 287 (1912); Patterson *v.* Colorado ex rel. Attorney General, 205 U.S. 454, 461 (1907); Stockholders *v.* Sterling, 300 U.S. 175, 182 (1937)

[1005] Virginia *v.* Rives, 100 U.S. 313, 318 (1880).

[1006] Minneapolis & St. L.R. Co. *v.* Beckwith, 129 U.S. 26, 28, 29 (1889).

[1007] Yick Wo *v.* Hopkins, 118 U.S. 356, 373, 374 (1886).

[1008] Snowden *v.* Hughes, 321 U.S. 1, 8 (1944).

[1009] Truax *v.* Corrigan, 257 U.S. 312 (1921).

[1010] Neal *v.* Delaware, 103 U.S. 370 (1881).

[1011] Shelley *v.* Kraemer, 334 U.S. 1 (1948).

[1012] Ibid. 19.

[1013] Missouri ex rel. Gaines *v.* Canada, 305 U.S. 337, 343 (1938).

[1014] Smith *v.* Allwright, 321 U.S. 649 (1944). *Cf.* Nixon *v.* Herndon, 273 U.S. 536 (1927); Nixon *v.* Condon, 286 U.S. 73 (1932); Grovey *v.* Townsend, 295 U.S.

45 (1938).

[1015] Slaughter-House Cases, 16 Wall. 36, 81 (1873).

[1016] Chicago, B. & Q.R. Co. *v.* Iowa, 94 U.S. 155 (1877); Peik *v.* Chicago & Northwestern R. Co., 94 U.S. 164 (1877); Chicago, M. & St. P.R. Co. *v.* Ackley, 94 U.S. 179 (1877); Winona & St. P.R. Co. *v.* Blake, 94 U.S. 180 (1877).

[1017] Santa Clara County *v.* Southern P.R. Co., 118 U.S. 394 (1886).

The ruling stood unchallenged until 1938 when Justice Black asserted in a dissenting opinion that "I do not believe the word 'person' in the Fourteenth Amendment includes corporations." Connecticut General Life Insurance Co. *v.* Johnson, 303 U.S. 77, 85 (1938). More recently Justice Douglas expressed the same view in a dissenting opinion in which Justice Black concurred. Wheeling Steel Corporation *v.* Glander, 337 U.S. 562, 576 (1949).

[1018] Yick Wo *v.* Hopkins, 118 U.S. 356, 369 (1886).

[1019] Newark *v.* New Jersey, 262 U.S. 192 (1923); Williams *v.* Baltimore, 289 U.S. 36 (1933).

[1020] *Cf.* Hillsborough *v.* Cromwell, 326 U.S. 620 (1846).

[1021] Blake *v.* McClung, 172 U.S. 239, 261 (1898); Sully *v.* American Nat. Bank, 178 U.S. 289 (1900).

[1022] Kentucky Finance Corp. *v.* Paramount Auto Exchange Corp., 262 U.S. 544 (1923).

[1023] Hillsborough *v.* Cromwell, 326 U.S. 620 (1946).

[1024] Wheeling Steel Corp. *v.* Glander, 337 U.S. 562 (1949); Hanover Insurance Co. *v.* Harding, 272 U.S. 494 (1926).

[1025] Fire Asso. of Philadelphia *v.* New York, 119 U.S. 110 (1886).

[1026] Yick Wo *v.* Hopkins, 118 U.S. 356, 369 (1886).

[1027] Barbier *v.* Connolly, 113 U.S. 27, 31 (1885).

[1028] Ibid. 31-32.

[1029] Truax *v.* Corrigan, 257 U.S. 312, 332-333 (1921).

[1030] Barrett *v.* Indiana, 229 U.S. 26 (1913).

[1031] Watson *v.* Maryland, 218 U.S. 173 (1910).

[1032] Orient Ins. Co. *v.* Daggs, 172 U.S. 557, 562 (1899).

[1033] Bachtel *v.* Wilson, 204 U.S. 36, 41 (1907). *See also* Frost *v.* Corporation Commission, 278 U.S. 515, 522 (1929); Smith *v.* Cahoon, 283 U.S. 553, 566-567 (1931).

[1034] Lindsley *v.* Natural Carbonic Gas Co., 220 U.S. 61 (1911).

[1035] Middleton *v.* Texas Power & Light Co., 249 U.S. 152, 157 (1919); Madden *v.* Kentucky, 309 U.S. 83 (1940).

[1036] Crescent Cotton Oil Co. *v.* Mississippi, 257 U.S. 129, 137 (1921).

[1037] West Coast Hotel Co. *v.* Parrish, 300 U.S. 379, 400 (1937).

[1038] Lindsley *v.* Natural Carbonic Gas Co., 220 U.S. 61, 81 (1911). *Cf.* United States *v.* Petrillo, 332 U.S. 1, 8 (1947).

[1039] Dominion Hotel *v.* Arizona, 249 U.S. 265, 268 (1919).

[1040] West Coast Hotel *v.* Parrish, 300 U.S. 379, 400 (1937).

[1041] Dominion Hotel *v.* Arizona, 249 U.S. 265, 268 (1919).

[1042] Watson *v.* Maryland, 218 U.S. 173, 179 (1910).

[1043] Phelps *v.* Board of Education, 300 U.S. 319, 324 (1937).

[1044] Chicago Dock & Canal Co. *v.* Fraley, 228 U.S. 680, 687 (1913).

[1045] Davidson *v.* New Orleans, 96 U.S. 97, 106 (1878).

[1046] Fire Asso. of Philadelphia *v.* New York, 119 U.S. 110 (1886); Santa Clara County *v.* Southern P.R. Co., 118 U.S. 394 (1886).

[1047] Bell's Gap R. Co. *v.* Pennsylvania, 134 U.S. 232, 237 (1890). (Emphasis supplied.)

[1048] Louisville Gas & E. Co. *v.* Coleman, 277 U.S. 32, 37 (1928).

Classification for purposes of taxation has been held valid in the following situations:

Banks: a heavier tax on banks which make loans mainly from money of depositors than on other financial institutions which make loans mainly from money supplied otherwise than by deposits. First Nat. Bank *v.* Louisiana Tax Commission, 289 U.S. 60 (1933).

Bank deposits: a tax of 50¢ per $100 on deposits in banks outside a State in contrast with a rate of 10¢ per $100 on deposits in the State. Madden *v.* Kentucky, 309 U.S. 83 (1940).

Coal: a tax of 2-1/2 percent on anthracite but not on bituminous coal. Heisler *v.* Thomas Colliery Co., 260 U.S. 245 (1922).

Gasoline: a graduated severance tax on oils sold primarily for their gasoline content, measured by resort to Baumé gravity. Ohio Oil Co. *v.* Conway, 281 U.S. 146 (1930).

Chain stores: a privilege tax graduated according to the number of stores maintained, State Tax Comr's. *v.* Jackson, 283 U.S. 527 (1931); Fox *v.* Standard Oil Co., 294 U.S. 87 (1935); a license tax based on the number of stores both within and without the State, Great A. & P. Tea Co. *v.* Grosjean, 301 U.S. 412 (1937).

Electricity: municipal systems may be exempted, Puget Sound Power & Light Co. *v.* Seattle, 291 U.S. 619 (1934); that portion of electricity produced which is used for pumping water for irrigating lands may be exempted, Utah Power & Light Co. *v.* Pfost, 286 U.S. 165 (1932).

Insurance companies: license tax measured by gross receipts upon domestic life insurance companies from which fraternal societies having lodge organizations and insuring lives of members only are exempt, and similar foreign corporations are subject to a fixed and comparatively slight fee for the privilege of doing local business of the same kind. Northwestern Mutual L. Ins. Co. *v.* Wisconsin, 247 U.S. 132 (1918).

Oleomargarine: classified separately from butter. Magnano Co. *v.* Hamilton, 292 U.S. 40 (1934).

Peddlers: classified separately from other vendors. Caskey Baking Co. *v.* Virginia, 313 U.S. 117 (1941).

Public utilities: a gross receipts tax at a higher rate for railroads than for other public utilities, Ohio Tax Cases, 232 U.S. 576 (1914); a gasoline storage tax which places a heavier burden upon railroads than upon common carriers by bus, Nashville C. & St. L. Co. *v.* Wallace, 288 U.S. 249 (1933); a tax on railroads measured by gross earnings from local operations, as applied to a railroad which received a larger net income than others from the local activity of renting, and borrowing cars, Illinois Central R. Co. *v.* Minnesota, 309 U.S. 157 (1940); a gross receipts tax applicable only to public utilities, including carriers, the proceeds of which are used for relieving the unemployed, New York Rapid Transit Corp. *v.* New York, 303 U.S. 573 (1938).

Wine: exemption of wine from grapes grown in the State while in the hands of the producer. Cox *v.* Texas, 202 U.S. 446 (1906).

Laws imposing miscellaneous license fees have been upheld as follows:

Cigarette dealers: taxing retailers and not wholesalers. Cook *v.* Marshall County, 196 U.S. 261 (1905).

Commission merchants: requirements that dealers in farm products on commission procure a license, Payne *v.* Kansas, 248 U.S. 112 (1918).

Elevators and warehouses: license limited to certain elevators and warehouses on right-of-way of railroad, Cargill Co. *v.* Minnesota, 180 U.S. 452 (1901); a license tax applicable only to commercial warehouses where no other commercial warehousing facilities in township subject to tax, Independent Warehouse Inc. *v.* Scheele, 331 U.S. 70 (1947).

Laundries: exemption from license tax of steam laundries and women engaged in the laundry business where not more than two women are employed. Quong Wing *v.* Kirkendall, 223 U.S. 59 (1912).

Merchants: exemption from license tax measured by amount of purchases, of manufacturers within the State selling their own product. Armour & Co. *v.* Virginia, 246 U.S. 1 (1918).

Sugar refineries: exemption from license applicable to refiners of sugar and

molasses of planters and farmers grinding and refining their own sugar and molasses. American Sugar Refining Co. *v.* Louisiana, 179 U.S. 89 (1900).

Theaters: license graded according to price of admission. Metropolis Theatre Co. *v.* Chicago, 228 U.S. 61 (1913).

Wholesalers of oil: occupation tax on wholesalers in oil not applicable to wholesalers in other products. Southwestern Oil Co. *v.* Texas, 217 U.S. 114 (1910).

[1049] Bell's Gap R. Co. *v.* Pennsylvania, 134 U.S. 232, 237 (1890).

[1050] Quong Wing *v.* Kirkendall, 223 U.S. 59, 62 (1912). *See also* Hammond Packing Co. *v.* Montana, 233 U.S. 331 (1914).

[1051] Puget Sound Power & Light Co. *v.* Seattle, 291 U.S. 619, 625 (1934).

[1052] Colgate *v.* Harvey, 296 U.S. 404, 422 (1935).

[1053] Southern R. Co. *v.* Greene, 216 U.S. 400, 417 (1910); Quaker City Cab Co. *v.* Pennsylvania, 277 U.S. 389, 400 (1928).

[1054] Keeney *v.* New York, 222 U.S. 525, 536 (1912); State Tax Comrs. *v.* Jackson, 283 U.S. 527, 538 (1931).

[1055] Giozza *v.* Tiernan, 148 U.S. 657, 662 (1893).

[1056] Louisville Gas & E. Co. *v.* Coleman, 277 U.S. 32, 37 (1928). *See also* Bell's Gap R. Co. *v.* Pennsylvania, 134 U.S. 232, 237 (1890).

[1057] Stewart Dry Goods Co. *v.* Lewis, 294 U.S. 550 (1935). *See also* Valentine *v.* Great A. & P. Tea Co., 299 U.S. 32 (1936).

[1058] Liggett Co. *v.* Lee, 288 U.S. 517 (1933).

[1059] Quaker City Cab Co. *v.* Pennsylvania, 277 U.S. 389 (1928).

[1060] State Tax Comrs. *v.* Jackson, 283 U.S. 527, 537 (1931).

[1061] Colgate *v.* Harvey, 296 U.S. 404, 422 (1935).

[1062] Darnell *v.* Indiana, 226 U.S. 390, 398 (1912); Farmers & M. Sav. Bank *v.* Minnesota, 232 U.S. 516, 531 (1914).

[1063] Morf *v.* Bingaman, 298 U.S. 407, 413 (1936).

[1064] Baltic Min. Co. *v.* Massachusetts, 231 U.S. 68, 88 (1913). *See also* Cheney Bros. Co. *v.* Massachusetts, 246 U.S. 147, 157 (1918).

[1065] Fire Asso. of Philadelphia *v.* New York, 119 U.S. 110, 119 (1886).

[1066] Hanover F. Ins. Co. *v.* Harding, 272 U.S. 494, 511 (1926).

[1067] Southern R. Co. *v.* Greene, 216 U.S. 400, 418 (1910).

[1068] Concordia F. Ins. Co. *v.* Illinois, 292 U.S. 535 (1934).

[1069] Lincoln Nat. Life Ins. Co. *v.* Read, 325 U.S. 673 (1945).

[1070] Wheeling Steel Corp. *v.* Glander, 337 U.S. 562, 571, 572 (1949).

[1071] Royster Guano Co. *v.* Virginia, 253 U.S. 412 (1920).

[1072] Shaffer *v.* Carter, 252 U.S. 37, 56, 57 (1920); Travis *v.* Yale & T. Mfg. Co., 252 U.S. 60, 75, 76 (1920).

[1073] Welch *v.* Henry, 305 U.S. 134 (1938).

[1074] Magoun *v.* Illinois Trust & Sav. Bank, 170 U.S. 283, 288, 300 (1898).

[1075] Billings *v.* Illinois, 188 U.S. 97 (1903).

[1076] Campbell *v.* California, 200 U.S. 87 (1906).

[1077] Salomon *v.* State Tax Commission, 278 U.S. 484 (1929).

[1078] Board of Education *v.* Illinois, 203 U.S. 553 (1906).

[1079] Maxwell *v.* Bugbee, 250 U.S. 525 (1919).

[1080] Continental Baking Co. *v.* Woodring, 286 U.S. 352 (1932).

[1081] Dixie Ohio Express Co. *v.* State Revenue Commission, 306 U.S. 72, 78 (1939).

[1082] Alward *v.* Johnson, 282 U.S. 509 (1931).

[1083] Bekins Van Lines *v.* Riley, 280 U.S. 80 (1929).

[1084] Morf *v.* Bingaman, 298 U.S. 407 (1936).

[1085] Clark *v.* Paul Gray, Inc., 306 U.S. 583 (1939).

[1086] Carley & Hamilton *v.* Snook, 281 U.S. 66 (1930).

[1087] Aero Mayflower Transit Co. *v.* Georgia Pub. Serv. Commission, 295 U.S. 285 (1935).

[1088] Breedlove *v.* Suttles, 302 U.S. 277 (1937).

[1089] Royster Guano Co. *v.* Virginia, 253 U.S. 412, 415 (1920).

[1090] Missouri *v.* Dockery, 191 U.S. 165 (1903).

[1091] Kentucky Union Co. *v.* Kentucky, 219 U.S. 140, 161 (1911).

[1092] Sunday Lake Iron Co. *v.* Wakefield Twp., 247 U.S. 350 (1918); Raymond *v.* Chicago Union Traction Co., 207 U.S. 20, 35, 37 (1907).

[1093] Coulter *v.* Louisville & N.R. Co., 196 U.S. 599 (1905). *See also* Chicago, B. & Q.R. Co. *v.* Babcock, 204 U.S. 585 (1907).

[1094] Charleston Assn. *v.* Alderson, 324 U.S. 182 (1945). Nashville, C. & St. L. Ry. *v.* Browning, 310 U.S. 362 (1940).

[1095] Sioux City Bridge Co. *v.* Dakota County, 260 U.S. 441, 446 (1923).

[1096] Hillsborough *v.* Cromwell, 326 U.S. 620, 623 (1946).

[1097] St. Louis-San Francisco R. Co. *v.* Middlekamp, 256 U.S. 226, 230 (1921).

[1098] Memphis & C.R. Co. *v.* Pace, 282 U.S. 241 (1931).

[1099] Kansas City Southern R. Co. *v.* Road Improv. Dist., 256 U.S. 658 (1921); Thomas *v.* Kansas City Southern R. Co., 261 U.S. 481 (1923).

[1100] Road Improv. Dist. *v.* Missouri P.R. Co., 274 U.S. 188 (1927).

[1101] Branson *v.* Bush, 251 U.S. 182 (1919).

[1102] Columbus & G.R. Co. *v.* Miller, 283 U.S. 96 (1931).

[1103] Buck *v.* Bell, 274 U.S. 200, 208 (1927).

[1104] Classifications under police regulations have been held valid in the following situations:

Advertising: discrimination between billboard and newspaper advertising of cigarettes, Packer Corp. *v.* Utah, 285 U.S. 105 (1932); prohibition of advertising signs on motor vehicles, except when used in the usual business of the owner, and not used mainly for advertising, Fifth Ave. Coach Co. *v.* New York, 221 U.S. 467 (1911); prohibition of advertising on motor vehicles except notices or advertising of products of the owner, Railway Express Inc. *v.* New York, 336 U.S. 106 (1949); prohibition against sale of articles on which there is a representation of the flag for advertising purposes, except newspapers, periodicals and books; Halter *v.* Nebraska, 205 U.S. 34 (1907).

Amusement: prohibition against keeping billiard halls for hire, except in case of hotels having twenty-five or more rooms for use of regular guests. Murphy *v.* California, 225 U.S. 623 (1912).

Barber shops: a law forbidding Sunday labor except works of necessity or charity, and specifically forbidding the keeping open of barber shops. Petit *v.* Minnesota, 177 U.S. 164 (1900).

Cattle: a classification of sheep, as distinguished from cattle, in a regulation restricting the use of public lands for grazing. Bacon *v.* Walker, 204 U.S. 311 (1907). *See also* Omaechevarria *v.* Idaho, 246 U.S. 343 (1918).

Cotton gins: in a State where cotton gins are held to be public utilities and their rates regulated, the granting of a license to a cooperative association distributing profits ratably to members and nonmembers does not deny other persons operating gins equal protection when there is nothing in the laws to forbid them to distribute their net earnings among their patrons. Corporations Commission *v.* Lowe, 281 U.S. 431 (1930).

Fish processing: stricter regulation of reduction of fish to flour or meal than of canning. Bayside Fish Flour Co. *v.* Gentry, 297 U.S. 422 (1936).

Food: bread sold in loaves must be of prescribed standard sizes, Schmidinger *v.* Chicago, 226 U.S. 578 (1913); food preservatives containing boric acid may not be sold, Price *v.* Illinois, 238 U.S. 446 (1915); lard not sold in bulk must be put up in containers holding one, three or five pounds or some whole multiple thereof, Armour & Co. *v.* North Dakota, 240 U.S. 510 (1916); milk industry may be placed in a special class for regulation, New York ex rel.

Lieberman *v.* Van De Carr, 199 U.S. 552 (1905); vendors producing milk outside city may be classified separately, Adams *v.* Milwaukee, 228 U.S. 572 (1913); producing and nonproducing vendors may be distinguished in milk regulations, St. John *v.* New York, 201 U.S. 633 (1906); different minimum and maximum milk prices may be fixed for distributors and storekeepers; Nebbia *v.* New York, 291 U.S. 502 (1934); price differential may be granted for sellers of milk not having a well advertised trade name, Borden's Farm Products Co. *v.* Ten Eyck, 297 U.S. 251 (1936); oleomargarine colored to resemble butter may be prohibited, Capital City Dairy Co. *v.* Ohio ex rel. Attorney General, 183 U.S. 238 (1902); table syrups may be required to be so labelled and disclose identity and proportion of ingredients, Corn Products Ref. Co. *v.* Eddy, 249 U.S. 427 (1919).

Geographical discriminations: legislation limited in application to a particular geographical or political subdivision of a State, Ft. Smith Light & Traction Co. *v.* Board of Improvement, 274 U.S. 387, 391 (1927); ordinance prohibiting a particular business in certain sections of a municipality, Hadacheck *v.* Sebastian, 239 U.S. 394 (1915); statute authorizing a municipal commission to limit the height of buildings in commercial districts to 125 feet and in other districts to 80 to 100 feet, Welch *v.* Swasey, 214 U.S. 91 (1909); ordinance prescribing limits in city outside of which no woman of lewd character shall dwell, L'Hote *v.* New Orleans, 177 U.S. 587, 595 (1900).

Hotels: requirement that keepers of hotels having over fifty guests employ night watchmen. Miller *v.* Strahl, 239 U.S. 426 (1915).

Insurance companies: regulation of fire insurance rates with exemption for farmers mutuals, German Alliance Ins. Co. *v.* Lewis, 233 U.S. 389 (1914); different requirements imposed upon reciprocal insurance associations than upon mutual companies, Hoopeston Canning Co. *v.* Cullen, 318 U.S. 313 (1943); prohibition against life insurance companies or agents engaging in undertaking business, Daniel *v.* Family Ins. Co., 336 U.S. 220 (1949).

Intoxicating liquors: exception of druggists or manufacturers from regulation. Ohio ex rel. Lloyd *v.* Dollison, 194 U.S. 445 (1904); Eberle *v.* Michigan, 232 U.S. 700 (1914).

Lodging houses: requirement that sprinkler systems be installed in buildings of nonfireproof construction is valid as applied to such a building which is safeguarded by a fire alarm system, constant watchman service and other safety arrangements. Queenside Hills Realty Co. *v.* Saxl, 328 U.S. 80 (1946).

Markets: prohibition against operation of private market within six squares of public market. Natal *v.* Louisiana, 139 U.S. 621 (1891).

Medicine: a uniform standard of professional attainment and conduct for all physicians, Missouri ex rel. Hurwitz *v.* North, 271 U.S. 40 (1926); reasonable exemptions from medical registration law, Watson *v.* Maryland, 218 U.S. 173 (1910); exemption of persons who heal by prayer from regulations applicable to drugless physicians, Crane *v.* Johnson, 242 U.S. 339 (1917); exclusion of osteopathic physicians from public hospitals, Hayman *v.* Galveston, 273 U.S. 414 (1927); requirement that persons who treat eyes without use of drugs be licensed as optometrists with exception for persons treating eyes by the use of drugs, who are regulated under a different statute, McNaughton *v.* Johnson, 242 U.S. 344 (1917); a prohibition against advertising by dentists, not applicable to other professions, Semler *v.* Oregon State Dental Examiners, 294 U.S. 608 (1935).

Motor vehicles: guest passenger regulation applicable to automobiles but not to other classes of vehicles, Silver *v.* Silver, 280 U.S. 117 (1929); exemption of vehicles from other States from registration requirement, Storaasli *v.* Minnesota, 283 U.S. 57 (1931); classification of driverless automobiles for hire as public vehicles, which are required to procure a license and to carry liability insurance, Hodge Drive-It-Yourself Co. *v.* Cincinnati, 284 U.S. 335 (1932); exemption from limitations on hours of labor for drivers of motor vehicles of carriers of property for hire, of those not principally engaged in transport of property for hire, and carriers operating wholly in metropolitan areas, Welch Co. *v.* New Hampshire, 306 U.S. 79 (1939); exemption of busses and temporary movements of farm implements and machinery and trucks making short hauls from common carriers from limitations in net load and length of trucks, Sproles *v.* Binford, 286 U.S. 374 (1932); prohibition against operation of uncertified carriers, Bradley *v.* Public Utilities Commission, 289 U.S. 92 (1933); exemption from regulations affecting carriers for hire, of persons whose chief business is farming and dairying, but who occasionally haul farm and dairy products for compensation, Hicklin *v.* Coney, 290 U.S. 169 (1933); exemption of private vehicles, street cars and omnibuses from insurance requirements applicable to taxicabs, Packard *v.* Banton, 264 U.S. 140 (1924).

Peddlers and solicitors: a State may classify and regulate itinerant vendors and peddlers, Emert *v.* Missouri, 156 U.S. 296 (1895); may forbid the sale by them of drugs and medicines, Baccus *v.* Louisiana, 232 U.S. 334 (1914); prohibit drumming or soliciting on trains for business for hotels, medical practitioners, etc., Williams *v.* Arkansas, 217 U.S. 79 (1910); or solicitation of employment to prosecute or collect claims, McCloskey *v.* Tobin, 252 U.S. 107 (1920). And a municipality may prohibit canvassers or peddlers from calling at private residences unless requested or invited by the occupant to do so. Breard *v.* Alexandria, 341 U.S. 622 (1951).

Property destruction: destruction of cedar trees to protect apple orchards from cedar rust. Miller *v.* Schoene, 276 U.S. 272 (1928).

Railroads: forbid operation on a certain street, Richmond, F. & P.R. Co. *v.* Richmond, 96 U.S. 521 (1878); require fences and cattle guards and allowed recovery of multiple damages for failure to comply, Missouri P.R. Co. *v.* Humes, 115 U.S. 512 (1885); Minneapolis & St. L.R. Co. *v.* Beckwith, 129 U.S. 26 (1889); Minneapolis & St. L.R. Co. *v.* Emmons, 149 U.S. 364 (1893); charge them with entire expense of altering a grade crossing, New York & N.E.R. Co. *v.* Bristol, 151 U.S. 556 (1894); makes them responsible for fire communicated by their engines, St. Louis & S.F.R. Co. *v.* Mathews, 165 U.S. 1 (1897); requires cutting of certain weeds, Missouri, K. & T.R. Co. *v.* May, 194 U.S. 267 (1904); create a presumption against a railroad failing to give prescribed warning signals, Atlantic Coast Line R. Co. *v.* Ford, 287 U.S. 502 (1933); require use of locomotive headlights of a specified form and power, Atlantic Coast Line R. Co. *v.* Georgia, 234 U.S. 280 (1914); make railroads liable for damage caused by operation of their locomotives, unless they make it appear that their agents exercised all ordinary and reasonable care and diligence, Seaboard Air Line R. Co. *v.* Watson, 287 U.S. 86 (1932); require sprinkling of streets between tracks to lay the dust, Pacific Gas & Electric Co. *v.* Police Court, 251 U.S. 22 (1919).

Sales in bulk: requirement of notice of bulk sale applicable only to retail dealers. Lemieux *v.* Young, 211 U.S. 489 (1909).

Secret societies: regulations applied only to one class of oath-bound associations, having a membership of 20 or more persons, where the class regulated has a tendency to make the secrecy of its purpose and membership a cloak for conduct inimical to the personal rights of others and to the public welfare. New York ex rel. Bryant *v.* Zimmerman, 278 U.S. 63 (1928).

Securities: a prohibition on the sale of capital stock on margin or for future delivery which is not applicable to other objects of speculation, e.g., cotton, grain. Otis *v.* Parker, 187 U.S. 606 (1903).

Syndicalism: a criminal syndicalism statute does not deny equal protection in penalizing those who advocate a resort to violent and unlawful methods as a means of changing industrial and political conditions while not penalizing those who advocate resort to such methods for maintaining such conditions. Whitney *v.* California, 274 U.S. 357 (1927).

Telegraph companies: a statute prohibiting stipulation against liability for negligence in the delivery of interstate message, which did not forbid express companies and other common carriers to limit their liability by contract. Western Union Teleg. Co. *v.* Commercial Milling Co., 218 U.S. 406 (1910).

[1105] Hartford Steam Boiler Inspection & Ins. Co. *v.* Harrison, 301 U.S. 459 (1937).

[1106] Smith *v.* Cahoon, 283 U.S. 553 (1931).

[1107] Mayflower Farms *v.* Ten Eyck, 297 U.S. 266 (1936).

[1108] Buck *v.* Bell, 274 U.S. 200 (1927).

[1109] Skinner *v.* Oklahoma, 316 U.S. 535 (1942).

[1110] Yick Wo *v.* Hopkins, 118 U.S. 356 (1886).

[1111] Fisher *v.* St. Louis, 194 U.S. 361 (1904).

[1112] Gorieb *v.* Fox, 274 U.S. 603 (1927).

[1113] Wilson *v.* Eureka City, 173 U.S. 32 (1899).

[1114] Gundling *v.* Chicago, 177 U.S. 183 (1900).

[1115] Kotch *v.* Pilot Comm'rs., 330 U.S. 552 (1947).

[1116] Yick Wo *v.* Hopkins, 118 U.S. 356 (1886). *Cf.* Hirabayashi *v.* United States, 320 U.S. 81 (1943), where the Court sustained the relocation of American citizens of Japanese ancestry on the ground that in this case the fact of origin

might reasonably be deemed to have some substantial relation to national security. It was careful to point out however, that normally distinctions based on race or national origin are invidious and hence void.

[1117] Ohio ex rel. Clarke *v.* Deckebach, 274 U.S. 392 (1927).

[1118] Patsone *v.* Pennsylvania, 232 U.S. 138 (1914).

[1119] Heim *v.* McCall, 239 U.S. 175 (1915); Crane *v.* New York, 239 U.S. 195 (1915).

[1120] Truax *v.* Raich, 239 U.S. 33 (1915).

[1121] Takahashi *v.* Fish & Game Comm'n., 334 U.S. 410 (1948).

[1122] Terrace *v.* Thompson, 263 U.S. 197 (1923).

[1123] 332 U.S. 633 (1948).

[1124] Ibid. 647, 650.

[1125] Holden *v.* Hardy, 169 U.S. 366 (1898).

[1126] Bunting *v.* Oregon, 243 U.S. 426 (1917).

[1127] Atkin *v.* Kansas, 191 U.S. 207 (1903).

[1128] Keokee Consol. Coke Co. *v.* Taylor, 234 U.S. 224 (1914); *see also* Knoxville Iron Co. *v.* Harbison, 183 U.S. 13 (1901).

[1129] McLean *v.* Arkansas, 211 U.S. 539 (1909).

[1130] Prudential Insurance Co. *v.* Cheek, 259 U.S. 530 (1922).

[1131] Chicago, R.I. & P.R. Co. *v.* Perry, 259 U.S. 548 (1922).

[1132] Mountain Timber Co. *v.* Washington, 243 U.S. 219 (1917).

[1133] New York C.R. Co. *v.* White, 243 U.S. 188 (1917); Middleton *v.* Texas Power & Light Co., 249 U.S. 152 (1919); Ward & Gow *v.* Krinsky, 259 U.S. 503 (1922).

[1134] Lincoln Federal Labor Union *v.* Northwestern Co., 335 U.S. 525 (1949).

[1135] Miller *v.* Wilson, 236 U.S. 373 (1915); Bosley *v.* McLaughlin, 236 U.S. 385 (1915).

[1136] Muller *v.* Oregon, 208 U.S. 412 (1908).

[1137] Dominion Hotel *v.* Arizona, 249 U.S. 265 (1919).

[1138] Radice *v.* New York, 264 U.S. 292 (1924).

[1139] West Coast Hotel Co. *v.* Parrish, 300 U.S. 379 (1937); overruling Adkins *v.* Children's Hospital, 261 U.S. 525 (1923); and Morehead *v.* Tipaldo, 298 U.S. 587 (1936).

[1140] Goesaert *v.* Cleary, 335 U.S. 464 (1948).

[1141] Ibid. 466.

[1142] Mallinckrodt Chemical Works *v.* Missouri ex rel. Jones, 238 U.S. 41 (1915).

[1143] International Harvester Co. *v.* Missouri ex rel. Atty. Gen., 234 U.S. 199 (1914).

[1144] Tigner *v.* Texas, 310 U.S. 141 (1940), overruling Connolly *v.* Union Sewer Pipe Co., 184 U.S. 540 (1902).

[1145] Standard Oil Co. *v.* Tennessee ex rel. Cates, 217 U.S. 413 (1910).

[1146] Carroll *v.* Greenwich Ins. Co., 199 U.S. 401 (1905).

[1147] Pacific States Box & Basket Co. *v.* White, 296 U.S. 176 (1935). *See also* Slaughter-House Cases, 16 Wall. 36 (1873); Nebbia *v.* New York, 291 U.S. 502, 529 (1934).

[1148] Pace *v.* Alabama, 106 U.S. 583 (1883).

[1149] Collins *v.* Johnston, 237 U.S. 502, 510 (1915); Pennsylvania ex rel. Sullivan *v.* Ashe, 302 U.S. 51 (1937).

[1150] McDonald *v.* Massachusetts, 180 U.S. 311 (1901). *See also* Moore *v.* Missouri, 159 U.S. 673 (1895); Graham *v.* West Virginia, 224 U.S. 616 (1912).

[1151] Carlesi *v.* New York, 233 U.S. 51 (1914).

[1152] Ughbanks *v.* Armstrong, 208 U.S. 481 (1908).

[1153] Pennsylvania ex rel. Sullivan *v.* Ashe, 302 U.S. 51 (1937).

[1154] Finley *v.* California, 222 U.S. 28 (1911).

[1155] Minnesota *v.* Probate Court, 309 U.S. 270 (1940).

[1156] Pace *v.* Alabama, 106 U.S. 583 (1883).

[1157] Francis *v.* Resweber, 329 U.S. 459 (1947).

[1158] Skinner *v.* Oklahoma, 316 U.S. 535 (1942). *Cf.* Buck *v.* Bell, 274 U.S. 200 (1927). (Sterilization of defectives.)

[1159] Buchanan *v.* Warley, 245 U.S. 60 (1917).

[1160] Corrigan *v.* Buckley, 271 U.S. 323 (1926).

[1161] Shelley *v.* Kraemer, 334 U.S. 1 (1948). *Cf.* Hurd *v.* Hodge, 334 U.S. 24 (1948), where the Court held that a restrictive covenant was unenforceable in the Federal Court of the District of Columbia for reasons of public policy.

[1162] Plessy *v.* Ferguson, 163 U.S. 537 (1896). *Cf.* Morgan *v.* Virginia, 328 U.S. 373 (1946), where a State statute requiring segregation of passengers on interstate journeys was held to be an unlawful restriction on interstate commerce. *See also* Hall *v.* De Cuir, 95 U.S. 485 (1878), where a State law forbidding steamboats on the Mississippi to segregate passengers according to race was held unconstitutional under the commerce clause, and Bob-Lo Excursion Co. *v.* Michigan, 333 U.S. 28 (1948), where a Michigan statute forbidding discrimination was held valid as applied to an excursion boat operating on the Detroit River; and Henderson *v.* United States, 339 U.S. 816 (1950), where segregation in a dining car operated by an interstate railroad was held to violate a federal statute.

[1163] McCabe *v.* Atchison, T. & S.F.R. Co., 235 U.S. 151 (1914).

[1164] Cumming *v.* County Board of Education, 175 U.S. 528 (1899).

[1165] Gong Lum *v.* Rice, 275 U.S. 78 (1927).

[1166] 305 U.S. 337 (1938).

[1167] Sipuel *v.* Oklahoma, 332 U.S. 631 (1948).

[1168] Fisher *v.* Hurst, 333 U.S. 147 (1948).

[1169] 339 U.S. 629 (1950).

[1170] 339 U.S. 637 (1950).

The "Separate but Equal" Doctrine took its rise in Chief Justice Shaw's opinion in Roberts *v.* City of Boston, 59 Mass. 198, 200 (1849), for an excellent account of which *see* the article by Leonard W. Levy and Harlan B. Phillips in 56 American Historical Review, 510-518 (April, 1951). *See also* Judge Danforth's opinion in Gallagher *v.* King, 93 N.Y. 438 (1883).

In a case in which Negro children brought a suit in the Federal District Court for the Eastern District of South Carolina, to enjoin certain school officials from making any distinctions based upon race or color in providing educational facilities, the court found that statutes of South Carolina which required separate schools for the two races did not of themselves violate the Fourteenth Amendment, but ordered the school officials to proceed at once to furnish equal educational facilities and to report to the court within six months as to the action taken. On appeal to the Supreme Court the case was remanded for further proceedings in order that the Supreme Court may "have the benefit of the views of the District Court upon the additional facts brought to the attention of that court in the report which it ordered." Briggs *v.* Elliott, 342 U.S. 350, 351 (1952).

Recently, the Fourth United States Circuit Court of Appeals, sitting at Richmond, ruled that Negroes must be admitted to the white University of North Carolina Law School in terms which flatly rejected the thesis of separate but equal facilities. "It is a definite handicap to the colored student to confine his association in the Law School with people of his own class," said the opinion of Judge Morris A. Soper.—McKissick *v.* Carmichael, 187 F. 2d 949, 952 (1951).

[1171] Guinn *v.* United States, 238 U.S. 347 (1915).

[1172] Williams *v.* Mississippi, 170 U.S. 213 (1898).

[1173] Giles *v.* Harris, 189 U.S. 475, 486 (1903).

[1174] Lane *v.* Wilson, 307 U.S. 268, 275 (1939).

[1175] *See* p. 1141, *ante*.

[1176] Nixon *v.* Herndon, 273 U.S. 536 (1927).

[1177] Nixon *v.* Condon, 286 U.S. 73, 89 (1932).

[1178] Grovey *v.* Townsend, 295 U.S. 45 (1935).

[1179] United States *v.* Classic, 313 U.S. 299 (1941).

[1180] 321 U.S. 649 (1944).

[1181] Pope *v.* Williams, 193 U.S. 621 (1904).

[1182] 321 U.S. 1 (1944).

[1183] 328 U.S. 549, 566 (1946). Justice Black dissented on the ground that the equal protection clause was violated.

[1184] 335 U.S. 281, 287, 288 (1948). Justice Douglas, with whom Justices Black and Murphy concurred, dissented saying that the statute lacked "the equality to which the exercise of political rights is entitled under the Fourteenth Amendment."

[1185] South *v.* Peters, 339 U.S. 276 (1950).

[1186] Dohany *v.* Rogers, 281 U.S. 362, 369 (1930).

[1187] Hayes *v.* Missouri, 120 U.S. 68 (1887).

[1188] Hardware Dealers Mut. F. Ins. Co. *v.* Glidden Co., 284 U.S. 151 (1931).

[1189] Lindsley *v.* Natural Carbonic Gas Co., 220 U.S. 61, 81, 82 (1911); *see also* Mobile, J. & K.C.R. Co. *v.* Turnipseed, 219 U.S. 35 (1910); Adams *v.* New York, 192 U.S. 585 (1904).

[1190] Cohen *v.* Beneficial Loan Corp., 337 U.S. 541, 552 (1949).

[1191] Bowman *v.* Lewis, 101 U.S. 22, 30 (1880). *See also* Duncan *v.* Missouri, 152 U.S. 377 (1894); Ohio ex rel. Bryant *v.* Akron Metropolitan Park Dist, 281 U.S. 74 (1930).

[1192] Mallett *v.* North Carolina, 181 U.S. 589 (1901); *see also* Bowman *v.* Lewis, 101 U.S. 22, 30 (1880).

[1193] Truax *v.* Corrigan, 257 U.S. 312 (1921).

[1194] Cochran *v.* Kansas, 316 U.S. 255 (1942).

[1195] Bain Peanut Co. *v.* Pinson, 282 U.S. 499 (1931).

[1196] Consolidated Rendering Co. *v.* Vermont, 207 U.S. 541 (1908). *See also* Hammond Packing Co. *v.* Arkansas, 212 U.S. 322 (1909).

[1197] Power Mfg. Co. *v.* Saunders, 274 U.S. 490 (1927).

[1198] Kentucky Finance Corp. *v.* Paramount Auto Exch. Corp., 262 U.S. 544 (1923).

[1199] Fidelity Mut. Life Asso. *v.* Mettler, 185 U.S. 308, 325 (1902). *See also* Manhattan L. Ins. Co. *v.* Cohen, 234 U.S. 123 (1914).

[1200] Lowe *v.* Kansas, 163 U.S. 81 (1896).

[1201] Missouri, K. & T.R. Co. *v.* Cade, 233 U.S. 642 (1914); *see also* Missouri, K. & T.R. Co. *v.* Harris, 234 U.S. 412 (1914).

[1202] Missouri P.R. Co. *v.* Larabee, 234 U.S. 459 (1914).

[1203] Atchison, T. & S.F.R. Co. *v.* Matthews, 174 U.S. 96 (1899).

[1204] Gulf, C. & S.F.R. Co. *v.* Ellis, 165 U.S. 150 (1897). *See also* Atchison, T. & S.F.R. Co. *v.* Vosburg, 238 U.S. 56 (1915).

[1205] 18 Stat. 336 (1875); 8 U.S.C. § 44 (1946).

[1206] Cassell *v.* Texas, 339 U.S. 282 (1950); Hill *v.* Texas, 316 U.S. 400, 404 (1942); Smith *v.* Texas, 311 U.S. 128 (1940); Pierre *v.* Louisiana, 306 U.S. 354 (1939); Virginia *v.* Rives, 100 U.S. 313 (1880).

[1207] Virginia *v.* Rives, 100 U.S. 313, 322, 323 (1880).

[1208] Akins *v.* Texas, 325 U.S. 398, 403 (1945).

[1209] Patton *v.* Mississippi, 332 U.S. 463 (1947). *See also* Shepherd *v.* Florida, 341 U.S. 50 (1951).

[1210] Gibson *v.* Mississippi, 162 U.S. 565 (1896).

[1211] Rawlins *v.* Georgia, 201 U.S. 638 (1906).

[1212] 332 U.S. 261 (1947).

In an interesting footnote to his opinion, Justice Jackson asserted that "it is unnecessary to decide whether the equal protection clause of the Fourteenth Amendment might of its own force prohibit discrimination on account of race in the selection of jurors, so that such discrimination would violate the due process clause of the same Amendment." Ibid. 284. Earlier cases dealing with racial discrimination have indicated that the discrimination was forbidden by the equal protection clause as well as by the Civil Rights Act of 1875. *See* cases cited to the preceding paragraph.

[1213] Ibid. 285.

[1214] Ibid. 270, 271.

[1215] Ibid. 291.

[1216] Ibid. 288, 289, 299, 300. Four Justices, speaking by Justice Murphy dissented, saying: "The proof here is adequate enough to demonstrate that this panel, like every discriminatorily selected 'blue ribbon' panel, suffers from a constitutional infirmity. That infirmity is the denial of equal protection to those who are tried by a jury drawn from a 'blue ribbon' panel. Such a panel is narrower and different from that used in forming juries to try the vast majority of other accused persons. To the extent of that difference, therefore, the persons tried by 'blue ribbon' juries receive unequal protection." "In addition, as illustrated in this case, the distinction that is drawn in fact between 'blue ribbon' jurors and general jurors is often of such a character as to destroy the representative nature of the 'blue ribbon' panel. There is no constitutional right to a jury drawn from a group of uneducated and unintelligent persons. Nor is there any right to a jury chosen solely from those at the lower end of the economic and social scale. But there is a constitutional right to a jury drawn from a group which represents a cross-section of the community. And a cross-section of the community includes persons with varying degrees of training and intelligence and with varying economic and social positions. Under our Constitution, the jury is not to be made the representative of the most intelligent, the most wealthy or the most successful, nor of the least intelligent, the least wealthy or the least successful. It is a democratic institution, representative of all qualified classes of people. * * * To the extent that a 'blue ribbon' panel fails to reflect this democratic principle, it is constitutionally defective."

[1217] 112 U.S. 94, 102 (1884).

[1218] W.G. Rice, Esq., Jr., University of Wisconsin Law School, The Position of the American Indian in the Law of the United States, 16 Journal of Comp. Leg. 78, 80 (1934).

[1219] 39 Op. Atty. Gen. 518, 519.

[1220] 46 Stat. 26; 55 Stat. 761; 2 U.S.C.A. § 2a (a).

[1221] Cong. Rec., 77th Cong., 1st sess., vol. 87, p. 70, January 8, 1941.

[1222] McPherson *v.* Blacker, 146 U.S. 1 (1892); Ex parte Yarbrough, 110 U.S. 651, 663 (1884).

[1223] Saunders *v.* Wilkins, 152 F. (2d) 235 (1945); certiorari denied, 328 U.S. 870 (1946); rehearing denied, 329 U.S. 825 (1946).

[1224] Saunders *v.* Wilkins, 152 F. (2d) 235, 237-238, citing Willoughby, Constitution, 2d ed., pp. 626, 627.

[1225] Legislation by Congress providing for removal was necessary to give effect to the prohibition of section 3; and until removed in pursuance of such legislation, the exercise of functions by persons in office before promulgation of the Fourteenth Amendment was not unlawful. (Griffin's Case, 11 Fed. Cas. No. 5815 (1869)). Nor were persons who had taken part in the Civil War and had been pardoned therefor by the President before the adoption of this Amendment precluded by this section from again holding office under the United States. (18 Op. Atty. Gen. 149 (1885)).

The phrase, "engaged in Rebellion" has been construed as implying a voluntary effort to assist an insurrection and to bring it to a successful termination; and accordingly as not embracing acts done under compulsion of force or of a well grounded fear of bodily harm. Thus, while the mere holding of a commission of justice of the peace under the Confederate government was not viewed as involving, of itself, "adherence or countenance to the Rebellion," action by such officer in furnishing a substitute for himself to the

Confederate Army amounted to such participation in a Rebellion unless said action could be shown to have resulted from fear of conscription and to have sprung, not from repugnance to military service, but from want of sympathy with the insurrectionary movement. (United States *v.* Powell, 27 Fed. Cas. No. 16,079 (1871)).

[1226] Perry *v.* United States, 294 U.S. 330, 354 (1935) in which the Court concluded "that the Joint Resolution of June 5, 1933, insofar as it attempted to override" the gold-clause obligation in a Fourth Liberty Loan Gold Bond, "went beyond the congressional power."

See also Branch *v.* Haas, 16 F. 53 (1883), citing Hanauer *v.* Woodruff, 15 Wall. 439 (1873) and Thorington *v.* Smith, 8 Wall. 1 (1869) in which it was held that inasmuch as bonds issued by the Confederate States were rendered illegal by section four, a contract for the sale and delivery before October 29, 1881 of 200 Confederate coupon bonds at the rate of $1000 was void, and a suit for damages for failure to deliver could not be maintained.

See also The Pietro Campanella, 73 F. Supp. 18 (1947) which arose out of a suit for the forfeiture, prior to our entry into World War II, of Italian vessels in an American port and their subsequent requisition by the Maritime Commission. The Attorney General, as successor to the Alien Property Custodian, was declared to be entitled to the fund thereafter determined to be due as compensation for the use and subsequent loss of the vessels; and the order of the Alien Property Custodian vesting in himself, for the United States, under authority of the Trading with the Enemy Act and Executive Order, all rights of claimants in the vessels and to the fund substituted therefor was held not to be a violation of section four. An attorney for certain of the claimants, who had asserted a personal right to a lien upon the fund for his services, had argued that when the Government requisitioned ships under the applicable statute providing for compensation, and at a time before this country was at war with Italy, the United States entered into a binding agreement with the owners for compensation and that this promise constituted a valid obligation of the United States which could not be repudiated without violating section four.

[1227] Civil Rights Cases, 109 U.S. 3, 13 (1883). *See also* United States *v.* Wheeler, 254 U.S. 281 (1920) on which it was held that the United States is without power to punish infractions by individuals of the right of citizen to reside peacefully in the several States, and to have free ingress into and egress from such States. Authority to deal with the forcible eviction by a mob of individuals across State boundaries is exclusively within the power reserved by the Constitution to the States.

[1228] Virginia *v.* Rives, 100 U.S. 313, 318 (1880); Strauder *v.* West Virginia, 100 U.S. 303 (1880).

[1229] Ex parte Virginia, 100 U.S. 339, 344 (1880).

[1230] United States *v.* Harris, 106 U.S. 629 (1883). *See also* Baldwin *v.* Franks, 120 U.S. 678, 685 (1887).

[1231] 325 U.S. 91 (1945).

[1232] 18 U.S.C.A. § 242.

[1233] No "opinion of the Court" was given. In announcing the judgment of the Court, Justice Douglas, who was joined by Chief Justice Stone and Justices Black and Reed, declared that the trial judge had erred in not charging the jury that the defendants must be found to have had the specific intention of depriving their victim of his right to a fair trial in accordance with due process of law, that this was the force of the word, "willfully," in section 20, and that any other construction of section 20 would be void for want of laying down an "ascertainable standard of guilt." To avoid a stalemate on the Court, Justice Rutledge concurred in the result; but, on the merits of the case, he would have affirmed the conviction. Justice Murphy announced that he favored affirming the conviction and therefore dissented. Justice Roberts, with whom Justices Frankfurter and Jackson were associated, dissented for reasons stated in the text.

[1234] 100 U.S. 339, 346 (1880).

[1235] 313 U.S. 299, 326 (1941).

[1236] 325 U.S. 91, 114-116 (1945). *But see* Barney *v.* City of New York, 193 U.S. 430, 438, 441 (1904).

[1237] Ibid. 106-107. The majority supporting this proposition was not the same majority as the one which held that "State" action was involved.

[1238] 341 U.S. 97 (1951).

[1239] Ibid. 103-104.

[1240] 342 U.S. 852.

[1241] Ibid. 853-854.

AMENDMENT 15

[Pg 1179]

RIGHT OF CITIZENS TO VOTE

[Pg 1181]

AMENDMENT 15.—RIGHT OF CITIZENS TO VOTE

[Pg 1183]

AMENDMENT 15

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.

Affirmative Interpretation

In its initial appraisals of this amendment the Court appeared disposed to emphasize only its purely negative aspects. "The Fifteenth Amendment," it announced, did "not confer the right * * * [to vote] upon any one," but merely "invested the citizens of the United States with a new constitutional right which is * * * exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude."[1] Within less than ten years, however, in Ex parte Yarbrough,[2] the Court ventured to read into the amendment an affirmative as well as a negative purpose. Conceding "that this article" had originally been construed as giving "no affirmative right to the colored man to vote," and as having been "designed primarily to prevent discrimination against him," Justice Miller, in behalf of his colleagues, disclosed their present ability "to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where the former slave-holding States had not removed from their Constitutions the words 'white man' as a qualification for voting, this provision did, in effect, confer on him the right to vote, because, * * *, it annulled the discriminating word *white*, and thus left him in the enjoyment of the same right as white persons. And such would be the effect of any future constitutional provision of a State which should give the right of voting exclusively to white people, * * *"

Negative Application; the "Grandfather Clause"

[Pg 1184]

The subsequent history of the Fifteenth Amendment has been largely a record of belated judicial condemnation of various attempts by States to disfranchise the Negro either overtly through statutory enactment, or covertly through inequitable administration of their electoral laws or by toleration of discriminatory membership practices of political parties. Of several devices which have been voided, one of the first to be held unconstitutional was the "grandfather clause." Without expressly disfranchising the Negro, but with a view to facilitating the permanent placement of white residents on the voting lists while continuing to interpose severe obstacles upon Negroes seeking qualification as voters, several States, beginning in 1895, enacted temporary laws whereby persons who were voters, or descendants of voters on January 1, 1867, could be registered notwithstanding their inability to meet any literacy requirements. Unable because of the date to avail themselves of the same exemption, Negroes were thus left exposed to disfranchisement on grounds of illiteracy while whites no less illiterate were enabled to become permanent voters. With the achievement of this intended result, most States permitted their laws to lapse; but Oklahoma's grandfather clause was enacted as a permanent amendment to the State constitution; and when presented with an opportunity to pass on its validity, a unanimous Court condemned the standard of voting thus established as recreating and perpetuating "the very conditions which the [Fifteenth] Amendment was intended to destroy."[3] Nor, when Oklahoma followed up this defeat with a statute of 1916 which provided that all persons, except those who voted in 1914, who were qualified to vote in 1916 but who failed to register between April 30 and May 11, 1916 (sick persons and persons absent had a second opportunity to register between May 11 and June 30, 1916) should be perpetually disfranchised, did the Court

experience any difficulty in holding the same to be repugnant to the amendment.[4] That amendment, Justice Frankfurter declared, "nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race."[5] More precisely, the effect of this statute, as discerned by the Court, was automatically to continue as permanent voters, without their being obliged to register again, all white persons who were on registry lists in 1914 by virtue of the hitherto invalidated grandfather clause; whereas Negroes, prevented from registering by that clause, were afforded only a twenty-day registration opportunity to avoid permanent disfranchisement.

Application to Party Primaries [Pg 1185]

Indecision was displayed by the Court, however, when it was first called upon to deal with the exclusion of Negroes from participation in primary elections.[6] Prior to its becoming convinced that primary contests were in fact elections,[7] the Court had relied upon the equal protection clause to strike down a Texas White Primary Law[8] and a subsequent Texas statute which contributed to a like exclusion by limiting voting in primaries to members of State political parties as determined by the central committees thereof.[9] When exclusion of Negroes was thereafter perpetuated by political parties acting not in obedience to any statutory command, this discrimination was for a time viewed as not constituting State action and therefore not prohibited by either the Fourteenth or the Fifteenth Amendments.[10] But this holding was reversed nine years later when the Court, in Smith *v.* Allwright,[11] declared that where the selection of candidates for public office is entrusted by statute to political parties, a political party in making its selection at a primary election is a State agency, and hence may not under this amendment exclude Negroes from such elections.

At a very early date the Court held that literacy tests which are drafted so as to apply alike to all applicants for the voting franchise would be deemed to be fair on their face, and in the absence of proof of discriminatory enforcement could not be viewed as denying the equal protection of the laws guaranteed by the Fourteenth Amendment.[12] More recently, the Boswell amendment to the constitution of Alabama, which provided that only persons who understood and could explain the Constitution of the United States to the reasonable satisfaction of boards of registrars was found, both in its object as well as in the manner of its administration, to be contrary to the Fifteenth Amendment. The legislative history of the adoption of the Alabama provision disclosed [Pg 1186] that "the ambiguity inherent in the phrase 'understand and explain' * * * was purposeful * * * and was intended as a grant of arbitrary power in an attempt to obviate the consequences of" Smith *v.* Allwright.[13]

Enforcement

Two major questions have presented themselves for decision as a consequence of the exercise by Congress of its powers to enforce this article, an amendment which the Court has acknowledged to be self-executing.[14] These have pertained to the limitations which the amendment imposes on the competency of Congress legislating thereunder to punish racial discrimination founded upon more than a denial of suffrage and to penalize such denials when perpetrated by private individuals not acting under color of public authority. Rulings on both these issues were made very early; and the Court thus far has manifested no disposition to depart from them, although their compatibility with more recent holdings may be doubtful. Thus, when the Enforcement Act of 1870,[15] which penalized State officers for refusing to receive the vote of any qualified citizen, was employed to support a prosecution of such officers for having prevented a qualified Negro from voting, the Court held it to be in excess of the authority conferred upon Congress.[16] The Fifteenth Amendment, Chief Justice Waite maintained, did not confer "authority to impose penalties for every wrongful refusal to receive * * * [a] vote * * *, [but] only when the wrongful refusal * * * is because of race, color, or previous condition of servitude, * * *" Voided for the like reason that this amendment "relates solely to action 'by the United States or by any State,' and does not contemplate wrongful individual acts" was another provision of the same act, which authorized prosecution of private individuals for having prevented citizens from voting at a Congressional election.[17]

Notes

[1] United States *v.* Reese, 92 U.S. 214, 217-218 (1876); United States *v.* Cruikshank, 92 U.S. 542, 556 (1876).

[2] 110 U.S. 651, 665 (1884); citing Neal *v.* Delaware, 103 U.S. 370, 389 (1881). This affirmative view was later reiterated in Guinn *v.* United States, 238 U.S. 347, 363 (1915).

[3] Guinn *v.* United States, 238 U.S. 347, 360, 363-364 (1915).

[4] Lane *v.* Wilson, 307 U.S. 268 (1939).

[5] Ibid. 275.

[6] Cases involving this and related issues are also discussed under the equal protection clause, p. 1163.

[7] United States *v.* Classic, 313 U.S. 299 (1941); Smith *v.* Allwright, 321 U.S. 649 (1944).

[8] Nixon *v.* Herndon, 273 U.S. 536 (1927).

[9] Nixon *v.* Condon, 286 U.S. 73, 89 (1932).

[10] Grovey *v.* Townsend, 295 U.S. 45, 55 (1935).

[11] 321 U.S. 649 (1944). Notwithstanding that the South Carolina Legislature, after the decision in Smith *v.* Allwright, repealed all statutory provisions regulating primary elections and political organizations conducting them, a political party thus freed of control is not to be regarded as a private club and for that reason exempt from the constitutional prohibitions against racial discrimination contained in the Fifteenth Amendment. Rice *v.* Elmore, 165 F. (2d) 387 (1947); certiorari denied, 333 U.S. 875 (1948). *See also* Brown *v.* Baskin, 78 F. Supp. 933, 940 (1948) which held violative of the Fifteenth Amendment a requirement of a South Carolina political party, which excluded Negroes from membership, that white as well as Negro qualified voters, as a prerequisite for voting in its primary, take an oath that they will support separation of the races.

[12] Williams *v.* Mississippi, 170 U.S. 213, 220 (1898).

[13] Davis *v.* Schnell, 81 F. Supp. 872, 878, 880 (1949); affirmed, 336 U.S. 933 (1949).

[14] United States *v.* Amsden, 6 F. 819 (1881).

[15] 16 Stat. 140.

[16] United States *v.*. Reese, 92 U.S. 214, 218 (1876).

[17] James *v.* Bowman, 190 U.S. 127, 136 (1903) *See also* Karem *v.* United States, 121 F. 250, 259 (1903).

AMENDMENT 16

[Pg 1187]

INCOME TAX

[Pg 1189]

INCOME TAX

[Pg 1191]

AMENDMENT 16

> 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.

History and Purpose of the Amendment

The ratification of this amendment was the direct consequence of the decision in 1895[1] whereby the attempt of Congress the previous year to tax incomes uniformly throughout the United States[2] was held by a divided court to be unconstitutional. A tax on incomes derived from property,[3] the Court declared, was a "direct tax" which Congress under the terms of article I, section 2, clause 3, and section 9, clause 4, could impose only by the rule of apportionment according to population; although scarcely fifteen years prior the Justices had unanimously sustained[4] the collection of a similar tax during the Civil War,[5] the only other occasion preceding Amendment Sixteen in which Congress had ventured to utilize this method of raising

revenue.[6]

During the interim between the Pollock decision in 1895, and the ratification of the Sixteenth Amendment in 1913, the Court gave evidence of a greater awareness of the dangerous consequences to national solvency which that holding threatened, and partially circumvented it, either by taking refuge in redefinitions of "direct tax" or, and more especially, by emphasizing, virtually to the exclusion of the former, the history of excise taxation. Thus, in a series of cases, notably Nicol v. Ames,[7] Knowlton *v.* Moore[8] and Patton *v.* Brady[9] the Court held the following [Pg 1192] taxes to have been levied merely upon one of the "incidents of ownership" and hence to be excises; a tax which involved affixing revenue stamps to memoranda evidencing the sale of merchandise on commodity exchanges, an inheritance tax, and a war revenue tax upon tobacco on which the hitherto imposed excise tax had already been paid and which was held by the manufacturer for resale.

Thanks to such endeavors the Court thus found it possible, in 1911,[10] to sustain a corporate income tax as an excise "measured by income" on the privilege of doing business in corporate form. The adoption of the Sixteenth Amendment, however, put an end to speculation as to whether the Court, unaided by constitutional amendment, would persist along these lines of construction until it had reversed its holding in the Pollock Case. Indeed, in its initial appraisal[11] of the amendment it classified income taxes as being inherently "indirect." "The command of the amendment that all income taxes shall not be subject to apportionment by a consideration of the sources from which the taxed income may be derived, forbids the application to such taxes of the rule applied in the Pollock Case by which alone such taxes were removed from the great class of excises, duties, and imposts subject to the rule of uniformity and were placed under the other or direct class.[12] * * * The Sixteenth Amendment conferred no new power of taxation but simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged * * *"[13]

Meaning of "Income" as Distinguished From Capital

Building upon definitions formulated in cases construing the Corporation Tax Act of 1909,[14] the Court initially described income as the "gain derived from capital, from labor, or from both combined," inclusive of the "profit gained through a sale or conversion of capital assets";[15] and in the following array of factual situations has subsequently applied this definition to achieve results that have been productive of extended controversy.

CORPORATE DIVIDENDS: WHEN TAXABLE AS INCOME [Pg 1193]

Rendered in conformity with the belief that all income "in the ordinary sense of the word" became taxable under the Sixteenth Amendment, the earliest decisions of the Court on the taxability of corporate dividends occasioned little comment. Emphasizing that in all such cases the stockholder is to be viewed as "a different entity from the corporation," the Court in Lynch *v.* Hornby[16] held that a cash dividend equal to 24% of the par value of outstanding stock and made possible largely by the conversion into money of assets earned prior to the adoption of the amendment, was income taxable to the stockholder for the year in which he received it, notwithstanding that such an extraordinary payment might appear "to be a mere realization in possession of an inchoate and contingent interest * * * [of] the stockholder * * * in a surplus of corporate assets previously existing." In Peabody *v.* Eisner,[17] decided on the same day and deemed to have been controlled by the preceding case, the Court ruled that a dividend paid in the stock of another corporation, although representing earnings that had accrued before ratification of the amendment, was also taxable to the shareholder as income. The dividend was likened to a distribution in specie.

THE "STOCK DIVIDENDS CASE"

Two years later the Court decided Eisner *v.* Macomber,[18] and the controversy which that decision precipitated still endures. Departing from the interpretation placed upon the Sixteenth Amendment in the earlier cases; namely, that the purpose of the amendment was to correct the "error" committed in the Pollock Case and to restore income taxation to "the category of indirect taxation to which it inherently belonged," Justice Pitney, who delivered the opinion in the Eisner Case, indicated that the sole purpose of the Sixteenth Amendment was merely to "remove the necessity which otherwise might exist for an apportionment among the States of taxes laid on income." He thereupon undertook to demonstrate how what was not income, but an increment of capital when received, could later be transmitted into income upon sale or conversion, and could [Pg 1194] be taxed as such without the necessity of apportionment. In short, the term "income" reacquired to some indefinite extent a restrictive significance.

Specifically, the Justice held that a stock dividend was capital when received by a stockholder of the issuing corporation and did not become taxable without apportionment; that is, as "income," until sold or converted, and then only to the extent that a gain was realized upon the proportion of the original investment which such stock represented. "A stock dividend," Justice Pitney maintained, "far from being a realization of profits to the stockholder, * * * tends rather to postpone such realization, in that the fund represented by the new stock has been transferred

from surplus to capital, and no longer is available for actual distribution. * * * not only does a stock dividend really take nothing from * * * the corporation and add nothing to that of the shareholder, but * * * the antecedent accumulation of profits evidenced thereby, while indicating that the shareholder is richer because of an increase of his capital, at the same time shows [that] he has not realized or received any income in" what is no more than a "bookkeeping transaction." But conceding that a stock dividend represented a gain, the Justice concluded that the only gain taxable as "income" under the amendment was "a gain, a profit, something of exchangeable value *proceeding from* the property, *severed from* the capital however invested or employed, and *coming in*, being '*derived*,' that is, *received* or *drawn by* the recipient [the taxpayer] for his *separate* use, benefit, and disposal; * * *." Only the latter, in his opinion, answered the description of income "derived" from property; whereas "a gain accruing to capital, not a *growth* or an *increment* of value *in* the investment" did not.[19]

Although steadfastly refusing to depart from the principle[20] which it asserted in Eisner *v.* Macomber, the Court in subsequent decisions has, however, slightly narrowed the application thereof. Thus, the distribution, as a dividend, to stockholders of an existing corporation of the [Pg 1195] stock of a new corporation to which the former corporation, under a reorganization, had transferred all its assets, including a surplus of accumulated profits, was treated as taxable income. The fact that a comparison of the market value of the shares in the older corporation immediately before, with the aggregate market value of those shares plus the dividend shares immediately after, the dividend showed that the stockholders experienced no increase in aggregate wealth was declared not to be a proper test for determining whether taxable income had been received by these stockholders.[21] On the other hand, no taxable income was held to have been produced by the mere receipt by a stockholder of rights to subscribe for shares in a new issue of capital stock, the intrinsic value of which was assumed to be in excess of the issuing price. The right to subscribe was declared to be analogous to a stock dividend, and "only so much of the proceeds obtained upon the sale of such rights as represents a realized profit over cost" to the stockholders was deemed to be taxable income.[22] Similarly, on grounds of consistency with Eisner *v.* Macomber, the Court has ruled that inasmuch as they gave the stockholder an interest different from that represented by his former holdings, a dividend in common stock to holders of preferred stock,[23] or a dividend in preferred stock accepted by a holder of common stock[24] was income taxable under the Sixteenth Amendment.

OTHER CORPORATE EARNINGS OR RECEIPTS: WHEN TAXABLE AS INCOME [Pg 1196]

On at least two occasions the Court has rejected as untenable the contention that a tax on undistributed corporate profits is essentially a penalty rather than a tax or that it is a direct tax on capital and hence is not exempt from the requirement of apportionment. Inasmuch as the exaction was permissible as a tax, its validity was held not to be impaired by its penal objective, namely, "to force corporations to distribute earnings in order to create a basis for taxation against the stockholders." As to the added contention that, because liability was assessed upon a mere purpose to evade imposition of surtaxes against stockholders, the tax was a direct tax on a state of mind, the Court replied that while "the existence of the defined purpose was a condition precedent to the imposition of the tax liability, * * * this * * * [did] not prevent it from being a true income tax within the meaning of the Sixteenth Amendment."[25] Subsequently, in Helvering *v.* Northwest Steel Mills,[26] this appraisal of the constitutionality of the undistributed profits tax was buttressed by the following observation: "It is true that the surtax is imposed upon the annual income only if it is not distributed, but this does not serve to make it anything other than a true tax on income within the meaning of the Sixteenth Amendment. Nor is it true, * * *, that because there might be an impairment of the capital stock, the tax on the current annual profit would be the equivalent of a tax upon capital. Whether there was an impairment of the capital stock or not, the tax * * * was imposed on profits earned during * * *—a tax year—and therefore on profits constituting income within the meaning of the Sixteenth Amendment."[27] Likening a cooperative to a corporation, federal courts have also declared to be taxable income the net earnings of a farmers' cooperative, a portion of which was used to pay dividends on capital stock without reference to patronage. The argument that such earnings were in reality accumulated savings of its patrons which the cooperative held as their bailee was rejected as unsound for the reason that "while those who might be entitled to patronage dividends have, * * *, an interest in such earnings, such interest never ripens into an individual ownership * * * until and if a patronage dividend be declared." Had such net earnings been apportioned to all of the patrons during the year, "there might be * * * a more serious question as to whether such earnings constituted 'income' [of the cooperative] within the Amendment."[28] Similarly, the power of Congress to tax the income of an unincorporated joint stock association has been held to be unaffected by the fact that under State law the association is not a legal entity and cannot hold title to property, or by the fact that the shareholders are liable for its debts as partners.[29]

Whether subsidies paid to corporations in money or in the form of grants of land or other physical [Pg 1197] property constitute taxable income has also concerned the Court. In Edwards *v.* Cuba Railroad Co.[30] it ruled that subsidies of lands, equipment, and money paid by Cuba for the construction of a railroad were not taxable income but were to be viewed as having been received by the railroad as a reimbursement for capital expenditures in completing such project. On the other hand, sums paid out by the Federal Government to fulfil its guarantee of minimum operating revenue to railroads during the six months following relinquishment of their control by that

government were found to be taxable income. Such payments were distinguished from those excluded from computation of income in the preceding case in that the former were neither bonuses, nor gifts, nor subsidies; "that is, contributions to capital."[31]

GAINS IN THE FORM OF REAL ESTATE; WHEN TAXABLE AS INCOME

When through forfeiture of a lease in 1933, a landlord became possessed of a new building erected on his land by the outgoing tenant, the resulting gain to the former was taxable to him in that year. Although "economic gain is not always taxable as income, it is settled that the realization of gain need not be in cash derived from the sale of an asset. * * * The fact that the gain is a portion of the value of the property received by the * * * [landlord] does not negative its realization. * * * [Nor is it necessary] to recognition of taxable gain that * * * [the landlord] should be able to sever the improvement begetting the gain from his original capital." Hence, the [Pg 1198] taxpayer was incorrect in contending that the amendment "does not permit the taxation of such [a] gain without apportionment amongst the states."[32] Consistently with this holding the Court has also ruled that when an apartment house was acquired by bequest subject to an unassumed mortgage, and several years thereafter was sold for a price slightly in excess of the mortgage, the basis for determining the gain from that sale was the difference between the selling price, undiminished by the amount of the mortgage, and the value of the property at the time of the acquisition, less deductions for depreciation during the years the building was held by the taxpayer. The latter's contention that the Revenue Act, as thus applied, taxed something which was not revenue was declared to be unfounded.[33]

GAINS IN THE FORM OF BEQUESTS; WHEN TAXABLE AS INCOME

As against the argument of a donee that a gift of stock became a capital asset when received and that therefore, when disposed of, no part of that value could be treated as taxable income to said donee, the Court has declared that it was within the power of Congress to require a donee of stock, who sells it at a profit, to pay income tax on the difference between the selling price and the value when the donor acquired it.[34] Moreover, "the receipt in cash or property * * * not [being] the only characteristic of realization of income to a taxpayer on the cash receipts basis," it follows that one who is normally taxable only on the receipt of interest payments cannot escape taxation thereon by giving away his right to such income in advance of payment. When "the taxpayer does not receive payment of income in money or property, realization may occur when the last step is taken by which he obtains the fruition of the economic gain which has already accrued to him." Hence an owner of bonds, reporting on the cash receipts basis, who clipped interest coupons therefrom before their due date and gave them to his son, was held to have realized taxable income in the amount of said coupons, notwithstanding that his son had collected them upon maturity later in the year.[35]

DIMINUTION OF LOSS, NOT INCOME

Mere diminution of loss is neither gain, profit, nor income. Accordingly, one who in 1913 borrowed a sum of money to be repaid in German marks and who subsequently lost said money in a business transaction cannot be taxed on the curtailment of debt effected by using [Pg 1199] depreciated marks in 1921 to settle a liability of $798,144 for $113,688, the "saving" having been exceeded by a loss on the entire operation.[36]

DATES APPLICABLE IN COMPUTATION OF TAXABLE GAINS

With a frequency that for obvious reasons is progressively diminishing, the Court has also been called upon to resolve questions as to whether gains, realized after 1913, on transactions consummated prior to ratification of the Sixteenth Amendment are taxable, and if so, how such tax is to be determined. The Court's answer generally has been that if the gain to the person whose income is under consideration became such subsequently to the date at which the amendment went into effect; namely, March 1, 1913, and is a real and not merely an apparent gain, said gain is taxable. Thus, one who purchased stock in 1912 for $500 could not limit his taxable gain to the difference between $695, the value of the stock on March 1, 1913 and $13,931, the price obtained on the sale thereof in 1916; but was obliged to pay tax on the entire gain, that is, the difference between the original purchase price and the proceeds of the sale.[37] Conversely, one who acquired stock in 1912 for $291,600 and who sold the same in 1916 for only $269,346, incurred a loss and could not be taxed at all, notwithstanding the fact that on March 1, 1913, his stock had depreciated to $148,635.[38] On the other hand, although the difference between the amount of life insurance premiums, paid as of 1908, and the amount distributed in 1919, when the insured received the amount of his policy plus cash dividends apportioned thereto since 1908, constituted a gain, that portion of the latter which accrued between 1908 and 1913 was deemed to be an accretion of capital and hence not taxable.[39]

DEDUCTIONS; EXEMPTIONS, ETC. [Pg 1200]

Notwithstanding the authorization contained in the Sixteenth Amendment to tax income "from whatever source derived," Congress has been held not to be precluded thereby from granting exemptions.[40] Thus, the fact that "under the Revenue Acts of 1913, 1916, 1917, and 1918, stock

fire insurance companies were taxed * * * upon gains realized from the sale * * * of property accruing subsequent to March 1, 1913," but were not so taxed by the Revenue Acts of 1921, 1924, and 1926, did not prevent Congress, under the terms of the Revenue Act of 1928, from taxing all the gain attributable to increase in value after March 1, 1913 which such a company realized from a sale of property in 1928. The constitutional power of Congress to tax a gain being well established, Congress, was declared competent to choose "the moment of its realization and the amount realized"; and "its failure to impose a tax upon the increase in value in the earlier years * * * [could not] preclude it from taxing the gain in the year when realized * * *"[41] Congress is equally well equipped with the "power to condition, limit, or deny deductions from gross incomes in order to arrive at the net that it chooses to tax."[42] Accordingly, even though the rental value of a building used by its owner does not constitute income within the meaning of the amendment,[43] Congress was competent to provide that an insurance company shall not be entitled to deductions for depreciation, maintenance, and property taxes on real estate owned and occupied by it unless it includes in its computation of gross income the rental value of the space thus used.[44]

ILLEGAL GAINS AS INCOME [Pg 1201]

In United States *v.* Sullivan[45] the Court held, in 1927, that gains derived from illicit traffic in liquor were taxable income under the Act of 1921.[46] Said Justice Holmes for the unanimous Court: "We see no reason * * * why the fact that a business is unlawful should exempt it from paying the taxes that if lawful it would have to pay."[47] But in Commissioner *v.* Wilcox,[48] decided in 1946, Justice Murphy, speaking for a majority of the Court, held that embezzled money was not taxable income to the embezzler, although any gain he derived from the use of it would be. Justice Burton dissented on the basis of the Sullivan Case. In Rutkin *v.* United States, [49] decided in 1952, a sharply divided Court cuts loose from the metaphysics of the Wilcox case and holds that Congress has the power under Amendment XVI to tax as income monies received by an extortioner.

Notes

[1] Pollock *v.* Farmers' Loan & Trust Co., 157 U.S. 429 (1895); 158 U.S. 601 (1895).

[2] 28 Stat. 509.

[3] The Court conceded that taxes on Incomes from "professions, trades, employments, or vocations" levied by this act were excise taxes and therefore valid. The entire statute, however, was voided on the ground that Congress never intended to permit the entire "burden of the tax to be borne by professions, trades, employments, or vocations" after real estate and personal property had been exempted. 158 U.S. 601, 635 (1895).

[4] Springer *v.* United States, 102 U.S. 586 (1881).

[5] 13 Stat. 223 (1864).

[6] For an account of the Pollock decision *see* pp. 319-320.

[7] 173 U.S. 509 (1899).

[8] 178 U.S. 41 (1900).

[9] 184 U.S. 608 (1902).

[10] Flint *v.* Stone Tracy Co., 220 U.S. 107 (1911).

[11] Brushaber *v.* Union P.R. Co., 240 U.S. 1 (1916); Stanton *v.* Baltic Min. Co., 240 U.S. 103 (1916); Tyee Realty Co. *v.* Anderson, 210 U.S. 115 (1916).

[12] Brushaber *v.* Union P.R. Co., 240 U.S. 1, 18-19 (1916).

[13] Stanton *v.* Baltic Min. Co., 240 U.S. 103, 112 (1916).

[14] Stratton's Independence *v.* Howbert, 231 U.S. 399 (1914); Doyle *v.* Mitchell Bros. Co., 247 U.S. 179 (1918).

[15] Eisner *v.* Macomber, 252 U.S. 189 (1920); Bowers *v.* Kerbaugh-Empire Co., 271 U.S. 170 (1926).

[16] 247 U.S. 339, 344 (1918).—On the other hand, in Lynch *v.* Turrish, 247 U.S. 221 (1918), the single and final dividend distributed upon liquidation of the entire assets of a corporation, although equalling twice the par value of the capital stock, was declared to represent only the intrinsic value of the latter earned prior to the effective date of the amendment, and hence was not taxable as income to the shareholder in the year in which actually received. Similarly, in Southern P. Co. *v.* Lowe, 247 U.S. 330 (1918) dividends paid out of surplus accumulated before the effective date of the amendment by a railway company whose entire capital stock was owned by another railway

company and whose physical assets were leased to and used by the latter was declared to be a nontaxable bookkeeping transaction between virtually identical corporations.

[17] 247 U.S. 347 (1918).

[18] 252 U.S. 189, 206-208 (1920).

[19] Eisner *v.* Macomber, 252 U.S. 189, 207, 211-212 (1920). This decision has been severely criticized, chiefly on the ground that gains accruing to capital over a period of years are not income and are not transformed into income by being dissevered from capital through sale or conversion. Critics have also experienced difficulty in understanding how a tax on income which has been severed from capital can continue to be labeled a "direct" tax on the capital from which the severance has thus been made. Finally, the contention has been made that in stressing the separate identities of a corporation and its stockholders, the Court overlooked the fact that when a surplus has been accumulated, the stockholders are thereby enriched, and that a stock dividend may therefore be appropriately viewed simply as a device whereby the corporation reinvests money earned in their behalf. *See also* Merchants' Loan & T. Co. *v.* Smietanka, 255 U.S. 509 (1921).

[20] Reconsideration was refused in Helvering *v.* Griffiths, 318 U.S. 371 (1943).

[21] United States *v.* Phellis, 257 U.S. 156 (1921); Rockefeller *v.* United States, 257 U.S. 176 (1921). *See also* Cullinan *v.* Walker, 262 U.S. 134 (1923).

In Marr *v.* United States, 268 U.S. 536, 540-541 (1925) it was held that the increased market value of stock issued by a new corporation in exchange for stock of an older corporation, the assets of which it was organized to absorb, was subject to taxation as income to the holder, notwithstanding that the income represented profits of the older corporation and that the capital remained invested in the same general enterprise. Weiss *v.* Stearn, 265 U.S. 242 (1924), in which the additional value in new securities was held not taxable, was likened to Eisner *v.* Macomber, and distinguished from the aforementioned cases on the ground of preservation of corporate identity. Although the "new corporation had * * * been organized to take over the assets and business of the old * * *, the corporate identity was deemed to have been substantially maintained because the new corporation was organized under the laws of the same State with presumably the same powers as the old. There was also no change in the character of the securities issued," with the result that "the proportional interest of the stockholder after the distribution of the new securities was deemed to be exactly the same."

[22] Miles *v.* Safe Deposit & Trust Co., 259 U.S. 247 (1922).

[23] Koshland *v.* Helvering, 298 U.S. 441 (1936)

[24] Helvering *v.* Gowran, 302 U.S. 238 (1937).

[25] Helvering *v.* National Grocery Co., 304 U.S. 282, 288-289 (1938). In Helvering *v.* Mitchell, 303 U.S. 391 (1938) the defendant contended the collection of 50% of any deficiency in addition to the deficiency alleged to have resulted from a fraudulent intent to evade the income tax amounted to the imposition of a criminal penalty. The Court, however, described the additional sum as a civil and not a criminal sanction, and one which could be constitutionally employed to safeguard the Government against loss of revenue. In contrast, the exaction upheld in Helvering *v.* National Grocery Co., though conceded to possess the attributes of a civil sanction, was declared to be sustainable as a tax.

[26] 311 U.S. 46 (1940). *See also* Crane-Johnson Co. *v.* Helvering, 311 U.S. 54 (1940).

[27] 311 U.S. 46, 53. Another provision of the Revenue Act, requiring undistributed net income of a foreign personal holding company to be included in the gross income of citizens or residents who are shareholders in such company, was upheld as constitutional in Rodney *v.* Hoey, 53 F. Supp. 604, 607-608 (1944).

[28] Farmers Union Co-op Co. *v.* Commissioner of Int. Rev., 90 F. (2d) 488, 491, 492 (1937).

[29] Burk-Waggoner Oil Asso. *v.* Hopkins, 269 U.S. 110 (1925).

[30] 268 U.S. 628 (1925).

[31] Texas & P. Ry. Co. *v.* United States, 286 U.S. 285, 289 (1932); Continental Tie & Lumber Co. *v.* United States, 286 U.S. 290 (1932).

[32] Helvering *v.* Bruun, 309 U.S. 461, 468-469 (1940). *See also* Hewitt Realty Co.

v. Commissioner of Internal Revenue, 76 F. (2d) 880 (1935).

[33] Crane *v.* Commissioner, 331 U.S. 1, 15-16 (1947).

[34] The donor could not, "by mere gift, enable another to hold this stock free from * * * the right of the sovereign to take part of any increase in its value when separated through sale or conversion and reduced to possession."—Taft *v.* Bowers, 278 U.S. 470, 482, 484 (1929).

[35] Helvering *v.* Horst, 311 U.S. 112, 115-116 (1940).

[36] Bowers *v.* Kerbaugh-Empire Co., 271 U.S. 170 (1926).

[37] Goodrich *v.* Edwards, 255 U.S. 527 (1921).

[38] Ibid. *See also* Walsh *v.* Brewster, 255 U.S. 536 (1921).

[39] Lucas *v.* Alexander, 279 U.S. 573 (1929).

However, a litigant who, in 1915, reduced to judgment, a suit pending on February 26, 1913 for an accounting under a patent infringement, was unable to have treated as capital, and excluded from the taxable income produced by such settlement, that portion of his claim which had accrued prior to March 1, 1913. Income within the meaning of the amendment was interpreted to be the fruit that is born of capital, not the potency of fruition. All that the taxpayer possessed in 1913 was a contingent chose in action which was inchoate, uncertain, and contested.—United States *v.* Safety Car Heating & L. Co., 297 U.S. 88 (1936).

Similarly, purchasers of coal lands subject to mining leases executed before adoption of the amendment could not successfully contend that royalties received during 1920-1926 were payments for capital assets sold before March 1, 1913, and hence not taxable. Such an exemption, these purchasers argued, would have been in harmony with applicable local law whereunder title to coal passes immediately to the lessee on execution of such leases. To the Court, on the other hand, such leases were not to be viewed "as a 'sale' of the mineral content of the soil" inasmuch as minerals "may or may not be present in the leased premises and may or may not be found [therein]. * * * If found, their abstraction * * * is a time consuming operation and the payments made by the lessee * * * do not normally become payable as the result of a single transaction." The result for tax purposes would have been the same even had the lease provided that title to the minerals would pass only "on severance by the lessee."—Bankers Pocahontas Coal Co. *v.* Burnet, 287 U.S. 308 (1932); Burnet *v.* Harmel, 287 U.S. 103, 106-107, 111 (1932).

[40] Brushaber *v.* Union Pac. R. Co., 240 U.S. 1 (1916).

[41] MacLaughlin *v.* Alliance Ins. Co., 286 U.S. 244, 250 (1932).

[42] Helvering *v.* Independent L. Ins. Co., 292 U.S. 371, 381 (1934); Helvering *v.* Winmill, 305 U.S. 79, 84 (1938).

[43] A tax on the rental value of property so occupied is a direct tax on the land and must be apportioned.—Helvering *v.* Independent L. Ins. Co., 292 U.S. 371, 378-379 (1934).

[44] 292 U.S. 381.—Expenditures incurred in the prosecution of work under a contract for the purpose of earning profits are not capital investments, the cost of which, if converted, must first be restored from the proceeds before there is a capital gain taxable as income. Accordingly, a dredging contractor, recovering a judgment for breach of warranty of the character of the material to be dredged, must include the amount thereof in the gross income of the year in which it was received, rather than of the years during which the contract was performed, even though it merely represents a return of expenditures made in performing the contract and resulting in a loss. The gain or profit subject to tax under the Sixteenth Amendment is the excess of receipts over allowable deductions during the accounting period, without regard to whether or not such excess represents a profit ascertained on the basis of particular transactions of the taxpayer when they are brought to a conclusion.—Burnet *v.* Sanford & B. Co., 282 U.S. 353 (1931).

[45] 274 U.S. 259 (1927).

[46] 42 Stat. 227, 250, 268.

[47] 274 at 263.

[48] 327 U.S. 404 (1946).

[49] 343 U.S. 130 (1952).

AMENDMENT 17

[Pg 1203]

POPULAR ELECTION OF SENATORS

[Pg 1205]

POPULAR ELECTION OF SENATORS

[Pg 1207]

AMENDMENT 17

Clause 1. 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.

Clause 2. 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.

Clause 3. 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.

Historical Origin

The ratification of this amendment was the outcome of increasing popular dissatisfaction with the operation of the originally established method of electing Senators. As the franchise became exercisable by greater numbers of people, the belief became widespread that Senators ought to be popularly elected in the same manner as Representatives. Acceptance of this idea was fostered by the mounting accumulation of evidence of the practical disadvantages and malpractices attendant upon legislative selection, such as deadlocks within legislatures resulting in vacancies remaining unfilled for substantial intervals, the influencing of legislative selection by corrupt political organizations and special interest groups through purchase of legislative seats, and the neglect of duties by legislators as a consequence of protracted electoral contests. Prior to ratification, however, many States had perfected arrangements calculated to afford the voters more effective control over the selection of Senators. State laws regulating direct primaries were [Pg 1208] amended so as to enable voters participating in primaries to designate their preference for one of several party candidates for a senatorial seat: and nominations unofficially effected thereby were transmitted to the legislature. Although their action rested upon no stronger foundation than common understanding, the legislatures generally elected the winning candidate of the majority, and, indeed, in two States, candidates for legislative seats were required to promise to support, without regard to party ties, the senatorial candidate polling the most votes. As a result of such developments, at least 29 States by 1912, one year before ratification, were nominating Senators on a popular basis; and, as a consequence, the constitutional discretion of the legislatures had been reduced to little more than that retained by presidential electors.

Right to Vote for Senators

Very shortly after ratification it was established that if a person possessed the qualifications requisite for voting for a Senator, his right to vote for such an officer was not derived merely from the constitution and laws of the State in which they are chosen but has its foundation in the Constitution of the United States.[1] Consistently with this view, federal courts more recently have declared that when local party authorities, acting pursuant to regulations prescribed by a party's State executive committee, refused to permit a Negro, on account of his race, to vote in a primary to select candidates for the office of United States Senator, they deprived him of a right secured to him by the Constitution and laws, in violation of this amendment.[2] An Illinois statute, on the other hand, which required that a petition to form, and to nominate candidates for, a new political party be signed by at least 25,000 voters from at least 50 counties was held not to impair any right under Amendment XVII, notwithstanding that 52% of the State's voters were residents of one county, 87% were residents of 49 counties, and only 13% resided in the 53 least populous counties.[3]

Notes

[1] United States *v.* Aczel, 219 F. 917 (1915), citing Ex parte Yarbrough, 110 U.S. 651 (1884).

[2] Chapman *v.* King, 154 F. (2d) 460 (1946); certiorari denied, 327 U.S. 800

(1946).

[3] MacDougall *v.* Green, 335 U.S. 281 (1948).

AMENDMENT 18

[Pg 1209]

PROHIBITION OF INTOXICATING LIQUORS

[Pg 1211]

PROHIBITION OF INTOXICATING LIQUORS

[Pg 1213]

AMENDMENT 18

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.

Validity of Adoption

Cases relating to this question are presented and discussed under article V.

Enforcement

Cases produced by enforcement and arising under Amendments Four and Five are considered in the discussion appearing under the latter amendments.

Repeal

This amendment was repealed by the Twenty-first Amendment, and titles I and II of the National Prohibition Act[1] were subsequently specifically repealed by the act of August 27, 1935.[2] Federal prohibition laws effective in various Districts and Territories were repealed as follows: District of Columbia—April 5, 1933, and January 24, 1934;[3] Puerto Rico and Virgin Islands—March 2, 1934;[4] Hawaii—March 26, 1934;[5] and Panama Canal Zone—June 19, 1934.[6]

Taking judicial notice of the fact that ratification of the Twenty-first Amendment was consummated on December 5, 1933, the Supreme Court held that the National Prohibition Act, [Pg 1214] insofar as it rested upon a grant of authority to Congress by Amendment XVIII thereupon became inoperative; with the result that prosecutions for violations of the National Prohibition Act, including proceedings on appeal, pending on, or begun after, the date of repeal, had to be dismissed for want of jurisdiction. Only final judgments of conviction rendered while the National Prohibition Act was in force remained unaffected.[7] Likewise a heavy "special excise tax," insofar as it could be construed as part of the machinery for enforcing the Eighteenth Amendment, was deemed to have become inapplicable automatically upon the latter's repeal.[8] However, liability on a bond conditioned upon the return on the day of trial of a vessel seized for illegal transportation of liquor was held not to have been extinguished by repeal when the facts disclosed that the trial took place in 1931 and had resulted in conviction of the crew. The liability became complete upon occurrence of the breach of the express contractual condition and a civil action for recovery was viewed as unaffected by the loss of penal sanctions.[9]

Notes

[1] 41 Stat. 305.

[2] 49 Stat. 872.

[3] 48 Stat. 28, § 12; 48 Stat. 319.

[4] 48 Stat. 361.

[5] 48 Stat. 467.

[6] 48 Stat. 1116.

[7] United States *v.* Chambers, 291 U.S. 217, 222-226 (1934). *See also* Ellerbee *v.* Aderhold, 5 F. Supp. 1022 (1934); United States ex rel. Randall *v.* United States Marshal for Eastern Dist. of New York, 143 F. (2d) 830 (1944).—The Twenty-first Amendment containing "no saving clause as to prosecutions for offenses theretofore committed," these holdings were rendered unavoidable by virtue of the well-established principle that after "the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force * * *"—Yeaton *v.* United States, 5 Cr. 281, 283 (1809), quoted in United States *v.* Chambers at pages 223-224.

[8] United States *v.* Constantine, 296 U.S. 287 (1935). The Court also took the position that even if the statute embodying this "tax" had not been "adopted to penalize [a] violations of the Amendment," but merely to ordain a penalty for violations of State liquor laws, "it ceased to be enforceable at the date of repeal"; for with the lapse of the unusual enforcement powers contained in the Eighteenth Amendment, Congress could not, without infringing upon powers reserved to the States by the Tenth Amendment, "impose cumulative penalties above and beyond those specified by State law for infractions of * * * [a] State's criminal code by its own citizens." Justice Cardozo, with whom Justices Brandeis and Stone were associated, dissented on the ground that, on its face, the statute levying this "tax" was "an appropriate instrument of * * * fiscal policy * * * Classification by Congress according to the nature of the calling affected by a tax * * * does not cease to be permissible because the line of division between callings to be favored and those to be reproved corresponds with a division between innocence and criminality under the statutes of a state."—Ibid. 294, 296, 297-298. In earlier cases it was nevertheless recognized that Congress also may tax what it forbids and that the basic tax on distilled spirits remained valid and enforceable during as well as after the life of the amendment—*See* United States *v.* Yuginovich, 256 U.S. 450, 462 (1921); United States *v.* Stafoff, 260 U.S. 477 (1923); United States *v.* Rizzo, 297 U.S. 530 (1936).

[9] United States *v.* Mack, 295 U.S. 480 (1935).

AMENDMENT 19

[Pg 1215]

EQUAL SUFFRAGE

[Pg 1217]

EQUAL SUFFRAGE

[Pg 1219]

AMENDMENT 19

Clause 1. The right of the 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.

Clause 2. Congress shall have power to enforce this article by appropriate legislation.

Origin of the Nineteenth Amendment

The adoption of this amendment is attributable in great measure to its advocacy since 1869 by certain long term supporters of women suffrage who had despaired of attaining their goal through modification of individual State laws. Agitation in behalf of women suffrage was recorded as early as the Jackson Administration, but the initial results were meager. Beginning in 1838, Kentucky did authorize women to vote in school elections, and its action was later copied by a number of other States. Kansas in 1887 even granted women unlimited rights to vote in municipal elections. Not until 1869, however, when Wyoming, as a territory, accorded women suffrage on terms of equality with men and continued to grant such privileges after its admission as a State in 1890, did these advocates register a notable victory. Progress thereafter proved discouraging, only ten additional other States having been added to the fold as of 1914; and as a consequence sponsors of equal voting rights for women concentrated on obtaining ratification of this amendment.

Validity of Adoption

Cases relating to this question are presented and discussed under article V.

Effect of Amendment

Although owning that the Nineteenth Amendment "applies to men and women alike and by its own force supersedes inconsistent measures, whether federal or State," the Court was unable to concede that a Georgia statute levying on inhabitants of the State a poll tax payment of which is made a prerequisite for voting but exempting females who do not register for voting, in any way abridged the right of male citizens to vote on account of their sex. To accept the appellant's contention, the Court urged, would make the Nineteenth Amendment a limitation on the taxing power.[1] [Pg 1220]

Notes

[1] Breedlove *v.* Suttles, 302 U.S. 277, 283-284 (1937). Although other interpretive decisions of federal courts are unavailable, many State courts, taking their cue from pronouncements of the Supreme Court as to the operative effect of the similarly phrased Fifteenth Amendment, have proclaimed that the Nineteenth Amendment did not confer upon women the right to vote but only prohibits discrimination against them in the drafting and administration of laws relating to suffrage qualifications and the conduct of elections. Like the Fifteenth Amendment, the Nineteenth Amendment, according to these State tribunals, is self-executing and by its own force and effect legally expunged the word, "male," and the masculine pronoun from State constitutions and laws defining voting qualifications and the right to vote to the end that such provisions now apply to both sexes.—*See* State *v.* Mittle, 120 S.C. 526 (1922); writ of error dismissed, 260 U.S. 705 (1922); Graves *v.* Eubank, 205 Ala. 174 (1921); in re Cavellier, 159 Misc. (N.Y.) 212; 287 N.Y.S. 739 (1936).

AMENDMENT 20 [Pg 1221]

COMMENCEMENT OF THE TERMS OF THE PRESIDENT, VICE PRESIDENT, AND MEMBERS OF CONGRESS, ETC.

COMMENCEMENT OF THE TERMS OF THE PRESIDENT, VICE PRESIDENT, AND MEMBERS OF CONGRESS, ETC. [Pg 1225]

AMENDMENT 20

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. [Pg 1226]

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.

Extension of Presidential Succession

Pursuant to the authority conferred upon it by section 3 of this amendment, Congress shaped the Presidential Succession Act of 1948[1] to meet the situation which would arise from the failure of both President elect and Vice President elect to qualify on or before the time fixed for the beginning of the new Presidential term.

Notes

[1] 62 Stat. 672, 677; 3 U.S.C.A. 19; *See* p. 388.

AMENDMENT 21 [Pg 1227]

REPEAL OF EIGHTEENTH AMENDMENT

[Pg 1229]

REPEAL OF EIGHTEENTH AMENDMENT [Pg 1231]

AMENDMENT 21

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.

Effect of Repeal

The operative effect of section 1, repealing the Eighteenth Amendment, is considered under the latter amendment.

Scope of the Regulatory Power Conferred Upon the States

DISCRIMINATION AS BETWEEN DOMESTIC AND IMPORTED PRODUCTS

In a series of interpretive decisions rendered shortly after ratification of this amendment, the Court established the proposition that States are competent to adopt legislation discriminating against imported intoxicating liquors in favor of those of domestic origin and that such discrimination offends neither the commerce clause of article I nor the equal protection and due process clauses of the Fourteenth Amendment. Thus, in State Board of Equalization *v.* Young's Market Co.[1] a California statute was upheld which exacted a $500 annual license fee for the privilege of importing beer from other States and a $750 fee for the privilege of manufacturing beer; and in Mahoney *v.* Triner Corp.[2] a Minnesota statute was sustained which prohibited a

licensed manufacturer or wholesaler from importing any brand of intoxicating liquor containing more than 25% of alcohol by volume and ready for sale without further processing, unless such brand was registered in the United States Patent Office. Also validated in Indianapolis Brewing [Pg 1232] Co. *v.* Liquor Commission[3] and Finch & Co. *v.* McKittrick[4] were retaliation laws enacted by Michigan and Missouri, respectively, by the terms of which sales in each of these States of beer manufactured in a State already discriminating against beer produced in Michigan or Missouri were rendered unlawful.

Conceding, in State Board of Equalization *v.* Young's Market Co.,[5] that "prior to the Twenty-first Amendment it would obviously have been unconstitutional to have imposed any fee for * * * the privilege of importation * * * even if the State had exacted an equal fee for the privilege of transporting domestic beer from its place of manufacture to the [seller's] place of business," the Court proclaimed that this amendment "abrogated the right to import free, so far as concerns intoxicating liquors." Inasmuch as the States were viewed as having acquired therefrom an unconditioned authority to prohibit totally the importation of intoxicating beverages, it logically followed that any discriminatory restriction falling short of total exclusion was equally valid, notwithstanding the absence of any connection between such restriction and public health, safety or morals. As to the contention that the unequal treatment of imported beer would contravene the equal protection clause, the Court succinctly observed that a "classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."[6]

REGULATION OF TRANSPORTATION AND "THROUGH" SHIPMENTS

Lately, however, when passing upon the constitutionality of legislation regulating the carriage of liquor interstate, a majority of the Justices have been disposed to by-pass the Twenty-first Amendment and to resolve the issue exclusively in terms of the commerce clause and State police power. This trend toward devaluation of the Twenty-first Amendment was set in motion by Ziffrin, Inc. *v.* Reeves[7] wherein a Kentucky statute, forbidding the transportation of intoxicating liquors by carriers other than licensed common carriers, was enforced as to an Indiana corporation, engaged in delivering liquor obtained from Kentucky distillers to consignees in Illinois; but licensed only as a contract carrier under the Federal Motor Carriers Act. After acknowledging that "the Twenty-first Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause,"[8] [Pg 1233] the Court then proceeded to found its ruling largely upon decisions antedating the amendment which sustained similar State regulations as a legitimate exercise of the police power not unduly burdening interstate commerce. In the light of the cases enumerated in the preceding paragraph, wherein the Twenty-first Amendment was construed as according a plenary power to the States, such extended emphasis on the police power and the commerce clause would seem to have been unnecessary. Thereafter, a total eclipse of the Twenty-first Amendment was recorded in Duckworth *v.* Arkansas[9] and Carter *v.* Virginia[10] wherein, without even considering that amendment, a majority of the Court upheld, as not contravening the commerce clause, statutes regulating the transport through the State of liquor cargoes originating and ending outside the regulating State's boundaries.[11]

REGULATION OF IMPORTS DESTINED FOR A FEDERAL AREA

Intoxicating beverages brought into a State for ultimate delivery at a National Park located therein but over which the United States retained exclusive jurisdiction has been construed as not constituting "transportation * * * into [a] State for delivery and use therein" within the meaning of section 2 of this amendment. The importation having had as its objective delivery and use in a federal area over which the State retained no jurisdiction, the increased powers which the latter acquired from the Twenty-first Amendment were declared to be inapplicable. California therefore could not extend the importation license and other regulatory requirements of its Alcoholic Beverage Control Act to a retail liquor dealer doing business in the Park.[12]

Effect on Federal Regulation

The Twenty-first Amendment of itself did not, it was held, bar a prosecution under the federal Sherman Antitrust Law of producers, wholesalers, and retailers charged with conspiring to fix and maintain retail prices of alcoholic beverages in Colorado.[13] In a concurring opinion, [Pg 1234] supported by Justice Roberts, Justice Frankfurter took the position that if the State of Colorado had in fact "* * * authorized the transactions here complained of, the Sherman Law could not override such exercise of state power. * * * [Since] the Sherman Law, * * *, can have no greater potency than the Commerce Clause itself, it must equally yield to state power drawn from the Twenty-first Amendment."[14] All other efforts to invoke the Twenty-first Amendment as a limitation upon the constitutional powers of the National Government, notably to invalidate the imposition, pursuant to the war power, of federal price controls on retail sales of liquors, have been equally abortive.[15]

Notes

[1] 299 U.S. 59 (1936).

[2] 304 U.S. 401 (1938).

[3] 305 U.S. 391 (1939).

[4] 305 U.S. 395 (1939).

[5] 299 U.S. 59, 62 (1936).

[6] Ibid 63-64. In the three decisions rendered subsequently, the Court merely restated these conclusions. The contention that discriminatory regulation of imported liquors violated the due process clause was summarily rejected in Indianapolis Brewing Co. *v.* Liquor Commission, 305 U.S. 391, 394 (1939).

[7] 308 U.S. 132 (1939).

[8] Ibid. 138.

[9] 314 U.S. 390 (1941).

[10] 321 U.S. 131 (1944). *See also* Cartlidge *v.* Rainey, 168 F. (2d) 841 (1948); certiorari denied, 335 U.S. 885 (1948).

[11] Arkansas required a permit for the transportation of liquor across its territory, but granted the same upon application and payment of a nominal fee. Virginia required carriers engaged in similar through-shipments to use the most direct route, carry a bill of lading describing that route, and post a $1000 bond conditioned on lawful transportation; and also stipulated that the true consignee be named in the bill of lading and be one having the legal right to receive the shipment at destination.

[12] Collins *v.* Yosemite Park, 304 U.S. 518, 537-538 (1938).

[13] United States *v.* Frankfort Distilleries, Inc., 324 U.S. 293, 297-299 (1945).

[14] Ibid. 301-302.

[15] Jatros *v.* Bowles, 143 F. (2d) 453, 455 (1944); Barnett *v.* Bowles, 151 F. (2d) 77, 79 (1945), certiorari denied, 326 U.S. 766 (1945); Dowling Bros. Distilling Co. *v.* United States, 153 F. (2d) 353, 357 (1946), certiorari denied, (Gould et al. *v.* United States) 328 U.S. 848 (1946); rehearing denied, 329 U.S. 820 (1946).

AMENDMENT 22

[Pg 1235]

PRESIDENTIAL TENURE

[Pg 1237]

SECTION 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

SECTION 2. 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 to the States by the Congress.

ACTS OF CONGRESS HELD UNCONSTITUTIONAL IN WHOLE OR IN PART BY THE SUPREME COURT OF THE UNITED STATES

[Pg 1239]

1. Act of September 24, 1789 (1 Stat. 81, sec. 13, in part). [Pg 1241]

Provision that "* * * [the Supreme Court] shall have power to issue * * * writs of mandamus, in cases warranted by the principles and usages of law, to any * * * persons holding office, under authority of the United States" as applied to the

issue of mandamus to the Secretary of State requiring him to deliver to plaintiff a commission (duly signed by the President) as justice of the peace in the District of Columbia, *held* an attempt to enlarge the original jurisdiction of the Supreme Court, fixed by article III, section 2.

Marbury *v.* Madison, 1 Cr. 137 (February 24, 1803).

2. Act of February 20, 1812 (2 Stat. 677, ch. 22).

Provisions authorizing land officers to examine into "validity of claims to land * * * which are derived from confirmations made * * * by the governors of the Northwest * * * territory", *held* not to authorize annulment of title confirmed by Governor St. Clair in 1799, nor to validate a subsequent sale and patent by the United States. (*See* Fifth Amendment.)

Reichert *v.* Felps, 6 Wallace 160 (March 16, 1868).

3. Act of March 6, 1820 (3 Stat. 548, sec. 8, proviso).

The Missouri Compromise, prohibiting slavery within the Louisiana Territory north of 36° 30', except Missouri, *held* not warranted as a regulation of Territory belonging to the United States under article IV, section 3, clause 2 (and *see* Fifth Amendment).

Dred Scott *v.* Sandford, 19 Howard 393 (March 6, 1857).

4. Act of February 25, 1862 (12 Stat. 345, sec. 1); July 11, 1862 (12 Stat. 532, sec. 1); March 3, 1863 (12 Stat. 711, sec. 3), each in part only.

"Legal tender clauses", making noninterest-bearing United States notes legal tender in payment of "all debts, public and private", so far as applied to debts contracted before passage of the act, *held* not within express or implied powers of Congress under article I, section 8, and inconsistent with article I, section 10, and Fifth Amendment.

Hepburn *v.* Griswold, 8 Wallace 603 (February 7, 1870); overruled in Knox *v.* Lee (Legal Tender cases), 12 Wallace 457 (May 1, 1871).

5. Act of March 3, 1863 (12 Stat. 756, ch. 81, sec. 5).

"So much of the fifth section * * * as provides for the removal of a judgment in a State court, and in which the cause was tried by a jury to the circuit court of the United States for a retrial on the facts and law, is not in pursuance of the Constitution, and is void" under the Seventh Amendment.

The Justices *v.* Murray, 9 Wallace 274 (March 14, 1870).

6. Act of March 3, 1863 (12 Stat. 766, ch. 92, sec. 5). [Pg 1242]

Provision for an appeal from the Court of Claims to the Supreme Court—there being, at the time, a further provision (sec. 14) requiring an estimate by the Secretary of the Treasury before payment of final judgments, *held* to contravene the judicial finality intended by the Constitution, article III.

Gordon *v.* United States, 2 Wallace 561 (March 10, 1865). (Case was dismissed without opinion; the grounds upon which this decision was made were stated in a posthumous opinion by Chief Justice Taney printed in the appendix to volume 117 of the U.S. Reports at p. 697.)

7. Act of June 30, 1864 (13 Stat. 311, ch. 174, sec. 13).

Provision that "any prize cause now pending in any circuit court shall, on the application of all parties in interest * * * be transferred by that court to the Supreme Court * * *", as applied in a case where no action had been taken in the Circuit Court on the appeal from the District Court, *held* to propose an appeal procedure not within article III, section 2.

The "Alicia", 7 Wallace 571 (January 25, 1869).

8. Act of January 24, 1865 (13 Stat. 424, ch. 20).

Requirement of a test oath (disavowing actions in hostility to the United States) before admission to appear as attorney in a Federal court by virtue of any previous admission, *held* invalid as applied to an attorney who had been pardoned by the President for all offenses during the Rebellion—as *ex post facto* (art. I, sec. 9, clause 3) and an interference with the pardoning power (art. II, sec. 2, clause 1).

Ex parte Garland, 4 Wallace 333 (January 14, 1867).

9. Act of July 13, 1866 (14 Stat. 138), amending act of June 30, 1864 (13 Stat. 284, ch. 173, sec. 122).

Tax on indebtedness of railroads, "* * * to whatsoever party or person the same

may be payable", as applied to railroad bonds held by a municipal corporation under authority of the State, *held* an infringement of reserved State sovereignty.

United States *v.* Baltimore & O.R. Co., 17 Wallace 322 (April 3, 1873).

10. Act of March 2, 1867 (14 Stat. 477, ch. 169, sec. 13), amending act of June 30, 1864 (13 Stat. 281, sec. 116).

Tax on income of "* * * every person residing in the United States * * * whether derived from * * * salaries * * * or from any source whatever * * *", as applied to income of State judges, *held* an interference with reserved powers of State. (*See* Tenth Amendment.)

The Collector *v.* Day, 11 Wallace 113 (April 3, 1871).

11. Act of March 2, 1867 (14 Stat. 484, ch. 169, sec. 29).

General prohibition on sale of naphtha, etc., for illuminating purposes, if inflammable at less temperature than 110° F., *held* invalid "except so far as the section named operates within the United States, but without the limits of any State," as being a mere police regulation. [Pg 1243]

United States *v.* Dewitt, 9 Wallace 41 (February 21, 1870).

12. Act of May 31, 1870 (16 Stat. 140, ch. 114, sees. 3, 4).

Provisions penalizing (1) refusal of local election officials to permit voting by persons offering to qualify under State laws, applicable to any citizens; and (2) hindering of any person from qualifying or voting, *held* invalid under Fifteenth Amendment.

United States *v.* Reese et al., 92 U.S. 214 (March 27, 1876).

13. Act of July 12, 1870 (16 Stat. 235, ch. 251).

Provision making Presidential pardons inadmissible in evidence in Court of Claims, prohibiting their use by that court in deciding claims or appeals, and requiring dismissal of appeals by the Supreme Court in cases where proof of loyalty had been made otherwise than as prescribed by law, *held* an interference with judicial power under article III, section 1, and with the pardoning power under article II, section 2, clause 1.

United States *v.* Klein, 13 Wallace 128 (January 29, 1872).

14. Act of June 22, 1874 (18 Stat. 187, sec. 5).

Provision authorizing Federal courts to require production of documents in proceedings, other than criminal, under the revenue laws (the allegations expected to be proved thereby to be taken as proved, on failure to produce such documents), *held* as applied to a suit for forfeiture under the customs laws, to constitute unreasonable search in violation of the Fourth Amendment.

Boyd *v.* United States, 116 U.S. 616 (February 1, 1886).

15. Revised Statutes 1977 (act of May 31, 1870, 16 Stat. 144).

Provision that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts * * * as is enjoyed by white citizens * * *," *held* invalid under the Thirteenth Amendment.

Hodges *v.* United States, 203 U.S. 1 (May 28, 1906).

16. Revised Statutes 4937-4947 (act of July 8, 1870, 16 Stat. 210), and act of August 14, 1876 (19 Stat. 141).

Original trademark law, applying to marks "for exclusive use within the United States," and a penal act designed solely for the protection of rights defined in the earlier measure, *held* not supportable by article I, section 8, clause 8 (copyright clause), nor article I, section 8, clause 3 (interstate commerce).

Trade-Mark Cases, 100 U.S. 82 (November 17, 1879).

17. Revised Statutes 5132, subdivision 9 (act of March 2, 1867, 14 Stat. 539).

Provision penalizing "any person respecting whom bankruptcy proceedings are commenced * * * who, within 3 months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels with intent to defraud * * *," *held* a police regulation not within the bankruptcy power (art. I, sec. 8, clause 4). [Pg 1244]

United States *v.* Fox, 95 U.S. 670 (January 7, 1878).

18. Revised Statutes 5507 (act of May 31, 1870, 16 Stat. 141, sec. 4).

Provision penalizing "every person who prevents, hinders, controls, or intimidates another from exercising * * * the right of suffrage, to whom that right is guaranteed by the Fifteenth Amendment to the Constitution of the United States, by means of bribery * * *," *held* not authorized by the said Fifteenth Amendment.

James *v.* Bowman, 190 U.S. 127 (May 4, 1903).

19. Revised Statutes 5519 (act of April 20, 1871, 17 Stat. 13, ch. 22, sec. 2).

Section providing punishment in case "two or more persons in any State * * * conspire * * * for the purpose of depriving * * * any person * * * of the equal protection of the laws * * * or for the purpose of preventing or hindering the constituted authorities of any State * * * from giving or securing to all persons within such State * * * the equal protection of the laws * * *," *held* invalid for punishment of conspiracy within a State—as not supported by the Thirteenth to Fifteenth Amendments.

United States *v.* Harris, 106 U.S. 629 (January 22, 1883).

In Baldwin *v.*. Franks, 120 U.S. 678 (March 7, 1887), an attempt was made to distinguish the Harris case, and apply it to conspiracy against aliens, though within a State, and *held*, the provision was not separable in such case.

20. Revised Statutes of the District of Columbia, section 1064 (act of June 17, 1870, 16 Stat. 154, ch. 133, sec. 3).

Provision that "prosecutions in the police court [of the District of Columbia] shall be by information under oath, without indictment by grand jury or trial by petit jury," as applied to punishment for conspiracy, *held* to Contravene article III, section 2, clause 3, requiring jury trial of all crimes.

Callan *v.* Wilson, 127 U.S. 540 (May 14, 1888).

21. Act of March 1, 1875 (18 Stat. 336, secs. 1, 2).

Provision "That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations * * * of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude"—subject to penalty, *held* not to be supported by the Thirteenth or Fourteenth Amendments.

Civil Rights Cases, 109 U.S. 3 (October 15, 1883), as to operation within States.

Butts *v.* Merchants and Miners Transportation Co., 230 U.S. 126 (June 16, 1913) as to operation outside the States.

22. Act of March 3, 1875 (18 Stat. 479, ch. 144, sec. 2). [Pg 1245]

Provision that "if the party [i.e., a person stealing property from the United States] has been convicted, then the judgment against him shall be conclusive evidence in the prosecution against [the] receiver that the property of the United States therein described has been embezzled, stolen, or purloined," *held* to contravene the Sixth Amendment.

Kirby *v.* United States, 174 U.S. 47 (April 11, 1899).

23. Act of July 12, 1876 (19 Stat. 80, sec. 6, in part).

Provision that "postmasters of the first, second, and third classes * * * may be removed by the President by and with the advice and consent of the Senate," *held* to infringe the executive power under article II, section 1, clause 1.

Myers *v.* United States, 272 U.S. 52 (October 25, 1926).

24. Act of August 14, 1876 (19 Stat. 141, trademark act), *see* Revised Statutes 4937.

25. Act of August 11, 1888 (25 Stat. 411).

Clause, in a provision for the purchase or condemnation of a certain lock and dam in the Monongahela River, that "* * * in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall not be considered or estimated * * *," *held* to contravene the Fifth Amendment.

Monongahela Navigation Co. *v.* United States, 148 U.S. 312 (March 27, 1893).

26. Act of May 5, 1892 (27 Stat. 25, ch. 60, sec. 4).

Provision of a Chinese exclusion act, that Chinese persons "convicted and adjudged to be not lawfully entitled to be or remain in the United States shall be

imprisoned at hard labor for a period not exceeding 1 year and thereafter removed from the United States * * *" (such conviction and judgment being had before a justice, judge, or commissioner upon a summary hearing), *held* to contravene the Fifth and Sixth Amendments.

Wong Wing *v.* United States, 163 U.S. 228 (May 18, 1896).

27. Joint Resolution of August 4, 1894 (28 Stat. 1018, No. 41).

Provision authorizing the Secretary of the Interior to approve a second lease of certain land by an Indian chief in Minnesota (granted to lessor's ancestor by art. 9 of a treaty with the Chippewa Indians), *held* an interference with judicial interpretation of treaties under article III, section 2, clause 1 (and repugnant to the Fifth Amendment).

Jones *v.* Meehan, 175 U.S. 1 (October 30, 1899).

28. Act of August 27, 1894 (28 Stat. 553-560, secs. 27-37).

Income tax provisions of the tariff act of 1894. "The tax imposed by sections 27 and 37, inclusive * * * so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because not apportioned according to representation [art. I, sec. 2, clause 3], all those sections, constituting one entire scheme of taxation, are necessarily invalid" (158 U.S. 601, 637). [Pg 1246]

Pollock *v.* Farmers' Loan and Trust Co., 157 U.S. 429 (April 8, 1895) and rehearing, 158 U.S. 601 (May 20, 1895).

29. Act of January 30, 1897 (29 Stat. 506, ch. 109).

Prohibition on sale of liquor "* * * to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government * * *," *held* a police regulation infringing State powers, and not warranted by the commerce clause, article I, section 8, clause 3.

Matter of Heff, 197 U.S. 488 (April 10, 1905) overruled in United States *v.* Nice, 241 U.S. 591 (1916).

30. Act of June 1, 1898 (30 Stat. 428).

Section 10, penalizing "any employer subject to the provisions of this act" who should "threaten any employee with loss of employment * * * because of his membership in * * * a labor corporation, association, or organization" (the act being applicable "to any common carrier * * * engaged in the transportation of passengers, or property * * * from one State * * * to another State * * *," etc.), *held* an infringement of the Fifth Amendment, not supported by the commerce clause.

Adair *v.* United States, 208 U.S. 161 (January 27, 1908).

31. Act of June 13, 1898 (30 Stat. 451, 459).

Stamp tax on foreign bills of lading, *held* a tax on exports in violation of article I, section 9.

Fairbank *v.* United States, 181 U.S. 283 (April 15, 1901).

32. Same (30 Stat. 451, 460).

Tax on charter parties, as applied to shipments exclusively from ports in United States to foreign ports, *held* a tax on exports in violation of article I, section 9.

United States *v.* Hvoslef, 237 U.S. 1 (March 22, 1915).

33. Same (30 Stat. 451, 461).

Tax on policies of marine insurance, as applied to insurance during voyage to foreign ports, *held* a tax on exports in violation of article I, section 9.

Thames and Mersey Marine Insurance Co. *v.* United States, 237 U.S. 19 (April 5, 1915).

34. Act of June 6, 1900 (31 Stat. 359, sec. 171).

Section of the Alaska Code providing for a six-person jury in trials for misdemeanors, *held* repugnant to the Sixth Amendment, requiring "jury" trial of crimes.

Rassmussen *v.* United States, 197 U.S. 516 (April 10, 1905).

35. Act of March 3, 1901 (31 Stat. 1341, sec. 935). [Pg 1247]

Section of the District of Columbia Code granting the same right of appeal, in criminal cases, to the United States or the District of Columbia as to the defendant, but providing that a verdict was not to be set aside for error found in

rulings during trial, *held* an attempt to take an advisory opinion, contrary to article III, section 2.

United States *v.* Evans, 213 U.S. 297 (April 19, 1909).

36. Act of June 11, 1906 (34 Stat. 232, ch. 3073).

Act providing that "every common carrier engaged in trade or commerce in the District of Columbia * * * or between the several States * * * shall be liable to any of its employees * * * for all damages which may result from the negligence of any of its officers * * * or by reason of any defect * * * due to its negligence in its cars, engines * * * roadbed", etc., *held* not supportable under article I, section 8, clause 3 as applied to employees engaged in moving trains in interstate commerce.

Employers' Liability Cases, 207 U.S. 463 (January 6, 1908). [The act was upheld as to the District of Columbia in Hyde *v.* Southern R. Co., 31 App. D.C. 466 [1908]; and as to Territories, in El Paso and Northeastern R. Co. *v.* Gutierrez, 215 U.S. 87 [1909].]

37. Act of June 16, 1906 (34 Stat. 269, sec. 2).

Provision of Oklahoma Enabling Act restricting relocation of the State capital prior to 1913, *held* not supportable by article IV, section 3, authorizing admission of new States.

Coyle *v.* Oklahoma (Smith), 221 U.S. 559 (May 29, 1911).

38. Act of February 20, 1907 (34 Stat. 899, sec. 3).

Provision in the Immigration Act of 1907 penalizing "whoever * * * shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution * * * any alien woman or girl, within 3 years after she shall have entered the United States," *held* an exercise of police power not within the control of Congress over immigration (whether drawn from the commerce clause or based on inherent sovereignty).

Keller *v.* United States, 213 U.S. 138 (April 5, 1909).

39. Act of March 1, 1907 (34 Stat. 1028).

Provisions authorizing certain Indians "to institute their suits in the Court of Claims to determine the validity of any acts of Congress passed since * * * 1902, insofar as said acts * * * attempt to increase or extend the restrictions upon alienation * * * of allotments of lands of Cherokee citizens * * *," and giving a right of appeal to the Supreme Court, *held* an attempt to enlarge the judicial power restricted by article III, section 2, to cases and controversies.

Muskrat *v.* United States and Brown and Gritts *v.* United States, 219 U.S. 346 (January 23, 1911).

40. Act of May 27, 1908 (35 Stat. 313, sec. 4). [Pg 1248]

Provision making locally taxable "all land [of Indians of the Five Civilized Tribes] from which restrictions have been or shall be removed," *held* a violation of the Fifth Amendment, in view of the Atoka Agreement, embodied in the Curtis Act of June 28, 1898, providing tax-exemption for allotted lands while title in original allottee, not exceeding 21 years.

Choate *v.* Trapp, 224 U.S. 665 (May 13, 1912).

41. Act of August 19, 1911 (37 Stat. 28).

A proviso in section 8 of the Federal Corrupt Practices Act fixing a maximum authorized expenditure by a candidate for Senator "in any campaign for his nomination and election," as applied to a primary election, *held* not supported by article I, section 4, giving Congress power to regulate the manner of holding elections for Senators and Representatives.

Newberry *v.* United States, 256 U.S. 232 (May 2, 1921).

42. Act of June 18, 1912 (37 Stat. 136, sec. 8).

Part of section 8 giving the Juvenile Court of the District of Columbia (proceeding upon information) concurrent jurisdiction of desertion cases (which were, by law, misdemeanors punishable by fine or imprisonment in the workhouse at hard labor for 1 year), *held* invalid under the Fifth Amendment, which gives right to presentment by a grand jury in case of infamous crimes.

United States *v.* Moreland, 258 U.S. 433 (April 17, 1922).

43. Act of March 4, 1913 (37 Stat. 988, part of par. 64).

Provision of the District of Columbia Public Utility Commission Act authorizing

appeal to the United States Supreme Court from decrees of the District of Columbia Court of Appeals modifying valuation decisions of the Utilities Commission, *held* an attempt to extend the appellate jurisdiction of the Supreme Court to cases not strictly judicial within the meaning of article III, section 2.

Keller *v.* Potomac Electric Power Co. et al., 261 U.S. 428 (April 9, 1923).

44. Act of September 1, 1916 (39 Stat. 675, ch. 432, entire).

The original Child Labor Law, providing "that no producer * * * shall ship * * * in interstate commerce * * * any article or commodity the product of any mill * * * in which within 30 days prior to the removal of such product therefrom children under the age of 14 years have been employed or permitted to work more than 8 hours in any day, or more than 6 days in any week * * *," *held* not within the commerce power of Congress.

Hammer *v.* Dagenhart, 247 U.S. 251 (June 3, 1918).

45. Act of September 8, 1916 (39 Stat. 757, sec. 2(a) in part).

Provision of the income-tax law of 1916, that a "stock dividend shall be considered income, to the amount of its cash value," *held* invalid (in spite of the Sixteenth Amendment) as an attempt to tax something not actually income, without regard to apportionment under article I, section 2, clause 3. [Pg 1249]

Eisner *v.* Macomber, 252 U.S. 189 (March 8, 1920).

46. Act of October 3, 1917 (40 Stat. 302, secs. 4, 303, secs. 201 and 333, sec. 1206 (amending 39 Stat. 765, sec. 10)); and

Act of February 24, 1919 (40 Stat. 1075, secs. 230 and 1088, sec. 301).

Income and excess-profits taxes on income of "every corporation," as applied to income of an oil corporation from leases of land granted by the United States to a State, for the support of common schools, etc., *held* an interference with State governmental functions. (*See* Tenth Amendment.)

Burnet *v.* Coronado Oil & Gas Co., 285 U.S. 393 (April 11, 1932).

47. Same (40 Stat. 316, sec. 600 (f)).

The tax "upon all tennis rackets, golf clubs, baseball bats * * * balls of all kinds, including baseballs * * * sold by the manufacturer, producer, or importer * * *" as applied to articles sold by a manufacturer to a commission merchant for exportation, *held* a tax on exports within the prohibition of article I, section 9.

Spalding & Bros. *v.* Edwards, 262 U.S. 66 (April 23, 1923).

48. Act of October 6, 1917 (40 Stat. 395, ch. 97, in part).

The amendment of sections 24 and 256 of the Judicial Code (which prescribe the jurisdiction of district courts) "saving * * * to claimants the rights and remedies under the workmen's compensation law of any State," *held* an attempt to transfer legislative power to the States—the Constitution, by article III, section 2, and article I, section 8, having adopted rules of general maritime law.

Knickerbocker Ice Co. *v.* Stewart, 253 U.S. 149 (May 17, 1920).

49. Act of September 19, 1918 (40 Stat. 960, ch. 174).

Specifically, that part of the Minimum Wage Law of the District of Columbia which authorized the Wage Board "to ascertain and declare * * * (a) Standards of minimum wages for women in any occupation within the District of Columbia, and what wages are inadequate to supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals * * *," *held* to interfere with freedom of contract under the Fifth Amendment.

Adkins et al. *v.* Children's Hospital and Adkins et al. *v.* Lyons, 261 U.S. 525 (April 9, 1923)—overruled in West Coast Hotel Co. *v.* Parrish, 300 U.S. 379 (March 29, 1937).

50. Act of February 24, 1919 (40 Stat. 1065, ch. 18, sec. 213, in part).

That part of section 213 of the Revenue Act of 1918 which provided that "* * * for the purposes of this title * * * the term 'gross income' * * * includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of * * * judges of the Supreme and inferior courts of the United States * * * the compensation received as such) * * *" as applied to a judge in office when the act was passed, *held* a violation of the guaranty of judges' salaries, in article III, section 1. [Pg 1250]

Evans *v.* Gore, 253 U.S. 245 (June 1, 1920).

Miles *v.* Graham (268 U.S. 501, June 1, 1925), held it invalid as applied to a judge taking office subsequent to the date of the act.

51. Act of February 24, 1919 (40 Stat. 1097, sec. 402 (c)).

That part of the estate tax providing that "gross estate" of a decedent should include value of all property "to the extent of any interest therein of which the decedent has at any time made a transfer or with respect to which he had at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this act), except in case of a *bona fide* sale * * *" as applied to a transfer of property made prior to the act and intended to take effect "in possession or enjoyment" at death of grantor, but not in fact testamentary or designed to evade taxation, *held* confiscatory, contrary to Fifth Amendment.

Nichols, Collector *v.* Coolidge et al., Executors, 274 U.S. 531 (May 31, 1927).

52. Act of February 24, 1919, title XII (40 Stat. 1138, entire title).

The Child Labor Tax Act, providing that "every person * * * operating * * * any * * * factory [etc.] * * * in which children under the age of 14 years have been employed or permitted to work * * * shall pay * * * in addition to all other taxes imposed by law, an excise tax equivalent to 10 percent of the entire net profits received * * * for such year from the sale * * * of the product of such * * * factory * * *," *held* beyond the taxing power under article I, section 8, clause 1, and an infringement of State authority.

Bailey *v.* Drexel Furniture Co. (Child Labor Tax Case), 259 U.S. 20 (May 15, 1922).

53. Act of October 22, 1919 (41 Stat. 298, sec. 2), amending act of August 10, 1917 (40 Stat. 277, sec. 4).

Section 4 of the Lever Act, providing in part "that it is hereby made unlawful for any person willfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries * * *" and fixing a penalty, *held* invalid to support an indictment for charging an unreasonable price on sale—as not setting up an ascertainable standard of guilt within the requirement of the Sixth Amendment.

United States *v.* Cohen Grocery Co., 255 U.S. 81 (February 28, 1921).

54. Same.

That provision of section 4 making it unlawful "to conspire, combine, agree, or arrange with any other person to * * * exact excessive prices for any necessaries" and fixing a penalty, *held* invalid to support an indictment, on the reasoning of the Cohen case. [Pg 1251]

Weeds, Inc., *v.* United States, 255 U.S. 109 (February 28, 1921)

55. Act of August 24, 1921 (42 Stat. 187, ch. 86, Future Trading Act).

(*a*) Section 4 (and interwoven regulations) providing a "tax of 20 cents a bushel on every bushel involved therein, upon each contract of sale of grain for future delivery, except * * * where such contracts are made by or through a member of a board of trade which has been designated by the Secretary of Agriculture as a 'contract market' * * *," *held* not within the taxing power under article I, section 8.

Hill *v.* Wallace, 259 U.S. 44 (May 15, 1922).

(*b*) Section 3, providing "That in addition to the taxes now imposed by law there is hereby levied a tax amounting to 20 cents per bushel on each bushel involved therein, whether the actual commodity is intended to be delivered or only nominally referred to, upon each * * * option for a contract either of purchase or sale of grain * * *", *held* invalid on the same reasoning.

Trusler *v.* Crooks, 269 U.S. 475 (Jan. 11, 1926).

56. Act of November 23, 1921 (42 Stat. 261, sec. 245, part).

Provision of Revenue Act of 1921 abating the deduction (4 percent of mean reserves) allowed from taxable income of life-insurance companies in general by the amount of interest on their tax-exempts, and so according no relative advantage to the owners of the tax-exempt securities, *held* to destroy a guaranteed exemption. (*See* Fifth Amendment.)

National Life Insurance Co. *v.* United States, 277 U.S. 508 (June 4, 1928).

57. Act of June 10, 1922 (42 Stat. 634, ch. 216).

A second attempt to amend sections 24 and 256 of the Judicial Code, relating to jurisdiction of district courts, by saving "to claimants for compensation for injuries

to or death of persons other than the master or members of the crew of a vessel, their rights and remedies under the workmen's compensation law of any State * * *" *held* invalid on authority of Knickerbocker Ice Co. *v.* Stewart.

Industrial Accident Commission of California *v.* Rolph et al., and Washington *v.* Dawson & Co., 264 U.S. 219 (February 25, 1924).

58. Act of June 2, 1924 (43 Stat. 313).

The gift tax provisions of the Revenue Act of 1924, *held* invalid under the Fifth Amendment as applied to *bona fide* gifts made before passage of the act.

Untermeyer *v.* Anderson, 276 U.S. 440 (April 9, 1928).

59. Revenue Act of June 2, 1924 (43 Stat. 322, sec. 600, in part).

Excise tax on certain articles "sold or leased by the manufacturer", measured by sale price [specifically, "(2) * * * motorcycles * * * 5 per centum"]—as applied to sale of motorcycle to a municipality for police use, *held* an infringement of State immunity under the principle of Collector *v.* Day. [Pg 1252]

Indian Motorcycle Co. *v.* United States, 283 U.S. 570 (May 25, 1931).

60. Act of February 26, 1926 (44 Stat. 9, ch. 27, in part).

(*a*). Section 302 in part (44 Stat. 70).

Second sentence, defining, for purposes of the estate tax, the term "made in contemplation of death" as including the value, over $5,000, of property transferred by a decedent, by trust, etc., without full consideration in money or money's worth, "within 2 years prior to his death but after the enactment of this act", although "not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death", *held* as applied to a transfer completed wholly between the living, spoliation without due process of law under the Fifth Amendment.

Heiner *v.* Donnan, 285 U.S. 312 (March 21, 1932).

(*b*). Section 701 in part (44 Stat. 95).

Provision imposing a special excise tax of $1,000 on liquor dealers in States where such business is illegal, *held* a penalty, without constitutional support following repeal of the Eighteenth Amendment.

United States *v.* Constantine, 296 U.S. 287 (December 9, 1935).

61. Act of March 20, 1933 (48 Stat. 11, sec. 17, in part).

Clause in the Economy Act of 1933 providing "* * * all laws granting or pertaining to yearly renewable term insurance are hereby repealed", *held* invalid to abrogate an outstanding contract of insurance, which is a vested right protected by the Fifth Amendment.

Lynch *v.* United States, 292 U.S. 571 (June 4, 1934).

62. Act of May 12, 1933 (48 Stat. 31).

Agricultural Adjustment Act providing for processing taxes on agricultural commodities and benefit payments therefrom to farmers, *held* not within the taxing power under article I, section 8, clause 1.

United States *v.* Wm. M. Butler et al., Receivers of Hoosac Mills Corp., 297 U.S. 1 (January 6, 1936).

63. Joint Resolution of June 5, 1933 (48 Stat. 113, sec. 1).

Abrogation of gold clause in Government obligations, *held* a repudiation of the pledge implicit in the power to borrow money (art. I, sec. 8, clause 2), and within the prohibition of the Fourteenth Amendment, against questioning the validity of the public debt. [The majority of the Court, however, held plaintiff not entitled to recover under the circumstances.]

Perry *v.* U.S., 294 U.S. 330 (February 18, 1935).

64. Act of June 16, 1933 (48 Stat. 195, ch. 90, the National Industrial Recovery Act).

A. Title I, except section 9.

Provisions relating to codes of fair competition, authorized to be approved by the President in his discretion "to effectuate the policy" of the act, *held* invalid as a grant of legislative power (*see* art. I, sec. 1) and not within the commerce power. [Pg 1253]

Schechter Poultry Corp. *v.* United States, 295 U.S. 495 (May 27, 1935).

B. Section 9 (c).

Clause of the oil regulation section authorizing the President "to prohibit the transportation in interstate * * * commerce of petroleum * * * produced or withdrawn from storage in excess of the amount permitted * * * by any State law * * *" and prescribing a penalty for violation of orders issued thereunder, *held* invalid as a grant of legislative power.

Panama Refining Co. et al. *v.* Ryan et al. and Amazon Petroleum Corp., et al. *v.* Ryan et al., 293 U.S. 388 (January 7, 1935).

65. Act of June 16, 1933 (48 Stat. 307, sec. 13).

Temporary reduction of 15 percent in retired pay of "judges (whose compensation, prior to retirement or resignation, could not, under the Constitution, have been diminished)", as applied to circuit or district judges retired from active service, but still subject to perform judicial duties under the act of March 1, 1929 (45 Stat. 1422), *held* a violation of the guaranty of judges' salaries under article III, section 1.

Booth *v.* United States (together with Amidon *v.* United States), 291 U.S. 339 (February 5, 1934).

66. Act of April 27, 1934 (48 Stat. 646, sec. 6), amending section 5 (i) of Home Owners' Loan Act of 1933.

Provision for conversion of State building and loan associations into federal associations, upon vote of 51 percent of the votes cast at a meeting of stockholders called to consider such action, *held* an encroachment on reserved powers of State.

Hopkins Federal Savings & Loan Association *v.* Cleary, 296 U.S. 315 (December 9, 1935).

67. Act of May 24, 1934 (48 Stat. 798, ch. 345).

Provision for readjustment of municipal indebtedness, *held* invalid, though "adequately related" to the bankruptcy power, as an interference with State sovereignty.

Ashton *v.* Cameron County Water Improvement District No. 1, 298 U.S. 513 (May 25, 1936).

68. Act of June 27, 1934 (48 Stat. 1283, ch. 868 entire).

The Railroad Retirement Act, establishing a detailed compulsory retirement system for employees of carriers subject to the Interstate Commerce Act, *held*, not a regulation of commerce within the meaning of article I, section 8, clause 3.

Railroad Retirement Board *v.* Alton R.R. et al., 295 U.S. 330 (May 6, 1935).

69. Act of June 28, 1934 (48 Stat. 1289, ch. 869).

The Frazier-Lemke Act, adding subsection (s) to section 75 of the Bankruptcy Act, designed to preserve to mortgagors the ownership and enjoyment of their farm property and providing specifically, in paragraph 7, that a bankrupt left in possession has the option at any time within 5 years of buying at the appraised value—subject meanwhile to no monetary obligation other than payment of reasonable rental, *held* a violation of property rights, under the Fifth Amendment. [Pg 1254]

Louisville Joint Stock Land Bank *v.* Radford, 295 U.S. 555 (May 27, 1935).

70. Act of August 24, 1935 (49 Stat. 750, ch. 641, title I).

Agricultural Adjustment Act amendments, *held* not within the taxing power.

Rickert Rice Mills *v.* Fontenot, 297 U.S. 110 (January 13, 1936).

71. Act of August 30, 1935 (49 Stat. 991, ch. 824).

Bituminous Coal Conservation Act of 1935, *held* to impose not a tax within article I, section 8, but a penalty not sustained by the commerce clause.

Carter *v.* Carter Coal Co., 298 U.S. 238 (May 18, 1936).

72. Act of June 30, 1938 (52 Stat. 1251, ch. 850, sec. 2 (f)).

Federal Firearms Act, section 2 (f), establishing a presumption of guilt based on a prior conviction and present possession of a firearm, *held* to violate the test of due process under the Fifth Amendment.

Tot *v.* United States, 319 U.S. 463 (June 7, 1943).

73. Act of November 15, 1943 (57 Stat. 450, ch. 218, sec. 304).

Urgent Deficiency Appropriation Act of 1943, section 304, providing that no salary should be paid to certain, named Federal employees out of moneys appropriated, *held* to violate article I, section 9, clause 3, forbidding enactment of bill of

attainder or *ex post facto* law.

United States *v.* Lovett, 328 U.S. 303 (June 3, 1946).

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Transcriber's notes:

Introduction:
page XII--added period after "thereby" to complete four period ellipsis
page XIV--corrected spelling of "kidnaping" to "kidnapping"
page XXI--corrected spelling of "injuction" to "injunction" and added period after "law" to complete four period ellipsis
page XXII--corrected spelling of "achivement" to "achievement"
page XXVIII--added opening quotation mark to Justice Holmes' remarks
page XXIX--corrected spelling of "Genessee" to "Genesee" in "The Genessee Chief"
page XXXIII--added period after "etc"
page XXXIV--added period after "etc"
Footnote 23--corrected case citation from "Dall. 54, 74" to "3 Dall. 54, 74"
Footnote 61--removed comma after "Dall."

Constitution of the United States:
page 22--corrected spelling of "questiond" to "questioned"
page 54--corrected spelling of "submisssion" to "submission"

Article I:
page 68--added period after "etc"
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page 86--corrected spelling of "apropriate" to "appropriate"
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Footnote 1168--in Justice Bradley quote, moved ending quotation mark after "... made in good faith."
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page 771--removed comma after "Dallas" in "1 Dallas, 319, 325"
page 785--corrected spelling of "anouncements" to "announcements"
page 786--corrected spelling of "forbiding" to "forbidding"
page 794--removed period after "et" in "et. al."
page 795--corrected spelling of "verthrowing" to "overthrowing"
page 797--corrected spelling of "docrine" to "doctrine"
page 800--corrected spelling of "trivalities" to "trivialities"
page 806--inserted "of" into the phrase "in any accurate meaning of these words"
Footnote 22--corrected spelling of "Morace Mann" to "Horace Mann"
Footnote 167--changed comma to period after "Comm'n" in "Communications Comm'n, v. N.B.C." and added comma after N.B.C.
Footnote 184--corrected spelling of "Terminello" to "Terminiello" in "Terminello v. Chicago"

Amendment 4
page 825--corrected spelling of "procedings" to "proceedings"
page 826--inserted "than" after "other" in "... if it is unreasonable on grounds other self incrimination...."

Amendment 5
page 839--corrected spelling of "defendent" to "defendant"
page 841--removed hyphen in "accusare-seipsum"
page 850--removed period after "WJR"
page 852--corrected spelling of "ailen" to "alien"
page 869--corrected spelling of "benefitted" to "benefited"
Footnote 148--added hyphen in "Cooperative" in "United States v. Rock Royal Cooperative"
Footnote 155--corrected spelling of "Idid." to "Ibid."
Footnote 160--corrected spelling of "Addystone" to "Addyston" in "Addystone Pipe and Steel Co. v. United States"
Footnote 165--added hyphen in "Cooperative" in "United States v. Rock Royal Cooperative"
Footnote 212--removed comma after "299" in "299, U.S. 232 (1936)"
Footnote 241--corrected spelling of "Untermyer" to "Untermeyer"
Footnote 261--added comma after "U.S." in "Brown v. U.S. 8 Cr. 110 (1814)"

Amendment 6
page 882--corrected spelling of "willfullness" to "willfulness"
page 883--corrected spelling of "poltical" to "political"

Amendment 7
page 896--removed extraneous "had" in "... it was held that a trial court had had the right...."

Amendment 8
page 903--removed semi-colon in "Who are to be the judges?;"
Footnote 5--corrected "USCA" to "U.S.C.A."

Amendment 11
page 929--corrected "Article 11" to "Amendment 11"
page 933--corrected spelling of "legislaion" to "legislation"
Footnote 4--corrected case citation from "Wheat. 738 (1824)" to "9 Wheat. 738 (1824)"
Footnote 20--corrected case citation for "Pennoyer v. McConnaughy" from "140 U.S. (1891)" to "140 U.S. 1 (1891)"
Footnote 23--added period after "rel" in "ex rel"

Amendment 12
page 944--corrected "undistinguishable" to "indistinguishable"

Amendment 13
page 952--in (5), added final period to "U.S.C.A."

Amendment 14
page 957--corrected page number reference from "669" to "969"
page 958--added period after "etc"--three occurrences on page
page 960--added period after "etc"--two occurrences on page
page 961--added period after "etc"--one occurrence on page
page 977--corrected spelling of "willingess" to "willingness"

page 1013--added opening single quote before "the" in "... the furnishing of such necessary...."
page 1014--removed comma after "railroad" in "... provides that a railroad, shall be responsible...."
page 1016--corrected "it" to "its" in "... unable to recoup it original investment...."
page 1030--added comma after Footnote anchor [403], in "... statutes ordering the destruction of unsafe and unwholesome food[403] prohibiting the sale...."
page 1030--changed "forbade" to "forbid" in "... to forbade the sale of drugs by itinerant vendors...."
page 1043--in (10), changed "later" to "latter" in "... protected by the later and subject to its jurisdiction."
page 1051--corrected spelling of "coporations" to "corporations"
page 1058--changed "than" to "that" in "... opportunity to submit evidence and arguments being all than can be adjudged vital...."
page 1071--corrected spelling of "determintion" to "determination"
page 1114--changed comma to period after "State" in "... the constitutional rights of the States,"
page 1114--corrected spelling of "consitutionally" to "constitutionally"
page 1134--added period after "rel" in "... in Louisiana ex rel Francis"
page 1153--corrected spelling of "arbitary" to "arbitrary"
Footnote 12--added hyphen in "Coop." in "Warehouse Co. v. Burley Tobacco Growers' Coop. Marketing Asso."
Footnote 75--removed comma after "Cr." in "6 Cr., 87, 128 (1810)"
Footnote 94--removed period after "Board" in "National Labor Relations Board. v. Jones & Laughlin"
Footnote 104--corrected spelling of "Schimdinger" to "Schmidinger" in "Schimdinger v. Chicago"
Footnote 157--removed "in" in "... and intimidations of in injury to future patrons...."
Footnote 219--corrected spelling of "revelant" to "relevant"
Footnote 221--changed period to comma after "(1944)"
Footnote 446--added period after "rel" in "ex rel"
Footnote 533--changed comma to period in "4 Wheat, 316, 429 (1819)"
Footnote 540--removed unmatched quotation mark
Footnote 695--removed comma in "19, Wall. 107 (1874)"
Footnote 698--corrected spelling of "Millikin" to "Milliken" in "Millikin v. Meyer"
Footnote 700--corrected spelling of "Pawlocki" to Pawloski" in "Hess v. Pawlocki"
Footnote 761--corrected spelling of "untrammelled" to "untrammeled"
Footnote 804--changed comma to period in "Wllson v. North Carolina ex rel, Caldwell" and corrected spelling to "Wilson"
Footnote 854--removed comma in "342, U.S. 881 (1951)"
Footnote 874--inserted comma after "York" in "Moore v. New York 333 U.S. 565, 569-570 (1948)"
Footnote 902--corrected "Section I" to "Section 1"
Footnote 937--corrected spelling of "Holahan" to "Holohan" in "Mooney v. Holahan"
Footnote 954--corrected spelling of "habeus" to "habeas"
Footnote 969--added closing quotation mark after "invasion."
Footnote 974--corrected spelling of "gurantees" to "guarantees"
Footnote 1016--corrected "Q.R.R." to "Q.R." in "Chicago, B. & Q.R.R. Co. v. Iowa"
Footnote 1048--corrected "exexempted" to "exempted"
Footnote 1104--changed comma to semi-colon before "oleomargarine"
Footnote 1203--corrected spelling of "Atchinson" to "Atchison" in "Atchinson, T. & S.F.R. Co. v. Matthews"

Amendment 16
page 1189--added period after "etc"

Amendment 18
page 1213--changed comma to period after "1935" in "August 27, 1935,"

Acts Held Unconstitutional
page 1241--corrected spelling of "Reichart" to "Reichert" in "Reichart v. Felps"
page 1246--corrected spelling of "waranted" to "warranted"
page 1247--changed "1" to "I" in "article 1, section 8, clause 3"
page 1250--in 51., removed comma after "Collector" in "Nichols, Collector, v. Coolidge et al."
page 1254--in 73., corrected "article I, section 3, clause 9" to "article I, section 9, clause 3"

Table of Cases
page 1257--removed comma after 175 in "Addyston Pipe & Steel Co. v. United States, 175, U.S. 211 (1899)"
page 1258--added period after "al" in "et al"
page 1259--removed period after "ex" in "Ashe v. United States ex. rel. Valotta"
page 1261--added period after "S" in "195 U.S 375"
page 1262--corrected spelling of "Perovick" to "Perovich" in "Biddle v. Perovick"
page 1263--removed comma after "451" in "342 U.S. 451, (1952)"
page 1264--removed comma after "Co." in "Brown v. Western Ry. Co., of Alabama"
page 1268--corrected spelling of "Whitten" to "Whitton" in "Chicago & Northwestern R. Co. v.

Whitten"
page 1270--removed comma after "R." in "Columbia R., Gas & E. Co. v. South Carolina"
page 1270--added period after "Pick" in "3 Pick (Mass.) 304 (1825)"
page 1270--corrected spelling of "Spratly" to "Spratley" in "Connecticut Mut. Ins. Co. v. Spratly"
page 1274--corrected spelling of "Kahanomoku" to "Kahanamoku"
page 1276--removed comma after "91" in "91, U.S. 29 (1875)"
page 1285--removed hyphen in "Holyoke Water-Power Co. v. Lyman"
page 1289--removed comma after "Bay" in "Kaukauna Water Power Co. v. Green Bay, & M. Canal Co."
page 1290--corrected spelling of "Morses" to "Morss" in "Knapp v. Morses"
page 1291--removed period after "ex" in "Lake Erie & W.R. Co. v. State Public Utilities Comm. ex. rel. Cameron"
page 1296--changed comma to period after "Wall" in "McCardle, Ex parte, 6 Wall, 318 (1868)"
page 1296--corrected spelling of "McCullock" to "McCulloch" in "McCullock v. Maryland"
page 1298--added comma after "Missouri" in "Missouri K. & T.R. Co. v. Cade"
page 1301--added "Bank," after "Merchants'" in "New Jersey Steam Nav. Co. v. Merchants' 6 How. 344 (1848)"
page 1304--corrected spelling of "Hildebrandt" to "Hildebrant" in "Ohio ex rel. Davis *v.* Hildebrandt"
page 1307--removed period after "Elg" in "Perkins v. Elg."
page 1310--corrected "O.R.R." to "O.R." in "Randall v. Baltimore & O.R.R. Co."
page 1310--added closing parenthesis after "(1935)" in "(Humphrey v. United States, 295 U.S. 602 (1935)"
page 1313--corrected "NLRB" to "N.L.R.B."
page 1314--removed comma after "Sharp" in "Sharp, v. United States"
page 1315--removed period after "Bank" in "Shriver v. Woodbine Sav. Bank."
page 1315--corrected spelling of "Galatin" to "Gallatin" in "Sinking Fund Cases (Central P.R. Co. v. Galatin ...)"
page 1318--corrected spelling of "Stevans" to "Stevens" in "Stevans v. Gladding"
page 1318--added period after "rel" in "Stone v. Mississippi ex rel Harris"
page 1318--corrected spelling of "Crowinshield" to "Crowninshield" in "Sturges v. Crowinshield"
page 1323--ordered page numbers in numerical order in "United States v. Classic"
page 1326--added hyphen in "Cooperative" in "United States v. Rock Royal Cooperative"
page 1332--removed comma after "205" in "205, U.S. 354 (1907)"
page 1332--corrected punctuation in "Chicago, B. & Q. RR. Co." to Chicago, B. & Q.R.R. Co."

Index
pages 1337-1361--in Index, added periods after "etc" where missing
page 1337--added period after "etc" in "State, procedural due process, notice and hearing, etc"
page 1339--changed comma to semi-colon in "Coins and Coinage. See Counterfeiting, Money."
page 1342--changed "431-610" to "431, 610" in "Indian tribes, not foreign state for jurisdictional purposes, 431-610"
page 1344--added closing parenthesis after "Amendment" in "Due Process of Law (Fourteenth Amendment"
page 1347--changed commas to semi-colons in "Health (see also Drugs, Food, Garbage, Milk, Sewers, Water)"
page 1350--changed 2nd "Process" to "Power" in "Legislative Process. See Congress; Internal Organization; Legislative Process"
page 1350--changed comma to semi-colon in "Mob violence. See Confrontation; Domestic Violence, Due Process of Law."
page 1351--changed hyphen to colon in "Municipal Corporations. See States-Political Subdivisions"

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