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AMERICAN SOCIAL PROGRESS SERIES

SOCIAL REFORM AND THE CONSTITUTION

The Kennedy Lectures for 1911, in the School of Philanthropy, conducted by the Charity Organization Society of the City of New York, and affiliated with Columbia University

SOCIAL REFORM AND THE CONSTITUTION

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PREFACE

In *Social Reform and the Constitution* the attempt has been to ascertain, from an examination of the decisions of our courts, and particularly those of the United States Supreme Court, to what extent the Constitution of the United States in its present form is a bar to the adoption of the most important social reform measures which have been made parts of the reform program of the most progressive peoples of the present day. This purpose has necessarily involved a discussion of political reform as well, since social is inextricably bound up with political reform in the present conditions of the United States.

In what has been said as to the concrete measures of reform discussed, the author has attempted, successfully it is hoped, to refrain from passing judgment on the desirability of such measures, and particularly from expressing any opinion as to their expediency in the conditions of present American life. His hope has been merely to set forth, so far as in him lay, accurately and impartially, the constitutional law upon some of the most vital social and political problems which the American nation is now attempting or will soon be called upon to solve. This hope and the further desire to lighten the labors of future students of this most absorbing subject are

the only justification for his presuming to add another to the already rather formidable list of studies on that most interesting instrument of government, the Constitution of the United States.

The substance of the following pages, with the exception of Chapter III, on "The Power of Congress to charter Interstate Commerce Corporations," was read before the New York School of Philanthropy, as the Kennedy Lectures for 1911. Chapter III was prepared at the suggestion and under the direction of the author by one of his former students, Mr. Sidney D. Moore Hudson, now Instructor in Government at Bryn Mawr College, and together with Chapter II, on the "Constitutionality of Uniform Commercial Regulations," and Chapter IV, on "The Power of Congress over the Private Law in Force in the United States," both the last two in abbreviated form, appeared in the *Political Science Quarterly*. Part of Chapter VII, on "The Constitutionality of Government Aid," was first published in *The American Political Science Review*.

FRANK J. GOODNOW.

WASHINGTON, D.C.
August, 1911.

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SOCIAL REFORM AND THE CONSTITUTION

CHAPTER I

THE DEMANDS OF POLITICAL AND SOCIAL REFORM

I. Introduction

The tremendous changes in political and social conditions due to the adoption of improved means of transportation and to the establishment of the factory system have brought with them problems whose solution seems to be impossible under the principles of law which were regarded as both axiomatic and permanently enduring at the end of the eighteenth century. That law was permeated by the theories of social compact and natural right, which in their turn were based upon the conception that society was static rather than dynamic or progressive in character — that there was, in other words, a social state which under all conditions and at all times was absolutely ideal. The various utopias which had been outlined by political theorists and philosophical dreamers had held before men's minds a goal unto which man should strive to attain. An ideal state was pictured in which, if it were once reached, humanity should cease from striving and, finally at rest, should contemplate with com-

placency the hardships of the past and anticipate with satisfaction the joys of the future.

Under the influence of this static conception of society political philosophers at first and lawgivers later accepted as a fundamental political theory the idea that the state was based upon a compact entered into between governors and governed, the details of which were, it is true, not defined, and the time of signing and sealing which was not exactly stated. The governed — *i.e.* the mass of mankind — were considered to have reserved at the time of making this compact, certain rights which were spoken of as natural rights and of which they might not be deprived by their governors. Finally, as these rights were conceived of as natural, they were thought to be possessed by man because of the fact of his humanity. All men were brothers in the same human family and were entitled to share equally in the advantages of brotherhood.

That these ideas had great effect in bettering the conditions of the western European world may not be denied. That they were true in fact is, however, certainly susceptible of contradiction, and that under present conditions they are working harm rather than good is believed by many. Prior to the eighteenth century no political system had been as a matter of fact based on any such compact. The nearest approach to such a contractual basis of society was to be found in feudalism. Under its influence a law was developed which appeared to recognize reciprocal obligations and rights upon the part of lord and vassal. But, notwithstanding such contract — if contract it can be called — and indeed, largely through its breach,

the political system changed from feudalism first into the absolute and then into the constitutional monarchy or the aristocratic or democratic republic.

The basis of political society was later seen to be, as it probably always was, historical development rather than contract, and all attempts to place society on a contractual basis have come to be believed as worse than useless in that they retard development by tending to force it along artificial lines rather than along lines which are natural and therefore those of least resistance.

This conception of political society as a historical development was, however, only dimly seen, if seen at all, prior to the formulation of the evolutionary theory of development in the world of science. Once, however, that theory was accepted, political writers began to apply it to the problems of social life; and at the present time thoughtful men are coming more and more to the conviction that a static society is all but impossible and that absolute political ideals are incapable of realization. More and more political and social students are recognizing that a policy of opportunism is the policy most likely to be followed by desirable results and that adherence to general theories which are to be applied at all times and under all conditions is productive of harm rather than good. This feeling, which has influenced philosophy through the writings of the pragmatic school, has been strengthened by the theory of the economic interpretation of history which of recent years has been received with so much favor.

One may, therefore, without committing himself to all the vagaries of pragmatic philosophy, and without admitting all the claims of the believers in the eco-

nomic interpretation of history, safely say, that at the present time most students regard the postulation of fundamental political principles of universal application as the statement of "mere useless opprobrious theory."[1] In fact, most American lawyers regard even the two great theories of social compact and natural rights as of themselves inapplicable as legal principles and as having the force of law only in so far as they have been incorporated into constitutions and bills of rights.

At the same time, however, both of these theories which were formulated in the eighteenth century have, as a matter of fact, been made the basis of the American constitutional system, which dates from the same time. The courts of this country, further, are permitted to declare unconstitutional acts of the legislature, on the one hand attempting to change the character of our political structure which is regarded as fixed in the social compact, or, on the other hand, violating any of the rights of the individual guaranteed to him by the bills of rights in which are formulated the natural rights of man. Inasmuch, therefore, as the constitution of the United States is, on account of the complicated procedure and the large majorities required, very difficult, if not impossible, of amendment under ordinary conditions, it must be confessed that Americans are in many respects living under a political system which has been framed upon the theory that society is static rather than dynamic, and that the rights, which individuals perhaps properly

[1] As Governor Pownall once said of certain plans proposed for the regulation of the relations of Great Britain with her North American colonies.

possessed in the eighteenth century, are the rights which they should properly possess at the beginning of the twentieth century, although present social and economic conditions are quite different from what they once were.[1]

Attempts so to change the structure of our political system and so to modify the content of private rights as to bring them into conformity with modern conditions are thus apt to meet with failure unless the courts, upon which devolves the duty of examining such attempts from the viewpoint of their constitutional propriety, recognize that legislative bodies possess wide discretion under the constitution, and unless they determine to treat the constitution somewhat differently from an ordinary statute and to apply to its interpretation less strictly than to other branches of the law the doctrine of *stare decisis*.

It is the purpose of the following pages to state in the first place what is the program of political and social reform proposed by most modern progressive countries which have been called upon to solve the problems the American people will soon be called upon to solve; in the second place, to inquire what is the attitude of American courts towards the concrete measures contained in such a program, and finally to

[1] "Dicey says of amending the constitution of the United States: 'The sovereign of the United States has been roused to serious action but once during the course of ninety years. It needed the thunder of the civil war to break his repose, and it may be doubted whether anything short of impending revolution will ever again rouse him to activity. But a monarch who slumbers for years is like a monarch who does not exist. A federal constitution is capable of change, but for all that a federal constitution is apt to be unchangeable.'" — THAYER, "Legal Essays," p. 33, note.

consider what methods there are by which pressure may be brought to bear upon the courts to induce them either to abandon or not to adopt the conception that our constitutions postulate a fixed and unchangeable political system and a rigid and inflexible rule of private right, and to apply the rule that constitutions, which are practically unamendable, should be considered rather as statements of general principles whose detailed application should take account of changing conditions, and should be so interpreted by judicial decision as to be susceptible of a continuous and uninterrupted development.

II. The Political Problems of the United States

The industrial revolution by which the last century and a half has been characterized has had certain well-defined effects noticeable in a more or less marked degree in all countries subjected to its influence. In such countries as England and Germany, which have been particularly devoted to industry, the effects of this industrial revolution have been naturally more general and more pronounced than in such countries as the United States and Russia, which have until quite recently been almost exclusively devoted to agricultural or even pastoral pursuits. But in almost all countries, social conditions are very different from what they were before the improvement in transportation, which is perhaps the most salient characteristic of the present age as compared with the ages which have preceded it.

Power machinery and steam transportation by both

land and water have at the same time so changed productive processes and so enlarged commercial markets that particular countries, like Great Britain, have found it to their apparent advantage to devote themselves almost exclusively to the pursuit of commerce and industry, while in almost all highly developed countries which have been subjected to the influence of western European civilization, classes of industrial workers have arisen which in numbers and in minute differentiation of occupation surpass anything which the world's history has hitherto exhibited. Improved methods of transportation, further, have of themselves so facilitated the intercourse between different countries and between what were once widely separated portions of the earth's surface that in many instances natural obstacles to communication have, comparatively speaking, ceased to exist, and arbitrary political boundaries have from the viewpoint of the economic life of man lost much of their significance.

In other words, classes have developed whose position in the state cannot be defined in accordance with the rubrics of a once almost universal legal lore, and political centralization is necessary if political systems are to be in accord with recognized economic facts. Just as local law once gave way to national law, and the privilege of the baron fell before the rights of the merchant, so at the present time a political organization based on more or less local isolation is being forced to succumb to the needs of an economic system based upon more general intercommunication, and the rights of labor are being emphasized at the expense of the position of the employer.

The regulation of the conditions of the vast and

minutely differentiated classes of industrial workers, many of whom are women and children, of itself presents problems most difficult of solution in countries whose political system has been brought into accord with economic facts. But in countries, like the United States, whose political system was framed in the latter part of the eighteenth century, the difficulty of solving these problems is vastly increased. For attempts at regulation are met by the contention that the authority which is making the attempts is, in the existing political system, devoid of jurisdiction.

The difficulties attendant upon the solution of social problems in political conditions such as exist in the United States are not, however, confined to the regulation of labor. They appear as well whenever the attempt is made to regulate methods of transportation, production, and distribution. Therefore, while in the United States the labor problem presses for solution with as great insistence as in other industrial countries, the political problem is of even greater importance, since upon its satisfactory solution depends the solution of almost all the other problems which present themselves. On that account our attention will be first directed to the political problems which have arisen as a result of the change in American economic conditions to which allusion has been made.

It is a well-known fact that when the constitution of the United States was adopted, there were lying along the Atlantic seaboard of North America a number of communities largely engaged in agricultural pursuits and occupying sparsely populated districts which, as compared with their population, were richly endowed with natural resources. These communities

were connected with each other only by the sea and by the rivers and estuaries which in many instances penetrated far into the interior of the country. The social conditions in these communities were as diverse as their geographical situation was isolated. In some, slave labor was predominant; in others, free labor was the rule. In some, one racial element or one religious confession was most pronounced; in others, another. Their comparative geographical isolation, and their difference in economic and social conditions, naturally had the effect of causing the states, as these communities came to be called, to regard the maintenance of a large degree of local independence as of the greatest importance. Under the influence of these considerations a constitution was adopted which, while recognizing that the states had certain common interests, is now commonly believed to have laid its emphasis upon the necessity of preserving for all time the same degree of state sovereignty and independence as was recognized to exist in the latter part of the eighteenth century. For that constitution attempted to secure to each of the states of the Union equal representation in the upper house of the legislature then established, of which no state could be deprived without its consent, and provided that no state should be divided nor united to another state against its will; while special care was taken to secure the recognition of the fact that the new government was one only of enumerated powers, and that powers not granted to such government were reserved to the states or to the people.

For one reason or another the people of the United States came soon to regard with an almost super-

stitious reverence the document into which this general scheme of government was incorporated, and many considered, and even now consider, that scheme, as they conceive it, to be the last word which can be said as to the proper form of government — a form believed to be suited to all times and conditions. The improvement in the means of communication between the states of the Union through the digging of waterways and the building of railways has, however, caused the geographical isolation of the once separated states to disappear. The development of industry and commerce has, notwithstanding the acquisition of the fertile fields of the West and the attendant agricultural development, caused the formerly overwhelmingly predominating agricultural character of the population to be lost. The gradual spread of the English language has brought about a complete unity in speech, while the greatly diminished influence of religious differences when taken together with the complete separation of church and state has prevented the centrifugal influences due to creeds from making themselves felt. At the present time, therefore, we have for the economic and social basis of our political system a series of closely connected communities inhabited by a reasonably homogeneous population whose interests are industrial and commercial as well as agricultural.

Notwithstanding this centralization, the tendency has been, with the exception of the period immediately succeeding the adoption of the constitution, to emphasize the rights of the states rather than the powers of the federal government. This tendency, when combined with the acceptance by the American people

generally of an extremely individualistic conception of the powers of government, has resulted in a constitutional tradition which is apt not to accord to the federal government powers it unquestionably ought to have the constitutional right to exercise. The question naturally arises before those who have no belief in a static political society or in permanent political principles of universal application, but who, on the contrary, are of the opinion that political organizations must be so framed and governmental powers must be so formulated as to be in accord as far as possible with the actual economic and social situation, — Is the kind of political system which we commonly believe our fathers established one which can with advantage be retained unchanged in the changed conditions which are seen to exist?

The answer to this question must be made in view of two sets of considerations. In the first place, we may justly inquire whether other communities which have, since the latter part of the eighteenth century, felt obliged to form a federal system of government — for that is the system under which we live — have deemed it expedient to establish relations between their local communities and their national government similar to those which we have believed were established for all time by the constitution of the United States and which many are still endeavoring to retain, or whether such communities have so arranged those relations as to bring them into accord with existing facts rather than with some absolute political theory. If investigation shows us that the latter is the case, we have established a presumption, to say the least, that we should abandon the idea that the political

theory at the basis of our constitutional system is either permanent or absolute, and should conclude, on the contrary, that that system should be made to harmonize with our actual economic and social situation.

Now, as a matter of fact, we have several examples of the establishment of federal government postdating ours. The most important are the Dominion of Canada, established in 1867; the German Empire, established in 1871; and the Commonwealth of Australia, established in 1900. In all these cases economic conditions were somewhat different from what they were with us in the eighteenth century. In all, the means of communication between the different communities seeking to form a union were better than was the case with us. In all there were more common interests than existed in the United States when our constitution was adopted, and in all greater powers have been given to the central government than are believed by many to have been given to the federal government of the United States in 1789. Thus in some it has been thought to be necessary to have one system of law administered under the control of one Supreme Court instead of systems peculiar to each state, as is the rule in this country. In practically all the regulatory power of the national legislature has been recognized as supreme, while in one, *i.e.* Germany, it has been provided that the constitution may be amended when such amendment may seem desirable by the federal government without the interposition of the states. Even in Australia, whose constitution is modeled more than the others on that of the United States, an amendment to the constitu-

tion may be made by the action of the Parliament, ratified by a majority of all the voters voting on the question, and a majority of the states at the same election. The latest attempt at the union of separate communities — viz. the South African Union — practically abandons completely the idea of federal government, and accords to the provinces, as they are called, only a certain administrative autonomy similar to that which under some American state constitutions is regarded as possessed by the local corporations.

It may therefore be said that the experience of the civilized world since our constitution was adopted is opposed to a system of federal government which fixes unalterably and in accordance with some political theory of universal application the jurisdiction of the national and state governments. Furthermore, the recently established systems of federal government accord greater power to the national government than is ordinarily believed to be accorded by our constitution to the national government of the United States. We are justified, therefore, in assuming that, if the American people were called upon at the present time to frame a scheme of federal government, they would adopt one which departed in a number of respects from the one under which we now live, and which would resemble that of Germany or of Canada in that it would make provision for greater ease of constitutional amendment and for securing to the national government greater powers than are believed by many to be accorded to the government of the United States under the present constitution.

But we are led to such a conclusion not alone by the experience of the countries in question, but as well

by the difficulties we encounter in our own country in our attempts to solve the problems which press upon us with the greatest insistence. The difficulties arising as the result of the existence of a law which varies from state to state in such important matters as divorce and general commercial relations have led to the formation in this country of permanent state commissions for uniform legislation and to the recent establishment of the annual conference of the executives of the states spoken of as "The House of Governors." The people of the United States have not, however, been satisfied with such unity as may be secured through the coöperation of the state governments. The federal government is every day assuming to exercise greater powers, and little opposition to this action is manifested except from those whose interest demands freedom from all government control, or who still believe, as some do, that what our fathers did in the eighteenth century should not be changed.

The greater confidence which the people of the United States exhibit in the federal government as compared with the state governments may be due in some measure, as Professor Henry Jones Ford has pointed out,[1] to the political weakness of the state governments, due to their constitutional organization. Owing to the ease with which state constitutions may be amended, changes have been made in the original state organization which resembled at one time very closely our national organization. These changes were due to the supposed dictates

[1] "The Influence of State Politics in Expanding Federal Power," Proceedings of American Political Science Association, Vol. V, p. 53.

of democracy, but have had the result of so disorganizing the state governments, largely through the too extensive application of the principle of popular election, the establishment of too many checks on official action, and the balancing of one authority over against another, that both the possibility of effective government has been greatly diminished, and the responsibility of the government to the people has been lost. As Professor Ford shows, the people of the country, disgusted at the inefficiency and corruption of the state governments, due thus in large measure to defective organization, are more and more turning to the national organization for relief, just as, when the conditions were reversed, the people of Germany turned from the impotent Imperial government of the seventeenth and eighteenth centuries to the more vigorous state governments which were then developing.

The refinements to which the Supreme Court of the United States has resorted in its endeavor, by differentiating the field of work of the states on the one hand from that of the national government on the other, to find constitutional justification for this extension of federal power, have brought it about that the law is uncertain and that the actual decisions reached by that august body are by some accounted for by the personal predilections of the individual members of the court rather than by the logical application of legal principles. Our constitutional law is losing what legal character it may once have had, and is becoming more or less a system of political science which at one time favors the demands of the advocates of the maintenance of the *status quo* in the

domain of political relations, and at another is influenced by conceptions of present economic and social needs. In other words, the Supreme Court of the United States has really become a political body of the supremest importance. For upon its determination depends the ability of the national legislature to exercise powers whose exercise is believed by many to be absolutely necessary to our existence as a democratic republic. What we need more than anything else at the present time is a consistent theory of constitutional interpretation, which will permit of our orderly development as a nation in accordance with our economic and social needs, and is not confined within the political and legal conceptions of a century or more ago.[1]

Our political problem is not, however, confined to the determination of the relations of the national and state governments, but has to do as well with the reciprocal relations of the three great departments of government recognized by our constitutional law. When our governmental system was established, the political thinkers of the world lay under the spell of the great philosopher Montesquieu, who, in his "Esprit des Lois," had set forth with such force his famous principle of the separation or distribution of the powers of government. Up to the time of the adoption of the American constitutions this principle had been a political theory whose observance in general outline was regarded as essential to constitutional

[1] For an appreciation by a foreigner of the present position of our Supreme Court, see Leacock, "The Limitations of Federal Government," Proceedings of American Political Science Association, Vol. V, p. 37.

government. With its incorporation into American written constitutions, however, and with the recognition of the principle that the courts had both the right and duty of declaring unconstitutional acts of the legislature which they regarded as not in accord with such written constitutions, what had been a theory of political science became a rule of law which the courts would apply. In so far as those constitutions have been difficult, if not impossible, of amendment, and in so far as the courts have considered the question of the constitutionality of legislative acts as legal rather than political, and have followed the doctrine of *stare decisis* rather than the rule that they should adapt their decisions to present economic and social needs, they have fixed upon the American people for all time a system of government which was framed as a result of the consideration of the political conditions of the eighteenth century, and which of necessity has no regard for the needs of the twentieth century.

Finally, it is to be remembered that the American constitutions contain bills of rights which formulate certain individual rights. Of these rights those to whom they are guaranteed may not be deprived even by legislative action. For the courts here as before may declare such action to be unconstitutional. If the courts take the same attitude with regard to such constitutional provisions, as has been described, we have under similar conditions a sphere of individual freedom of action, the conception of which was again derived from a consideration of eighteenth-century conditions, and has therefore no regard for existing social needs.

In order to understand what effect upon social reform such constitutional limitations have, it will be necessary for us to consider what are the measures being taken by the governments of progressive peoples, and especially of those unhampered by constitutional limitations, to alleviate the evils which manifest themselves in connection with present social conditions.

III. The Social Problems of the United States

It is somewhat difficult to state in any reasonable compass the measures which go to make up a comprehensive plan of social reform. It is practically impossible to make exhaustive any such statement that may be attempted. All that can be done is to classify under appropriate, though at the same time rather broad, headings some of the more important and, it is hoped, typical measures either adopted or proposed as means for remedying the evils in connection with our modern industrial and capitalistic social and economic conditions and institutions. With this idea in mind, we may place the concrete measures selected for observation and comment under the three general heads of Government Ownership, Government Regulation, and Government Aid.

1. GOVERNMENT OWNERSHIP

Government ownership is characteristic of modern social reform really only in those countries like the United States, in which the theory of *laisser faire* has been regarded both fundamental and axiomatic as a rule of social conduct. In other countries — particu-

larly those of continental Europe — government ownership has either developed almost imperceptibly out of the domainial rights possessed for a long time by the crown in such things as forests and mines, or has been adopted, as in the case of railways, for military and fiscal rather than social reasons. In England, however, it has been applied under the form of the municipal ownership and operation of the peculiar services necessitated by the development of urban life, more, it would seem, as a result of social reasons, though it must be admitted that the desire to find new sources of revenue from which to provide for increasing urban expenditure has been a powerful motive with British borough councils.

In Australasia the motives which have led to the spread of government ownership have also been somewhat mixed. But on the whole it may perhaps be safely said that social motives have predominated. In this part of the world, government ownership has been extended in directions in which profit could hardly be expected, but the action which has been taken has been had with the idea of reducing to the individual the expense of a service of which it has been deemed desirable that he should avail. Such would certainly appear to be the reason why the government of New Zealand, *e.g.* has entered into the business of both life and fire insurance.

In the United States, however, different from the other countries which have been mentioned, what little government ownership has been entered upon has been motived by the desire to provide a service which it was believed could be better done by the government than by private individuals and com-

panies; and the fear that such government ownership might prove more expensive than private ownership has been offset by the belief that the social advantages of this method of providing for a service which was believed to be absolutely necessary, would compensate for any pecuniary loss which might occur. This has certainly been the main idea at the bottom of the almost universal municipal ownership and operation of waterworks in the United States. Seldom is it the case that an American city attempts even to know whether its management of waterworks is profitable or not, so convinced is it of the social desirability of the policy which it has adopted.

Generally speaking, government ownership has been everywhere confined to undertakings which, different from ordinary business, need for their successful operation the use of powers exercisable only as a result of governmental permission. Such an undertaking is well illustrated by a railway enterprise which is open to individuals only because of special provisions of law. Within the last quarter of a century, however, there is a tendency, not as yet very marked, for government ownership to extend to certain lines of ordinary business like insurance, and the finding of employment for those out of work, or the loaning of money to those desirous of borrowing.

2. GOVERNMENT REGULATION

Regulation on the part of the government has been undertaken in different countries with two somewhat different purposes in view. Thus, the attempt has been made to limit the freedom of both employer and

employee to contract for the services of the employee where it is believed that the recognition of such freedom is apt to be followed by evil results. In this class of regulations may be placed those attempts to limit the hours of labor permitted to either the weaker classes of laborers such as women or children, or laborers in employments prejudicial to health, such as miners, or of special concern to the public safety, such as railway employees. Most progressive nations have attempted a certain amount of such regulation. Some have attempted to limit the hours of labor of adult male laborers. Others have confined their regulation to the labor of women and children, and some have gone so far as forbid such classes of persons to work at all in certain occupations.

Most progressive countries have also an elaborate system of legislation which attempts, through compelling the adoption of safety appliances and the provision of sanitary conditions, to protect those engaged in dangerous or unhealthy occupations from the damages necessarily caused either by the accidents which are liable to occur in connection with such occupations or by working in unsanitary conditions. In close connection with this legislation may be mentioned the attempts made so to formulate the rules of the law of tort as to impose upon the employer a wider pecuniary liability to the employee for the damage he may have suffered. The extreme form which such legislation takes is that of compensation, regardless of the question by whose negligence the damage was caused. The theory upon which compensation is based is that statistics show that there is on the average, even where the best of care

has been taken, a certain amount of damage to the laborer which is bound to occur, and that this damage should be regarded as one of the fixed charges of the business like fire insurance, which should be distributed over the whole consuming public through an increase in the price of the article in making which the damage occurred. In some instances, compensation in case of injuries is indirectly secured through provision for either voluntary or compulsory insurance in case of accident. Such insurance is also sometimes provided in case of death and sickness, or takes the form of old-age pensions.

Finally, in a few states the attempt has been made to regulate through government action, not merely the conditions under which labor is to be carried on and the hours during which it is to be permitted, but, through some form of conciliation or arbitration, as well the wages which are to be paid; while it is quite common to prohibit by law the payment in kind of wages in certain industries and to require that wages shall be paid at specified intervals.

In the second place, the congestion of the population in the urban districts, which has been characteristic of western European countries, has in its turn called for action in the nature of regulation upon the part of the government. Thus in the cities of Germany, where this kind of regulation has been carried perhaps the farthest, the attempt has been made to impose limitations upon the height and character of buildings and upon the area of land buildings may cover, which vary with particular districts, and by a comprehensive city plan, made long in advance of city needs and intended to secure a distribution of

population with relation to occupations, to prevent an undue demand for land in particular sections. In the state of New York the attempt has been made to apply such regulations not to buildings in general, but only to those classes of buildings such as tenements, in which the problem of congestion is present in its most acute form. Furthermore, inasmuch as all regulations of this sort can affect the question of congestion only from the point of view of the population per acre, the further attempt has been made to prevent congestion per room by insisting, in the case of buildings in which such congestion is to be apprehended, that provision shall be made for giving each occupant a certain amount of cubic feet of air space.

Closely connected with such regulation is the prohibition of certain kinds of labor at the home of the laborer, or of subletting certain contracts, as in the garment-making industries, the purpose of such provisions being the prevention of the development of what have come to be known as "sweat shops." This has been done rather commonly in Australasia.

In the third place, the attempt has been made to regulate the character of the services rendered the public by private corporations and individuals and the price which may be charged for such services. Usually these attempts have been confined to those undertakings which, like railways or what are known as public service companies, are regarded as, in the words of Anglo-American law, "affected with a public interest." But in exceptional instances the attempt has been made to apply the same principle in directions where the affectation with a public interest is

not so apparent. Thus, in Ireland the attempt has been made to fix the rent which may be charged for agricultural lands, while in some of the states of the American Union laws have been enacted which prohibit foreign corporations doing business within the state from charging in different parts of the state different prices, due allowance being made for freight charges, for the commodities which they sell.

In the fourth place, the attempt has been made to exercise the power of taxation not merely for the purpose of producing revenue, but of bringing about certain desired social results. The use of the taxing power with such an end in view is not a novel thing either in this country or in foreign countries. For every country which has a protective tariff has consciously and purposely made use of the taxing power in order to further the development of its own industries. The more modern instances of this use of the taxing power are, however, characterized by the fact that their purpose has been to influence the distribution of wealth rather than its production. They have all, therefore, in common progressive rates of taxation which increase with the amount taxed, whether the subject of taxation be property, income, or inheritance. Sometimes the highest rates — *i.e.* upon the largest amounts of property or the greatest incomes — are so high as to make the accumulation and preservation of large estates very difficult. In the same way high rates of taxation may be imposed, as is the case in New Zealand, on lands owned by persons not resident in the country with the idea of discouraging the absentee ownership of land. Finally, it has been attempted through the selection of the objects to be

taxed to discourage some particular industry or tendency. Thus the endeavor has been made to prevent the holding of land for purposes of speculation through the imposition of the entire burden of the land tax on the unimproved value of lands, as is done by New Zealand, or to force successful speculators in land to share with the public a part of their profit through the taxation of the increment in land value, as is done in a number of German cities and in the famous English budget.

In the fifth place, the attempt has been made particularly in the United States to prevent the making of combinations and agreements in restraint of trade and in the interest of monopoly.

3. GOVERNMENT AID

Finally, the modern program of social reform insists that the government in its central or local organization shall positively aid the less fortunate members of society, who experience is believed to have shown are in need of aid. The principle of government aid is, of course, not a new thing. Public poor relief has for centuries been characteristic of Protestant countries, while both Protestant and Roman Catholic countries have for a long time been making public provision for the support and care of the defective and dependent classes, such as the insane and feeble-minded, and children of tender years. But the government aid which is characteristic of modern social reform goes much farther than the relief of even able-bodied paupers. It attempts to give the aid before a condition of actual pauperism is reached, with the

idea of preventing such a condition. Possibly Germany and Australasia have gone farther in this direction than most other countries. Thus Germany has attempted, by a system of insurance for old age, accident, and sickness which is compulsory on certain classes of persons and towards the expense of which the government contributes, to diminish the amount of pauperism, much of which is believed to be due to the causes against which this public insurance has been provided.

New Zealand, in addition to providing for old age pensions, has made provision for loaning to persons in need of advances, money to enable them to get a start in life. Thus the law of this country provides for such advances to workingmen in cities to enable them to own their own homes, and to settlers on public land, with the idea both of helping the rural laborer to become an independent agriculturalist and of securing a better distribution of the population, which there as elsewhere tends to congregate in the urban districts.

Such are some of the methods adopted by the most progressive nations of the present day to ameliorate the abuses and evils which have accompanied the industrial development of the last two hundred years. It has not been intended by the enumeration of them which has been given, and which by no means is exhaustive, to express any conclusions as to the success or failure of any of them or, indeed, as to the expediency of adopting them in the United States. All that has been had in mind has been to give in as small a compass as possible a description of what various countries which have been called upon to

solve modern social problems have attempted as such solutions.

The political and social problems which the American people have to face are, then:—

First, those arising from the fact that we have, under economic and social conditions which bring about considerable economic and social unity, a political system which was framed in view of great economic and social disunity.

Second, those caused by a governmental system which was based on the fundamental theory of the separation of governmental powers, a theory which was elaborated in view of the political development of western Europe prior to the end of the eighteenth century, when political conditions were quite different from what they are at present.

Third, those due to the existence of a sphere of individual freedom and a conception of property rights derived from a consideration of the economic conditions and needs of the eighteenth rather than of the twentieth century.

The question which Americans have to ask themselves is: Can the solution of the political and social problems which exist in the United States be undertaken with hope of success under the constitutional law now in force in this country? The endeavor to answer this question necessarily involves a somewhat searching examination of that law, and must be based upon an understanding of the legal relations of the federal government and the states.

Before entering upon this examination it will be advisable to call attention to the limits which the time at command makes it necessary to place upon

our investigation and to state the reasons why the particular limits chosen have been selected. Under the American law the determination by government of the social relations of individuals is in principle within the powers of the states, and not the federal government. The great exception to the rule is to be found in the case of regulations which may be regarded as justified by the exercise of the power of Congress to regulate commerce with foreign nations and among the several states. In addition to the commerce clause, which, so far as it confers authority on the federal government, deprives the states of power, there are several provisions of the United States constitution which positively limit the sphere of action of the states. Thus, no state may pass any law impairing the obligation of contracts, nor deprive any person of his liberty or property without due process of law. State constitutions also limit the powers of state legislatures. The constitutionality of state regulation of the social relations of individuals must be considered, therefore, from two points of view; namely, from that of the state constitutions and that of the federal constitution.

Upon some one of these constitutional provisions the state courts have based their decisions that certain legislative acts, *e.g.* regulating the relations of labor, are unconstitutional. Many of these cases were decided prior to the determination by the United States Supreme Court of the questions involved when they came before it on appeal from a state court holding such legislation constitutional from the point of view of the federal constitution. When the Supreme Court was called upon to decide questions of

this sort, it took, in most instances, a more liberal view as to the constitutionality of such legislation than had been previously taken by some of the state courts. Most of the cases in the Supreme Court, as well as the more liberal cases in the state courts, have been based upon the principle which in its general outline has been universally accepted, that the general provisions of the constitutions referred to do not limit that rather ill-defined power of the state known as the police power. Whether legislative regulations are to be considered as an exercise of this police power, is regarded as dependent upon their adaptability to the purpose for which they have been adopted, *i.e.* upon their reasonableness; and the question of reasonableness is to be determined in the light of the conditions actually existent at the time the regulations are adopted.[1]

Furthermore, the courts of the present day very generally lay down the rule that when courts are called upon to consider the constitutionality of a statute, they are to presume that the statute is constitutional, and that this presumption is overcome only where it is proved, beyond a reasonable doubt, that the statute is contrary to the constitution.[2] It therefore follows that a statute which may at one time be regarded as unconstitutional, may, at another, and because of a change in conditions, be held to be constitutional. For such a change in conditions may

[1] See Freund, "The Constitutional Aspect of the Protection of Women in Industry," Proceedings of the Academy of Political Science in the City of New York, Vol. I, No. I.

[2] See the Sinking Fund Cases, 99 U. S. 718; also Baldwin, "The American Judiciary," p. 103; Dodd, "The Growth of Judicial Power," *Pol. Sci. Quar.*, Vol. XXIV, p. 193.

naturally raise in the mind of the court a reasonable doubt, which may not have existed prior to such change as to the propriety of the action of the legislature; in which case the action of the legislature must be treated as constitutional.[1]

Finally, inasmuch as the constitutions of the states are, comparatively speaking, rather easy of amendment, it has frequently happened that subsequent to a decision of a state court that an act of the state legislature is unconstitutional, the state constitution has been so changed as to remove all objections to the passage of the statute from the point of view of the state constitution.[2] The natural result is that the limitations of the state constitutions as interpreted by the state courts are not serious permanent obstacles to social reform, either in the matter of labor legislation, or, indeed, in any other matter in which change is desired.

But the limitations imposed upon the power of the legislature, both state and national, to inaugurate a plan of social reform are to be found as well in the federal constitution. As the act of Congress which regulates the jurisdiction of the United States courts stands at present, both the state and the United States courts have jurisdiction of cases arising under the constitution of the United States. Only civil cases involving a certain amount may, however, be removed from the state to the United States courts,

[1] Cf. Ritchie *v.* State, 155 Ill. 98 and Ritchie & Co. *v.* Wayman, 244 Ill. 509.

[2] See Dodd, *loc. cit.*, p. 201, who says: "A tendency to overrule judicial decisions by constitutional alterations has been clearly apparent in recent years."

and appeals may go from the decisions of the state courts of last instance to the Supreme Court of the United States only in the case the former courts declare an act of the state legislature to be constitutional from the point of view of the United States constitution. The result is that the constitutional law of the country is not, either necessarily or actually, uniform. For a state court may declare unconstitutional from the point of view of the federal constitution an act of a state legislature which would have been regarded as constitutional by the United States Supreme Court. If, therefore, the state courts are more conservative than the Supreme Court, and many believe they are, they determine finally what is, in a particular state, the effect of the limitations of the federal constitution upon state action. This condition of things is, however, not one which need be permanent, nor one which can be changed only through constitutional amendment. For the jurisdiction of the federal courts is in these matters entirely within the control of Congress, which may constitutionally provide, if it sees fit to do so, that all cases both civil and criminal involving a federal question may be removed to the federal courts, and that appeals may go to the Supreme Court from all decisions of the state courts of last instance, whether they affirm or not the constitutionality of state laws.

Therefore, from a constitutional point of view, the attitude of the Supreme Court of the United States is the only really important thing to consider when we are treating of the permanent constitutional obstacles to social reform in the United States. On that account, what will be said as to the effect on the

possibilities of such reform of the limitations contained in the federal constitution will in the main be confined to a consideration of the attitude of the Supreme Court towards these questions.

Our attention will naturally be directed, first to an examination of the powers of the Congress of the United States, as they are to be derived from a consideration of the provisions of the constitution as interpreted by the Supreme Court, and particularly to those clauses which contain the power to regulate commerce and the judicial power. For it is almost only through the exercise of these powers that any great centralization of our government may be secured.

CHAPTER II

CONSTITUTIONALITY OF UNIFORM COMMERCIAL REGULATION

THE constitution of the United States may be divided into four parts, or perhaps it would be more accurate to say that almost every provision of that instrument may be placed under one of four heads. These are organization, functions, prohibitions on federal action, and prohibitions on state action. Those provisions which relate to governmental organization do not interest us at this juncture, as their purpose is merely to provide the machine which is to do the work assigned to the federal government. Those which impose limitations upon the action of the federal and state governments are of some interest to us, but only in so far as they affect, as they frequently do, indirectly at any rate, the functions of the federal government. It is the provisions relative to the functions of the federal government to which our attention must be almost exclusively directed, since they determine the competence of the federal government, and since the powers which it may discharge must all find their origin in one or more of these provisions. Most of these provisions are to be found in Art. 1, Sec. 8. This section enumerates most of the powers which are vested by the constitution in the legislative organ of the national government, viz. the Congress.

Of the provisions which outline the functions of the federal government, some relate to the method by which the Congress or other authorities of the federal government shall act, as, *e.g.*, the provisions for the apportionment of direct taxes among the states. These also have little interest for our inquiry except in so far as the method of action provided is of such a character as seriously to limit the extent of the power granted.

The other provisions of the constitution relative to the functions of the federal government affect the content of the powers granted rather than the methods of their exercise, and are therefore the provisions which determine the character of the government when regarded from the viewpoint of the relations of the federal government and the states. Of these provisions a number, to which must be added some of those provisions prohibiting action on the part of the states, were evidently adopted with the idea of conferring upon the federal government the exclusive power of dealing with foreign governments, including a wide war power. These provisions have since the adoption of the constitution been interpreted by the Supreme Court as embracing the power to acquire foreign territory.[1] Other provisions permit the establishment by the federal government of a financial system of its own, including a national currency, and a system of courts, independent in every respect of the states. Still other provisions vest in Congress legislative powers over specially enumerated subjects such as postal matters, patents and copyrights, naturalization and bankruptcy, the territories, the

[1] Cf. Downes *v.* Bidwell, 182 U. S. 244.

seat of the federal government, and places purchased with the consent of the states for the purposes of the federal government; while the last clause of Art. 1, Sec. 8 gives to Congress the power to make all laws which shall be necessary and proper for carrying into execution any power vested by the constitution in the government of the United States or any department or officer thereof.

It is characteristic of the provisions fixing the content of the sphere of activity of the federal government, which have been mentioned, that almost all of them are rather special in character. Most of the litigation that has been had with regard to them has been carried on about the question whether the powers granted in them are exclusive in Congress or not, rather than with the purpose of determining the extent of the powers themselves. Perhaps an exception should be made of the power to make all necessary and proper laws. This power, as is well known, was in our early history interpreted rather liberally. But even the liberal interpretation which was given may not properly be said to have increased the actual competence of the federal government, since the powers recognized affect almost exclusively methods and not subjects of action.

The great exception to the rule that the powers granted to the federal government were rather special than general in character is, however, to be found in the power "to regulate commerce with foreign nations, among the several states and with the Indian tribes." [1] The content of the subject to be regulated is not determined, the methods of regulation are not stated,

[1] Const. Art. I, Sec. 8, Clause 3.

nor are the words "among the several states" defined. The result is that, if the decision of all the questions which may arise under this clause is made by a body or bodies representing the nation as a whole, as is the case, the clause may be, and probably will be, interpreted in such a way as vastly to increase the power of the federal government. It is the one clause in the constitution which lends itself most readily as a means for the reconstitution of our political system in accordance with changing economic needs. For the Supreme Court may properly consider that a matter which at one time was not really "commerce among the several states," and was not, therefore, subject to federal regulation, may take on that character as a result of an actual centralization of our economic conditions. For that reason we shall consider at some length the powers which both Congress and the states have under the commerce clause of the constitution as it has been construed by the courts.

In the early history of the United States, practically all the commerce of the country, both foreign and between the several states, was carried on by water. Naturally, then, the commerce which Congress first attempted to regulate was navigation, which was held by the Supreme Court to be included within commerce.[1] In reaching this decision the court was influenced by the fact that Congress had already assumed the right to regulate navigation. Chief Justice Marshall, in giving the opinion of the court, said: "If commerce does not include navigation, the government of the Union has no direct power over the subject, and can make no law prescribing what

[1] Gibbons *v.* Ogden, 9 Wheaton, 1 (1824).

shall constitute American vessels or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands and has uniformly understood the word 'commerce' to comprehend navigation. It was so understood and must have been so understood when the Constitution was framed."

At first, apparently, it was believed that in so far as Congress did not regulate commerce, the states had the right to regulate it.[1] Later, it was held that the power of the states was limited to that part of commerce which in the opinion of the Supreme Court did not admit of uniform regulation;[2] and that, in so far as Congress refrained from regulating that part of commerce which was susceptible of uniform regulation, its inaction indicated an intention that commerce should be unregulated and therefore free.[3]

While the early cases were decided with reference to navigation, the immediately succeeding cases were decided with reference to commerce on land, and they interpreted not so much the power of regulation possessed by Congress as the power still possessed by the states. In deciding this class of cases, the Su-

[1] License Cases, 5 Howard, 504 (1847).

[2] Cooley *v.* Board, 12 Howard, 299 (1851).

[3] Henderson *v.* Mayor, 92 U. S. 259; Robbins *v.* Shelby County Taxing District, 120 U. S. 489. As will be pointed out later, state police regulations, which are not regarded as regulations of commerce, although they affect commerce, are permitted in the absence of action by Congress, even though such police regulations are made as to a subject which permits of uniform regulation.

preme Court held that a number of matters not connected in any way with navigation or even with transportation, such as sales and the negotiations intended to induce sales, were included within the term "commerce."[1]

Our conceptions of the nature and extent of the power of Congress to regulate commerce have thus been derived from the decisions of the Supreme Court: first, as to navigation; second, as to transportation by land, which the states may not regulate because it is a part of foreign or interstate commerce; and, third, as to commerce, neither navigation nor transportation by land, and also not subject to state regulation. Only comparatively recently in our history has Congress attempted itself positively to regulate commerce which is not navigation; and only after Congress had begun to do this could the question arise, whether the conceptions derived from the decisions as to commerce which is at the same time navigation, or which is not subject to regulation by the states, are applicable to commerce which is not navigation, when the attempt is made by Congress to subject that commerce to regulation. While we are unquestionably aided in answering this question by a consideration of the decisions relative to the powers of the states, it must always be borne in mind that the recognition of powers in the states over commerce is coupled with the assumption that state regulations of foreign and interstate commerce are valid only where they are of a local or of a police character and are not in conflict with any action which Congress may have taken.

[1] *E.g.* Robbins *v.* Shelby County Taxing District, *supra.*

I. The Power of Congress to Regulate Navigation

What now has been the attitude of the Supreme Court as to the power of Congress to regulate foreign and interstate navigation? In order to answer this question we must ascertain what is meant: first, by navigation; second, by foreign and interstate navigation; and third, by regulation.

What is meant, now, by navigation? In the early history of the country, *e.g.* in 1825, the only waters which were considered navigable from a legal point of view were waters in which the tide ebbed and flowed.[1] Later on, in 1851, this view was abandoned; and in The Propeller Genesee Chief *v.* Fitzhugh,[2] the Steamboat Magnolia,[3] and The Hine *v.* Trevor,[4] the conception of navigable waters was extended so as to include the Great Lakes and the waters of rivers totally within the limits of a state — waters which, though connected with the sea, or on which communication with other states was possible, were unaffected by the ebb and flow of the tide. In 1903 the conception was still further extended so as to include the Erie Canal, an artificial waterway constructed by one of the states and entirely within its limits, but connecting the navigable waters of Lake Erie with the ocean.[5]

[1] The Thomas Jefferson, 10 Wheaton, 428 (1825), followed in The Steamboat Orleans *v.* Phœbus, 11 Peters, 175.

[2] 12 Howard, 443. [3] 20 Howard, 296. [4] 4 Wall, 555.

[5] The Robert W. Parsons, 191 U. S. 17. Cf. also Simmons *v.* The Jefferson, 215 U. S. 130, in which it is held that the admiralty jurisdiction extends to a "libel claiming salvage for services rendered by tugs in subduing a fire communicated from the shore to a vessel undergoing repairs in a dry dock from which all water had been emptied."

All these cases, it is to be remembered, were decided not in interpreting the power of Congress to regulate commerce, but in reaching a determination as to the extent of the admiralty jurisdiction of the United States courts. They are not, therefore, authorities upon the question, what are the navigable waters of the United States from the viewpoint of the power of Congress to regulate navigation.[1] But the Supreme Court has in a number of cases expressed the opinion that the criterion of the navigability of waters is the same from the viewpoint of the admiralty jurisdiction of the courts and as regards the navigation which Congress has the exclusive power to regulate. Thus in The Daniel Ball [2] it was held that a river wholly within the limits of one state, but emptying into Lake Michigan, was a navigable water subject to the regulation of Congress.[3] Furthermore, while many early cases decided that a state might permit within its own limits an obstruction in a navigable river (*i.e.* a river in which navigation was possible and which was connected with navigable waters) where Congress had taken no action with regard to the matter,[4] the state regulation of such waters is now regarded as inexpedient, and the whole matter has been regulated by Congressional legislation passed in 1890, which prohibits "the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters in respect to which the United States

[1] Cf. the remarks of Chief Justice Taney in The Genesee Chief, 12 Howard, 443, 452.

[2] 10 Wallace, 557.

[3] Cf. also *In re* Garnett, 141 U. S. 1, 12.

[4] Cf. Escanaba Company *v.* Chicago, 107 U. S. 678.

has jurisdiction." This law has been interpreted as preventing not merely the placing of an obstruction, such as a dam or a bridge, but also the diversion of water so as to interfere with the navigability of navigable waters.[1]

We may therefore, say that the United States Congress has jurisdiction over all waters, over which navigation with foreign countries or between two states is possible and, probably, only over such waters.[2] This being the case, a state may not, even in the absence of action by Congress, regulate this navigation [3] except as to purely local matters, such as pilotage,[4] quarantine,[5] port regulations [6] and wharfage.[7] Nor may it exclude from the privilege of navigating such waters any vessel authorized by the United States to use them,[8] even if they are entirely within the state's limits.[9]

The cases which have been referred to partly answer the question, What is foreign or interstate navigation? Thus in The Daniel Ball navigation upon a navigable water of the United States, where the navigation was limited to two places within the

[1] U. S. *v.* Rio Grande Dam and Irrigation Company, 174 U. S. 690. The recent act of Congress providing for the formation of forest reserves in the Eastern States is based upon this power of Congress to regulate navigation.

[2] Cf. Leovy *v.* United States, 177 U. S. 621.

[3] Gibbons *v.* Ogden, 9 Wheaton, 1.

[4] Cooley *v.* Board, 12 Howard, 299.

[5] Morgan's Steamship Company *v.* Louisiana Board of Health, 118 U. S. 455.

[6] The Brig James Gray *v.* The Ship John Fraser, 21 Howard, 184.

[7] Packet Company *v.* Catlettsburg, 105 U. S. 559.

[8] Gibbons *v.* Ogden, *supra.*

[9] Harman *v.* Chicago, 147 U. S. 396; Moran *v.* New Orleans, 112 U. S. 69.

same state, was held to be subject to the regulatory power of Congress.[1]

Some of the cases referred to also help us in the determination of the meaning of the power to regulate, certainly so far as it is exercised with regard to navigation. In the first place, we may say that the power to regulate includes the power to prohibit. Thus Congress has, without objection and for many years, prohibited all vessels not of American registry from engaging in the coasting trade of the United States. The constitutionality of such action has not been questioned and is implied in the decision of the case of The Daniel Ball. Furthermore, the recognition of the constitutionality of the Embargo Act[2] proves that regulation includes prohibition.

In the second place, the power to regulate includes the power to license, and Congress has, from an early period, required a license from all vessels of any size engaged in the navigation of the navigable waters of the United States. Its action in this respect was approved by the Supreme Court in the case of The

[1] Cf. Lord *v.* Steamship Company, 102 U. S. 541, in which navigation over the Pacific Ocean between the ports of San Francisco and San Diego, both in the state of California, was held to be subject to the regulation of Congress; and Steamboat Company *v.* Livingston, 3 Cowen, 713, in which boats plying between two places in the same state were held to be subject to the power of Congress. Cf. also United States *v.* Ferry Company, 21 Fed. Rep. 331, and The Steamboat Sunswick, 6 Benedict, 112. Cf. also State Tonnage Tax Cases, 12 Wallace, 204, which held that the states may not impose tonnage taxes on vessels plying between two ports of the same state, since such vessels, if plying the navigable waters of the United States, are enrolled and licensed by Congress.

[2] United States *v.* The William, 2 American Law Journal, 255; approved in Pennsylvania *v.* Wheeling, etc., Bridge Company, 18 Howard, 421, 239.

Daniel Ball, also referred to, where a libel was upheld against a vessel to recover a penalty for the use of the vessel on the navigable waters of the United States without the license required by act of Congress.[1]

In the third place, Congress has the right to regulate the contractual relations of persons and corporations engaged in navigation. As early as 1790, Congress passed an act providing for the apprehension of deserters and their delivery on board the vessel from which they had deserted. In 1872 such desertion from a vessel was punished by forfeiture of wages and by imprisonment. In this act and the amendments thereto careful provision was made for the protection of seamen engaged in foreign commerce against the frauds and cruelty of masters, the devices of boarding-house keepers and, as far as possible, against the consequences of their own ignorance and improvidence. This legislation was declared to be constitutional as an exercise of the power to regulate commerce in Patterson *v.* The Bark Eudora.[2] Another case, in which Congressional regulation of the contractual relations of persons engaged in navigation is recognized as proper, is that of Lord *v.* Steamship Company,[3]

[1] Cf. United States *v.* Ferry Company, 21 Fed. Rep. 331; The City of Salem, 38 Fed. Rep. 762, and The Oysters Police Steamers of Maryland, 31 Fed. Rep. 763. In this last case police steamers belonging to a state were forced to have their boilers examined by an inspector of the United States.

[2] 190 U. S. 169, approving Robertson *v.* Baldwin, 165 U. S. 275. In this last case the only question which was considered was whether the act of Congress was constitutional from the viewpoint of the thirteenth amendment, prohibiting slavery or involuntary servitude except for crime. The court did not even consider whether the act was proper as a regulation of commerce or navigation.

[3] 102 U.S. 541.

where an act of Congress fixing the liability of the owner of a vessel for any property shipped on such vessel was held to apply, as a regulation of interstate commerce, to a shipment on a steamer plying between San Francisco and San Diego, both ports of California. The only question to which the court devoted any attention was the question whether the commerce to which it was attempted to apply the act of Congress was interstate commerce or state commerce. It was assumed that the regulation was proper if the commerce were foreign or interstate.[1]

We may therefore say, first, that Congress has wide powers of regulation over that part of commerce which is known as navigation, regardless of the fact that the instrumentality of navigation regulated is made use of merely between two ports in the same state; and, second, that these powers extend to the contractual relations of the persons, both shippers and ship owners and employers and employed, engaged in navigation.[2]

In the exercise of these powers, Congress, from the beginning of our history as a nation, has assumed jurisdiction of the navigable waters of the United States;[3] has insisted on a license from all vessels;[4]

[1] Cf. *In re* Garnett, 141 U. S. 1, in which it was held that Congress might constitutionally regulate the liability of the owners of vessels plying between two points in a state situated on the navigable waters of the United States.

[2] It has not been decided that Congress has the power to regulate the relations of seamen not engaged in foreign or interstate navigation; cf. Patterson *v.* The Bark Eudora, 190 U. S. 169, where the court expressly refuses to give an opinion on this question.

[3] Even in opposition to the wishes of some particular state; cf. Wisconsin *v.* Duluth, 96 U.S. 379.

[4] The Daniel Ball, 10 Wallace, 557.

has inspected all steam vessels navigating such waters;[1] has formulated rules of navigation;[2] has regulated the contractual relations of employers and employed[3] and of owners and shippers,[4] and has punished acts incidental to navigation which tended to obstruct it. In United States *v.* Coombs,[5] the question submitted to the court was whether a circuit court of the United States had jurisdiction to punish one who, contrary to an act of Congress, had plundered a wrecked vessel, the offense having been committed above high-water mark. Justice Story, who delivered the opinion, held that the court could not base its jurisdiction on the clause of the constitution which provided that the judicial power of the United States should extend "to all cases of admiralty and maritime jurisdiction," but that it did have jurisdiction under the clause which authorized Congress to regulate commerce. In support of this ruling Justice Story said:—

"We are of the opinion that, under the clause of the constitution giving power to Congress 'to regulate commerce with foreign nations and among the several states,' Congress possessed the power to punish offences of the sort which are enumerated in the ninth section of the Act of 1825, now under consideration. The power to regulate commerce includes the power to regulate navigation, as connected with the commerce with foreign nations and among the states. . . . It does not stop at the mere boundary line of a state, nor is it confined to acts done on the water, or in the necessary course of the navigation thereof. It extends to such acts done on land, which interfere with, obstruct, or prevent the due exercise of the

[1] The Oyster Police Steamers, etc., 31 Fed. Rep. 763.
[2] The Delaware, 161 U. S. 459; The New York, 175 U. S. 187.
[3] Patterson *v.* The Bark Eudora, 190 U. S. 169.
[4] *Ex parte* Garnett, 141 U. S. 1.
[5] 12 Peters, 72.

power to regulate commerce and navigation with foreign nations and among the states. Any offense which thus interferes with, obstructs, or prevents such commerce and navigation, though done on land, may be punished by Congress, under its general authority to make all laws necessary and proper to execute their delegated constitutional powers. No one can doubt that the various offenses enumerated in the ninth section of the act are all of a nature which tend essentially to obstruct, prevent, or destroy the due operations of commerce and navigation with foreign nations and among the several states. Congress have, in a great variety of cases, acted upon this interpretation of the constitution, from the earliest period after the constitution. . . ."

In a word, there is no distinction between intrastate and interstate navigation. All navigation is subject to the regulation of Congress. Are there now any reasons why the rules which have been formulated by the Supreme Court with regard to navigation are to be limited in their application when applied to interstate and foreign commerce by land instead of by water?

There are, it must be admitted, two provisions in the United States constitution which might seem to confer upon the United States government as a whole wider powers with regard to commerce by water than by land. Thus, Art. I, Sec. 8, Clause 10 gives Congress power "to define and punish piracies and felonies committed on the high seas," while Art. III, Sec. 2 provides that the judicial power of the United States "shall extend . . . to all cases of admiralty and maritime jurisdiction." The former clause merely gives power to Congress to define and punish certain kinds of crimes. The latter clause, however, is believed by some to be the main if not the

sole basis of the power of Congress to regulate navigation.[1]

It is difficult to ascertain from an examination of the decisions of the Supreme Court and the other United States courts relative to the power of Congress to regulate navigation, what is the accepted judicial opinion as to the source of this power, *i.e.* whether it is to be found in the commerce clause or in the admiralty clause. The original view of the Supreme Court seems to have been that the source of the power to regulate navigation was to be found in the commerce clause. This was certainly the opinion of Chief Justice Marshall.[2] Not only did he make the commerce clause the basis of the power to regulate navigation, but he extended this power so as to include everything incidental to foreign and interstate navigation. Thus he said: —

"It is obvious that the government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the states, may use means that may also be employed by a state, in the exercise of its acknowledged powers; that, for example, of regulating commerce within the state. If Congress license vessels to sail from one port to another in the same state, the act is supposed to be, necessarily, incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a state, or to act directly on its system of police."

[1] Thus in the brief of the defendants in the Employers' Liability Cases, 207 U. S. 463, the statement is made that the cases cited in the brief of the government as to the rule of damages in the case of injuries on vessels do not fall under the commerce clause, but under the admiralty and maritime jurisdiction.

[2] Cf. citation from Gibbons *v.* Ogden, *supra*, p. 36,

The derivation of the power to regulate navigation from the commerce clause rather than from the admiralty clause was probably due to the feeling that a wider power would thus be secured to Congress. For at this time (1824) it was believed that the admiralty jurisdiction was limited to waters affected by the ebb and flow of the tide. In the case of The Thomas Jefferson,[1] in which this rule was laid down, Justice Story said: "Whether under the power to regulate commerce between the states, Congress may not extend the remedy, by the summary process of the admiralty, to the case of voyages on the western waters, it is unnecessary for us to consider."[2] This seems to have been the view of the Supreme Court as late as 1868. In that year Justice Nelson, in upholding as constitutional an act of Congress which regulated the sale and mortgage of vessels licensed by the United States, said: —

"Congress having created, as it were, this species of property and conferred upon it its chief value under the power given in the constitution to regulate commerce, we perceive no reason for entertaining any serious doubt but that this power may be extended to the security and protection of the rights and title of all persons dealing therein. The judicial mind seems to have generally taken this direction."[3]

[1] 10 Wheaton, 428 (1825).

[2] Chief Justice Marshall also claimed that the power to regulate commerce would include commerce on streams not at the time regarded as navigable. Gibbons *v.* Ogden, at p. 195. Cf. also the opinion of Savage, C. J., in North River Steamboat Company *v.* Livingston, 3 Cowen, 713, at p. 751.

[3] White's Bank *v.* Smith, 7 Wallace, 646, at p. 656. In support of the statement quoted above, the court cited: The Martha Washington, 25 Law Reporter, 22; Fontaine *v.* Beers, 19 Ala. 722; Mitchell *v.* Steelman, 8 Cal. 363; Shaw *v.* McCandless, 36 Miss. 296.

Finally, in Patterson *v.* The Bark Eudora, as has been said,[1] an act of Congress regulating the method of hiring seamen was spoken of as a regulation of commerce; and in The Lottawanna, decided in 1874,[2] Justice Bradley, in delivering the opinion of the Supreme Court as to what was the maritime law which was to be applied in the case at bar, expressed the view that Congress got its power to determine the maritime law from its power to regulate commerce. Justice Bradley said: —

"To ascertain, therefore, what the maritime law of this country is, it is not enough to read the French, German, Italian, and other foreign works on the subject, or the codes which they have framed; but we must have regard to our own legal history, constitution, legislation, usages, and adjudications as well. The decisions of this court illustrative of these sources, and giving construction to the laws and constitution are especially to be considered. . . But we must always remember that the court cannot make the law; it can only declare it. If within its proper scope any change is desired in its rules, other than those of procedure, it must be made by the legislative department. It cannot be supposed that the framers of the constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed. The scope of the maritime law and that of commercial regulations are not coterminous, it is true, but the latter embraces much the largest portion of the ground covered by the former. Under it Congress has regulated the registry, enrolment, 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 captain and crews; and many other things of a character truly maritime."[3]

[1] *Supra*, p. 43. [2] 21 Wallace, 558.

[3] *Ibid.*, pp. 576, 577. Cf. also the opinion of Justice Story in United States *v.* Coombs, 12 Peters, 72 (*supra*, p. 45), claiming for

The statement made in Steamboat Sunswick[1] is interesting as showing what was the view of the lower courts, as late as 1892, as to what power was exercised by Congress in providing for the inspection of steamboats. The steamboat concerned was a ferryboat plying between Manhattan and Long Island — both in the state of New York and separated by the East River, an arm of the sea. The court said: —

"Judicial notice may be taken of the fact that Astoria is on an island, which contains a large population and has numerous and extensive manufactories and large cities within its bounds; that its inhabitants have commercial relations with various states of the Union, and use the ferryboats as the ordinary means of communication between the island and the mainland; that upon these boats large quantities of merchandise and numerous passengers, destined to places in different states, are necessarily transported in the ordinary course of daily business; and that it is principally by means of these ferries that the commerce between Long Island and other states is carried on."

The court admitted that there was no evidence "showing a transporting on this ferryboat, at any particular time, of either merchandise which had begun to move as an article of trade from one state to another, or of passengers having a similar destination," but it concluded that the boat must be inspected as provided by the act of Congress.[2]

In the meantime, however, the law had developed

Congress the power under the commerce clause to punish the plundering of wrecks even where the offense takes place above high water and therefore within the jurisdiction of a state.

[1] 6 Benedict, 112.

[2] This opinion should be compared with that in United States *v.* Burlington and Henderson County Ferry Company, 21 Fed. Rep. 331, decided in 1888, which derives the power of Congress to provide for the inspection of vessels from the admiralty clause.

in two directions. On the one hand, the admiralty jurisdiction had been extended to all waters upon which navigation was possible between points in a state and points outside of a state, regardless of the nature of the business in which a vessel might be engaged;[1] and, on the other hand, there had grown up the conception of an intrastate commerce which was not subject to the regulation of Congress. That such a commerce existed was perhaps conceded by Chief Justice Marshall, but, with the development of states' rights ideas, the extent of this field was regarded as wider than the great chief justice would probably have admitted. It was apparently felt by the Supreme Court that, under the sway of such political ideas, the conditions of legal development were different from those which were believed to exist at the time of the decision in Gibbons *v.* Ogden, and that greater powers of regulation over navigation could be recognized as belonging to Congress under the admiralty than under the commerce clause. Thus in the case of The Belfast,[2] Justice Clifford said: —

"Unable to deny that admiralty has jurisdiction over marine torts, though the voyage is between ports and places in the same state, it having been held that jurisdiction in those cases resulted from the fact that the wrongful act was committed on navigable waters, the advocates of the more restricted jurisdiction over maritime contracts set up a distinction and contend that the admiralty jurisdiction over such contracts is limited by the power granted to Congress to regulate commerce."[3]

This position was not regarded as sound; and the decision of the court was that a state could not im-

[1] Cf. The Commerce, 1 Black, 574.
[2] 7 Wallace, 624 (1868). [3] *Ibid.*, p. 641.

pose on a vessel, licensed by the United States and engaged in navigation from a point within to a point without the state, a maritime lien for goods that were to be carried between two points in the state and were lost *en route*.[1]

Under the influence of these ideas and with the desire to uphold the action of Congress in its regulation of navigation and to exclude state action thereupon, — for it was believed that the rules for all navigation should be the same,[2] — the more recent decisions of the Supreme Court have regarded the admiralty clause in the constitution as not merely vesting jurisdiction in the courts of the United States to hear cases, but as also giving power to Congress to issue regulations.

This idea, that the power of Congress to regulate navigation may be based on some other clause of the constitution than that which empowers Congress to regulate commerce, is hinted at in The Lottawanna,[3] decided in 1874; is definitely announced in Butler *v.* Boston Steamship Company,[4] decided in 1888; and receives its most complete and forcible expression in *In re* Garnett,[5] decided in 1890. In this case, in which a law of Congress limiting the liability of

[1] Cf. the opinion of Justice Miller in The Bright Star, Woolw. 266.

[2] Cf. opinion of Judge Love in United States *v.* Ferry Company, 21 Fed. Rep. 331, at p. 340.

[3] *Supra*, p. 49.

[4] 130 U. S. 527. In this case the court said: "As the constitution extends the judicial power of the United States to 'all cases of admiralty and maritime jurisdiction,' and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature, and not in the state legislatures" (p. 557).

[5] 141 U. S. 1.

owners of vessels plying between two places in the same state was upheld as constitutional, the court said: —

"It is unnecessary to invoke the power given to Congress to regulate commerce with foreign nations, and among the several states, in order to find authority to pass the law in question. The act of Congress which limits the liability of shipowners was passed in amendment of the maritime law of the country, and the power to make such amendments is coextensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends."[1]

Are we now to accept the theory that these decisions as to the power of Congress to regulate navigation are not applicable to commerce by land; and, as a consequence, are we to conclude that the Supreme Court, abandoning the view expressed by Chief Justice Marshall, has committed itself to the idea that the power to regulate interstate commerce by land does not carry with it the power to regulate all matters of intrastate commerce which incidentally affect the commerce subject to the regulation of Congress? Such a conclusion seems both unnecessary and improper. The utterances of the court are not decisive on this point. All that they decide is that Congress does not derive its power to regulate navigation solely from its power to regulate commerce. The court has not as yet been called upon to decide, and it has therefore not decided, that matters incidental to interstate commerce by land are not subject to regulation by Congress in the exercise of its power to

[1] *Ibid.*, p. 12.

regulate commerce among the states. Indeed, as will be pointed out later, many of the most recent decisions of the Supreme Court seem to accord to Congress, in matters which fall primarily within the competence of the several states, but which are incidental to interstate commerce by land, rights similar to those claimed by Marshall for Congress — and, as a matter of fact, since exercised by it — with regard to such commerce by water.

It may therefore be said that, while the Supreme Court, thanks to the admiralty clause, has found it unnecessary to base the right of Congress to regulate navigation solely on the power to regulate commerce, there are numerous judicial utterances to the effect that such regulation of navigation is, as a matter of fact, a regulation of commerce. It cannot be denied, however, that the admiralty clause has had an influence, particularly in recent years, in extending both the jurisdiction of the United States courts and the legislative power of Congress over navigation.

II. The Power of Congress to regulate Transportation by Land

Originally, as has been intimated, Congress did not attempt to regulate commerce except upon the navigable waters of the United States. Indeed, we find no serious attempt to regulate commerce by land until about the middle of the nineteenth century. Justice Moody, in a dissenting opinion in the Employers' Liability cases,[1] refers to this matter as follows: —

[1] 207 U. S. 463.

"It is said that Congress has never before enacted legislation of this nature for the government of interstate commerce on land, though it has for the government of such commerce upon the water and for the government of foreign commerce; that on the contrary the relations affected have been controlled by the undoubted power of the states to govern men and things within their respective dominions; and that this omission of Congress is of controlling significance. The fundamental fallacy of this argument is that it misunderstands the nature of the constitution, undervalues its usefulness, and forgets that its unchanging provisions are adaptable to the infinite variety of the changing conditions of our national life. Surely there is no statute of limitations which bars Congress from the exercise of any of its granted powers, nor any authority save that of the people whom it represents, which may with propriety challenge the wisdom of its choice of the time when remedies shall first be applied to what it deems wrong. It cannot be doubted that the exercise of a power for the first time is a circumstance to be considered. But in this case it is a circumstance whose significance disappears in the light of history. Henry Adams, a writer of high authority, in the first chapter of his 'History of the United States,' has drawn a vivid picture of the conditions of our national life at the beginning of the nineteenth century. The center of population was near Baltimore. The interior was almost impenetrable except by the waterways and two wagon roads from Philadelphia to Pittsburg and from the Potomac to the Monongahela. The scattered settlements of what was then the Western country were severed from the seaboard settlements by mountain ranges, and there was little connection between the two almost independent peoples. There was scarcely a possibility of trade between the states except along the seacoast and over the dangerous and uncertain rivers. 'The experience of mankind,' says the author, p. 7, 'proved trade to be dependent upon water communications, and as yet Americans did not dream that the experience of mankind was useless to them.' We need not look beyond these conditions for an explanation why Congress, though it early and vigorously exercised its power of legislation over foreign commerce and interstate commerce by water, left it unused in respect to interstate

commerce on the land. As population multiplied, bringing the isolated settlements nearer to each other, wealth increased, creating a wider demand for commodities, and roads and bridges came to be better and more numerous, doubtless overland commerce was somewhat stimulated. But the iron restrictions which nature had placed upon land transportation remained constant until they were unloosed by the operation of the steam railroad. The system of steam transportation began modestly by the construction of short lines, often wholly within a single state. These lines were lengthened by extensions and consolidations, until at the present time the states of the Union are all bound together by a network of interstate railroads. Their operation, aided by the quick and cheap transmission of the mails, and the communication of intelligence by electricity, has transformed the commerce of the country. Interstate commerce by land, once so slight as to be unworthy of the attention of the national legislature, has come to be the most important part of all trade, and it is not too much to say that the daily needs of the factory and the household are no longer dependent upon the resources of the locality, but are largely supplied by the products of other states.

"It was not reasonably to be expected that a phenomenon so contrary to the experience of mankind, so vast, so rapidly developing and changing, as the growth of land commerce among the states, would speedily be appreciated in all its aspects, or would at once call forth the exercise of all the unused power vested in Congress by the commerce clause of the constitution. Such a phenomenon demands study and experience. The habit of our people, accentuated by our system of representative government, is not so much in legislation to anticipate problems as it is to deal with them after experience has shown them to exist. So Congress has exercised its power sparingly, step by step, and has acted only when experience seemed to it to require action. A description of its action in this respect was given in *In re* Debs, 158 U. S. 564, where it was said, p. 579: 'Congress has exercised the power granted in respect to interstate commerce in a variety of legislative acts. Passing by for the present all that legislation in respect to commerce by water, and considering only that which bears upon railroad interstate transportation (for this is

the specific matter involved in this case), these acts may be noticed: First, That of June 15, 1866, c. 124, 14 Stat. 66, carried into the Revised Statutes as paragraph 5258, which provides: "Whereas the constitution of the United States confers upon Congress, in express terms, the power to regulate commerce among the several states, to establish post roads, and to raise and support armies: Therefore, Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every railroad company in the United States whose road is operated by steam, its successors, and assigns, be, and is hereby, authorized to carry upon and over its road, boats, bridges, and ferries all passengers, troops, government supplies, mails, freight, and property on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines, for the transportation of the same to the place of destination. Second. That of March 3, 1873, c. 252, 17 Stat. 584 (Rev. Stat. §§ 4386 to 4389) which regulates the transportation of live stock over interstate railroads. Third. That of May 29, 1884, c. 60, § 6, 23 Stat. 31, 32, prohibiting interstate transportation by railroads of live stock affected with any contagious or infectious disease. Fourth. That of February 4, 1887, c. 104, 24 Stat. 379, with its amendments of March 2, 1889, c. 382, 25 Stat. 855, and February 10, 1891, c. 128, 26 Stat. 743, known as the 'Interstate Commerce Act,' by which a commission was created with large powers of regulation and control of interstate commerce by railroads, and the sixteenth section of which act gives to the courts of the United States power to enforce the orders of the commission. Fifth. That of October 1, 1888, c. 1063, 25 Stat. 501, providing for arbitration between railroad interstate companies and their employees; and, Sixth, the act of March 2, 1893, c. 196, 27 Stat. 531, requiring the use of automatic couplers on interstate trains, and empowering the Interstate Commerce Commission to enforce its provisions."

"Since this decision other laws more fully regulating interstate commerce on land have been enacted, which need not here be stated. They show a constantly increasing tendency to exercise more fully and vigorously the power conferred by the commerce clause. It is well to notice, however, that Congress has

assumed the duty of promoting the safety of public travel by enacting the Safety Appliance Law; an act to require reports of casualties to employees or passengers (31 Stat. 1446); a resolution directing the Interstate Commerce Commission to investigate and report on the necessity for block signals (34 Stat. 838); an act limiting the hours of service of employees and the act under consideration. These acts, all relating to interstate transportation, demonstrate the belief of Congress that the safety of interstate travel is a matter of national concern, and its deliberate purpose to increase that safety by laws which it deems conducive to that end. I think, therefore, that we may consider whether this act finds authority in the commerce clause of the Constitution without embarrassment from any inferences which may be drawn from the inaction of Congress." [1]

Let us now endeavor to ascertain what has been the attitude of the Supreme Court toward the most important attempts which Congress has made in recent years to regulate interstate commerce by land, some of which are recapitulated in the foregoing quotation.[2]

The power of Congress, which was exercised in the passage of the Interstate Commerce Acts, to provide that charges by interstate carriers shall be reasonable and just, and that individual discriminations in the matter of rates shall not be made by such carriers, has been upheld in a series of cases. In some, the Supreme Court has upheld orders of the Interstate Commerce Commission (which was established by the act) requiring carriers to refrain from greater charges

[1] 207 U. S. 463, at pp. 521–525.

[2] Inasmuch as the Anti-Trust Act of 1890, which may be added to the list of the acts of Congress regulating interstate commerce, attempted to regulate commerce in quite a different way from that in which navigation had up to that time been regulated, a consideration of this act will be for the moment deferred.

for carrying merchandise to one specified place than to another.[1] In others, criminal punishments have been imposed upon interstate carriers for having made individual discriminations by the giving of rebates.[2]

The act of Congress providing for safety appliances has been several times before the Supreme Court. In these cases the question of constitutionality seems not to have been raised; but in applying the provisions of the act to the particular facts of each case, the court has implicitly upheld its constitutionality. The act in question provided that after January 1, 1898, it should "be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine engaged in moving interstate traffic not equipped with a power driving wheel brake . . . (or) to haul or permit to be hauled or use on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact (etc.) . . . (and) that any employee of any such common carrier who may be injured by any locomotive car or train in use contrary to the provision of this Act shall not be deemed to have assumed the risk thereby occasioned," although continuing in the employment of such carrier after the unlawful use of such locomotive car or train had been brought to his knowledge.

In the case of Johnson *v.* Southern Pacific Com-

[1] Cincinnati, New Orleans, and Texas Pacific Railway *v.* Interstate Commerce Commission, 162 U. S. 184. Cf. also Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 473, which distinctly and expressly upholds the constitutionality of the act.

[2] New York Central Railroad Company *v.* United States, 212 U. S. 481.

pany,[1] the claim of an injured employee for damages was met by the objection that, the dining car, in coupling which the accident occurred, was empty and had not actually started upon its trip; but the court overruled this objection on the ground that the car "had been constantly used for several years to furnish meals to passengers between San Francisco and Ogden, and for no other purposes. On the day of the accident the east-bound train was so late that it was found that the car could not reach Ogden in time to return on the west-bound train, and it was therefore dropped off at Promontory to be picked up by that train as it came along that evening." The court on this ground overturned a verdict given for the defendant, and ordered a new trial.

In Schlemmer *v.* Buffalo, Rochester, and Pittsburg Railroad Company,[2] the main question was as to the meaning of that clause in the act which provides that the employee "shall not be deemed to have assumed the risk" by reason of his knowledge of a violation of the act by the company. The Supreme Court of Pennsylvania had affirmed a judgment of nonsuit on the ground of contributory negligence on the part of the deceased. This judgment was reversed by the Supreme Court of the United States, because, in its opinion, the Pennsylvania court had refused to give effect to the provision of the act which covered this point.

In 1906 Congress attempted to exercise its power of regulating foreign and interstate commerce by providing that every carrier engaged in such commerce should be liable to "any of its employees" and, in

[1] 196 U. S. 1. [2] 205 U. S. 1.

case of the death of an employee, to his widow and children, etc., for all damages caused by the negligence of any of its officers, and that the fact that the employee was guilty of contributory negligence should not of itself bar recovery. In the Employers' Liability cases[1] this law was declared to be unconstitutional because it in terms applied to "any of its (the carrier's) employees" and thus affected employees not engaged in interstate and foreign commerce. This decision was reached, notwithstanding the fact that in both suits the plaintiff's deceased was at the time of his death admittedly "serving as a fireman on a locomotive actually engaged in moving an interstate commerce train." It was contended by the defendants in these cases that the act was unconstitutional upon another ground, viz. because it attempted to regulate the relations of master and servant, which were not fairly parts of interstate commerce. This contention was declared to be unsound. Justice White, in delivering the opinion of the court, said: —

"We may not test the power of Congress to regulate commerce solely by abstractly considering the particular subject to which a regulation relates, irrespective of whether the regulation in question is one of interstate commerce. On the contrary, the test of power is not merely the matter regulated, but whether the regulation is directly one of interstate commerce, or is embraced within the grant conferred on Congress to use all lawful means necessary and appropriate to the execution of the power to regulate commerce. We think the unsoundness of the contention, that because the act regulates the relation of master and servant, it is unconstitutional, because under no circumstances and to no extent can the regulation of such subject be within the grant of authority to regulate commerce, is demonstrable.

[1] 207 U. S. 463.

We say this because we fail to perceive any just reason for holding that Congress is without power to regulate the relation of master and servant, to the extent that regulations adopted by Congress on that subject are solely confined to interstate commerce, and therefore are within the grant to regulate that commerce, or within the authority given to use all means appropriate to the exercise of the powers conferred. To illustrate: Take the case of an interstate railway train, that is, a train moving in interstate commerce, and the regulation of which, therefore, is, in the nature of things, a regulation of such commerce. It cannot be said that because a regulation adopted by Congress as to such train when so engaged in interstate commerce deals with the relation of the master to the servants operating such train, or the relations of the servants engaged in such operation between themselves, that it is not a regulation of interstate commerce. This must be, since to admit the authority to regulate such train, and yet to say that all regulations which deal with the relation of master and servants engaged in its operation are invalid for want of power, would be but to concede the power and then to deny it, or at all events to recognize the power and yet to render it incomplete.

"Because of the reasons just stated we might well pass from the consideration of the subject. We add, however, that we think the error of the proposition is shown by previous decisions of this court. Thus the want of power in a state to interfere with an interstate commerce train, if thereby a direct burden is imposed upon interstate commerce, is settled beyond question. Mississippi R. R. Com. *v.* Illinois Central R.R., 203 U. S. 335, 343, and cases cited; Atlantic Coast Line R.R. *v.* Wharton *et al.*, Railroad Commissioners, 207 U. S. 328. And decisions cited in the margin, holding that state statutes which regulated the relation of master and servant were applicable to those actually engaged in an operation of interstate commerce, because the state power existed until Congress acted, by necessary implication refute the contention that a regulation of the subject, confined to interstate commerce, when adopted by Congress, would be necessarily void because the regulation of the relation of master and servant was, however intimately connected with interstate commerce, beyond the power of Congress. And a like

conclusion also persuasively results from previous rulings of this court concerning the act of Congress, known as the Safety Appliance Act. Johnson *v.* Southern Pacific Co., 196 U. S. 1; Schlemmer *v.* Buffalo, Rochester, etc., Ry., 205 U. S. 1."

At least four of the members of the court concurred in Justice White's view that Congress has the power to regulate the relations of masters and servants engaged in interstate commerce. It may therefore be said that Congress may regulate many, if not all, of the legal relations of persons engaged in interstate transportation with their employees, where such relations arise out of the act of transportation and where such employees are directly engaged in interstate or foreign commerce.

The recent case of Atlantic Coast Line *v.* Riverside Mills [1] recognizes that Congress has the power also to regulate some, if not all, of the legal relations of persons engaged in interstate and foreign commerce with the public which makes use of their services. In this case the court held constitutional an act of Congress which provided that any common carrier receiving property for transportation from a point in one state to a point in another should issue a bill of lading therefor, and should be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier to which such property might be delivered, and that such common carrier should not be permitted to exempt itself from such liability. The court held, first, that this act was a regulation of interstate commerce, and, second, that it did not violate the fifth amendment in depriving a person of his property or liberty without due

[1] 31 S. C. R. 164.

process of law. One of the reasons which apparently led the court to reach its decision was that the carrier could have, so far as concerned the act of Congress, escaped from the liability by refusing to accept goods for shipment designated for a point beyond its own line, and that by accepting the goods and delivering them to another carrier it made such carrier its agent, and therefore made itself responsible for the acts of such agent.

To the contention that the carrier was unconstitutionally deprived of its liberty to contract by being forbidden to exempt itself from liability, the court answered "that there is no such thing as absolute freedom of contract . . . the power to make contracts may in all cases be regulated as to form, evidence, and validity as to third persons. The power of government extends to the denial of liberty of contract, to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interests." [1]

As yet, however, we have not ascertained whether the power of regulation, possessed by Congress, may be extended so as to embrace purely intrastate commerce by land where the regulation of that commerce is necessary in order that the regulation of interstate commerce may be effective.

This question has been considered, if not decided, by the Supreme Court in the most recent cases upon

[1] Somewhat the same principle was involved in Interstate Com. Com. *v.* Ill. Cent. R. R. (215 U. S. 452) and Same *v.* Chicago and Alton R. R. (*ibid.*, 479) which upheld the power of the Interstate Commerce Commission, proceeding under an act of Congress to regulate the distribution of coal cars in times of car shortage in order to prevent unjust preference or undue discrimination.

the power of Congress to regulate interstate commerce. The Employers' Liability cases would seem to hold that the mere fact that one is an employee of a person engaged in interstate commerce is not sufficient to justify the regulation by Congress of his relations with his employer. In order to be subject to the direct regulatory power of Congress, the employee himself must be actually engaged in interstate commerce. This would seem to be admitted by most of the judges who dissented from the majority decision in this case. If this principle is permanently adopted by the Supreme Court, it will have the effect of taking out of the direct regulatory power of Congress all the employees of manufacturing corporations devoting their attention strictly to manufacturing. The contractual and other private legal relations of such employees may not be the subject of Congressional regulation. This view of the law is corroborated by such cases as Mugler *v.* Kansas,[1] Powell *v.* Pennsylvania,[2] and United States *v.* E. C. Knight Company,[3] which hold that it is in the power of the states and not in the power of Congress to regulate manufacturing by determining, for example, what articles may be manufactured in the several states. It has also been expressly held that neither life insurance, nor insurance against fire, nor insurance against the perils of the sea is included within the constitutional conception of commerce.[4] It is to be remembered, however, that these cases were decided with regard to the

[1] 123 U. S. 623. [2] 127 U. S. 678. [3] 156 U. S. 1.

[4] New York Life Insurance Company *v.* Cravens, 178 U. S. 389; Insurance Company *v.* Dunham, 11 Wallace, 1; Hooper *v.* California, 155 U. S. 648.

power, not of Congress, but of the states. They might, therefore, be considered as recognizing a power in the states to issue in the absence of action by Congress local regulations on a subject not at the time requiring uniform treatment. The recent decision in International Textbook Company *v.* Pigg,[1] in which education by correspondence between two states was held to be interstate commerce, goes far in abandoning the theory upon which interstate insurance was held not to be interstate commerce.

In the Employers' Liability cases, further, the Supreme Court did not determine whether Congress, in order to regulate effectively the technical operations of carriers engaged in interstate commerce, has the right incidentally to regulate intrastate commerce. In one of the cases arising under the Safety Appliances Acts, however, it decided that a car ordinarily used in interstate commerce was an instrument of such commerce, although standing still and not having commenced its journey.[2] It has also held that a rate made by a railway from a point within a state to a point without a state is an interstate rate, and that no state may regulate that portion of it which may be charged for the journey within the state;[3] and further, that this rate is subject, as an interstate rate, to the jurisdiction of the Interstate Commerce Commission.[4] Two recent cases[5] tend even more strongly

[1] 217 U. S. 91. [2] Johnson *v.* Southern Pacific Company, 205 U. S. 1.

[3] Wabash, St. Louis, and Pacific Railway Company *v.* Illinois, 118 U. S. 557, overruling Peik *v.* Chicago and Northwestern Railway Company, 94 U. S. 164.

[4] Cincinnati, New Orleans, and Texas Pacific Railway *v.* Interstate Commerce Commission, 162 U. S. 184.

[5] Western Union Telegraph Company *v.* Kansas, 216 U. S. 1 and the Pullman Company *v.* Kansas, *ibid.*, 56.

in the same direction. In these cases the state of Kansas attempted to impose upon foreign corporations engaged in interstate commerce a tax for the state school fund upon their entire capital stock for the privilege of doing intrastate commerce. The Supreme Court held the law unconstitutional. Justice Harlan, who delivered the opinion of the court in both cases, said: —

"The statutory requirement that the telegraph company shall, as a condition of its right to engage in local business in Kansas, pay into the state school fund a given per cent of its authorized capital, representing all its business and property everywhere, is a burden on the company's interstate commerce and its privilege to engage in that commerce, in that it makes both such commerce as conducted by the company and its property outside of the state contribute to the support of the state's schools. . . . We cannot fail to recognize the intimate connection which at this day exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done, or can generally be better and more economically done, by such interstate companies rather than by domestic companies organized to conduct only local business."

In reaching these conclusions the Supreme Court would seem to have been governed by the same ideas which it had in mind in deciding cases relative to the power of Congress to regulate navigation. Thus in the case of The Daniel Ball,[1] to which several references have already been made, the court upheld the action of the United States government in demanding a license of a steamboat plying navigable waters — in this case a river wholly within a state — between two

[1] 10 Wallace, 557.

points in the same state. The decision was based upon the grounds: first, that the vessel was engaged in navigating the waters of the United States; and second, that she was carrying merchandise destined for points out of the state, although it was admitted that she "did not run in connection with, or in continuation of, any line of vessels or railway leading to other states." In rendering this decision the court said: —

"The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state, and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulations of Congress. It is said that if the position here asserted be sustained, there is no such thing as the domestic trade of a state; that Congress may take the entire control of the commerce of the country, and extend its regulations to the railroads within a state on which grain or fruit is transported to a distant market. 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 that 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."

In a recent circuit court of appeals case,[1] it was held that the rule laid down in The Daniel Ball should be applied to interstate commerce by land, and that a car which was used to aid in the transport of goods from a point outside of the state to a point within the state was engaged in interstate commerce, although the car itself, running on a narrow-gauge road which ended in the state, could not go outside of the state. The company was accordingly punished for not equipping such car with automatic couplers in accordance with the act of Congress.[2] The Supreme Court, however, has not yet decided whether a car which is admittedly engaged only in intrastate commerce is subject to the regulatory power of Congress, *e.g.* in the matter of safety appliances, where it is coupled to a car engaged in interstate commerce. If such a car is not regarded as subject to the power of Congress, the exercise by that body of its power to regulate interstate commerce will be rendered singularly ineffective; for automatic coupling by impact, as prescribed by Congress, is naturally impossible when one of the cars is not equipped with an automatic coupler; and, unless cars are actually coupled automatically by impact, the purpose of the regulation of Congress, viz. the protection of the safety of trainmen engaged in interstate commerce, will not be realized.

[1] United States *v.* Colorado and Northwestern Railway Company, 85 C. C. A. 27.

[2] The contrary view, however, seems to have been adopted in United States *v.* Geddes, 65 C. C. A. 320. Further, it has been decided by the Supreme Court that a steam shovel, so arranged as to travel on its own wheels by rail, and being hauled from a point in one state to a point in another state, is a car engaged in interstate commerce. Schlemmer *v.* Buffalo, etc., Railway Company, 205 U. S. 1.

For this reason a lower state court has held that the Safety Appliance Acts forbid coupling such a car to an interstate car in any way except by impact.[1]

It would seem, therefore, to be true that most regulations which might be passed as to the technical operations of railways engaged in interstate commerce would lose greatly in effectiveness if it were not possible to apply them also to vehicles of commerce engaged only in state commerce. Thus, if power brakes make for the safety of transportation, their absence in the case of cars exclusively engaged in state commerce would increase the dangers of interstate commerce where that was carried on over a railway engaged in both kinds of commerce. From many points of view, accordingly, effective regulation of interstate commerce would seem necessarily to involve the regulation of commerce which, when considered alone, is primarily and strictly state commerce. Where this is the case, it would seem that the power to regulate state commerce as incident to the effective regulation of interstate commerce should be recognized as possessed by Congress. Such would seem also to be the law, if the rules which have been applied to navigation are applicable to land commerce. The courts, as has been pointed out, already exhibit a tendency to adopt this view. The cases decided under the Anti-Trust Act [2] would seem to point in the same direction.

Do the same considerations which have determined the attitude of the courts concerning navigation

[1] Winkler *v.* Philadelphia and Reading Railway Company, 4 Pennewill (Del.) 80.

[2] See *infra*, pp. 79.

require a recognition of similar powers in Congress to regulate all commerce by land, whether it be interstate or foreign on the one hand, or intrastate on the other?

At first blush it may seem that the conditions in land commerce are different from those in navigation. But as Justice Brewer, referring to the suggestion that there is a difference between natural highways, such as navigable waters, and artificial highways, such as railways, said in Monongahela Navigation Company *v.* United States: —

"The power of Congress is not determined by the character of the highway. Nowhere in the constitution is there given power in terms over highways, unless it be that clause to establish post offices and post roads. The power which Congress possesses in respect to this taking of property springs from the grant of power to regulate commerce, and the regulation of commerce implies as much control over an artificial as over a natural highway. They are simply the means and instrumentalities of commerce, and the power of Congress to regulate commerce carries with it power over all the means and instrumentalities by which commerce is carried on. There may be differences in the modes and manner of using these different highways, but such differences do not affect or limit that supreme power of Congress to regulate commerce, and in such regulation to control its means and instrumentalities. We are so much accustomed to see artificial highways, such as common roads, turnpike roads, and railroads, constructed under the authority of the states, and the improvement of natural highways carried on by the general government, that at the first it might seem that there was some inherent difference in the power of the national government over them. But the grant of the power is the same. There are not two clauses of the constitution, each severally applicable to a different kind of highway. The fee of the soil in neither case is in the general government, but in the states or private individuals. The differences between the two

are in their origin — nature provides the one, man establishes the other." [1]

In this case it was held that Congress might in the exercise of its commerce power condemn and appropriate, with just compensation, the property, consisting of locks and dams on navigable waters, of a corporation organized under a state law to improve the waters of a river for purposes of navigation.

If again it be said that land routes are constructed either directly by the states or under their authority, the answer is that it is not necessary that they be so constructed. Congress has under the constitution the power to construct them or to authorize their construction. Thus in California *v.* Pacific Railroad Company,[2] it is said: —

"The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from state to state, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. . . . Of course the authority of Congress over the territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing states as well as territories, and employing the agency of state as well as federal corporations." [3]

[1] 148 U. S. 312, 342. [2] 127 U. S. 1, 39.

[3] In quoting this passage with approval the Supreme Court said, in Cherokee Nation *v.* Southern Kansas Railway Company, 135 U. S. 641: "Upon this point nothing more need be said." Cf. also Indiana *v.* United States, 148 U. S. 148, which impliedly recognizes the propriety of the action of Congress in providing for the construction of

Not only may Congress grant to state corporations the franchise to operate an interstate railroad,[1] but it may also itself create corporations in order more effectively to exercise one of its constitutional powers;[2] and it may itself exercise the power of eminent domain,[3] or it may give authority to exercise such a power to a corporation, even if such corporation is organized by a state.[4]

Up to the present time, as has been shown, Congress has very seldom taken action with regard to the construction of land highways, and has only very recently, as in the Safety Appliance Acts and the Employers' Liability Acts, attempted any regulation of the technical operations and liabilities of interstate carriers by land. But it would seem, as in the case of navigation, that its power of regulation should be recognized as extending to matters incidental to interstate commerce by land whenever their regulation is necessary to the effective regulation of such commerce, regardless of the fact that they are not, when considered by themselves, strictly interstate commerce.

It is conceivable, in these days of scientific invention, that methods of transportation may be devised which do not make use, as do railways, of specially constructed highways. Thus it would not require an

interstate highways; approved in Wilson *v.* Shaw, 204 U. S. 24, which goes far toward holding as constitutional the action of Congress in constructing the Panama Canal.

[1] This was decided in California *v.* Pacific Railroad Company, as a necessary part of the decision that California could not tax such a franchise.

[2] McCulloch *v.* Maryland, 4 Wheaton, 316.

[3] Kohl *v.* United States, 91 U. S. 367.

[4] United States *v.* Gettysburg Electric Railway Company, 160 U. S. 668.

extraordinary development of motor vehicles using ordinary highways, or of the recently invented airship, to provide us with means of communication which will make a distinction between interstate and intrastate vehicles as difficult and as inexpedient as in the case of vessels engaged in navigation. In order that travel and transportation may be safe under such conditions, all vehicles, whatever be their commercial character, must observe the same rules, and if a license be required, they must be licensed upon the same terms. If such conditions should ever arise, no one can doubt that Congress, with the approval of the Supreme Court, will assert its power to regulate commerce by land or by air to the same extent to which it has already regulated commerce by water.

To reach these results the Supreme Court will, if necessary, abandon the idea so recently expressed that the power to regulate navigation is based on the admiralty clause, and will resort to Chief Justice Marshall's view that this power is derived from the commerce clause. Any attempt to deny to Congress the right, for example, to insist that safety appliances shall be provided for all cars which use a highway capable of being used for interstate commerce, and to emphasize the distinction between an interstate and a state vehicle, when that distinction will tend to diminish the effectiveness of the power of Congress to regulate interstate commerce, indicates an inability to see the fundamental principle which the Supreme Court has steadily endeavored to apply in the long course of its history, viz. uniform regulation of all commerce, whether by water or by land. When the commerce clause was believed to be broader than

the admiralty clause, the court referred the power of Congress to regulate navigation to that clause. When by reason of the wider conception of navigable waters, which was developed through the exercise of the admiralty jurisdiction, the admiralty clause was regarded as vesting wider powers of regulation in Congress, resort was had by the court to that clause of the constitution. Such, at any rate, are the conclusions which we must draw from a study of the most recent cases determining the effect of the Anti-Trust Act of 1890.

III. The Power of Congress to regulate Commerce other than Transportation

Until the latter part of the nineteenth century the regulation by Congress of navigation was not extended, except in a few cases, to anything but the means and instrumentalities of transportation. Indeed, the only laws passed by Congress that went beyond such limits were those which fixed the liability to shippers of carriers by water and the legal relations of seamen. In the case of commerce by land, however, Congress has extended its regulation not only to carriers and shippers, but also to other persons who are engaged in foreign and interstate commerce. For while the decision that commerce included navigation, with all the implications which have been noted, laid the basis for the comprehensive powers of Congress to regulate transportation both by water and by land, a series of decisions limiting the powers of the states over commerce announced the principle that commerce was something more than mere transportation

and communication, and embraced, for example, sales and agreements with regard to sales. Thus the states were forbidden to tax salesmen of business houses in other states for the privilege of taking orders within their limits for goods.[1] Thus again the states were forbidden to prohibit the sale within their limits of what the Supreme Court recognized to be a legitimate article of commerce.[2] In this way it was recognized that commerce was something more than transportation, and in this way, naturally, the powers of Congress were really increased beyond the extent to which they had originally been exercised with regard to navigation.

When there sprang up throughout this country, as a result of the very general concentration of industry, great corporations and groups of corporations acting in harmony with each other, each great corporation or group of corporations apparently striving for a monopoly of the particular branch of industry to which its attention was devoted, the way was clear for Congress to extend, if it saw fit, its power of regulation to that part of foreign and interstate commerce not embraced within transportation. This field it attempted to enter by the Anti-Trust Act, passed in the latter part of the nineteenth century. This act made illegal any contract, combination, or conspiracy in restraint of trade or commerce with foreign nations or among the several states, thus laying down the rule that there should be freedom of competition in foreign and interstate commerce.

[1] Robbins *v.* Shelby County Taxing District, 120 U. S. 489.

[2] Leisy *v.* Hardin, 135 U. S. 100; Schollenberger *v.* Pennsylvania, 171 U. S. 1.

One of the first, if not the first, of the cases arising under this act was United States *v.* E. C. Knight Company,[1] in which it was held that the mere purchase by one manufacturing corporation of the plant of a competitor was not, and could not be, prohibited by the act of Congress, because manufacturing was not commerce, even if the articles manufactured were intended to be sent out of the state.

Since the decision of this case, a number of other cases have come before the court. Some of these have involved the legality of agreements of transportation companies, and are of interest not because they have in any way explained the meaning of commerce, — for the companies concerned were admittedly engaged in commerce, — but because they indicated an intention upon the part of the court to apply the act strictly, without considering whether the effect of the contract in question was or was not an unreasonable restraint of commerce.[2] Other cases, however, have attempted to define, or at any rate to describe, commerce, and have held that interstate commerce comprehends intercourse for all the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between citizens of different states, and that the power to regulate it embraces all the instrumentalities by which such commerce is conducted. Accordingly, agreements between corporations engaged in the manufacture, sale, and transportation of commodities, whereby

[1] 156 U. S. 1.

[2] Such cases were United States *v.* Trans-Missouri Freight Association, 166 U. S. 290; and United States *v.* Joint Traffic Association, 171 U. S. 505.

competition among them as to interstate commerce was avoided, have been held to be illegal under the Anti-Trust Act.[1] In the Northern Securities case[2] the formation of a holding company, which actually controlled through ownership of stock the operations of competing transportation companies, was held to be illegal; and in Continental Wall Paper Company *v.* Voight it was held that, if articles were sold in accordance with a contract made in restraint of commerce among the several states, the seller could not recover the purchase price.[3]

Some of the later cases decided in applying the Anti-Trust Act have also gone far in limiting the effect of the decision in the Knight case. Thus in Swift and Company *v.* United States,[4] the bill of injunction granted in the circuit court charged —

"a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live-stock markets of the different states, to bid up prices for a few days in order to induce cattlemen to send their stock to the stockyards, to fix prices at which they will sell, and to that end to restrict shipments of meat when necessary, to establish a uniform rule of credit to dealers, and to keep a black list, to make uniform and improper charges for cartage, and finally to get less than lawful rates from the railroads to the exclusion of competitors. It is true that the last charge is not clearly stated to be a part of the combination."

[1] Addyston Pipe and Steel Company *v.* United States, 175 U. S. 211; Montague *v.* Lowry, 193 U. S. 38; Continental Wall Paper Company *v.* Voight, etc., 212 U. S. 227.

[2] Northern Securities Company *v.* United States, 193 U. S. 197.

[3] This case was distinguished from Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540, where recovery was permitted on a contract of sale, not a part of the illegal combination into which the seller was admitted to have entered.

[4] 196 U. S. 375.

This bill was demurred to, and the case came before the Supreme Court on the demurrer, so that there was no question as to the facts. The Supreme Court modified slightly, but otherwise affirmed the decree of the lower court issuing the injunction. In the course of the opinion delivered by Justice Holmes, it was said, in answer to the objection that the bill did not set forth sufficient definite or specific facts: —

"The scheme as a whole seems to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. . . . Although the combination alleged embraces restraint and monopoly of trade within a single state, its effect upon commerce among the states is not accidental, secondary, remote, or merely probable. On the allegations of the bill the latter commerce no less, perhaps even more, than commerce within a single state is an object of attack."

Somewhat the same view was taken by the Supreme Court in the later case of Loewe *v.* Lawlor.[1] This case also came up on demurrer and involved the legality under the Anti-Trust Act of an alleged combination among workmen in the nature of a boycott following a strike. The averments of the complaint, as summarized by the court, were —

"that there was an existing interstate traffic between plaintiffs and citizens of other states, and that for the direct purpose of destroying such interstate traffic defendants combined, not merely to prevent plaintiffs from manufacturing articles then and there intended for transportation beyond the state but also to prevent the vendees from reselling the hats which they had imported from Connecticut, or from further negotiating with plaintiffs for the purchase and interstate transportation of such hats from Connecticut to the various places of destina-

[1] 208 U. S. 274.

tion. So that, although some of the means whereby the interstate traffic was to be destroyed were acts within a state, and some of them were in themselves as a part of their obvious purpose and effect beyond the scope of federal authority, still, as we have seen, the acts must be considered as a whole, and the plan is open to condemnation, notwithstanding a negligible amount of intrastate business might be affected in carrying it out. If the purposes of the combination were, as alleged, to prevent any interstate transportation at all, the fact that the means operated at one end before physical transportation commenced, and at the other end after physical transportation ended, was immaterial."

The court decided that "a case within the statute was set up and that the demurrer should have been overruled." It may therefore be said that in the case of commerce by land, whether transportation or not, as well as in the case of navigation, Congress has the right incidentally to regulate intrastate commerce where such regulation is necessary to the effective regulation of interstate commerce.

IV. The Power of Congress to prohibit Commerce

The rule which had been applied to navigation, viz. that Congress, in the exercise of its power to regulate, has the right to prohibit commerce, has been applied to both foreign commerce, not navigation,[1] and to interstate commerce by land.[2] In United States *v.* Delaware and Hudson Company, Justice White, in delivering the opinion of the court, said: "We then construe the statute as prohibiting a rail-

[1] Buttfield *v.* Stranahan, 192 U. S. 470.

[2] Champion *v.* Ames, 188 U. S. 321; United States *v.* Delaware and Hudson Company, 213 U. S. 366.

road company engaged in interstate commerce from transporting in such commerce articles or commodities" under conditions which are specified. "The question then arises whether, as thus construed, the statute was inherently within the power of Congress to enact as a regulation of commerce. That it was, we think, is apparent." He added that, if reference to authority were necessary, it was "afforded by a consideration of the ruling in the New Haven case to which we have previously referred." This was the case of the New Haven Railroad *v.* Interstate Commerce Commission,[1] in which it was held that the Interstate Commerce Act prevented "a carrier engaged in interstate commerce from buying and selling a commodity which it carried, in such a way as to frustrate the provisions of the act, even if the effect of applying the act would be substantially to render buying and selling by an interstate carrier of a commodity which it transported practically impossible."

"We do not say this," Justice White continued, "upon the assumption that by the grant of power to regulate commerce the authority of the government of the United States has been unduly limited on the one hand and inordinately extended on the other, nor do we rest it upon the hypothesis that the power conferred embraces the right absolutely to prohibit the movement between the states of lawful commodities or to destroy the governmental power of the states as to subjects within their jurisdiction, however remotely and indirectly the exercise of such powers may touch interstate commerce. On the contrary, putting these considerations entirely out of mind, the conclusion just previously stated rests upon what we deem to be the obvious result of the statute as we have interpreted it: that it merely and unequivocally is confined to a regulation which Congress

[1] 200 U. S. 361.

has the power to adopt and to which all preëxisting rights of the railroad companies were subordinated."[1]

The foregoing examination of the decisions upon the recent legislation of Congress regulating commerce would appear to yield the following results. In the first place, there has been an extension of the matter subject to Congressional regulation. Not merely transportation and its incidents, but also the sale and exchange of commodities, are commerce, while it would appear to be recognized that Congress may regulate purely intrastate commerce where its regulation is necessary to the effective regulation of interstate commerce. In the second place, the fact that the power to regulate implies the power, subject to other constitutional limitations, to prohibit, is given an emphasis which it had never before received apart from the regulation of navigation.

The emphasis which has been given by these recent decisions to the power to prohibit, included within the power to regulate, makes profitable the consideration of the question, whether that power may be used in such a way as to encourage if not to force upon the part of those desiring to engage in foreign or interstate commerce, conduct which Congress has not under the other provisions of the constitution the

[1] The hint given in this opinion, that the power of Congress to regulate commerce is subject to the ordinary constitutional limitations on the powers of the United States government, is made in a more forcible manner in Champion *v.* Ames, where it is distinctly stated that the commerce power of Congress "although plenary cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the constitution"; and in Monongahela Navigation Company *v.* United States (148 U. S. 312) and Adair *v.* United States (208 U. S. 161) it is held that the commerce power is subject to the limitations of the fifth amendment.

right to regulate. Congress would appear to have taken such a view of its powers in the case of a number of statutes which it has recently passed. Thus, as we have just seen, Congress, although it has no positive power to prohibit lotteries in the states, has both prohibited the use of the post office for the purposes of lottery business, and punished criminally the transportation in interstate or foreign commerce of lottery tickets, and its action has in both instances been upheld by the Supreme Court.[1] Congress has also provided in its pure food legislation that food products not complying with the provisions of the pure food law shall not be transported in foreign or interstate commerce. Its action has just been approved by the Supreme Court.[2]

In all these cases, however, as has been pointed out by Professor Willoughby,[3] both the purpose and the effect of the action of Congress has been the protection of the people who are engaging in commerce, *i.e.* the consumers of the articles of foreign and interstate commerce. The decisions of the Supreme Court, therefore, are not in his opinion authority for the proposition that Congress may use its power to regulate commerce for the protection of the producer of the articles by prohibiting their transportation in interstate or foreign commerce. For by so doing it is entering into a field of regulation not assigned to it by the constitution, but recognized as belonging to the

[1] *In re* Rapier, 143 U. S. 110; Champion *v.* Ames, 188 U. S. 321.

[2] Hipolite Egg Company *v.* United States October Term, 1910.

[3] "The Constitutional Law of the United States," p. 738. It would seem that the dictum from *Ex parte* Jackson, 96 U. S. 727, quoted in this passage, has been repudiated in the Lottery cases.

states. For this reason Professor Willoughby regards as improper from a constitutional point of view the bill recently introduced into the Congress of the United States forbidding the transportation in foreign and interstate commerce of articles made by child labor.

Is now this distinction a valid one, *i.e.* is it justified by our legislative and judicial history and precedents? Is Congress, in other words, limited in the exercise of its power to prohibit commerce to the protection of the consumer? In the first place, is such a rule the effect of the decisions with regard to the power to prohibit? It may be, of course, that the court had this idea in mind when it decided the Lottery and the Tea cases, but it certainly did not give expression to it. These cases, while only authority for the proposition that the power to regulate commerce may be exercised in the interest of the consumer, are in no way authority for the proposition that the power is thus limited. Furthermore, in one of the latest cases decided by the court upon this subject, viz. United States *v.* Delaware & Hudson Co.,[1] and which upheld the propriety of the exercise of the power to prohibit, the power was, as a matter of fact, exercised to protect the independent mine owner as well as the consuming public. Finally, in the Beef Trust case one of the important facts going to make up the conspiracy held to be prohibited by the act of Congress was the combination among the parties to the conspiracy not to bid against each other in the live-stock markets of the different states "except perfunctorily and without good faith" and by this means

[1] 213 U. S. 366.

"compelling the owners of such stock to sell at less prices than they would receive if the bidding was really competitive." The injunction made perpetual by the circuit court and as modified by the Supreme Court restrained the defendants from giving directions or from making agreements not to compete in the purchase of live stock.[1]

If, in the second place, we study our legislative history, and particularly the history of the adoption of the commerce clause, we can hardly fail to reach the conclusion that one of the most important purposes of those who framed the constitution was, by means of the commerce clause, and those clauses defining the taxing power of the federal government, particularly those with regard to the power to levy customs duties, to arrange the powers of government in such a way that a uniform, harmonious policy might be adopted which would, through the imposition of protective duties, encourage American manufactures.[2] Indeed, the first tariff act enacted by the Congress provided by the constitution contained in its preamble a statement of the necessity of imposing duties for "the encouragement and protection of manufactures." The protection of American manufacturers was therefore always regarded as constitutionally within the power of Congress, although manufactures are not of themselves a part of commerce. If the protection of the employer engaged in manufacturing is constitutional, it is difficult to see why similar protection may not be extended to the

[1] See Swift & Co. *v.* U. S., 196 U. S. 375, 400.

[2] See Brown, "The Commercial Power of Congress," pp. 16, 154, 160.

employed through the exercise of some general power admittedly granted to the federal government. Indeed, one of the arguments most commonly advanced in favor of the protective tariff is that it betters the condition of the laboring classes.

This being the case, the validity of the distinction between the consumer and the producer would seem to be more than doubtful as a criterion in determining the constitutionality of an attempted regulation of commerce by Congress. Of course, it is true that when a protective tariff is established, it is the power of taxation rather than the commercial power which is exercised, and that this power may be used to provide for "the general welfare of the United States."[1] But after all it is in both cases a power of the federal government which is exercised in the interest of the producing rather than the consuming classes; and if the purpose is proper in one case, it is difficult to see its impropriety in the other, unless such a purpose is expressly or impliedly forbidden. Furthermore, if it be said that the courts are not at liberty to inquire into the motives of the legislature in its exercise of the taxing power, it may be answered that the field of judicial inquiry is no wider in the case of the commerce power, since no limitation has been imposed upon the purposes for which that power may be exercised. In either case, it is a question of constitutional power rather than of legislative motive. In *In re* Rapier[2] the Supreme Court said: "It is not necessary that Congress should have the power to deal with crime and immorality within the states, in order to maintain that it possesses the power to for-

[1] Const. Art. I, Sec. 8. [2] 143 U. S. 110.

bid the use of the mails in aid of the perpetration of crime or immorality." Finally, attention may be called to the prohibition of the importation of convict-made goods, first made by Congress in the Tariff Act of 1890. This prohibition made as a result of the exercise of the commerce power has been unquestioned for twenty years and is evidently intended to protect the American producer rather than consumer.

It may perhaps be said that the recently decided case of Adair *v.* United States[1] is opposed to this view. In this case an act of Congress was declared to be unconstitutional which attempted to forbid certain corporations engaged in interstate commerce and their agents to discriminate against trade unions in the employment or discharge of men. Mr. Justice Harlan wrote the majority opinion, Mr. Justice McKenna and Mr. Justice Holmes dissenting. His argument was that the act violated the fifth amendment in depriving without due process of law the corporations concerned and their agents of their liberty to make contracts, and that it was therefore void unless it could be justified as a regulation of commerce. Mr. Justice Harlan then examined the question whether the act was a regulation of commerce, decided that the regulation in this manner of the contract of employment of one engaged in interstate commerce was not a regulation of commerce, and therefore held that the act was unconstitutional. The decision would thus appear to be an authority for the proposition that the conditions of employment of even those persons who are engaged in interstate

[1] 208 U. S. 161.

or foreign commerce are not commerce, and therefore not subject to the regulation of commerce.

It is submitted that the statement in the opinion that these conditions of employment are not commerce is not in harmony with other holdings of the court,[1] and was not necessary to the decision that the act of Congress under consideration was unconstitutional. This decision, if it may be called one, was made on the assumption that a regulation of Congress in conflict with the provisions of the fifth amendment is constitutional if it is a regulation of commerce. This is not the law. Regulations of Congress, which were admittedly regulations of commerce, have been either held or said to be unconstitutional because they deprived persons of their property without compensation or without due process of law.[2] The act of Congress under consideration in Adair *v.* United States was, therefore, even if considered to be a regulation of commerce, unconstitutional, because violative of the fifth amendment, and the statement in the opinion that the conditions of employment of one engaged in transportation are not included within the content of the commerce subject to the regulation of Congress is simply *obiter dictum.*

But even if Adair *v.* United States be considered decisive of the proposition that the conditions of employment are not commerce, the case is not an authority as to the power of Congress to prohibit the transportation in foreign or interstate commerce of specific articles. For the act of Congress under con-

[1] *Supra*, p. 61.

[2] Monongahela Navigation Co. *v.* United States, 148 U. S. 312; cf. Champion *v.* Ames, 188 U. S. 321.

sideration in Adair *v.* United States did not purport to be an exercise of the prohibitory power of Congress, but was, on the contrary, an attempt positively and directly to regulate a particular subject with the necessarily resultant effect of subjecting certain acts in all cases to criminal punishment. Such, however, is not the effect of the exercise of the power to prohibit. An act of Congress, *e.g.*, which prohibits the interstate transportation of articles made by child labor or under any conditions prohibited by Congress does not attempt to punish criminally or otherwise make illegal the employment of children or the violation of such conditions. It merely denies to articles made under the prohibited conditions the right or privilege of being an article of interstate commerce. The attempt on the part of Congress to regulate positively conditions of manufacture would probably in all cases be regarded as an excess of power because making illegal certain acts not subject to Congressional regulation. The prohibition to enter interstate commerce is, however, the exercise of a power admittedly within the jurisdiction of Congress, and the only objection to its use in the particular case is the motive by which Congress has been actuated.

While it must be admitted that the motives of legislatures are not entirely outside of judicial cognizance, at the same time it is to be remembered both that the courts enter upon their consideration with extreme reluctance and that the desire to encourage American manufactures and protect American laborers has been regarded as a justifiable motive for the exercise by Congress of its power to regulate foreign commerce as well as to impose taxes, although the

general subject of the regulation of manufacturing is not within the jurisdiction of the federal government.

Finally, it is to be remembered that the power of regulation may, like the power of taxation, properly be used either to destroy or to encourage. This is the reason why neither the states nor the general government may in our federal political system impose taxes upon the agencies of each other. This is again the reason why the police power of the states, which is in essence a power similar to the commerce power of Congress, though of wider content, has been recognized as properly used to destroy certain occupations, which prior to its exercise had been perfectly legitimate, but which in the opinion of the legislature had become dangerous to the morals and welfare of the people.[1]

We may say, then, that Congress has the power to prohibit the transportation in interstate and foreign commerce of any article made contrary to its injunction, provided its regulations do not offend against some other provision of the constitution. This conception of the power to prohibit as a part of the power of Congress to regulate commerce, is, it must be admitted, opposed to the ideas which have been developed within the last fifty or seventy-five years as to the content and legal position of that intrastate commerce which the judicial decisions rendered during that time have distinguished. Such commerce has been considered as outside of the jurisdiction of Congress and as necessarily remaining subject only to state regulation. Such a distribution of powers has been regarded as constitutionally necessary, even

[1] Cf. Mugler *v.* Kansas, 123 U. S. 623.

though its inevitable result in the competition now existing between the different industrial states is that any uniform regulation of industrial conditions will be forever impossible, no matter how urgent such uniform regulation may be.

It is quite significant of the extent to which conceptions of state powers have in the last half century been pushed that Congress is denied the right to exercise its power to prohibit as a part of its commercial power, because its exercise of the power will interfere with the power of the states to regulate manufacturing, and that in order to justify the denial of this power the courts are called upon to inquire not so much into the extent of a constitutional power as into the motives which have brought about its exercise. These conceptions are regarded as proper, although the constitution declares that the laws of Congress made in pursuance of the constitution shall be the supreme law of the land. Men's minds are peculiarly twisted when they argue, under a constitution containing such a provision, that a regulation purporting to be a regulation of interstate commerce is not such because it will necessarily have the incidental effect of regulating conditions of manufacture. The only reason why it will have this incidental effect is because in the economic conditions of the present day manufacturing has ceased to be a state, and has become an interstate, matter. A state with no factory legislation can, in the present conditions of interstate transportation, underbid a state which seriously attempts to improve the conditions of manufacturing. The denial by the federal government of the right of the states to protect their laboring population against

competition based on cheaper and lower conditions of labor, really makes it incumbent on the federal government to exercise its constitutional powers to the fullest extent in the interest of the laboring classes which the states no longer can protect.

The close connection existing thus at the present time between interstate commerce and intrastate manufacturing is not therefore an argument that a regulation of Congress is not a regulation of the commerce subject to its jurisdiction because such a regulation has the incidental effect of fixing the conditions of manufacturing. It is rather an argument in favor of the direct and positive regulation by Congress of intrastate manufacturing on the theory adopted by the Supreme Court in its determination of the extent of the powers of Congress relative to navigation, and now being cautiously extended to other parts of commerce, viz. that Congress may regulate anything whose regulation is necessary to the effective regulation of foreign or interstate commerce.

If this is a correct view of the matter, Congress may, through the exercise of its power to prohibit the interstate or foreign transportation of articles made contrary to the provisions of its legislation, exercise an enormous influence in securing uniform regulation of all the conditions of manufacturing in this country. It may not perhaps positively regulate under criminal penalties these conditions, but by the passage of a factory or labor code whose observance would be necessary by any manufacturer desirous of engaging in interstate commerce, Congress could practically banish from our soil evil conditions of labor, so far as such conditions can be affected by legislation, just as

it has banished the demoralizing lottery and poisonous, impure, and adulterated food products.

V. The Power of the States to prohibit the Introduction and Sale of Articles

It has been pointed out that a state has no power, in the absence of Congressional action, to prohibit the sale in the state of what the Supreme Court considers to be an article of foreign or interstate commerce. Such an article is one which, in the opinion of the court, is made the subject of purchase and sale in the ordinary course of trade, and is at the same time in the original package in which it has been brought into the state and in the hands of the person who brought it in.[1] But it has been held that Congress may constitutionally provide that such an article may, on its arrival in the state, be subject to the police power of the state.[2] Congress may therefore subject to state regulation any article of foreign or interstate commerce.

Further, the Supreme Court has indicated in a number of cases that, notwithstanding the grant of the commerce power to Congress, the states have the right to prohibit the introduction or sale within their borders of any article which by reason of its unmerchantable condition they deem prejudicial to health or morals, and which because of this unmerchantable condition is not an article of commerce.[3]

[1] Leisy *v.* Hardin, 135 U. S. 100.

[2] *In re* Rahrer, 140 U. S. 545.

[3] Cf. Hannibal, etc., Railroad Company *v.* Husen, 95 U. S. 465, and Bowman *v.* Chicago and Northwestern Railway Company, 125 U. S. 465, where it is said that a state may exclude persons and animals

The court has also held that a state may prohibit the sale in the state of an article which by reason of adulteration is calculated to deceive an unwary purchaser, although the article be sold in the original package and by the person who brought it into the state.[1]

In most of the cases recognizing this power in the states, the state had prohibited the sale of the article in the absence of Congressional action as to the article in question. In Plumley *v.* Massachusetts, however, the article the sale of which was prohibited was oleomargarine which had been manufactured, packed, and branded in accordance with an act of Congress regulating the manufacture, sale, importation, and exportation of oleomargarine and imposing a tax thereon. Notwithstanding this action of Congress, the Supreme Court held that, because the oleomargarine in question was colored to imitate yellow butter manufactured out of unadulterated milk or cream, the state might prohibit its sale within the state.[2] It may accordingly be said that Congress

suffering from contagious or infectious diseases, as well as convicts or lunatics or other persons liable to be a public charge; also The License Cases, 5 Howard, 504, 600, where it is intimated that the state may exclude an article which " from its nature does not belong to commerce, or if its condition from putrescence or other cause is such when it is about to enter the state that it no longer belongs to commerce." See also Asbell *v.* Kansas, 209 U. S. 251.

[1] Plumley *v.* Massachusetts, 155 U. S. 461. Cf. also Patterson *v.* Kentucky, 97 U. S. 501, and Crossman *v.* Lurman, 192 U. S. 189.

[2] In this case four Justices dissented, and, in the later case of Schollenberger *v.* Pennsylvania, 171 U. S. 1, it was held that the state might not prohibit the sale of all oleomargarine. In this last case, the court refers to the act of Congress with reference to oleomargarine and says: "Any legislation of Congress upon the subject must of course be regarded by this court as a fact of the first impor-

may not, in the exercise of its power to regulate commerce, force a state to permit the sale within its borders of an article which by reason of its condition is deleterious to the public health, or by reason of its appearance is liable to deceive the unwary purchaser, and which, therefore, is not an article of commerce.[1]

Finally, it is to be remembered that Congress does not possess any police power apart from that which is incident to its power over interstate and foreign commerce. Thus it has been held that, while Congress may punish any one who brings to the United States any alien woman for an immoral purpose, it may not punish one who keeps or harbors such a woman within three years after she is brought here.[2]

VI. Conclusions

In summarizing the conclusions which may be drawn from an examination of the decisions of the Supreme Court upon the power of Congress to regulate commerce with foreign nations and among the several states, it seems advisable to present them under the following heads: first, what is commerce; second, what is interstate commerce; and third, what is the meaning of the word "regulate."

(1) Commerce, as a subject of Congressional regulation, embraces, in the first place, transportation

tance. If Congress has affirmatively pronounced the article to be a proper subject of commerce, we should properly be influenced by that declaration."

[1] Cf. also Patapsco Guana Company *v.* North Carolina Board of Agriculture, 171 U. S. 345, and Reid *v.* Colorado, 187 U. S. 137, which recognizes the right of the state in the absence of action by Congress to pass bona fide nondiscriminating inspection laws.

[2] Keller *v.* United States, 213 U. S. 138.

both by water and by land and the means and instrumentalities of transportation. Commerce therefore includes not merely the act of transporting persons or articles from one place to another, but both natural and artificial land and water routes and their terminals, such as harbors, the vehicles by which the act of transporting is performed, and the persons, both carriers, shippers, and consignees on the one hand, and employers and employed on the other, engaged in the act of transporting. Commerce embraces, in the second place, purchases and sales and the negotiations entered into in order to lead thereto of all articles ordinarily made the subject of trade, and agreements for such purchases and sales, both between the sellers among themselves and the purchasers among themselves on the one hand, and the sellers and purchasers with each other on the other hand. Commerce, therefore, does not embrace manufacturing; although the tendency of the courts is to include manufacturing where its regulation is necessary to the effective regulation of what is admittedly commerce. Commerce does not embrace the ordinary internal police of the states, not incidental to commerce transcending the borders of a single state; although there are a few cases which hold that Congress may forbid, in the exercise of the commerce power, acts, such as the plundering of wrecked vessels, even where such plundering has taken place above high-water mark and therefore within the jurisdiction of a state, and agreements not to compete in the purchase of articles entering into commerce.

(2) Commerce among the states is, first, that commerce, as above described, which originates in one

state and terminates in another state; and second, that commerce, as above described, which originates and terminates in the same state and the matters incident to that commerce, where the regulation of such commerce and those incidents is necessary to the effective regulation by Congress of what is recognized to be interstate commerce.

(3) The power to regulate commerce includes the powers: first, to construct or provide, even by the chartering of corporations, for the construction of commercial routes by water and by land, and to lay down the rules to be observed by those making use of such routes; second, to determine the legal, including the contractual, relations which shall exist between shippers and carriers, between carriers and their employees, between sellers, between purchasers, and between sellers and purchasers; third, to prohibit commerce in certain articles and certain methods of carrying on commerce and to license those engaged in commerce; and fourth, to subject interstate commerce, in certain respects, to regulation by the states. The exercise of all these powers is, however, subject to the limitations of the constitution, such as the fifth amendment, protecting private rights. Furthermore, the power to regulate does not include the right positively to regulate purely intrastate matters which have no relation to interstate commerce, nor the right to force upon a state an article which by reason of its condition is not an article of commerce.

Finally, it is to be observed that there has apparently been less objection, both on the part of the public, as evidenced by the smaller number of litigated cases, and on the part of the Supreme Court, as evi-

denced by its decisions, to accord to Congress a wide power over navigation than to accord to it such a power over land commerce. The explanation is probably to be found, in part, in the fact that the power of Congress over navigation was defined by, or at least under the influence of, Chief Justice Marshall, whose belief in wide national powers is so well known, and, in part, in the desire of the people of the states that Congress should improve harbors and waterways.

The attempt has been made in this chapter to show that there is no real basis, either in the nature of the subject or in the decisions of the Supreme Court, for a distinction between commerce by water and commerce by land, and to indicate that the Supreme Court will probably be forced by the necessities of the situation to apply to commerce by land the same rules which it has in the past applied to commerce by water, even if thereby the field which we have become accustomed to regard as subject to state rather than to Congressional action be seriously narrowed and that popularly recognized as in the jurisdiction of Congress be greatly enlarged. Indeed, it is not beyond the bounds of probability that the distinction between interstate and intrastate commerce on land will be abandoned as it has been practically abandoned in the case of navigation.[1] If the distinction between

[1] The fineness of distinction to which the Supreme Court is now sometimes forced in order to differentiate interstate from intrastate commerce is well exemplified by the cases of McNeill *v.* Southern Railway Co., 202 U. S. 543 and Missouri Pacific Railway Co. *v.* Larrabee Flour Mills Co., 211 U. S. 612. In the former the hauling of cars loaded with interstate commodities to a private siding was treated as interstate commerce. In the latter, the hauling of empty cars to a private siding for the purpose of loading them with a com-

interstate and intrastate commerce is abandoned, a great influence will be available for making our political system conform to existing economic conditions, and necessary political centralization can be secured without that formal amendment of the constitution which now seems to be so nearly impossible.

modity to be shipped out of the state was held to be intrastate commerce. In the former the state had no jurisdiction; in the latter it had.

CHAPTER III

THE POWER OF CONGRESS TO CHARTER INTERSTATE COMMERCE CORPORATIONS[1]

THE main thesis of this chapter is that Congress has authority, first, to create commercial corporations to carry on an interstate and foreign business, to confer upon such corporations authority to manufacture articles to be passed into such commerce and to exempt all their operations and private-legal relations from any state control whatsoever; and second, to license individuals as well as corporations for a like purpose and to confer upon them similar exemptions from state control.

This, however, is only a part of a wider power, viz. the power of Congress to create a system of interstate and foreign commerce and to license the production of articles to be passed into such commerce under exclusively federal control. This wider power includes also the power of excluding from such commerce all individuals or corporations not conforming to the conditions laid down by Congress, as well as all goods not produced in conformity to such conditions, it being understood, always, that these conditions

[1] This chapter did not constitute one of the Kennedy Lectures, but is here added to complete the discussion of the topics considered in Chapter II and elsewhere in the book. It was prepared under the direction of the author by Mr. Sidney D. Moore Hudson.

must not violate constitutionally protected private rights.

All discussion of the constitutionality of laws passed by Congress providing for the erection of corporations to carry on interstate or foreign commerce must start from the controversy which was waged with regard to the first and second United States banks, and which received its judicial determination in the case of McCulloch *v.* Maryland,[1] affirming the constitutionality of the second bank. Before considering this decision, however, it will be well to examine Hamilton's cabinet opinion, which convinced Washington of the constitutionality of federal incorporation as applied to the first bank. The similarity of the views of Hamilton and Marshall, often extending to a very close agreement of language, reveals Marshall's indebtedness to Hamilton. This fact gives to Hamilton's argument an almost judicial authority, in addition to its intrinsic value as the best discussion of federal incorporation to be found in our political and juristic literature.[2]

The essential basis of Hamilton's argument is to be found in the proposition — "*inherent* in the very *definition* of government" — "that every power vested in a government is in its nature *sovereign*." [3] From this fact it follows that "all the *means* requisite and fairly applicable to the attainment of the *ends* of such power" may be used in carrying it into effect,

[1] 4 Wheaton, 316.

[2] Cf. Farmers' National Bank *v.* Deering, 91 U. S. 29. Here the court couples the reasoning of Hamilton with that of Marshall as affording justification for the principle of the National Bank Act of 1864.

[3] Hamilton's Works, Federal Edition, Vol. III, p. 446.

provided they are not precluded by express restrictions and exceptions found in the constitution. Accordingly, there can be no "abstract" question as to the power of the United States to erect corporations. Such erections are an unquestionable incident of sovereign power.[1] The only limitation upon the power is found in the fact that corporations chartered by the United States must bear a relation to the attainment of those objects over which the national government has authority. An illustration of an improper object for the erection of a federal corporation is the superintendence of the police of Philadelphia, since the national government has no control over that matter.[2] Among the illustrations of proper objects are foreign and interstate commerce, because "it is the province of the federal government to *regulate* these objects, and because it is incident to a general *sovereign* or legislative power to *regulate* a thing, to employ all the means which relate to its regulation to the best and greatest advantage."

The power of erecting a corporation is necessarily implied in the power of regulating an object, since a corporation is but a "*quality, capacity,* or *means* to an end," and not "some *great, independent, substantive thing.*"[3] Nor is there requisite any particular degree of necessity as a means to an end, but only a "relation between the nature of the means employed towards the execution of a power, and the object of that power." Again, Hamilton formulates as a criterion of constitutionality the principle that "if the *end* be clearly comprehended within any of the

[1] Hamilton's Works, Federal Edition, Vol. III, p. 448.
[2] *Ibid.*, p. 450.
[3] *Ibid.*, p. 451.

specified powers, and if the measure have an obvious relation to that *end*, and is not forbidden by any particular provision of the constitution, it may safely be deemed to come within the compass of the national authority."[1]

Finally, Hamilton cites, as a clear illustration of the validity of federal incorporation, the supposed case of a company formed for the development of a new branch of foreign trade. Such an incorporation is a means in general use among foreign countries, and, Hamilton inquires, why may not the United States "*constitutionally* employ the *means*, usual in other countries, for attaining the *ends* intrusted to them"?[2]

On the broad basis of Hamilton's argument rests Marshall's opinion, in the case of McCulloch *v.* Maryland.[3] The key to Marshall's reasoning is to be found in the proposition that the general powers intrusted to the federal government, with their vital connection with the well-being of the nation, may be regarded as carrying with them ample means for their successful execution. He points out that "the power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means." Applied to the case before the court, this means that the erection of a corporation not being forbidden, such an erection is permissible whenever "essential to the beneficial exercise of those powers." The words "necessary and proper" include "any means calculated to produce the end."[4]

[1] *Ibid.*, p. 458.
[2] *Ibid.*, p. 487.
[3] 4 Wheaton, 316.
[4] *Ibid.*, p. 413.

This meaning of "necessary" is enforced by the distinction between a constitution intended for permanence and adaptability to changing circumstances and a mere legal code.[1] A narrower meaning would deprive the legislature of discretion and the power to take advantage of experience and to fit its legislation to changing circumstances. After pointing out that the "necessary and proper" clause purports, from its location in the constitution, to be a power granted and not a limitation upon congressional authority, Marshall concludes this part of the argument with these trenchant words: —

"But we think the sound construction of the constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[2]

Marshall then shows that a corporation is an appropriate means for carrying out the powers intrusted to the federal government, and that a banking corporation is an appropriate fiscal instrument. It should be noted here that Marshall, like Hamilton, does not regard the bank as a peculiar case standing upon any unusually strong ground, but holds rather that the power to charter corporations "may be employed indiscriminately with other means to carry into execution the powers of the government."[3]

[1] 4 Wheaton, 415.

[2] *Ibid.*, p. 421.

[3] *Ibid.*, p. 422. It will be noted that there is here no suggestion of any superior sanctity attached to a corporation which has a "political" connection with the government.

The degree of utility or necessity is not a matter for judicial consideration. "Where the law is not prohibited and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground." It may accordingly be affirmed that, where the measures of Congress have reasonable relation to the attainment of the legitimate objects of the federal government, their constitutionality will be recognized.

In the case of Osborn *v.* The Bank of the United States,[1] Marshall considers an argument which, he thinks, if representing the true facts regarding the nature of the bank, not only would justify taxation by the states of the operations of the bank, but would also show that the incorporation of the bank was unconstitutional. He accordingly once more examines the grounds upon which the constitutionality of the incorporation may be upheld. In this discussion some phrases appear which may easily give rise to the idea that these grounds are much more limited than we have found them to be in the above discussion of the McCulloch case, and that something in the nature of a distinctly "political" connection between the government of the United States and any corporation erected by it is essential. Careful consideration, however, will show any such idea to be unfounded, and will demonstrate the invalidity of all those arguments against any federal incorporation which are founded upon the "private" nature either of the motives actuating the company or of the operations which it

[1] 9 Wheaton, 738.

carries on, provided that the purpose of the government is the facilitation of its control over, and the better regulation of, any matter intrusted to its care.

The position of appellant's counsel in this case, as stated by Marshall, was that "the right of a state to tax the bank is laid in the supposed character of that institution. The argument supposes the corporation to have been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and profit for its great and principal object."[1] It was alleged[2] that "banking is, in its nature, a private trade . . . the whole is a private concern; the capital is private property; the business is a private and individual trade; the convenience and profit of private men the end and object." The bank was classed with "insurance, canal, bridge, and turnpike companies," in all of which cases the corporations were alleged to be private, although "the uses may, in a certain sense, be called public." The bank was carefully distinguished from the post office, the business of which "is of a public character" and the charge of which "is expressly conferred upon Congress by the constitution." It was alleged that, although the subordinate agents of the post office are invested with the character of public officers, the contractors who carry the mails are not, and that the horses and carriages which they use for this purpose are liable to state taxation, since they are used for the private profit of the contractor. And the case of the bank is alleged to be even more clear, since the chief use of the horses and wagons is for

[1] 9 Wheaton, p. 859.

[2] Argument of Mr. Hammond; *ibid.*, pp. 766 *et seq.*

public business, while the public business of the bank is subordinate and incidental.

The argument for a distinction (resting upon the basis of a company's motive as being primarily or exclusively the securing of private gain) between instrumentalities of the government (using "instrumentality" in a narrow sense) and private corporations is certainly here set forth with all possible cogency. Marshall indeed grants that the conclusion reached would result from the premises assumed, but he denies the validity of the premises. The bank is to be considered "as a public corporation, created for public and national purposes."

"That the mere business of banking is, in its own nature, a private business and may be carried on by individuals or companies having no political connection with the government is admitted; but the bank is not such an individual or company. It was not created for its own sake or for private purposes. It has never been supposed that Congress could create such a corporation. The whole opinion of the court, in the case of McCulloch *v.* The State of Maryland, is founded upon and sustained by the idea that the bank is an instrument which is 'necessary and proper for carrying into effect the powers vested in the government of the United States.'"

Certain phrases in the above quotation might possibly appear, *prima facie*, to support the theory that federal incorporation must be very closely limited in scope. But more careful examination will show that such an interpretation would be erroneous. Marshall's statement that the bank is not to be considered as a private corporation, with private gain as its principal object, means simply that the purpose of Congress in incorporating the bank was, not to aid the shareholders in securing a private profit, but rather to

secure a useful means for providing for the national welfare in a matter intrusted to the care of Congress. The context, particularly the admission that banking is in its own nature a private business, demonstrates this. Furthermore, it would be absurd to understand Marshall to deny that the principal object of the shareholders was private gain. Nor can he mean, what was not true, that the principal business of the bank was directly governmental and its private business only incidental. The point of Marshall's contention is that the bank "was not created for its own sake . . . [but] is an instrument . . . for carrying into effect the powers vested in the government of the United States." Private gain is indisputably the motive of the stockholders, but the criterion of constitutionality is rather the purpose of Congress, and this is a public purpose.

A more plausible argument may be founded upon Marshall's use of the word "political." What is the true import of Marshall's distinction between banking as carried on by "individuals or companies having no political connection with the government" and banking as carried on by individuals or companies which do have a political connection? This distinction may have either of two meanings.

It may mean that the bank may be regarded as a quasi-governmental body, performing certain ordinary governmental functions which must otherwise be performed by the government itself. If this interpretation correctly represents Marshall's meaning, it does not at all follow that he means to imply that no federal incorporation is permissible where the corporation does not discharge this kind of political function.

In this decision he is explaining further his opinion in McCulloch *v.* Maryland, and no such limitation is to be found in that opinion. The argument there is that federal incorporation may be used indiscriminately in the carrying into effect of the powers vested in the federal government. The power to incorporate is an incident of sovereignty, no more limited in the case of the United States than in that of the states; and the states are, of course, not limited in their creation of corporations to those which are to perform quasi-governmental functions. If anything further were needed to show that, if Marshall is using the word "political" in this very narrow sense, he is not intending to indicate a limitation upon the general federal power of creating corporations, but is merely giving the most striking particular justification of the bank, corroboration is found in his assertion that "it has never been supposed" that Congress could create such a corporation as a banking corporation having no "political" connection with the government. Considering the evident close dependence of Marshall's argument upon that of Hamilton and the celebrity of Hamilton's opinion, it is past all belief that Marshall could assert that anything which formed the very core of Hamilton's argument "has never been supposed."

It might accordingly be conceded that Marshall used the word "political" in this narrow sense without at all weakening the broad basis of his own and Hamilton's arguments. It would certainly seem, however, that he used the word in a much wider sense, covering the entire field of the relation of federal incorporation as a means to the accomplish-

ment of ends within the purview of the federal government. Thus used, "political" would be synonymous with "public," connoting the existence of a public motive. Thus interpreted, Marshall's statement means simply that any incorporation must bear a real relation to the proper regulation of some matter intrusted to the care of the federal government. It is submitted that this interpretation of Marshall's use of the word "political" is in more obvious agreement with the context, which shows it to have been an elaboration of the doctrine of McCulloch *v.* Maryland. Furthermore, it is a natural signification of a word admittedly ambiguous and capable of diverse meanings.

Marshall remarks that the right of doing a private business is essential to the usefulness of the bank; that

"if it be as competent to the purposes of the government without as with this faculty, there will be much difficulty in sustaining that essential part of the charter. If it cannot, then this faculty is necessary to the legitimate operations of government and was constitutionally and rightfully engrafted on the institution."[1]

This principle that whatever powers are essential, in order that a corporation may be completely fitted to serve the ends for which the government creates it, may be constitutionally conferred, is of distinct applicability to the conferring of the power upon federal corporations, created to engage in interstate commerce, to manufacture the products which are to pass into such interstate commerce; since otherwise the

[1] 9 Wheaton, 864.

ends which make the incorporation legitimate cannot be efficiently secured.

Marshall points out also that it is not the corporate character of the bank which exempts its operations from state control. The exemption arises because "the business of the bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government. Its corporate character is merely an incident which enables it to transact that business more beneficially." [1]

Any operations of a federal corporation or licensee which are essential to the fulfillment of the national purpose for the sake of which the charter or license is granted are exempt from state control. The question of such essentiality is primarily one for legislative determination.[2] But Marshall's own criterion is simply the fact that any particular power conferred gives to the corporation a superior fitness as an instrument for the carrying into effect of national purposes. With regard to a particular argument of counsel, he points out that the acts of federal contractors in fulfilling their contracts are not within state control.

Considering the decision as a whole, it may be said that it does not at all limit the principles advanced in Hamilton's cabinet opinion and laid down judicially, in essentially the same breadth, by Marshall in McCulloch *v.* Maryland. In meeting the issue raised in Osborn *v.* The Bank of the United States, as to the effects of the motive of private gain as animating the company, it carries the argument explicitly another step in advance. Finally, in the discussion of the powers which may constitutionally be conferred in

[1] *Ibid.*, p. 862. [2] *Ibid.*, p. 864.

order to create a satisfactory instrumentality for the working out of proper national purposes, it affords solid ground upon which to rest the constitutionality of legislation conferring power to manufacture upon federally erected interstate commerce corporations.

The constitutionality of the National Bank Act of 1864 was maintained by the court in the case of Farmers' National Bank *v.* Deering.[1]

Aside from the question of national banks, discussion of the power of Congress to charter corporations has been occasioned chiefly by the federal incorporation of, or the grant of franchises to, railroad companies, particularly in connection with the development of the system of Pacific railroads.

In the Pacific Removal case,[2] the court held that the Union Pacific Railroad Company was "strictly a corporation of the United States." It further held that, when powers granted by the federal government are inextricably blended with powers granted by the states, the control of Congress is determinative in regard to the whole matter. In the case of California *v.* Central Pacific Railroad Company,[3] the court held not only that the company held federal franchises, but also that the grant of such franchises was constitutional. It held, further, that the authority of Congress to grant such franchises does not rest solely upon its power over postal and military matters, but also — and upon this ground the court laid most stress — upon the commercial power. The court said: —

"It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several states . . . had authority to pass these laws. The power to construct

[1] 91 U. S. 29. [2] 115 U. S. 15, 16. [3] 127 U. S. 1.

or to authorize individuals or corporations to construct national highways or bridges from state to state is essential to the complete control and regulation of interstate commerce."

The court pointed out that under earlier economic conditions, when commerce by water was most important, many statesmen doubted the power to establish ways of communication by land. But with the development of land commerce "a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject" — a power "very freely exercised, and much to the general satisfaction," in the creation of the Pacific railroad system.

If due consideration is given to the opinions of Hamilton and Marshall, it can hardly be doubted that, if Congress can grant franchises, it can create corporations, it being understood in either case that the end for which the power is exercised is one within the competence of Congress. It should also be noted that, both in the case just considered [1] and in the later case of the Central Pacific Railroad Company *v.* California,[2] it is explicitly recognized that a railroad company having federal franchises is an agent of the federal government. And, as the commerce power is cited as the chief authorization for such a grant, it is evident that the term "agent" may include a corporation erected for the sake of the facilitation and regulation of interstate commerce.[3]

[1] *Ibid.*, p. 40. [2] 162 U. S. 91, at pp. 124, 125.

[3] Federal incorporation has also been employed in the case of a bridge company. In the case of Luxton *v.* North River Bridge Company (153 U. S. 525) the incorporation of the company and the authorization of the construction by it of a bridge across the North River

Before summarizing and applying the conclusions thus far reached regarding the federal power of establishing corporations, it is well to allude briefly to the views of the Supreme Court as to the effect upon constitutional interpretation of changing industrial and commercial conditions. In the case of *In re* Debs,[1] the court points out that the "basis upon which rests its [*i.e.* the federal government's] jurisdiction over artificial highways is the same as that which supports it over the natural highways," notwithstanding the fact that this jurisdiction had previously been exercised almost exclusively over the latter. The court says: —

"Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon and on water by canal-boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so is it with the grant to the national government of power over interstate commerce. The constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop." [2]

The same principle is elaborated with perhaps even greater force and clarity by Justice Moody, in his dis-

between New York and New Jersey was upheld as a valid exercise of the commercial power. The court states, as resting "upon principles of constitutional law, now established beyond dispute," the proposition that Congress may create a corporation "for the purpose of promoting commerce among the states."

[1] 158 U. S. 564.

[2] 158 U. S. 564, at pp. 590 *et seq.*

senting opinion in the Employers' Liability cases.[1] After discussing the development of commerce, he says: —

"The different kinds of commerce described (foreign, Indian, interstate), have the common qualities that they are more extensive than the jurisdiction of a single state and liable to injury from conflicting state laws and thereby are all distinguished from the purely internal commerce of the states. . . . It was not reasonably to be expected that a phenomenon so contrary to the experience of mankind, so vast, so rapidly developing and changing, as the growth of land commerce among the states, would speedily be appreciated in all its aspects, or would at once call forth the exercise of all the unused power vested in Congress by the commerce clause of the constitution. Such a phenomenon demands study and experience. The habit of our people, accentuated by our system of representative government, is not so much in legislation to anticipate problems as it is to deal with them after experience has shown them to exist. So Congress has exercised its power sparingly, step by step, and has acted only when experience seemed to require action."[2]

This is the method of constitutional interpretation which alone can preserve the true meaning and intent of the constitution. If it be not followed, the bankruptcy of American constitutional interpretation, as its foundations were established by Chief Justice Marshall, will in effect have arrived, and the intent of the constitution will have been sacrificed to a narrowness of vision which cannot be dignified even by calling it a worship of the letter of the constitution.

It is evident that what has been said applies not only to the development of new forms of commerce, but also to changes which affect the distinction be-

[1] 207 U. S. 463, at pp. 519 *et seq.* It should be noted that in this portion of his opinion Justice Moody is not dissenting from the prevailing opinion.

[2] *Ibid.*, p. 523.

tween interstate and intrastate commerce. Under the conditions of 1911 many matters are properly interstate which in 1789 would have been purely or principally intrastate. This development must be taken into consideration, and all commerce which is, under existing conditions, "more extensive than the jurisdiction of a single state and liable to injury from conflicting state laws" must be recognized as properly under the jurisdiction of Congress.

On the basis of the conclusions thus far attained, it is proposed to examine, first, the constitutionality of the erection of federal corporations having the power to engage in interstate commerce. The constitutionality of granting to such corporations the power to manufacture will be discussed later.

In order to show the constitutionality of the erection of federal corporations having the power to carry on any sort of interstate commerce — the particular cases of water and land transportation having already been decided affirmatively — about all that seems necessary is the restatement of the principles deduced from the cases above examined regarding the federal power of incorporation, together with a brief statement of the conditions under which alone a really effective control of interstate commerce can be established.

Those principles may be recapitulated as follows: (1) A corporation is not an independent end, but simply a means of attaining an end. (2) The creation of a corporation is not a great and unusual matter, requiring special justification, but is rather an ordinary incident of the exercise of sovereignty, sovereignty being used in the sense of supreme legislative power over a given matter. (3) The government of the

United States, having such sovereignty with regard to the matters intrusted to its care by the federal constitution, may exercise with regard to such matters the power of erecting corporations. (4) The sole tests of the validity of such federal incorporations are that the Congressional purpose must be the better exercise of power over such matters, that the acts of incorporation must have an actual relation thereto sufficiently close to indicate that such better exercise of power is the real purpose of Congress, and, finally, that the action of Congress does not conflict with any constitutional prohibition. (5) Congress has such sovereignty or "plenary power" to regulate interstate and foreign commerce; and in the exercise of this power it may accordingly erect, as in fact it has erected, corporations. (6) The validity of the erection of federal corporations being subject to no tests other than those above mentioned, and Congress being the proper judge of the degree of necessity for the erection, no special limitations, such as the existence of a strictly "political" connection between the government and the corporation erected, can be assumed as a necessary prerequisite to Congressional action. It is submitted that these principles are contained in the decisions above examined.

It need then be shown merely that corporations carrying on interstate commerce have in fact a relation to the regulation of interstate commerce sufficiently close to indicate that such regulation may reasonably be regarded as the purpose of Congress in the erection of the corporations. Now if corporations may be erected, as has been affirmed in the case of railroad and bridge companies, in order to facilitate

the carrying on of interstate commerce through the provision of more adequate instrumentalities thereof, why may they not be erected in order to facilitate it by providing a more efficient organization for those who carry it on — a result which incorporation indubitably accomplishes? If it be contended that there is an essential difference between bridge and railroad companies and trading companies, inasmuch as the former have a peculiarly public nature, and the latter are supposedly in less need of facilitation and control, it need only be replied that the degree of necessity is a matter for the consideration of Congress.

Although the facilitation of interstate and foreign commerce, through the provision of a superior form of organization for the use of those engaged therein, would of itself amply justify federal incorporation, there is another and, if possible, still clearer justification. The public utility of an efficient national control over persons engaged in interstate and foreign commerce is obvious. The confusion, not to say chaos, which results from state incorporation coupled with attempted federal control, has been amply demonstrated. And no remedy save national incorporation has been discovered, nor, as may be confidently affirmed, can be discovered, which will save, for the benefit of the people of the United States, the "big" corporation with its nation-wide — indeed world-wide — ramifications and at the same time subject it to an efficient governmental control. It is not necessary to discuss alternative plans; since, even admitting that any of them might prove satisfactory, Congress is recognized to possess the right to a choice of means.

Suggestions, heard in some quarters, that Congress

abdicate its functions and responsibility as to interstate commerce, that the principles approved in regard to the liquor trade in the Rahrer case [1] be accepted as governing Congressional action in other commercial matters and that a clear field be left to the state police power, are, aside from serious constitutional objections, chiefly interesting as illustrating the utopianism of their exponents. Few, if any, wilder ideas have ever been advanced in American politics than the notion that effective concerted action can be secured from the several states with regard to matters of this sort. Not until the American people forget the lessons of the Confederation, and of practically all their intervening history, will any such idea gain general acceptance.

From the judicial standpoint, then, it is necessary to show only that the corporate form of commercial organization is a means to the exercise of national authority over interstate and foreign commerce, and a means which bears such a relation to the subject matter of the commerce clause that federal incorporation of trading companies may reasonably be regarded as springing from a Congressional purpose of exercising control over such commerce. And this much is abundantly evident, whether attention be directed to the facilitation of that commerce through the provision of a more efficient organization thereof, or to the fact that such incorporation also provides an agency for more efficient federal control. Either of these considerations and, *a fortiori*, both taken together,

[1] 140 U. S. 545; upholding the validity of an act of Congress providing that liquors shipped into a state should upon arrival therein become subject to the police power of the state.

afford adequate constitutional justification for federal incorporation. From the constitutional point of view the utility or nonutility of any alternate schemes for the organization and control of this commerce have alsolutely no bearing on the validity of federal incorporation.

The next question to be considered is that of the constitutionality of legislation conferring upon federal interstate commerce corporations the power to manufacture for the sake of passing the articles manufactured into interstate or foreign commerce. It is well at the outset to dispose of some very plausible, but not, as it would seem, at all valid, objections to the recognition of such power. These objections rest upon the well-established principle that manufacturing is not *per se* commerce. It is submitted, however, that this principle does not render unconstitutional the conferring of the power to manufacture upon federal corporations engaged in interstate or foreign commerce.

The distinction between manufacturing and commerce is best developed in the case of Kidd *v.* Pearson.[1] An Iowa statute, prohibiting the manufacture, except for specified uses, of liquor, was held not to be a violation of the federal power over interstate commerce, notwithstanding its necessary economic relation to such commerce. The court said: —

"No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation — the fashioning of raw materials into a change of form for use. The functions of commerce are different. The

[1] 128 U. S. 1.

buying and selling and the transportation incident thereto constitute commerce, and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. . . . If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing."

Thus interpreted, commerce would embrace "every branch of human industry"; for, asks the court: —

"Is there one of them that does not contemplate more or less clearly, an interstate or foreign market? Does not the wheat-grower of the Northwest, and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago?"[1]

It is further pointed out that it would be impossible to regulate the details of all these productive enterprises by "uniform legislation generally applicable throughout the United States"; and it is asserted that the "local, detailed, and incongruous legislation" required for successful regulation would, if enacted by Congress, be "about the widest possible departure from the declared object" of the commerce clause. Finally, it is said that there would in any case remain the possibility that the producer contemplated an intrastate market; and so "interminable trouble" would be caused by attempting to draw a line between state and Congressional regulation upon the basis of the "secret and changeable intentions of the producer in each and every act of production."[2]

The validity of the distinction as expressed by the court may readily be granted, as may also the correct-

[1] *Ibid.*, p. 20. [2] *Ibid.*, p. 22.

ness of the decision of the case at bar. What should be particularly noted, however, is the limited constitutional application of the distinction. As the above quotation shows, the decision rested not simply upon the distinction between manufacturing and commerce, but upon the fact that there was no basis for determining whether liquors manufactured in the state were to pass in interstate and foreign commerce. This consideration would serve by itself to distinguish Kidd *v.* Pearson from any case which might involve the validity of legislation conferring the power of manufacturing for the sake of passing the product into interstate and foreign commerce. In such a case the intent of the producer would be determined by the power granted. *Ex hypothesi*, no authority would be given to manufacture products to be used in intrastate commerce. If a state should choose to give this additional power to a federal corporation, that would be the affair of the state itself.

That a definite federal grant of the kind under discussion, and an inquiry regarding the constitutionality of such a grant would involve considerations quite other than those which determined the decision in Kidd *v.* Pearson, will become evident if we consider the question from another point of view. In the case of Kidd *v.* Pearson, a contrary decision would have denied to the state a power to control manufacture incidental to intrastate commerce because of the alleged effect of the prohibition upon interstate commerce. This would have been unreasonable. It would have established, in effect, the right to manufacture, for the purpose of using in intrastate commerce the articles manufactured, without the corre-

sponding obligation of subjection to police control. But, aside from the difficulty of determining the intention of the producer, it may reasonably be asserted that the fact that manufacturing is not *per se* commerce apparently gives to the state, in the absence of federal legislation based on the relation between manufacturing and commerce, a plenary police power over manufacturing, whatever may be the intent of the producer as to the disposition of his product.

The case of the United States *v.* E. C. Knight Company[1] adds nothing in principle to that of Kidd *v.* Pearson. In the Knight case the principles of the distinction between manufacturing and commerce are elaborated upon the same basis as in the case of Kidd *v.* Pearson, which is cited at some length, and the conclusion is reached that a monopoly of manufacture is not *per se* a monopoly of commerce. The chief distinguishing feature in the Knight case is that the law under consideration was a federal law. But the application of the Knight case is very limited, since the decision rested, in large part at least, on the fact that the pleadings failed to show that the monopoly in manufacture had as its purpose or necessary result a monopoly of interstate commerce. It is accordingly not possible to say that, had the pleadings shown this, the monopoly of manufacturing would not have been held to work a restraint of trade in violation of the Sherman Act.

There is, indeed, an important series of more recent cases which support the position that, if a scheme of action, when taken as a whole, is predominantly directed toward interstate commerce, the component

[1] 156 U. S. 1.

parts of the scheme fall under Congressional control, and that manufacturing may be such a component part.

In the case of Swift and Company *v.* United States [1] the admissibility of an incidental federal control over intrastate commerce was at issue. The court treats the matter as follows: —

"Although the combination alleged embraces restraint and monopoly of trade within a single state, its effect upon commerce among the states is not accidental, secondary, remote, or merely probable. On the allegations of the bill, the latter commerce no less, perhaps even more, than commerce within a single state, is an object of attack. . . . Moreover it is a direct object, it is that for the sake of which the several specific acts and courses of conduct are done and adopted. Therefore the case is not like U. S. *v.* E. C. Knight Co., 156 U. S. 1, where the subject matter of the combination was manufacture and the direct object monopoly of manufacture within a state. However likely monopoly of commerce among the states in the articles manufactured was to follow from the agreement, it was not a necessary consequence nor a primary end. . . . The two cases are near to each other . . . but the line between them is distinct." [2]

The case of Montague *v.* Lowry [3] goes a step farther than the Swift case; for the combination under consideration was a combination between dealers and manufacturers, and not between dealers alone. The court held that —

"the whole thing is so bound together that when looked at as a whole the sale of unset tiles ceases to be a mere transaction in the state of California, and becomes part of a purpose which, when carried out, amounts to and is a contract or combination in restraint of interstate trade or commerce." [4]

[1] 196 U. S. 375.
[2] *Ibid.*, p. 396.
[3] 193 U. S. 38.
[4] 193 U. S. 46.

The same doctrine is applied in Loewe *v.* Lawler[1] — the Danbury Hatters case — and in this case the right, under certain conditions, of direct federal control over manufactures appears to be affirmed. The court indicates the nature of the case by the following quotation from the allegations: —

"We repeat that the complaint averred that plaintiffs were manufacturers of hats in Danbury, Connecticut, having a factory there, and were then and there engaged in an interstate trade in some twenty states other than the state of Connecticut that they were practically dependent upon such interstate trade to consume the product of their factory, only a small percentage of their entire output being consumed in the state of Connecticut; that at the time the alleged combination was formed they were in the process of manufacturing a large number of hats for the purpose of filling engagements then actually made with consignees and wholesale dealers in states other than Connecticut; and that, if prevented from carrying on the work of manufacturing these hats, they would be unable to complete these engagements."[2]

It is further shown how a labor combination, the members of which resided "in all the places where the wholesale dealers in hats and their customers resided and did business," sought to compel plaintiffs to unionize their factory, as part of a purpose to force "all manufacturers of fur hats in the United States" to do the same. Upon plaintiffs' refusal, a boycott was declared against them and was extended to their customers and, eventually, to the customers of the latter. It was not confined to the state of Connecticut, but covered as well the interstate trade of the plaintiffs. Among the means of coercion to be employed was the causing, by threats and coercion "and

[1] 208 U. S. 274. [2] *Ibid.*, p. 304.

without warning or information to the plaintiffs, the concerted and simultaneous withdrawal of all the makers and finishers of hats then working for them," both union and nonunion. The design was "thereby [to] cripple the operations of the plaintiffs' factory and prevent the plaintiffs from filling a large number of orders then on hand from such wholesale dealers in states other than Connecticut." The court regarded these averments as indicative of the existence of a direct purpose of destroying plaintiffs' interstate trade, not merely of preventing them "from manufacturing articles then and there intended for transportation beyond the state," but also preventing "the vendees from reselling the hats which they had imported from Connecticut or from further negotiating with plaintiffs for the purchase and intertransportation of such hats from Connecticut to the various places of destination." [1] The court accordingly held that —

> "although some of the means whereby the interstate traffic was to be destroyed were acts within a state, and some of them were in themselves as a part of their obvious purpose and effect beyond the scope of federal authority, still . . . the acts must be considered as a whole, and the plan is open to condemnation, notwithstanding a negligible amount of intrastate business might be affected in carrying it out. If the purposes of the combinations were, as alleged, to prevent any interstate transportation at all, the fact that the means operated at one end before physical transportation commenced and at the other after physical transportation ended was immaterial.

The Knight case is distinguished upon the ground that there "the object and intention of the combination determined its legality." [2] This view of the Knight

[1] 208 U. S. p. 300. [2] *Ibid.*, p. 297.

case, especially when coupled with the defectiveness of the pleadings therein, goes far to support the opinion expressed above regarding that case.

The Danbury Hatters case is worthy of more careful examination than can here be devoted to it. For our purposes it is sufficient to point out that the case shows conclusively that a necessary relation may exist between manufacturing and interstate trade, and that such a relation may form a legitimate basis for federal action with regard to manufacturing. To justify federal legislation conferring upon federal interstate commerce corporations the power to manufacture articles to be passed into the channels of interstate trade, it is necessary only to show that the bestowal of such a power will make them more efficient organs for the working out of the national regulation of interstate commerce. The most strictly limited interpretation which it is possible to give to the principles governing the decision in this case will afford judicial precedent for the recognition of this degree of connection between manufacturing and commerce.

Special attention should be called to a few of the facts in this case. (1) The ultimate purpose of the labor combination related to conditions of manufacturing, not to the conditions under which interstate trade, in and of itself, was to be carried on. The decision therefore establishes the principle that any substantial relation between acts and purposes on the one hand and the carrying on of interstate commerce on the other justifies federal control with regard to such acts and purposes, and that such a relation exists where such acts and purposes affect interstate commerce only by the results which neces-

sarily attend the carrying out of the purposes. (2) Since the decision is based upon the purpose and effect of the scheme as a whole, and since it is held to be immaterial that some of the acts alleged were done either before or after physical transportation, it must logically follow that, given the purpose of restraining interstate trade, even if the acts done for the sake of that end had related simply to the prevention of manufacture, with the necessary result, however, of preventing shipment, all the essential elements of the scheme would have been present and the decision must have been the same. (3) Finally, the existence of orders for goods to be transshipped in interstate commerce furnishes an answer, with regard at least to federal control over acts by private parties which would prevent manufacture of goods to be used in filling such orders, to the objection largely controlling in Kidd *v.* Pearson and the Knight case, *i.e.* the uncertain intent of the producer.

The conclusions reached from the foregoing examination of the leading cases dealing with the relationship between manufacturing and interstate trade may be recapitulated as follows: (1) Manufacturing is not *per se* commerce. (2) Manufacturing may, nevertheless, be controlled by the federal government under the commerce power, in so far as in any given case of the exercise of such control a necessary relation between manufacturing and commerce can be shown to exist. (3) The variable and uncertain intent of the producer is a bar to federal control and a justification of state control, even though such state control may have an actual and important effect upon interstate trade. (4) Under some circumstances a

necessary connection between manufacturing and interstate trade may remove this uncertainty as to the intent of the producer. Under such circumstances manufacturing, or any interference therewith, is recognized as being part of a scheme which, when taken as a whole, relates to interstate commerce and falls under the regulating authority of federal government.

If the foregoing analysis is correct, it is clear that there are no judicial precedents which can be invoked to deny to the federal government the right to confer, upon any corporations which it may erect and to which it may give the power to carry on an interstate trade, the further power to manufacture articles to be transshipped into such trade. The great bar to federal control over manufacturing — the uncertain intent of the producer as to the interstate or intrastate disposition of the articles manufactured — will clearly not exist where the power to manufacture is thus limited by the very terms in which it is bestowed. This being true, it remains only to show that the conferring of such a power to manufacture would have the effect of better fitting federal interstate commerce corporations to fulfill the ends for which the federal government may create them. This can be done by showing the existence of a real relation between manufacturing and commerce. The Danbury Hatters case has already been considered and found to support the view that such a relation actually exists. Some further consideration will tend to put the argument beyond the possibility of reasonable question.

It should first be noted that, in order to justify the conferring of a given power upon federal corporations or licensees, the relation between manufacturing and

interstate commerce need not be so close as it must be in order to justify a general federal control over the matter in question. For example, the relation of ordinary banking operations to the purposes for which the federal government incorporates national banks justifies the conferring upon these banks of the power to carry on all such operations. But the federal government cannot control these operations as carried on by state banks. In the case of powers conferred upon federal corporations, this distinction depends largely upon the existence or the elimination of uncertainty as to the necessity of the relation between the power conferred and the legitimate ends of the federal government. It is largely a matter of making the exercise of such powers part of a scheme over which, when it is taken as a whole, the government has indubitable authority.

It is evident that the connection between manufacturing and interstate commerce is a necessary relation in the sense that the conditions under which manufacturing is carried on profoundly affect interstate commerce. Consider, in the first place, the effects of the power of the states over "foreign" corporations. It is well settled that it is wholly within the discretion of a state to admit or exclude a corporation created by another state. Subject to the federal guaranty of the obligation of contracts and, it would seem, to the provisions of the fourteenth amendment, a state has also the power to exclude such corporations after they have been admitted. In the case of the Hammond Packing Company *v.* Arkansas,[1] it was held that an allegation as to the motive for the exclu-

[1] 212 U. S. 322.

sion, even though such motive may arise from acts done by the corporation outside of the jurisdiction of the state, need not be considered by the court. The court said: —

"If the premise of the asserted proposition be that, even though the statute addressed itself exclusively to the doing of business within the state under the circumstances stated, it nevertheless exerted an extraterritorial power, because it restrained the continuance of business within the state by a corporation which had done the designated acts outside the state, we think the proposition without merit. As the state possesses the plenary power to exclude a foreign corporation from doing business within its borders, it follows that, if the state exerted such unquestioned power from a consideration of acts done in another jurisdiction, the motive for the exertion of the lawful power did not operate to call the power into play. This being true, it follows that, as the power of the state to prevent a foreign corporation from continuing to do business is but the correlative of its authority to prevent such corporation from coming into the state, unless by the act of admission some contract right in favor of the corporation arose . . . the prohibition against continuing to do business in the state because of acts done beyond the state was none the less a valid exertion of power as to a subject within the jurisdiction of the state. . . . The power, and not the motive, is the test to be resorted to for the purpose of determining the constitutionality of the legislative action." [1]

It is evident that a state may thus interfere very radically with the operations of companies not federally incorporated. It is also clear that federal incorporation without grant of the power to manufacture would still leave corporations largely at the mercy of the states. In order to carry on manufacturing, they would require state charters or state grants of privilege; and even though the state and

[1] *Ibid.*, p. 342.

federal corporations were absolutely separate in organization, it is clear that the state power over corporations admitted or created by its authority could be used to superadd regulations which might, in terms or in effect, control the purely trading operations of the federal corporation. Federal control over manufacturing is essential to independent and efficient federal control over purely trading operations.

This, however, is but one illustration of the legal interdependence of manufacturing and commerce. The legal relation between these matters is inevitable because of the economic relation, which is simply that of means to end. The existence and application of this relation is a commonplace in the legislative history of every commercial power. Upon it is based the almost universal system of protective tariffs. The relation also appears in the fact that one of the most important considerations regarding the advisability of various forms of labor legislation is always the probable effect upon foreign commerce, and, in state legislation, upon interstate commerce, of the increased cost of production which regularly follows every attempt to improve the position of the laborers. At a time when the United States is developing its export trade with unexampled rapidity, the necessity of subjecting the manufacture of the goods which are to pass in that trade to a federal — and exclusively federal — control is too obvious to require discussion. And the same necessity applies to the manufacture of goods which are to pass in interstate commerce. The whole business of manufacturing is carried on with a view to, and its success is dependent upon, the securing of a low production cost in order to compete suc-

cessfully in the disposal of the goods produced. If legislative control over manufacturing carried on for the sake of interstate and foreign commerce be allowed to remain with the states, the development of these forms of commerce will be most seriously hampered. Not only will the development of our export trade be imperiled, but fair and equal disposition through the channels of interstate trade of articles manufactured in different states will be impossible. On the other hand, in proportion to the influence which the foregoing considerations, especially the necessity of a low production cost, exercise upon the minds of our state legislators, regulations, in the nature of labor and other legislation, which might control manufacturing in such a way as effectively to promote the public welfare, will be in a large measure defeated, because each state will be apprehensive that its manufacturers may be placed at a serious disadvantage in the disposition of the goods produced. Manufacturing and trading operations are so inextricably blended that the one can be effectively regulated only by the authority which controls the regulation of the other. If the interrelations between the two do not constitute a "necessary relation," it is difficult to conceive in what a necessary relation would consist.

It may then be said that the power of Congress to confer upon federal interstate commerce corporations the right to manufacture goods to be passed in interstate or foreign commerce amply meets Marshall's test, as he developed it in connection with the granting to the National Bank of the power to do a private banking business. The grant of the power to manufacture is essential in order to make these corporations

fit instruments for the carrying out of federal purposes relative to the regulation of interstate commerce. The purpose of Congress in granting this power would be a public purpose and would have a reasonable relation to the control of interstate and foreign commerce.

Many of the arguments advanced against the recognition of the power which is here claimed to reside in the federal government are doubtless inspired by a feeling of apprehension, evoked by the remarkable expansion of federal authority which has already been occasioned by changing industrial conditions. But, as has been pointed out above and supported by quotations from the opinions of the Supreme Court, constitutional principles must, in order to preserve their real meaning, necessarily have different applications to various concrete situations. The principles governing the problem discussed in this chapter have always been the same, and no situation has ever existed in which federal interstate commerce corporations, with the powers relative to manufacturing outlined above, could not have been constitutionally created. That under present industrial conditions such corporations would in their operations occupy a very extensive portion of the commercial and industrial field can in no wise offer a ground of legitimate argument against their constitutionality.

Before closing this part of the discussion, it may be well to revert to a point already noticed in connection with Marshall's opinion in Osborn *v.* The Bank, viz. the possible contention that every federal corporation must be an "agent" of the government or have a strictly "political" connection therewith. It is hoped

that the considerations previously advanced made it apparent that either these relations were not at all essential or else the words "agent" and "political" must be interpreted in so broad a sense as to mean simply "having utility for a public and properly national purpose." But upon the basis of the argument as developed in the later parts of this chapter, it is believed that it can be safely asserted that, granting the existence of such limitations upon the federal power of incorporation, incorporation for the purposes and with the grant of the powers above contended for could still be justified.

If the argument be based upon the word "agency," and if agency be understood to mean the performance of a function which the government itself could constitutionally undertake, it is hard to see why the government itself could not constitutionally carry on interstate commerce and manufacture goods to be used in such commerce. If the government could do this, however undesirable such governmental action might be, it is evident that corporations erected for that purpose would necessarily be governmental agents, even in this restricted interpretation of the term. And since regulation involves a choice of means, the burden of proof is with those who would deny this power to the government.

Again, if the argument be based upon the word "political," and if a political connection be, for the purposes of argument, understood to be a connection relative to a peculiarly governmental function, where shall we draw the line which will include banking and transportation and exclude trading operations? In the present stage of industrial and commercial develop-

ment, is it possible to assert that a corporation which should furnish a medium for efficient governmental control over matters the regulation of which is so essential to the general welfare would not have this peculiarly political connection with the government? These considerations are, however, introduced merely for the sake of argument. That federal incorporation is not at all subject to any such tests has, as it is hoped, been sufficiently established in the preceding discussion.

It will be impossible in this chapter to treat at all fully the powers which may be constitutionally conferred upon such federal corporations and the correlative exemptions from state control. The general principle is plain enough, and has already been developed in connection with the subject of manufacturing. Any power which will fit the corporation to perform more effectively the work for the sake of which it is created may properly be conferred, in the absence of any direct constitutional prohibition, and the exercise of such powers cannot in any way be interfered with or controlled by a state. Furthermore, as an incident to the right of Congress to a choice of means, Congressional judgment, if at all reasonable, as to the necessity of any particular power will be conclusive upon the court. These principles, it will be recalled, are elaborated in Marshall's opinions in the United States Bank cases.[1]

Exclusive jurisdiction over suits to which a federal corporation is a party may be vested in the federal courts. It was held in Osborn *v.* The Bank[2] that federal corporations may be authorized to sue in the

[1] Cf. *supra*, pp. 103–113. [2] 9 Wheaton, 738.

federal courts, since every act of a federal corporation grows out of a law of the United States. The Pacific Removal cases [1] held that it may be provided that a federal corporation shall be sued in the federal courts, and, accordingly, that such a corporation may — the privilege being deducible from its charter — cause any suit against it to be removed into the federal courts. It follows that the federal courts may be made the sole tribunals for the decision of cases relative to federal corporations, and the fact that various matters not dependent upon the construction of federal law may be involved, is immaterial.

A few illustrations of the extent of the powers and exemptions from state control which may be granted to federal corporations may be useful. The case of Easton *v.* Iowa [2] is particularly instructive. It was held in this case that a state statute designed to prevent fraud cannot apply to a national bank. And it should be remembered that this power of legislation for the prevention of fraud is one of the most far-reaching of state powers. The following quotation shows very clearly the viewpoint of the court: —

"Our conclusions, upon principle and authority, are that Congress, having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control their operations . . . ; that it is not competent for state legislatures to interfere, whether with hostile or friendly intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the general government." [3]

These principles apply with equal force to the powers granted to any federal corporation or bestowed upon

[1] 115 U. S. 1. [2] 188 U. S. 220. [3] *Ibid.*, p. 238.

any individual by the federal government in the exercise of its constitutional authority.

Citations regarding the exemption of federal corporations from state control might be multiplied indefinitely. Marshall sets forth the principle very clearly in the case of Weston *v.* Charleston.[1] Two quotations from that opinion will reveal its force.

"The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but not to those means which are employed by Congress to carry into execution powers conferred upon that body by the people of the United States. . . . The states have no power by taxation or otherwise to retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the "general government." [2]

The same principles are set forth in Davis *v.* Elmira Savings Bank,[3] where a New York statute regarding the distribution of the assets of insolvent banks conflicted with congressional legislation regarding national banks. The court said: —

"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. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court."

[1] 2 Peters, 449.

[2] *Ibid.*, p. 466. Marshall is quoting from his opinion in McCulloch *v.* Maryland.

[3] 161 U. S. 275.

Cases regarding the acts of officers of the United States done in the performance of their duties are in point, since their exemption from state control rests upon the same principle. Among these cases may be cited Tarble's case,[1] Tennessee *v.* Davis,[2] *In re* Neagle,[3] and *Ex parte* Siebold.[4] Although there may be a certain distinction between the acts of federal officers and federal corporations, — a distinction which would apparently find application with regard to the granting of writs of *habeas corpus*, — the principle of the supremacy of federal law is the same in both classes of cases.

That the federal government may determine private-legal relations with regard to matters within its jurisdiction is also illustrated by the case of Lord *v.* Steamship Company.[5] This decision, based upon the commerce power, upholds a federal law limiting the liability of carriers by water. The carriage in question was upon the high seas, but entirely between ports and places in the same state.[6]

The case of Ohio *v.* Thomas [7] is particularly instructive by reason of the apparent unessentiality of the matter over which federal control was none the less affirmed. The governor of a soldiers' home, located in Ohio and upon land subject to the jurisdiction of that state, had supplied oleomargarine to the inmates and had been arrested for violation of an Ohio law. The court found that he had acted under authority of federal law; it consequently upheld the action of

[1] 13 Wallace, 397. [2] 100 U. S. 257. [3] 135 U. S. 1.
[4] 100 U. S. 371. [5] 102 U. S. 541.
[6] Cf. also Employers' Liability cases, 207 U. S. 463.
[7] 173 U. S. 276.

the circuit court in granting a writ of *habeas corpus*. The particular interest of the case lies in the claim made in behalf of the state that the acts done by the governor were properly subject to state law, in that they were "not necessary for the government and management of the home for the purpose for which it was incorporated, or authorized by any act of the United States." But the court held that the act was done under authority of the United States and was "therefore legal, any act of the state to the contrary notwithstanding." It would appear, accordingly, that whatever is done in accordance with United States authority will, to an extremely wide extent, be accepted by the court as being necessary to the carrying out of the purpose of federal incorporation. The giving out of oleomargarine as a ration can hardly be regarded as a matter of very pressing necessity. It must then follow that the inherent importance of any particular action is immaterial; that any and every detail of the management of a federal corporation may be regulated by the federal government, and this to the exclusion of state control.

It is therefore needless to go into details as to powers which may be conferred and as to correlative exemptions from state authority.[1] Aside from any direct constitutional prohibitions, the discretion of Congress is limited solely by the necessity of some reasonable relation between the powers conferred and the better fitting of the corporation for carrying out

[1] An interesting statement of what the court conceives that Congress may do with propriety in the case of national banks is to be found in Cook County National Bank *v.* United States, 107 U. S. 445. But Congress has never in the organization of these banks occupied the full field belonging to it.

the public purposes for which it is established. Just as Congress, to recur to Hamilton's illustration, could not erect a corporation for superintending the police of Philadelphia, so it could not confer that power upon a corporation previously erected for a proper purpose. The reason for this is not that the power conferred must be such as would justify the erection of a corporation for the sake of that function taken by itself, but rather that the superintendence of the Philadelphia police could not effectively further a proper purpose of Congressional action.

This limitation, however, must be rather narrowly construed. It has been shown above that things ordinarily outside federal jurisdiction may be included among the powers granted to federal corporations or conferred as part of a licensing system upon individuals. It has also been shown why and to what extent this is true: it is true in so far as such matters form constituent parts of a scheme which, taken as a whole is subject to federal authority. Among the powers which may be conferred upon federal interstate commerce corporations it is probably safe to include that of doing an intrastate business, to the extent to which such intrastate business forms a necessary part of the interstate business. This relation certainly exists in the case of local telegraph business.[1] It may also be well to note particularly that the relations between employer and employee would be subject to exclusive federal jurisdiction.

It is not necessary to discuss in any detail the cases in which state laws have been held to apply to national banks, since such cases always rest either upon express

[1] Cf. Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1, 37.

permission of Congress or else upon failure of Congress to cover the subject matter either directly or by implication. In Bank *v.* Commonwealth [1] there is to be found what is perhaps the strongest statement by the Supreme Court of the authority of the states. The decision rests in effect upon Congressional permission; but the opinion contains statements which are somewhat ambiguous. It may be well to quote: —

"The agencies of the federal government are only exempted from state legislation, so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle, founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the states. The salary of a federal officer may not be taxed; he may be exempted from any personal service which interferes with the discharge of his official duties, because these exemptions are essential to enable him to perform those duties. But he is subject to all the laws of the state which affect his family or social relations, or his property, and he is liable to punishment for crime, though that punishment be imprisonment or death. So of the banks. They 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." [2]

The above quotation contains suggestive and valuable examples of matters which may be regulated by state laws in the absence of Congressional action.

[1] 9 Wallace, 353. [2] *Ibid.*, p. 362.

The decision was hardly intended to go — and it certainly would not be a proper interpretation of the constitution if it actually went — farther than this. The very nature of the points referred to demonstrates this conclusively. For instance, it would be altogether absurd to contend that the utility of a national bank as a federal instrumentality might not be easily impaired if the right of the bank to collect its debts could not be constitutionally provided for and controlled by the federal government. Again, the comparison with federal officers is not completely in point, since a federal officer has a dual character, one official, one private. The bank, on the other hand, since it neither exists by the authority nor is introduced by the permission of the state, may, if Congress so determines, be subjected to federal control as to its every act, as exclusively as if it were not physically situated within the state.

The last question which remains to be discussed is that of the right of the federal government to restrict the conduct of interstate commerce under the corporate form of organization to corporations either of its own creation or else admitted by it to such commerce. It must be held that the federal government has this right. It is well settled that the power of the federal government over interstate commerce is plenary, and thus inclusive of the right to exclude from such commerce, provided always that the exclusion is not arbitrary. The matter was discussed at length in the Lottery case,[1] and it was expressly held that such a power of exclusion existed and was limited only by direct constitutional prohibitions or by the constitu-

[1] 188 U. S. 321.

tional guaranties of private rights. The state power of excluding foreign corporations has been noticed above. To say nothing of the clause as to the impairment of the obligation of contracts, the guaranties of the fourteenth amendment limit the states as closely as those of the fifth amendment limit the federal government. Further argument does not seem to be required.

The further problem of the effect upon property rights of the exclusion from interstate commerce of corporations whose participation in such commerce has been tacitly recognized by Congress cannot be considered within the limits of this chapter.[1] It would be most unfortunate if Congress were to be recognized as having the power practically to confiscate property, and it is not believed that either Congress or a state has any such power in its dealings with corporations. Without such power, the congressional authority over new corporations and the Congressional powers of justifiable police control over corporations already participating in interstate commerce are amply sufficient to secure every end of a sane legislative policy.

It has already been shown that the power of granting licenses to individuals has the same extent as that of erecting corporations. It may be added that the power of excluding individual participation in interstate commerce is fundamentally the same as that of excluding corporations. There is, however, this important difference. A corporation which has not been directly or tacitly admitted to a participation

[1] But cf. The Commodities case, United States *v.* Delaware and Hudson Company, 213 U. S. 366.

in such commerce has absolutely no implied right to such admission. An individual always has this right, subject to a reasonable police control. This control must be in the interest of the public welfare and must have a reasonable relation to the good conduct of interstate commerce. Its general scope is the same as that of the control over corporations already admitted to interstate commerce. Its exact delimitation would require a discussion far too extended to be included in the present chapter; but the general principle is sufficiently clear.

The conclusions of this chapter may be summed up in a sentence: Congress has full constitutional power to create a system of interstate commerce under complete federal control, to include within that system, the manufacture or other production of goods to be passed in such commerce, and to protect this system, in all its details, from any species of state interference. Thus baldly stated, these conclusions may appear to be somewhat radical. But it is hoped that they have been justified by the reasoning and precedents which have been advanced in their support. It is also believed that it cannot be successfully disputed that such a system, so far from imperiling private rights, is absolutely necessary for their protection — a task to which the system of divided control over interstate commerce is palpably unequal.

CHAPTER IV

THE POWER OF CONGRESS OVER THE PRIVATE LAW IN FORCE IN THE UNITED STATES

In some of the federal systems of government which have been organized since the adoption of the United States constitution, the establishment of the federal system has had for its consequence the unification or the possibility of the unification of the private law in force in the confederated states. Such, for example, was the case in Germany. In Germany, the process of unification of the law has proceeded quite slowly, but the adoption in recent years of the Imperial Civil Code is evidence of the fact that the process has now been practically completed.

In the United States, however, the necessity of an express provision for a uniform law of private relations was hardly thought to exist at the time of the adoption of the constitution, and as a result the constitution contained no section which can be regarded as having been consciously intended to bring about such unification of the law. Indeed, the passage by the first Congress of the Judiciary Act is evidence, as will be pointed out, of the feeling on the part of the men then at the head of public affairs that the laws of the several states should remain intact.

The reasons for this failure to recognize the expediency of providing for a national law were probably to be found, first, in the economic and social diversity of the different states, to which attention has been directed and which was such a potent influence in preventing the adoption of any plan of government based on the theory of a centralized political organization. These reasons are probably also to be found in the further fact that most of the law then in force in the states was the unwritten common law rather than the written statute law, and that this unwritten common law was in very large degree the English common law. In other words, the law in force in the thirteen original states was actually reasonably uniform, and there was no particular reason for anticipating that such uniformity as existed would cease to exist. In any case the uniformity which did exist was sufficiently great not to cause any particular embarrassment in the economic conditions of the time.

With, however, the increase in the centralization of economic conditions due particularly to the improvement in the means of communication and the consequent enlargement of the area over which commercial transactions extend, and with the increase in the mobility of the population, the need for greater uniformity in the law has become apparent. While economic centralization has thus in many directions made uniformity in the law more necessary than it once was, influences have been at work which have actually produced diversity in the law rather than increased uniformity. The greater number of courts of last resort which has followed upon the increase in the

number of the states, together with the decreasing authority of the decisions of English courts has been one of these influences. Another is to be found in the increasing amount of statute law. The increase of the statute law has been due to the crystallization of the common law under the influence of the doctrine of *stare decisis* and the apparent inability of the courts to change a rule applied in a long series of decisions, although the rule may have become unsuited to the conditions in which it is sought to apply it. Legislatures of different states not being controlled by any necessity of following precedent, have, where it has seemed necessary to change the common law, amended that law in different ways. The result has been that although economic conditions have been centralized during our century and a quarter of national life, our law has probably become less uniform than it was.

The attempt has been made, as has been intimated, in those instances where lack of uniformity has been most productive of evil, *e.g.* in the law of commercial relations, to secure the desired uniformity through coöperation on the part of the states. State commissions for uniform legislation have done considerable work in this direction, though it must be confessed their actual accomplishments have hardly been commensurate with the efforts made, while the "House of Governors" meets annually in the hope of helping along the good work. These methods to which resort has been had, in order to rid us of the lack of uniformity in the law which most persons in the United States deplore, while probably not unconstitutional, are, it may be said, distinctly extracon-

stitutional, rather ineffective and extremely slow in their operation. It is the purpose of this chapter to inquire whether the constitution of the United States, as it has been or may properly be interpreted by the Supreme Court, offers a means which is at the same time constitutional and effective, and may be expected to secure a practical uniformity in our law within a reasonable period of time.

As the making of law is particularly the function of the legislature, such a means must be sought in the legislative powers of the Congress of the United States.

Most of the legislative powers of the Congress are to be found, as has been said, in Art. I, Sec. 8 of the constitution; but from the beginning of our history as a nation the Supreme Court of the United States has recognized that Congress derives powers of legislation from other articles. The most important of such other articles is Art. III, which both defines the judicial power of the United States and vests it in one Supreme Court and such inferior courts as Congress shall from time to time ordain and establish.[1]

This article does not contain a word about Congress or its powers, but taken in connection with Art. I,

[1] Section 2 of this article provides that "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 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."

Sec. 8, Paragraph 19, which gives to Congress the power to pass all laws necessary and proper for carrying out any power conferred upon the United States or any department or officer thereof, it has been construed as conferring upon Congress the power in certain instances to determine what shall be the law to be applied by the United States Courts in the exercise of the judicial power conferred upon them by the judicial article.

Let us now endeavor to ascertain from an examination of the decisions of the Supreme Court and a study of our legislative history: (1) what is the legislative power of Congress, which may be derived from the judicial article; (2) from a consideration of the action of Congress, how far the power has been exercised by that body; and (3) what effects upon our law as a whole would result from an occupation by Congress of the entire field recognized as belonging to it.

I

First, what is the extent of the legislative power of Congress which may be derived from the judicial article of the constitution?

The first intimation by the Supreme Court that Congress possessed any legislative power as a consequence of the provision of the judicial article is to be found in United States *v.* Bevans.[1] In this case the question before the court was whether the United States court had jurisdiction of a murder committed on a United States man-of-war lying in Boston harbor, and its decision involved the construction of an act of Congress.

[1] 3 Wheaton, 336 (1818).

Chief Justice Marshall, in deciding that jurisdiction had not been ceded by Massachusetts to the United States, said: "It is contended to have been ceded by that article in the constitution, which declares that 'the judicial power shall extend to all cases of admiralty and maritime jurisdiction.' The argument is, that the power thus granted is exclusive; and that the murder committed by the prisoner is a case of admiralty and maritime jurisdiction. Let this be admitted. It proves the power of Congress to legislate in the case; not that Congress has exercised that power."

For a considerable period of our history, however, little if any reliance was placed upon the theory that Congress received from the third article legislative power with regard to anything but the organization, jurisdiction, and procedure of the courts, and particularly the inferior courts, of the United States. That Congress had powers of legislation with regard to these matters was, however, recognized very early in our history. Thus in Wayman *v.* Southard [1] in answering the objection that "the government of the Union cannot, by law, regulate the conduct of its officers in the service of executions on judgments rendered in the federal courts; but that the state legislatures retain complete authority over them," Chief Justice Marshall said:

"The court cannot accede to this novel construction. The constitution concludes its enumeration of granted powers, with a clause authorizing Congress 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

[1] 10 Wheaton, 1, 22.

government of the United States or in any department or officer thereof. The judicial department is invested with jurisdiction in certain specified cases, in all of which it has power to render judgment. That a power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce is expressly conferred by this clause seems to be one of those plain propositions which reasoning cannot make plainer. The terms of the clause neither require nor admit of elucidation. The court, therefore, will only say, that no doubt whatever is entertained on the power of Congress over the subject."

It is true that Section 34 of the original Judiciary Act, now Section 721, of the Revised Statutes, did provide that, "except where otherwise provided by the Constitution, treaties or statutes of the United States, the laws of the several states are to be regarded as rules of decision in trials at common law in the courts of the United States where they apply"; and that this act as amended in 1792 also provided that the forms and modes of proceeding in equity and admiralty proceedings should be according to the practice of courts of equity and admiralty, subject to alteration by rules to be made by the Supreme Court. This enactment naturally involved a claim upon the part of Congress of a legislative power based upon the third article of the constitution.[1] The

[1] In a number of cases, the most important of which is Wayman *v.* Southard, 10 Wheaton, 48, it has been said that in the absence of action by Congress the federal courts would have adopted this rule. But this statement does not mean that Section 34 of the Judiciary Act was declaratory of any constitutional principle, but rather that the courts of the United States, following the rules which are recognized in cases of conflicts of law, (cf. Wisconsin *v.* Pelican Insurance Company, 127 U. S. 265), would have applied the local law properly applicable to the contract or other legal relation at issue. The action of courts in such cases, it is to be borne in mind, is based, in the absence

action taken by Congress incidental to the assertion of this claim was, however, so modest that no objection was made to it in any quarter; and from that time to this the courts of the United States have been regarded in the main as tribunals which, free from local prejudice, are called upon to determine those cases and controversies over which they have jurisdiction in accordance with the principles of law in force in the particular states in which they sit. For a long time it was not apparently believed that the third article of the constitution conferred upon Congress any legislative power with regard to the substantive law to be applied by the federal courts in the exercise of their acknowledged jurisdiction. At any rate, Congress made no attempt to exercise any such power.

In one branch of the law, however, the courts of the United States began at an early time to administer a law which was not found in the "laws of the several states." This was the admiralty or maritime law. This exception to the general rule has been based upon two distinct grounds.

In the first place, in that section of the Judiciary Act which is now Section 711 of the Revised Statutes, Congress provided that the admiralty and maritime jurisdiction of the United States district courts, then established, should be exclusive, "saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it." This clause has been interpreted as giving to the district

of legislative provisions, upon considerations of expediency and of comity rather than upon constitutional or legal obligation. See remarks by Marshall in the Virginia Convention. *Infra*, p. 188.

courts of the United States exclusive jurisdiction in all cases in which the remedy sought is an action primarily *in rem* against an offending vessel.[1] At first the admiralty jurisdiction of the United States was supposed to extend merely to waters affected by the ebb and flow of the tide.[2] So long as this was the recognized rule, the states endeavored to regulate the legal relations of vessels, arising in waters not considered to be within the admiralty jurisdiction of the United States, by legislation, which provided remedies to be administered by the ordinary state courts similar to, if not identical with, admiralty remedies. Later in the history of the country the Supreme Court changed its view as to what were navigable waters of the United States. In 1851, in the Genesee Chief *v.* Fitzhugh,[3] and in 1857, in The Steamboat Magnolia,[4] it laid down the rule that navigable waters subject to the admiralty jurisdiction of the United States are waters actually navigable, upon which commerce with foreign countries or between the several states is carried on.[5] When this determination was reached, it was believed that the state legislation referred to, which provided for the administration by state courts of admiralty remedies as to matters arising on state waters, ceased to have any effect, and that the jurisdiction of the admiralty courts of the Unted States was as exclusive over what had been regarded as state waters, but now were regarded as United States waters, as it had been from

[1] The Moses Taylor (1866), 4 Wallace, 411.
[2] The Thomas Jefferson (1825), 10 Wheaton, 428.
[3] 12 Howard, 443. [4] 20 Howard, 296.
[5] See Leovy *v.* United States, 177 U. S. 621.

the beginning over tidal waters.[1] The Supreme Court admitted, indeed, that the reservation in the Judiciary Act touching common law remedies still permitted the state courts to take jurisdiction of actions in maritime contract and tort, provided the remedy was primarily *in personam* rather than *in rem.*[2]

In what were regarded as admiralty proceedings in the strict sense, *i.e.* in actions *in rem* against vessels, not being obliged by Congress to follow state laws, the courts of the United States applied the admiralty or maritime law, which they described as a sort of world law, and which they gradually elaborated and developed in their decisions. In the meantime, however, the Congress of the United States had been passing a whole body of legislation concerning the registry and license of vessels, the inspection of steam vessels, the duties of masters and seamen, and the rights and liabilities of shippers and shipowners. The states also passed many laws on the same subjects; for the states were recognized as having, in the absence of Congressional regulation, a concurrent power of legislation as to many parts of the substantive law,[3] and the state courts have jurisdiction of the cases arising under such laws provided the remedy given by them is a common law remedy.[4] In case, however, such laws provide for a maritime lien not recognized by the general maritime law, they will be applied by the admiralty courts of the United States, which further have exclusive jurisdiction.[5]

[1] The Hine *v.* Trevor (1866), 4 Wallace, 555.

[2] *Ibid.*; Knapp, Stout & Co. *v.* McCaffery, 177 U. S. 638, and cases cited; The Hamilton, 207 U. S. 398.

[3] Sherlock *v.* Alling, 83 U. S. 99; The Hamilton, 207 U. S. 398.

[4] *Ibid.*

[5] The J. E. Rumbell, 148 U. S. 1.

For a long time, notwithstanding Chief Justice Marshall's suggestion in United States *v.* Bevans[1] it was believed, as has been shown, that the power of Congress to legislate with regard to the maritime law was derived from the power to regulate commerce, which early in our history had been held to include navigation.[1] But when the admiralty jurisdiction was extended over what had previously been regarded as state waters, it was apparently believed by the United States courts that a wider Congressional power to regulate the maritime law could be found in the judicial article of the constitution than in the clause empowering Congress to regulate commerce. In a series of cases, ending with *In re* Garnett, decided in 1890,[2] the Supreme Court has adopted unequivocally the view that Congress has a power to fix and determine the maritime law, because the courts of the United States are clothed, under Art. III of the constitution, with the power to decide admiralty cases. It may therefore be said that Congress derives legislative power from that part of the judicial article of the constitution which provides that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. It is interesting to note that Mr. Justice Holmes says in The Hamilton[3] in regard to the saving of the common law remedy to suitors that it

"leaves open the common law jurisdiction of the state courts over torts committed at sea. . . . And as the state courts in their decisions would follow their own notions about the law and might change them from time to time, it would be strange

[1] Cf. *supra*, p. 150. [2] 141 U. S. 1. [3] 207 U. S. 398.

if the state might not make changes by its other mouthpiece, the legislature. The same argument that deduces the legislative power of Congress from the jurisdiction of the national courts tends to establish the legislative power of the state where Congress has not acted. Accordingly, it has been held that a statute giving damages for death caused by a tort might be enforced in a state court, although the tort was committed at sea."

The substantive maritime law is, therefore, first, the general maritime law of the world, so far as recognized by the decisions of the admiralty courts of the United States; second, acts of Congress; and third, acts of the state legislatures not inconsistent with acts of Congress.

It is to be remembered, however, that the judicial power of the United States, according to the provisions of the third article of the constitution, extends to several classes of cases other than cases of admiralty and maritime jurisdiction. The question accordingly presents itself: Does Congress obtain from the judicial article the same power of legislation in these other classes of cases which it is recognized as obtaining in admiralty and maritime cases?

To answer this question we must consider the judicial article in some detail. The cases enumerated fall into two classes. The first class includes all cases in law or equity arising under the constitution, the laws of the United States and treaties made or to be made under their authority, all cases affecting ambassadors, other public ministers and consuls, and all cases of admiralty and maritime jurisdiction. The second class includes controversies to which the United States shall be a party, controversies between two or more states, between citizens of different states, between

a state and citizens of another state, between citizens of the same state claiming lands under grants from different states, and between a state or the citizens thereof and foreign states, citizens or subjects. This clause was amended by the eleventh amendment so as to exclude from the judicial power of the United States "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." [1]

These two classes of cases are to be distinguished, because to those enumerated in the first class is prefixed the word "all," and because those in the first class are referred to as "cases" and those in the second as "controversies." The use of the word "all" in the first class of cases and its omission in the second are not, however, considered to be of any special significance. The article is certainly not regarded as conferring upon the United States courts exclusive jurisdiction in the one class of cases and concurrent jurisdiction in the other. The Supreme Court, on the contrary, has adopted the view that the exclusiveness or concurrency of the jurisdiction of the courts of the United States is dependent upon the action of Congress, which has the right in all cases to make the federal jurisdiction exclusive or concurrent if it sees fit to do so.[2] The difference between "case" and

[1] This amendment has been interpreted to include suits brought against a state by its own citizens. Hans *v.* Louisiana, 134 U. S. 1.

[2] Thus in The Moses Taylor, 4 Wallace, 428, the court says: "The Judiciary Act of 1789, in its distribution of jurisdiction to the several federal courts, recognizes and is framed upon the theory that in all cases to which the judicial power of the United States extends, Congress may rightfully vest exclusive jurisdiction in the federal courts."

"controversy," while from some points of view important, has little significance for the present investigation. It is to be said, however, that the jurisdiction of the federal courts is wider in "controversies" than in "cases." Thus it has been held that, although these courts have no jurisdiction to probate wills, they have jurisdiction to hear and determine controversies between citizens of different states, the purpose of which is to annul a will already probated.[1]

It is further to be noticed, as Chief Justice Marshall pointed out in Cohens *v.* Virginia,[2] that the cases in which jurisdiction is given to the courts of the Union may be grouped in two classes from another point of view: —

"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.' [Cases of admiralty and maritime jurisdiction are usually regarded as included in this class.] . . . 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.' [Controversies between citizens of different states and between citizens and aliens are of this class.] If these be the parties, it is unimportant what may be the subject of the controversy. Be it what it may, these parties have the constitutional right to come into the courts of the Union."

In the same way it has been held that the word "all" preceding the word "cases" does not give either the United States courts or the Supreme Court, where it is used with regard to the jurisdiction of that body, exclusive jurisdiction. See Börs *v.* Preston, 111 U. S. 252, and cases cited.

[1] *Infra*, pp. 197 *et seq.*

[2] 6 Wheaton, 264.

It may perhaps be urged that in the first class of cases, *i.e.* those in which the federal courts have jurisdiction on account of the subject matter, Congress has greater independence in determining what law shall be applied than it has in the second, in which jurisdiction is obtained by reason of the character of the parties; and it is true that the instances in which Congress has endeavored to fix the law to be applied, irrespective of the law of the states, are more marked in the former than in the latter class. But, as will be pointed out,[1] the branch of law in which the Supreme Court has displayed the greatest independence of state law has been the commercial law, and in the great majority of commercial cases the federal courts obtain jurisdiction only by reason of the diversity of citizenship of the parties. It can hardly be said, therefore, that the power of legislation which Congress derives from this clause can be determined by this distinction. Furthermore, as has been shown, "cases of admiralty and maritime jurisdiction" which are usually regarded as within the judicial power of the United States because of the character of the subject matter, are after all to be distinguished from other cases more because of the combination of the kind of remedy used, *i.e.* an action *in rem*, and the character of the party or rather the subject of the suit, *i.e.* a vessel on the navigable waters of the United States, than because of the nature of the law applied.[2] Before it had been decided that

[1] *Infra*, pp. 172 *et seq.*

[2] This would appear to be absolutely true of marine torts. In the case of contracts, however, in order that an admiralty court may have jurisdiction, the contract must be maritime in its nature. See Hughes, "Handbook of Admiralty Law," p. 16.

admiralty jurisdiction extended to our Western inland waters, state courts administered practically the same sort of law now administered by the United States admiralty courts. The legislative power of Congress over maritime matters has extended to these cases with the extension of the jurisdiction of the admiralty courts of the United States.

From the viewpoint of this investigation we may therefore treat the various cases subjected to the judicial power of the United States as possessing the same character. The result is that the recognition that Congress possesses the legislative power under one clause in the judicial article involves the recognition of the same power under the other clauses, unless the question is affected, on the one hand, by the express provisions of the constitution granting powers or imposing limitations on Congress, or, on the other hand, by the general spirit of the constitution considered as a whole.

Let us then take up, one by one, the cases included within the judicial power granted by the constitution and see whether they are affected by the other provisions of that instrument, either enabling or prohibitory.

In the first place, the judicial power of the United States extends to all cases in law and equity arising under the constitution, the laws of the United States and treaties made or to be made under their authority. It is quite evident that the laws of the United States referred to in this paragraph are primarily the laws which Congress has the right to pass under the other provisions of the constitution, — for example, under Art. I, Sec. 8; but the Supreme Court has assumed, that the words "law and equity" apply

not merely to the cases arising under the constitution, the laws of the United States and treaties, but also to the cases arising under other grants of judicial power, in the sense, at any rate, that the judicial power there granted embraces cases of both law and equity. The Supreme Court has, however, intimated that in controversies between citizens of different states, the judicial power is not limited to such cases as arise "in law and equity." [1]

Furthermore, inasmuch as Congress in Section 34 of the Judiciary Act (now Section 721 of the Revised Statutes) has provided that the laws of the states shall be regarded as rules of decision only in trials at common law, the courts of the United States have felt at liberty to develop their own system of equity. They have felt not only at liberty, but even obliged, to do so if the United States courts are to exercise equity powers. For in some of the states at the time of the adoption of the constitution, there were no courts of equity, while in others equitable and legal remedies had been joined in the same forms of action. The federal courts have therefore attempted, regardless of the decisions of state courts and even in some instances of state statutes, to work out, in large degree upon the basis of the decisions of the English Court of Chancery, a system of equitable remedies and of equity jurisprudence of their own, which may be in conflict with the law of some particular state or states.[2] In

[1] *Infra*, p. 198.

[2] See Russell *v.* Southard, 12 Howard, 139, where the Supreme Court of the United States refused to be guided by the highest court of the state of Kentucky in determining whether parol evidence was admissible in an equitable action to show that what was apparently a deed was intended as a mortgage; Neves *v.* Scott, 13 Howard, 268,

so doing they have obeyed the injunction of Congress (contained in Section 913 of the Revised Statutes) which authorizes the Supreme Court to adopt equity rules and provides that the forms and modes of procedure in equity suits shall be in accordance with the practice of courts of equity. The Supreme Court has said, further, that Congress has the right to legislate as to the equity jurisdiction of the United States courts, and that, where there is conflict between the statutes of Congress and those of the states with regard to this matter, the courts of the United States must follow the statutes of Congress.[1]

In matters affecting ambassadors, other public ministers and consuls, little if any legislative power needs to be derived from the judicial power, since Art. I, Sec. 8, Paragraph 10 of the constitution, which empowers Congress to punish offenses against the law of nations, gives the United States ample means of protecting through the criminal law the persons of diplomatic agents against attack.[2] In so far, however, as the private legal relations of such

where the Supreme Court refused to modify its decision, so as to accord with the judgment of the highest state court of Georgia, as to the effect of a marriage settlement; and Payne *v.* Hook, 7 Wallace, 425, where the Supreme Court of the United States permitted the use of an equitable remedy not permitted by the statutes of the state. See also McConihay *v.* Wright, 121 U. S. 201, 206, and Scott *v.* Neely, 140 U. S. 106, 111.

[1] Cf. Neves *v.* Scott, 13 Howard, 268. In McConihay *v.* Wright, 121 U. S. 201, 206, it is said that the equity jurisdiction of the federal courts "is vested as a part of the judicial power of the United States in its courts by the constitution and acts of Congress in execution thereof. Without the assent of Congress that jurisdiction cannot be impaired or diminished by the statutes of the several states regulating the practice of their own courts."

[2] United States *v.* Ortega, 11 Wheaton, 467.

persons are concerned, the law is in the same condition as in the other cases in which the United States courts have jurisdiction by reason of the character of the parties. The consideration of this point may therefore be postponed until we examine those parts of the judicial article.

In the case of the clause relative to admiralty and maritime jurisdiction, as has been shown, the Supreme Court has held that Congress derives from it power to fix the maritime law. It is well to remember, however, that for a long time in our history the belief of the court was that Congress obtained its power to legislate upon such matters from the commerce clause rather than from the admiralty clause, and that it was only when it was thought that greater power could be derived from the latter clause that resort was had to it. It is to be remembered, also, that the states retain concurrent power to legislate in the absence of Congressional action as to many parts of the law of maritime tort and liability generally, and that these state laws will be applied by the United States admiralty courts. In other words, Congress has a paramount power to legislate as to the substantive law of admiralty because of the fact that the United States courts have exclusive jurisdiction of distinctly admiralty remedies; while the states retain a concurrent power of legislation as to maritime matters, partly, at any rate, because of the reservation by Congress of the "common law remedy, where the common law is competent to give it."

The clause with reference to controversies to which the United States shall be a party may perhaps be regarded as authorizing Congress to subject the United

States to the liability to be sued and to define that liability. As a matter of fact, Congress has so provided in the Act of 1855, establishing the United States Court of Claims, and in the Tucker Act of 1887, making the district and circuit courts of claims for certain classes of cases. Each of these acts has introduced into the law to be applied in these cases certain modifications which are binding upon the courts of the United States acting as courts of claims.[1]

We come now to the 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. Since the termination, early in our history, of the controversies regarding lands granted by different states, and since the passage of the eleventh amendment, the only controversies in this class which have retained their importance are those to which a state is a party, those between citizens of different states, and those between citizens and aliens.

In a number of instances the Supreme Court has taken jurisdiction of controversies between states, but in few of these cases has the question been raised as to the power of Congress to fix the law which is to be applied to such cases. A marked exception to this statement is to be found, however, in the case of Kansas *v.* Colorado.[2] In this case a bill of equity was filed in the Supreme Court by the state of Kansas against the state of Colorado, to restrain the latter

[1] The Floyd Acceptances, 7 Wallace, 666; Langford *v.* United States, 101 U. S. 341.

[2] 206 U. S. 46.

state from depriving the state of Kansas and its inhabitants of the water of the Arkansas River, which, it was alleged, was being diverted from its natural channel under the authority of the state of Colorado for the purpose of irrigating lands in that state. Since this was an equitable action, Section 721 of the United States Revised Statutes did not oblige the court to regard the laws of the several states as the rules of decision. The application of the laws of the several states would, moreover, have been impossible, since Kansas held to the common law as to water rights, while Colorado had abandoned it. The government of the United States asked to intervene in the case, alleging in its petition "that legislation of Congress, decisions of courts, and acts of the executive department have sanctioned and approved the use of water for irrigation purposes in arid regions, and that he who is prior in time is prior in right, and that it is recognized that the common law doctrine of riparian rights is not applicable to the public land owned by the United States in the arid region." The government also suggested that the "decree should embrace in terms or in effect a recognition of the national law and of the government's right to direct the matter of water distribution on this nonnavigable stream." In deciding this case the Supreme Court distinctly refused to adopt the view that Congress had any legislative power over matters of irrigation, even when the interests of two states were affected, adopting the theory that the United States government is a government of enumerated powers, and that, as no power to control irrigation matters had been granted to Congress, that body could not

lay down the law which the court was to apply in such cases.

It may therefore be said that Kansas *v.* Colorado is an authority for the proposition that Congress has no power to lay down the law to be applied by the Supreme Court in controversies between states as to irrigation matters. But this case cannot be regarded as authority for the proposition that Congress does not derive legislative power from the judicial article.

In the first place, that particular point was not raised, and was therefore not decided. The counsel for the government attempted to base the power of Congress to legislate, not upon the judicial article, but upon the commerce clause, contending that commerce is intercourse in its broadest sense and that "conflicting irrigation rights between two states on the waters of a stream passing from one state to another involve the power over interstate commerce. Water is sold for irrigation and flows downstream and along ditches to the point of delivery." This view did not appeal to the court, which held that taking water for purposes of irrigation did not involve commercial questions except where navigation might be affected thereby.

In the second place, the august character of the contesting parties in these controversies between sovereign states has caused the court to regard itself as an international tribunal, which is to apply the principles of international law. This law is to be derived from a consideration of the customs and usages of nations rather than from the legislation of a body like Congress.

It is to be regretted that the Supreme Court has adopted the view that Congress has no power to lay

down the law to be applied by the Supreme Court in controversies between states. For, as was said in Missouri *v.* Illinois,[1] "in a case which did not fall within the power of Congress to regulate, the result of a declaration of rights by this court would be the establishment of a rule which would be irrevocable by any power except that of this court to reverse its own decision, an amendment of the constitution, or possibly an agreement between the states sanctioned by the legislature of the United States." It is to be noted that one of the arguments used by the Supreme Court in favor of the legislative power of Congress in matters of maritime law is the necessity of developing the law. This argument would appear to have as much force in the matter of interstate controversies as in the matter of the maritime law.

The decision of the Supreme Court in Kansas *v.* Colorado may accordingly be regarded as authority for the statement that Congress derives no legislative power from that part of the judicial article which declares that the judicial power of the United States shall extend to controversies between states; but it cannot be said that, because this is true, it follows that Congress does not derive legislative power from other portions of the judicial article.

Controversies between a state and citizens of another state are, since the eleventh amendment, controversies in which the state is plaintiff. They differ from controversies between states in that they have no international character, and they are to be treated from much the same point of view as controversies between citizens of different states.

[1] 200 U. S. 496, 520.

We come then to the consideration of controversies between citizens of different states and between citizens and aliens. Does Congress derive any legislative power from this part of the judicial article?

Neither in the judicial article nor elsewhere in the constitution is the exercise of such a power expressly granted or expressly prohibited. Conditions are the same here as in the case of other judicial clauses, except that the legislative power of Congress under the commerce clause is more closely related to matters of admiralty and maritime jurisdiction than to controversies between citizens of different states and between citizens and aliens.

Two things however, have contributed to the adoption of the popular view that Congress has not the same power of legislation in these classes of cases as in admiralty cases. One is the fact that Congress has made the admiralty jurisdiction exclusive, while it has provided that the jurisdiction of the United States courts in these other controversies shall be concurrent with that of the state courts, subject merely to the provisions of law as to the removal to the United States courts of certain cases of this sort originating in the state courts. The other is that, partly as a result of the exclusiveness of the jurisdiction of the admiralty courts of the United States, those courts have developed their own law, subject to the action of Congress and state legislatures, while in the case of controversies between citizens of different states the United States courts have generally followed the injunction of Congress to regard the laws of the several states as the rules of decisions in all trials of common law.

But, as has been pointed out, Congress may make the entire jurisdiction of the United States courts exclusive if it sees fit so to do, and the adoption by the United States courts of the laws of the several states as rules of decision in trials at common law is due to a provision to that effect in an act of Congress, and not to any provision of the constitution. It has already been noted that in matters of equity, in which the federal courts have not been obliged by the provisions of the Judiciary Act to regard the laws of the several states as rules of decision, these courts have, in the exercise of powers granted by Congress, developed rules of their own; and that in so far as Congress has legislated regarding the equitable jurisdiction of these courts, they have felt obliged to apply such acts of Congress rather than the laws of the states.

Finally, it is to be noted that, notwithstanding the provision of Congress that the laws of the several states shall be regarded as rules of decision in the federal courts in trials at common law where they apply, an important part of the law administered by the United States courts in dealing with controversies between citizens of different states is different from the law administered by the courts of the states. This difference is noticeable not only in the system of remedies which are applicable, but also in the rules of law which are to be applied in the case of particular legal relations, or, in other words, in what are often called the rules of substantive law.

Congress has provided that forms and modes of proceeding in equity and admiralty suits shall be according to the practice of courts of equity and

admiralty,[1] and that the practice, pleadings, and forms and modes of proceedings in other civil causes shall conform as near as may be to the proceedings of the state within which the federal court sits.[2] But the courts have recognized the right of Congress to regulate any matter of procedure in the United States courts,[3] and Congress has in specific instances not given to the federal courts the right to make use of certain remedies, such as mandamus, certiorari, or injunction, of which the state courts make use.[4] Congress has also legislated with regard to the competency of witnesses and with regard to evidence in actions brought in the United States courts; and these courts have held, time and time again, that they are bound by the acts of Congress, even where such acts are in conflict with the laws of the states.[5]

These are some of the cases in which Congress has by legislation determined the system of remedies which shall be applied in the United States courts. To sum up on this point, it may be said, that partly as a result of judicial decision and partly as a result of Congressional legislation, the whole system of equity jurisprudence of the United States is independent of that of the states; that in a number of cases the common law remedies are likewise independent; and that

[1] Revised Statutes, Sec. 913.

[2] *Ibid.*, Sec. 914.

[3] Southern Pacific Co. *v.* Denton, 146 U. S. 202, 209.

[4] McIntire *v.* Wood, 7 Cranch, 504; *Ex parte* Van Orden, 3 Blatchford, 166; Snyder *v.* Marks, 109 U. S. 189. See also Cary *v.* Curtis, 3 Howard, 236.

[5] King *v.* Worthington, 104 U. S. 44; *Ex parte* Fiske, 113 U. S. 713, 721; Whitford *v.* Clark Company, 119 U. S. 522.

Congress has, with the approval of the Supreme Court, claimed and exercised the right to determine, often in opposition to the positive law of particular states, the law to be applied in the United States courts as regards the competency of witnesses and evidence in general.

While the decisions immediately above cited deal with the remedies applicable in the federal courts, some of them, rendered in cases of an equitable character, seem to recognize that either the federal judiciary or Congress has the right to determine the rules of substantive law to be administered in the equity courts of the United States.

When we come to consider more particularly the rules of substantive law which may be applied in the federal courts in trials at common law, we find that while Congress has seldom if ever taken any action as to the law to be applied in controversies where the jurisdiction of the federal courts results merely from the character of the parties, the federal courts themselves, in the exercise of their constitutional jurisdiction, have limited very seriously the application of the rule laid down in the Judiciary Act, which provides that the laws of the several states shall be regarded as rules of decision in trials at common law in the courts of the United States.

In Swift *v.* Tyson,[1] decided in 1842, the Supreme Court was called upon to consider whether a federal court, having jurisdiction as a result of diversity of citizenship, was obliged by the thirty-fourth section of the Judiciary Act (now Section 721 of the Revised Statutes) to follow the decisions of a state court that

[1] 16 Peters, 1, 18.

a preëxisting debt was not a valuable consideration for a negotiable instrument. Justice Story said: —

"That section provides: 'that the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.' In order to maintain the argument [that the United States courts are bound by the decisions of the state courts] it is essential therefore to hold that the word 'laws' in this section includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what laws are, and are not of themselves laws. They are often reëxamined, reversed, and qualified by the courts themselves whenever they are found to be either defective or ill founded or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof or long-established local customs having the force of laws. In all the various cases which have hitherto come before us for decision this court have uniformly supposed that the true interpretation of the thirty-fourth section limited its application to state laws strictly local; that is to say, to the positive statutes of the state and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us that the section did apply or was designed to apply to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves; that is, to ascertain upon general reasoning and legal analogies what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty

in holding that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence."

The Supreme Court therefore held that it would not follow the decisions of the New York courts.

In the application of this theory the federal courts have determined for themselves what is the law, not only with regard to negotiable paper, but also with regard to the liabilities of carriers.[1] And since the decision of Swift *v.* Tyson, the doctrine that the federal courts are not obliged to regard the decisions of the courts of the several states as rules of decision in matters of general commercial law has been extended in two ways.

In the first place, the same general principle has been applied in other branches of the law, for example, in the law of master and servant. In Baltimore and Ohio Railroad *v.* Baugh [2] the Supreme Court decided that it would determine for itself, irrespective of the decisions of the Ohio courts, what was the extent of the application of the rule that a servant could not recover from the master where the negligence causing the damage was that of a co-servant.

In the second place, the Supreme Court has held that in determining the rules of law affecting commercial paper it will disregard even a statute which

[1] Myrick *v.* Michigan Central Railway Company, 107 U. S. 102; Lake Shore, etc., Railroad Company *v.* Prentice, 147 U. S. 101; N. Y. Central Railroad Company *v.* Lockwood, 17 Wallace, 357.

[2] 149 U. S. 368.

it considers to be opposed to the rules of the general commercial law. In the case of Watson *v.* Tarpley the court said: —

"Whilst it will not be denied, that the laws of the several states are of binding authority upon their domestic tribunals, and upon persons and property within their appropriate jurisdiction, it is equally clear that those laws cannot affect, either by enlargement or diminution, the jurisdiction of the courts of the United States as vested and prescribed by the constitution and laws of the United States, nor destroy or control the rights of parties litigant to whom the right of resort to these courts has been secured by the laws and constitution. This is a position which has been frequently affirmed by this court, and would seem to compel the general assent upon its simple enunciation. . . . The general commercial law being circumscribed within no local limits, nor committed for its administration to any peculiar jurisdiction, and the constitution and laws of the United States having conferred upon the citizens of the several states, and upon aliens, the power or privilege of litigating and enforcing their rights acquired under and defined by that general commercial law, before the judicial tribunals of the United States, it must follow, by regular consequence, that any state law or regulation, the effect of which would be to impair the rights thus secured, or to divest the federal courts of cognizance thereof, in their fullest acceptation under the commercial law, must be nugatory and unavailing." [1]

[1] 18 Howard, 517, at pp. 520, 521. See, however, Phipps *v.* Harding, 34 U. S. Appeals, 148, which holds that the federal courts are bound by state statutes with regard to the substantive commercial law, and distinguishes (at p. 159) this decision from that rendered in Watson *v.* Tarpley on the ground that the statute there disregarded affected the remedy only. See also Equitable Trust Company *v.* Fowler, 141 U. S. 384, which, without argument, holds that state legislation controls the federal courts in determining what local law governs the validity of a contract alleged to be usurious. In Burgess *v.* Seligman, 107 U. S. 20, the Supreme Court refused to follow in the construction of a state statute the decision of a state court, rendered subsequently to the decision of the case in the lower federal court. Here the question at issue was whether the voting by the

The adoption by the Supreme Court of the doctrine of estoppel by recital in the case of municipal bonds in the hands of bona fide holders is an example of the extent to which the federal courts have claimed power to determine, independently of the decisions of the state courts made even in construing state statutes, the law applicable to cases of a commercial character coming before them as a result of diversity of citizenship.

Thus, in Town of Venice *v.* Murdock [1] the court refused to follow the interpretation given by the New York Court of Appeals to a state statute authorizing a town under certain conditions to issue bonds. The Court of Appeals had held that under a statute providing for the filing by town officers of a certificate that the conditions precedent to the issue of bonds had been complied with, such certificate was not evidence of compliance with statutory conditions, but that the plaintiff must prove that the conditions had actually been complied with; and furthermore, that the town issuing the bonds was not estopped by recitals in such bonds to the effect that the law had been complied with from showing that as a matter of fact the law had not been complied with. Nevertheless, the Supreme Court refused to adopt the rule of the Court of Appeals and held that the lower court did not err in holding that, in view of the existence of such certificate and recitals, no such actual compliance need be proved. The court did not, however, regard the New York decisions as made in construction of the

pledgee of stock held as security for a loan estopped such pledgee from showing, in a suit against him as owner, that he was not the owner, but the pledgee.

[1] 92 U. S. 494.

state statute, but as an expression of a general rule of law.

In a decision made subsequent to the decision in Town of Venice *v.* Murdock, the New York Court of Appeals held that even a statute providing that an official certificate of compliance with the law "shall be evidence of the facts therein contained" did not make the certificate "conclusive evidence. It is satisfied by holding that it is competent or *prima facie* evidence." [1]

In Craig *v.* Andes [2] the certificate provided by law was a determination made by the county judge, who was by the statute to "adjudge and determine" that a majority of the taxpayers had petitioned for the issue of bonds. This determination was to be recorded and was to have the "same force and effect as other judgments and records in courts of record in this state." The Court of Appeals held both that the certificate of the county judge that a majority of the taxpayers had consented to the issue of the bonds could be impeached by the town in an action against it on the bonds, and that the town when sued on the bonds was not estopped by recitals in the bonds, to the effect that certain acts authorized their issue by the town "all necessary and legal proceedings having been taken and had under said acts," from showing that as a matter of fact the bonds were illegally issued. The New York court in making this decision certainly believed that it was construing the state statute as

[1] Cagwin *v.* Town of Hancock, 84 N. Y. 532. In the opinion in this case the court says: "There are undoubtedly decisions of the federal courts holding in favor of bona fide holders a different doctrine, but those decisions have not been regarded as controlling authority in this court."

[2] 93 N. Y. 405.

to the effect of the determination provided by such statute. But the Supreme Court of the United States refused to follow the decision of the state court, and held on the authority of Orleans *v.* Platt [1] and Lyons *v.* Munson [2] first, that the determination of the county judge was conclusive; and second, that the town was estopped by the recitals from showing the illegality of the bonds in the hands of a bona fide holder.[3]

In the more recent cases the Supreme Court has carried this doctrine of estoppel by recital so far as to make it applicable under certain conditions to recitals that an issue of bonds is not in excess of the constitutional or statutory limit of indebtedness.[4] It has little hesitation in holding that a public corporation is estopped by such a recital from alleging, in a suit on the bonds by a bona fide holder, that the bonds were issued in excess of the legal limit. In answer to the objection that by adopting such a rule they are not applying the laws of the state, the United States courts say that the question "is not one of the construction of the constitution or statutes of" a state.

[1] 99 U. S. 676. [2] *Ibid.*, 684.

[3] The court disposes of Craig *v.* Town of Andes by calling it a collusive suit, as it was said to be by the Court of Appeals in Calhoun *v.* Millard (121 N. Y. 59), where it was sought to cancel these bonds. But it is to be noticed that the Court of Appeals did not overrule Craig *v.* Andes, but distinctly places its decision in Calhoun *v.* Millard on the general equitable ground that a court of equity may "refuse to exercise its jurisdiction and leave the party to his defense at law when the instrument is sought to be enforced against him." The Supreme Court did, it is true, go into the merits of the objections of the New York Court of Appeals to the legality of the bonds which it did not sustain.

[4] See *e.g.* Gunnison County Court *v.* Rollins, 173 U. S. 255, and cases cited.

"It simply involves the construction and effect of recitals in negotiable instruments. It is a question of commercial and not of constitutional law, upon which the decisions of the state courts are not controlling in the federal tribunals. It is not only the privilege but the duty of the federal courts imposed upon them by the constitution and statutes of the United States, to consider for themselves, and to form their independent opinions and decisions upon questions of commercial or general law presented in cases in which they have jurisdiction, and it is a duty which they cannot justly renounce or disregard. Jurisdiction of such cases was conferred upon them for the express purpose of securing their independent opinions upon the questions arising in the litigation remitted to them. And a citizen of the United States who has the right to prosecute his suit in the national courts has also the right to the opinions and decisions of those courts upon every crucial question of general or commercial law or of right under the constitution or statutes of the nation which he presents." [1]

In another case, the Supreme Court says: —

"it is entirely competent for a state to provide by statute that all obligations in whatever form executed by a municipality under its existing laws shall be subject to any defense that would be allowed in cases of nonnegotiable instruments. But for reasons that every one understands, no such statutes are passed. Municipal obligations executed under such a statute could not be readily disposed of to those who invest in such securities." [2]

At the same time, as all of those estoppel by recital cases are based upon the fundamental proposition "that the corporate officers had authority by law to determine and certify" as to the matters of fact contained in the recitals [3] and as the Supreme Court gives to such determination when recited in the bond the

[1] Independent School District of Sioux City *v.* Rew, 111 Fed. Rep. 1.

[2] Waite *v.* Santa Cruz, 184 U. S. 302, 319.

[3] Dixon County *v.* Field, 111 U. S. 92–94.

effect of conclusive evidence of the truth of the facts determined and recited, whatever may be the effect given to it by the state courts construing the statute, it may be said that the United States courts do not, in these estoppel by recital cases, follow the decisions of state courts interpreting the effect of state statutes giving power to municipal officers.

No attempt has been made to give an exhaustive enumeration of the cases in which the federal courts have so construed Section 721 of the Revised Statutes of the United States as to permit them, even in common law cases, to act independently of the laws of the several states in the determination of the law applicable to the cases before them; but enough has been said, it is hoped, to show that the federal courts have considerable independence in determining what law is to be applied in these cases and, if need be, may work out the law without regard to the decisions of the state courts.[1] This being the case, it cannot well be doubted that Congress itself has the power to change the law laid down by the federal courts. For, as Mr. Justice Bradley said in The Lottawanna,[2] in asserting

[1] See an interesting article in the *Northwestern Law Review* for 1894, entitled, "Is there a Federal Common Law" in which the author, Mr. Blewett Lee, says that the decisions of the federal courts have established "a general uniform commercial law prevalent in the United States courts throughout the republic" and suggests that "it may be the United States Congress has power, if it chooses, not only to make a commercial code for the regulation of interstate and foreign commerce, but to make a civil code for the decision of all cases in its courts under their jurisdiction as conferred by Congress under the constitution. The latter question is much like that in case of admiralty, where the courts are given jurisdiction, but Congress is given no express power to enact admiralty law.

[2] 21 Wallace, 558.

the power of Congress to limit the liability of shipowners to shippers: —

"We must always remember that the court cannot make the law; it can only declare it. If within its proper scope any change is desired in its rules, other than those of procedure, it must be made by the legislative department. It cannot be supposed that the framers of the constitution contemplated that the law should forever remain unalterable."

In this case, it is true, Mr. Justice Bradley derives the power of Congress to fix the law in the particular case from the commerce clause; but in the later case of *In re* Garnett [1] he as distinctly derives the power of Congress to limit the liability of shipowners, in the case of shipments of goods from one place to another in the same state, from the judicial article, saying: —

"It is unnecessary to invoke the power given to Congress to regulate commerce with foreign nations and among the several states in order to find authority to pass the law in question. The act of Congress which limits the liability of shipowners was passed in amendment of the maritime law of the country, and the power to make such amendments is coextensive with the law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce, but in maritime matters it extends to all matters and places to which maritime law extends." [2]

[1] 141 U. S. 1.

[2] See also the opinion of the Supreme Court in Butler *v.* Boston Steamship Company, 130 U. S. 527, 557, where it is said: "As the constitution extends the judicial power of the United States to 'all cases of admiralty and maritime jurisdiction," and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must be in the national legislature and not in the state legislatures."

It will be remembered that the admiralty jurisdiction is exclusive not because the constitution, but because Congress, has made it so, and that Congress could similarly make the jurisdiction of the federal courts resulting from diversity of citizenship exclusive instead of concurrent with that of the state courts, as it now is.

The argument of the Supreme Court in support of the contention that Congress has legislative power with regard to the admiralty law is based, it will be noticed, upon the proposition that there is a common law of admiralty which the courts having admiralty jurisdiction will apply, but that that law may be changed through the action of the competent legislative authority. This authority, we have seen, is the Congress of the United States, which, however, through the reservation of the common law remedy, where that is competent, has delegated to the state legislatures the right to legislate upon the substantive admiralty law, provided such legislation is not in conflict with the legislation of Congress. It follows, therefore, that if there is a federal common law which the United States may apply in the cases subject to their jurisdiction, that law may be changed by Congress either by acting directly itself or by delegating the power to act to the state legislatures. Congress did delegate this power to the state legislatures by Section 34 of the Judiciary Act of 1789, which provided that the laws of the several states should be regarded as rules of decision in trials at common law in the United States courts where they apply. This provision has been interpreted, as has been shown, as generally obliging the United States courts to apply state statutes, but as

leaving those courts pretty wide freedom as to following the decisions of state courts in other than local matters.

There have been two opinions advanced both by the Supreme Court itself and by the writers upon the constitution as to what law the United States courts apply when, in cases coming before them as a result of diversity of citizenship, they refuse to follow the decisions of state courts. One is that they are applying principles of "general law," [1] or "the general principles and doctrines of commercial jurisprudence." [2] The other is that there is no federal common law, and that the United States courts are really applying the common law of one of the several states, and that the highest state courts either do not know the law of the state or have made a mistake with regard to it.[3]

The conception that the courts of the United States always apply state law in these cases does not involve a denial, it will be noticed, to those courts of an independent power of determining what the state law is, but is based upon the rather absurd proposition that the highest state courts are, as compared with the United States courts, deficient in either legal knowledge or acumen and do not know the law of the state, whose judicial power is by the state constitution vested in them. This conception is therefore based upon a false idea of the judicial supremacy of the state courts and a fanciful explanation of an undoubted fact, viz. that the United States courts have in the absence

[1] See *e.g.* Baltimore & Ohio Ry. Co. *v.* Baugh, 149 U. S. 92.
[2] See *e.g.* Swift *v.* Tyson, 16 Peters, 1.
[3] See *e.g.* Smith *v.* Alabama, 124 U. S. 465.

of statute an independent power of determining the law which they will apply in cases coming before them. It has furthermore been adopted simply for the purpose of denying the existence of a federal common law, which, as a matter of fact, does for all practical purposes exist, and naturally has for its effect the further denial of the right of Congress or the federal courts to determine that the law to be applied by those courts need not be the law of the state, although Congress, when it passed the Judiciary Act, expressly provided that the laws of the states should be regarded as rules of decisions only where it was not otherwise provided by the laws of the United States.

While the action of Congress in providing that the laws of the states shall be regarded where not otherwise provided as rules of decision in the United States courts, has necessarily obscured the matter, since the United States courts have, because of the action of Congress, very commonly applied the state law, it cannot be said that it has been judicially determined that there is no federal common law. Indeed, it has been actually held that, in cases arising under the constitution and laws of the United States, there is a federal common law.[1]

Furthermore, an examination of English judicial history will show that the courts of England, whether those of general jurisdiction like the common law and equity courts, or those of special jurisdiction such as the ecclesiastical, admiralty, piepowder, or staple courts, always acted as if they considered that it was

[1] Murray *v.* C. &. N. W. R. Co., 62 Fed. 24, approved in Western Union Tel. Co. *v.* Call Pub. Co., 181 U. S. 92, 103, and cases cited.

an incident of their jurisdiction to determine the substantive law which they were to apply in cases before them, where that law had not been fixed by the competent legislative authority.

This being the case, the question naturally arises as to whether the framers of the United States constitution did not expect that the courts for which provision was made in that instrument would exercise such a power. It is difficult to answer this question. An examination of the debates on the constitution as reported in Eliot's "Debates" would seem to show that in the National Convention the judicial article of the constitution aroused little comment, and that the question — what law would be administered by the federal courts — was hardly raised. The question was, however, raised in some of the state conventions, and several of the speakers evidently expected that the establishment of United States courts would have for its effect the gradual development of a uniform law. Thus, in the convention of North Carolina, Mr. Iredell said: —

"The propriety of having a Supreme Court in every government must be obvious to every man of reflection. There can be no other way of securing the administration of justice uniformly in the several states. There might be, otherwise, as many different jurisdictions as there are states. It is to be hoped that, if this government be established, connections still more intimate than the present will subsist between the different states. The same measure of justice, therefore, as to the objects of their common concern, ought to prevail in all. A man in North Carolina, for example, if he owed £100 here and was compellable to pay it in good money, ought to have the means of recovering the same sum if due to him in Rhode Island and not merely the nominal sum at about an eighth or tenth part of its

intrinsic value. To obviate such a grievance as this, the constitution has provided a tribunal to administer equal justice to all." [1]

In the same convention Mr. Davie said:—

"The people of the United States have one common interest; they are all members of the same community, and ought to have justice administered to them equally in every part of the continent, in the same manner, with the same dispatch, and on the same principles. It is therefore absolutely necessary that the judiciary of the Union should have jurisdiction in all cases arising in law and equity under the constitution. . . . The security of impartiality is the principal reason for giving the ultimate decision of controversies between citizens of different states. It is essential to the interest of agriculture and commerce that the hands of the states should be bound from making paper money, instalment laws, or *pine barren acts*. By such iniquitous laws the merchant or farmer may be defrauded of a considerable part of his just claims. But in a federal court, real money will be recovered with that speed which is necessary to accommodate the circumstances of individuals. The tedious delays of judicial proceedings, at present, in some states, are ruinous to creditors. In Virginia many suits are for twenty or thirty years spun out by legal ingenuity and the defective construction of their judiciary. A citizen of Massachusetts or this country might be ruined before he could recover a debt in that state. It is necessary, therefore, in order to obtain justice, that we recur to the judiciary of the United States, where justice must be equally administered, and where a debt may be recovered from the citizen of one state as soon as from the citizen of another." [2]

In the South Carolina convention Mr. Pinckney is reported to have said in reference to the federal judiciary that "from the extensiveness of its powers, it may be easily seen, that under a wise management,

[1] Eliot, "The Debates in the Several State Conventions," etc., Philadelphia, 1876, Vol. IV, p. 147. [2] *Ibid.*, 157 *et seq.*

the department might be made the keystone of the arch, the means of connecting and binding the whole together, of preserving uniformity in all the judicial proceedings of the Union."[1]

In the convention of Pennsylvania, Mr. Wilson said, in speaking of the clause giving the United States courts jurisdiction of controversies between citizens and aliens and between citizens of different states: —

"Is it not necessary, if we mean to restore either public or private credit, that foreigners, as well as ourselves, have a just and impartial tribunal to which they may resort? I would ask how a merchant must feel to have his property lie at the mercy of the laws of Rhode Island. I ask, further, How will a creditor feel who has his debts at the mercy of tender laws in other states? It is true that under this constitution, these particular iniquities may be restrained in future; but sir, there are other ways of avoiding payment of debts. There have been installment acts and other acts of a similar effect. Such things, sir, destroy the very sources of credit.

"Is it not an important object to extend our manufactures and our commerce? This cannot be done, unless a proper security is provided for the regular discharge of contracts. This cannot be obtained, unless we give the power of deciding upon those contracts to the general government. . . . At present how are we circumstanced? Merchants of eminence will tell you that they cannot trust their property to the laws of the state in which their correspondents live."[2]

The opinions which have been quoted were expressed by those who were in favor of the adoption of the constitution. But much stronger statements as to the probable effect of that instrument were made by those opposed to it. Thus in the Virginia convention, Mr. Mason said: —

[1] *Ibid.*, p. 258. [2] *Ibid.*, Vol. II, 492 *et seq.*

"When we consider the nature of these [federal] courts we must conclude that their effect and operation will be utterly to destroy the state governments. . . . To those who think that one national consolidated government is best for America, this extensive judicial authority will be agreeable." [1]

Mr. Henry added his protest to Mr. Mason's, observing that the

"Jurisdiction in disputes between citizens of different states will be productive of serious inconveniences. . . . I beg gentlemen to inform me of this — in what courts are they to go, and by what law are they to be tried? Is it by a law of Pennsylvania or Virginia? Those judges must be acquainted with all the laws of the different states. I see arising out of that paper a tribunal that is to be recurred to in all cases, when the destruction of the state judiciaries shall happen; and from the extensive jurisdiction of these paramount courts, the state courts must soon be annihilated." [2]

To this John Marshall, afterwards Chief Justice of the Supreme Court, anticipating the opinion he expressed when on the Supreme Court, answered: —

"In the court of which state will it [a suit] be instituted? said the honorable gentleman. It will be instituted in the court of the state where the defendant resides, where the law can get at him, and nowhere else. By the laws of what state will it be determined? said he. By the laws of the state where the contract was made. According to those laws and those only, can it be decided. Is this a novelty? No; it is a principle in the jurisprudence of this commonwealth. If a man contracted a debt in the East Indies, and it was sued for here, the decision must be consonant to the laws of that country. Suppose a contract made in Maryland where the annual interest is at six per centum and a suit instituted for it in Virginia; what interest would be given now, without any federal aid? The interest of Maryland most certainly; and if the contract had been made in Virginia,

[1] Eliot, "The Debates in the Several State Conventions," etc., Philadelphia, 1876, Vol. IV, p. 521 *et seq.* [2] *Ibid.*, p. 542.

and suit brought in Maryland, the interest of Virginia must be given, without doubt. It is now to be governed by the laws of that state where the contract was made. The laws which governed the contract at its formation govern it in its decision." [1]

Our examination of the debates on the constitution is thus somewhat unsatisfactory and inconclusive, as to the intentions of the men who framed or adopted that instrument. It can hardly be said that they had very clear ideas as to what was the function which the United States courts would discharge. It may, however, be said that many of them evinced a great distrust of the state courts and the state laws, and that most of them looked forward, some with disapproval and others with satisfaction, to a considerable curtailment of the power of the state courts and to the exercise by the new federal courts of much influence in producing uniformity in the law.

The only man who had any clear conception of the position which the federal courts would occupy was John Marshall, whose place on the Supreme Court in later years gave him the opportunity to do much to realize the conception which he had of the duties of those courts. But even he was not altogether right in his view. For while the federal courts have in the main, and in obedience to the action of Congress, applied state law in common law cases arising before them as a result of diversity of citizenship, they have, as has been shown, abandoned the state law, so far as that has been found in the decisions of the state courts in a number of most important branches of the law. But Marshall can hardly be regarded as holding in what he said before the Virginia convention,

[1] *Ibid.*, p. 556.

that the United States courts would be obliged to apply state law. Indeed, he treats the question as merely a question of judicial usage in the determination of questions arising as a result of the conflict of laws, and says nothing to indicate that Congress did not have power to lay down the law to be applied in the courts of the United States. Certainly, what he says is not sufficient to offset what was said by such men as Iredell and Wilson as to the unification of the law of the country which in their opinion would follow the establishment of the judicial system of the United States.

We may therefore conclude that there was nothing said in the conventions, state or national, which either framed or adopted the United States constitution, clearly indicating that those responsible for that instrument intended to deprive either the new courts of the function, incident to judicial power, viz. to lay down the law applicable to cases before them where this had not been determined by legislative authority, or to take away from Congress the legislative power to determine the law to be applied by the United States courts. That one of the first acts of the first Congress was to enact that in trials at common law where not otherwise provided by the laws of the United States the laws of the several states should be regarded as rules of decision in the United States courts, is indicative of doubt whether those courts would apply state law in the absence of such an injunction. Certainly, the reservation made by Congress as to trials at common law, and its positive command that in equity cases the United States courts should be governed by the practice of courts of equity, are evidence that

Congress believed that it had the power to determine what law should be applied in the courts of the United States. The fact that in one case, viz. in trials at common law Congress provided that the laws of the several states should, in the absence of Congressional action to the contrary, be regarded as rules of decision where they apply, is rather evidence of its belief that it was expedient at the time to make a concession to the strong states' rights feeling then existing than an indication that it did not consider that it had the constitutional power to determine what law was to be used by the federal courts in the exercise of the judicial power of the United States.[1]

Are there now, as the result of the express prohibitions on the powers of Congress or of the general spirit of the constitution, any limits to this legislative power of Congress?

Most of the express limitations upon the power of Congress are limitations upon the express powers

[1] See on this point remarks by counsel in Brown *v.* Van Braam, 3 Dallas, 344, 351, decided in 1797.

[The recent decision in the Employers' Liability cases (207 U. S. 463) may seem at first blush to deny the right of Congress to legislate with regard to the private legal relations of individuals. But an examination of the case shows that, in the words of Justice White, "the right of action was expressly based upon the act of Congress of July 11, 1906," which attempted through the exercise by that body of its commerce power to regulate the relations of employers and employed when engaged in interstate commerce. All that the case holds is that Congress cannot through the exercise of the commerce power regulate the relations of employees not engaged in interstate commerce. As the lower federal court obtained jurisdiction under an alleged law of the United States and not through the diversity of citizenship of the parties to the suit, the case cannot be held to lay down any rule as to the legislative power which Congress may exercise under the judicial article of the constitution.

granted, as, for example, those imposed upon the taxing power. There are, however, a few, such as those imposed by the fifth amendment, which have been held to limit the legislative power of Congress under the commerce clause,[1] and which, if the occasion required, would undoubtedly be held to limit any of its implied legislative powers also. But such express limitations are few in number and would not seriously diminish those powers. The statement contained in Art. X of the amendments, to the effect that "the powers not delegated to the United States by the constitution nor prohibited by it to the states, are reserved to the states or to the people," cannot be regarded as controlling, since the question at issue is whether a power of legislation has been granted to Congress by Art. III when taken in connection with Art. I, Sec. 8, Paragraph 18.

Is there, however, anything in what has been termed "the spirit of the constitution" which would prevent the exercise by Congress of legislative power under the judicial article. It cannot be denied that one is apt to regard the proposition that Congress has the right to determine the private legal relations of citizens of the United States with aliens and those of citizens of one state with citizens of another as preposterous and as clearly out of harmony with the spirit of the constitution; but it must always be kept in mind that existing conditions are due, not to the constitution, but to Congress, which determined to adopt — but in trials at common law only — the laws of

[1] Monongahela Navigation Company *v.* United States, 148 U. S. 312; Champion *v.* Ames, 188 U. S. 321; United States *v.* Adair, 208 U. S. 161.

the several states as rules of decision for the federal courts. This action of Congress was, however, taken in the latter part of the eighteenth century, at a time when social and economic conditions were, as compared with the present, very decentralized, and when the jealousy of the exercise of power by the national government was very great and the insistence upon the rights of the several states much more marked than it is at present. It must further be remembered that the movement for a centralization of the law of the United States is already in full swing. Congress has already centralized the maritime law; the federal courts are centralizing the commercial law, particularly that with regard to municipal bonds and the law of carriers and of master and servant; and state commissioners and houses of governors are, as has been pointed out, meeting every year in the effort to bring about uniformity in those branches of the law in which uniformity is believed to be desirable. Who, in view of these facts, will dare to say that if Congress, becoming convinced of the desirability of the existence of a uniform law to be administered by the federal courts in controversies between citizens and aliens and between citizens of different states, shall make provision by legislation for such law, the Supreme Court will say it nay? Is not the real spirit of the constitution that matters requiring uniformity of treatment shall receive that treatment rather than that a set of concrete subjects, determined by judicial decisions made under special economic and social conditions, shall for all time be assigned to Congress and another set to the states? Was not the constitution purposely silent as to the law to be applied

by the United States courts? And is not the action of the Supreme Court in extending the admiralty jurisdiction and in deciding that Congress has power under the judicial article to fix the maritime law based upon the idea that the social needs of the country require uniformity in this branch of the law? If the same needs are felt in other branches of the law, why should it be claimed that Congress has not the constitutional power to satisfy those needs? Certainly there is no distinct prohibition of such action. On the other hand, there is the express grant of power to Congress to make all laws which shall be necessary and proper for carrying into execution all powers vested by the constitution in the government of the United States or in any department or officer thereof; and it cannot be denied that the judicial power has been vested by the constitution in the courts of the United States, and that courts without a substantive law are inconceivable. This was certainly the opinion of Chief Justice Marshall as to the power of Congress to legislate concerning the remedies to be applied in the federal courts, and this is the theory upon which both Congress and the Supreme Court have acted in the development of the remedies which may be used in those courts. No distinction between remedies and substantive law is made by the constitution in this respect.

Are there, however, any parts of the law to be applied by the United States courts in controversies arising as a result of diversity of citizenship to which this legislative power of Congress may not be extended?

In answering this question we must be careful not to lay too great emphasis upon those decisions of the

Supreme Court made in applying Section 721 of the United States Revised Statutes, which hold that, under the law as it now stands, the federal courts must apply state laws in what are regarded as purely local matters, such as real property; for these decisions were made, not in interpreting the constitution, but in construing a statute of Congress; and there is more than one case decided by the federal courts, sitting as courts of equity, in which those courts have refused to follow the decisions of state courts even where the title to land in a state was affected thereby.[1] But in spite of these equity cases, it cannot be denied that the law of real property is probably more thoroughly a matter of local concern than almost any other branch of the law; and it may be assumed that it will be with the greatest hesitation that the Supreme Court will ever recognize a power in Congress, should Congress ever desire to exercise it, to regulate the law of real property. It must be remembered, however, that in cases of diversity of citizenship the United States courts have jurisdiction, regardless of the character of the controversy.

Similar considerations present themselves when we come to the law governing domestic relations. There are several utterances of the Supreme Court which go far to support the proposition that the judicial power of the United States does not extend over the field of domestic relations, although, it must be confessed, no satisfactory reason is given for the statement. Thus in Barber *v.* Barber,[2] Justice Wayne says, without either argument or citation: "We disclaim al-

[1] See, for example, Russell *v.* Southard, 12 Howard, 139.
[2] 21 Howard, 582.

together any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo* or to one from bed and board." In this case, however, the court held that a woman who was separated *a mensa et thoro* from her husband could on the ground of diversity of citizenship sue her husband, who had left the state of the marriage domicile, in the courts of the United States, in order to recover against him a claim for alimony based on the decree of the state court granting her the separation. Again, in the case of *In re* Burrus,[1] the court says, in denying to a father a *habeas corpus* to recover possession of his infant child: —

"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. As to the right to the control and possession of this child as it is contested by its father and its grandfather, it is one in regard to which neither the Congress of the United States nor any authority of the United States has any special jurisdiction. Whether the one or the other is entitled to the possession does not depend upon any act of Congress or any treaty of the United States or its constitution."

What is here said as to the law of the domestic relations is, however, merely dictum, as the case was decided on the ground that under the act of Congress the courts of the United States do not have jurisdiction to issue the *habeas corpus* in this class of cases.[2]

[1] 136 U. S. 586.

[2] But see Andrews *v.* Andrews, 188 U. S. 32, and Haddock *v.* Haddock, 201 U. S. 575, where a similar statement is made *a ratio decidendi*, and may therefore be regarded as part of the actual decision.

The lack of any instance of a suit for divorce originating in the United States courts is of course primarily due to the fact that Congress has never conferred upon them such jurisdiction. The failure of Congress to act may of course be due to the belief that a divorce case is not a case in law or equity and that no court has divorce powers except as a result of statute.[1] But it is to be remembered that the term "law and equity" is to be liberally interpreted, and it has been decided that the federal courts may administer new equitable remedies provided by state statutes.[2]

The probate law is in somewhat the same position as the law of domestic relations. That is, whatever may be the constitutional extent of the powers which may be given by Congress to the federal courts, those courts have never attempted to exercise a probate jurisdiction, or, even by an equitable proceeding, to set aside the probate of a will.[3] Their reasons for pursuing this course, however, have apparently been statutory rather than constitutional; and they have been ready to take jurisdiction of controversies between citizens of different states arising out of the transfer of property under a will or in the case of intestacy.[4] Thus they have permitted the removal to them of suits instituted in state courts to annul a will as a muniment of title, where the will had been admitted to probate as a result of a prior proceeding in

[1] See *e.g.* Erkenbrach *v.* Erkenbrach, 96 N. Y. 456.

[2] See remarks of Justice Field in Ellis *v.* Davis, *infra.*

[3] Fouvergue *v.* Municipality, 18 Howard, 470; Broderick's Will, 21 Wallace, 503; Reed *v.* Reed, 31 Fed. 49; *In re* Cilley, 58 Fed. 977; *In re* Aspinwall's Estate, 83 Fed. 851; Wold *v.* Franz, 100 Fed. 680.

[4] See Foley *v.* Hartley, 72 Fed. 570; *In re* Foley, 76 Fed. 390; Craigie *v.* McArthur, 4 Dillon, 474.

a state court and where the state law recognized such a jurisdiction in the state courts. This was done in Gaines *v.* Fuentes.[1]

[1] 92 U. S. 10. In rendering the decision in this case, Justice Field said: "In the case of Broderick's Will, 21 Wallace, 503, the doctrine is approved, which is established both in England and in this country, that by the general jurisdiction of courts of equity, independent of statutes, a bill will not lie to set aside a will or its probate; and, whatever the cause of the establishment of this doctrine originally, there is ample reason for its maintenance in this country, from the full jurisdiction over the subject of wills vested in the probate courts, and the revisory power over their adjudications in the appellate courts. But that such jurisdiction may be vested in the state courts of equity by statute is there recognized, and that, when so vested, the federal courts, sitting in the states where such statutes exist, will also entertain concurrent jurisdiction in a case between proper parties.

"There are, it is true, in several decisions of this court expressions of opinion that the federal courts have no probate jurisdiction, referring particularly to the establishment of wills; and such is undoubtedly the case under the existing legislation of Congress. The reason lies in the nature of the proceeding to probate a will as one *in rem*, which does not necessarily involve any controversy between parties; indeed, in the majority of instances, no controversy exists. In its initiation all persons are cited to appear, whether of the state where the will is offered, or of other states. From its nature, and from the want of parties, or the fact that all the world are parties, the proceeding is not within the designation of cases at law or in equity between parties of different states, of which the federal courts have concurrent jurisdiction with the state courts under the Judiciary Act; but whenever a controversy in a suit between such parties arises respecting the validity or construction of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties."

This same doctrine was laid down by Justice Matthews in Ellis *v.* Davis (109 U. S. 485, 496, 497). He said: "The judicial power of the United States extends, by the terms of the constitution, 'to controversies between citizens of different states'; and on the supposition which is not admitted, that this embraces only such as arise in cases 'in law and equity' it does not necessarily exclude those which may

But the power which the courts of the United States thus have over the estates of deceased persons does not give them the right to assume full control of such estates so as to distribute them among all persons

involve the exercise of jurisdiction in reference to the proof of the validity of wills. The original probate, of course, is mere matter of state regulation, and depends entirely upon the local law; for it is that law which confers the power of making wills, and prescribes the conditions upon which alone they may take effect; and as, by the law in almost all the states, no instrument can be effective as a will until proved, no rights in relation to it, capable of being contested between parties, can arise until preliminary probate has been first made. Jurisdiction as to wills, and their probate as such, is neither included in nor excepted out of the grant of judicial power to the courts of the United States. So far as it is *ex parte* and merely administrative, it is not conferred, and it cannot be exercised by them at all until, in a case at law or in equity, its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties. It has often been decided by this court that the terms 'law' and 'equity,' as used in the constitution, although intended to mark and fix the distinction between the two systems of jurisprudence as known and practiced at the time of its adoption, do not restrict the jurisdiction conferred by it to the very rights and remedies then recognized and employed, but embrace as well not only rights newly created by statutes of the states as in cases of actions for the loss occasioned to survivors by the death of a person caused by the wrongful act, neglect, or default of another (Railway Company *v.* Whitton, 13 Wallace, 270, 287; Dennick *v.* Railroad Company, 103 U. S. 11), but new forms of remedies to be administered in the courts of the United States according to the nature of the case, so as to save to suitors the right to trial by jury in cases in which they are entitled to it according to the course and analogy of the common law."

Applying these principles, the Supreme Court has often held that "the general equity jurisdiction of the circuit court of the United States to administer, as between citizens of different states, the assets of a deceased person within its jurisdiction cannot be defeated or impaired by laws of a state undertaking to give exclusive jurisdiction to its own courts." (Lawrence *v.* Nelson, 143 U. S. 215, 223. See also Clark *v.* Bever, 139 U. S. 96, 103; Hayes *v.* Pratt, 147 U. S. 557; Payne *v.* Hook, 7 Wallace, 425.)

interested therein, citizens and noncitizens. A debt against an estate may be established in a federal court, but the debt so established "must take its place and share of the estate as administered by the probate court; and it cannot be enforced by process directly against the property of the decedent."[1]

Finally, it is difficult to conceive that Congress could derive from the judicial article any legislative powers with regard to matters falling within the administrative law of the states. It could hardly undertake to determine, for example, the law governing taxation, officers, the police power, or municipal corporations.[2] It is true, of course, that there are a number of provisions in the United States constitution, like the fourteenth and fifteenth amendments, which limit the powers of the states, and which at the same time expressly confer upon Congress the power to enforce these limitations by appropriate legislation. The Supreme Court has interpreted the fourteenth amendment as confining Congress to legislation directed against the actions of the states,[3] and it is difficult to see how, under this amendment, Congress could prescribe the administrative proceedings which states must follow in depriving a person of his life, liberty, or property. Without such legislation, however, the Supreme Court has already laid down certain limits beyond which the state may not go.

It is true, also, as has been pointed out, that, in the exercise of their jurisdiction based on diversity of citizenship, the federal courts have developed in the

[1] Byers *v.* McAuley, 149 U. S. 608, 620.
[2] See *e.g.* Detroit *v.* Osborne, 135 U. S. 492.
[3] Cruikshank *v.* United States, 92 U. S. 542.

case of municipal bonds a law of estoppel by recital which is quite opposed to the law administered in the courts of some of the states. But it is very doubtful, to say the least, whether the federal courts could independently determine the regularity of the issue of municipal bonds where the matter had been clearly regulated by a state statute; [1] and if the federal courts have no such power, Congress could hardly exercise legislative powers as to the subject. At the same time it is to be remembered that the law of municipal bonds and other similar securities has a great resemblance to the law of negotiable paper, in regard to which the federal courts have claimed large powers of independent action.

Finally, it is well to remember that no provision of the constitution, either expressly or impliedly, imposes upon the United States government the obligation to administer in its courts any law of which it does not approve. The courts of the United States are instruments of the United States government, just as the post office is such an instrument; and it has been held that Congress has the right to determine that it will not lend itself or its post offices to the distribution of mail matter of which it does not approve.[2] What is there in the constitution to prevent Congress from determining that it will not permit its courts to be made use of to administer laws which it deems to be improper? It would not by so doing infringe upon the rights of the states, any more than a court of England would be infringing upon the rights of the state of New York if it applied to a case before it, arising between a British citizen and a citizen of New York,

[1] Waite *v.* Santa Cruz; 184 U. S. 302, 319.
[2] *In re* Rapier, 143 U. S. 110; *Ex parte* Jackson, 96 U. S. 727.

an act of Parliament contrary to the general principles of international private law.

II

The question, how far Congress has attempted, or in the absence of federal legislation the federal courts themselves have attempted, to lay down the substantive law to be applied by them in the exercise of the judicial power conferred upon them by Art. III of the constitution, has been practically answered in the foregoing pages. By way of summing up the points already noted, it may be said that Congress has laid down the rule that, in trials at common law, the federal courts are, except as otherwise provided, to regard the laws of the several states as rules of decision. Congress has, however, otherwise provided as to the competency of witnesses. The United States courts have with Congressional authority developed their own system of equity jurisprudence; and they have acted independently of the decisions of the state courts, and, in rare cases, even of state statutes, in certain branches of the law, prominent among which are the commercial law and the law of master and servant. Practically the whole field of admiralty and maritime law is regulated by Congress, whose action is regarded as controlling that of the states in those cases in which the states have been recognized as possessing concurrent powers of action. Congress has also fixed the liabilities of the United States government acting in a private legal capacity.

It cannot therefore be said that, apart from the maritime law and the law affecting the liabilities of the

United States government, in which the jurisdiction of the federal courts is for the most part made exclusive by act of Congress, either Congress or the federal courts have claimed or exercised the right to determine the law to be applied by the federal courts in their exercise of the judicial power granted to the United States by the constitution. But the few cases in which the claim has been made by the federal courts, when taken in connection with the extensive powers of legislation which Congress, with the approval of the Supreme Court, has actually exercised in regard to the maritime law, go far towards proving the proposition that Congress both has, and has exercised, legislative powers which are derived from the judicial article of the constitution.

III

The third point to which it is desirable to direct attention is the effect which the recognition of the legislative power here attributed to Congress would have on our law.

The answer to this question is dependent in large measure upon a consideration of two points: the extent to which the jurisdiction of the federal courts in cases of diversity of citizenship is limited by Congressional legislation and may be widened by Congress; and the extent to which, under the decisions of the federal courts, diversity of citizenship may be artificially produced, for example, by assignment of claims or by change of residence, for the purpose of establishing federal jurisdiction.

Inasmuch as Congress has the right to vest in the federal courts such portion of the judicial power of the

United States as it sees fit, and need not grant the entire judicial power, it may limit the jurisdiction of such courts in cases of diversity of citizenship. As a matter of fact, it has done so, in the act of March 3, 1875, Chapter 475,[1] as amended. In this act the jurisdiction of the circuit courts is limited to suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of interest and costs, the sum of two thousand dollars.[2] It is furthermore provided that, in case the jurisdiction is based on diversity of citizenship, no circuit court or district court shall have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover said contents if no assignment or transfer had been made. Another section of the same act provides for the removal by the defendant to the circuit court of any suit begun in a state court of which the circuit court has jurisdiction by reason of diversity of citizenship.

Under these provisions either the plaintiff may initiate the suit in a federal court, or the defendant may remove it to the federal court if it has been begun in a state court; so that it is possible, where either of the parties to a suit of which the federal courts have jurisdiction so desires, to have the case tried in such courts, although the act of Congress expressly provides that

[1] 18 Statutes at Large, 470.

[2] The Judiciary Act just passed by Congress has raised this limit to $3000.

the federal courts in these cases of diversity of citizenship shall have a jurisdiction which is concurrent with that of the state courts. If, therefore, the people of this country were on the whole better satisfied with either the procedure of the federal courts or with the law administered therein, and if Congress should remove the prohibition as to assignments, or should make the jurisdiction of the United States courts exclusive in all the cases in which the judicial power of the United States is recognized in the constitution, they could, and would, in cases of diversity of citizenship, neglect the state courts and try all their cases in the federal courts.

The possibility of a great increase of the work of the federal courts was undoubtedly present in the mind of Congress when it passed the law cited above, denying to the federal courts jurisdiction where there had been an assignment of a promissory note or other chose in action in order to give a federal court jurisdiction. This prohibition, however, is purely statutory and may therefore be removed, as it was imposed, by Congress.

Further, notwithstanding the prohibition of assignment, there are still certain claims which may be the basis of suit and which may be assigned; and the Supreme Court has held that, if there is a consideration for the assignment, without which consideration the federal courts will not take jurisdiction,[1] the mere fact that the sole purpose of the assignment was to give the federal courts jurisdiction will not divest them of jurisdiction.[2] The lower United States courts have also held that, if a citizen removes from

[1] Bernards Township *v.* Stebbins, 109 U. S. 341.
[2] Lehigh, etc., Company *v.* Kelly, 160 U. S. 327.

one state to another in order to prosecute a suit in the courts of the United States, provided the removal be real, the motive of the act cannot be inquired into;[1] and that the change of domicile or acquisition of citizenship after the commencement of a suit in the federal courts will not oust their jurisdiction, if such jurisdiction were rightfully acquired originally.[2] This being the law, we have only to remember what happened long ago, in England, when the royal courts, with their more satisfactory procedure and remedies, came into competition with the popular courts. These latter bodies found themselves deserted to such an extent by suitors, who preferred the justice administered by the royal courts, that they gradually dropped out of existence, although they were never abolished by act of Parliament.

Of course, the jurisdiction of the federal courts could not, under the existing constitution, be extended so far as was that of the royal courts. There would of necessity remain considerable litigation between residents of the same state, and there are parts of the law which would presumably continue to be determined by the courts or the legislatures of the states. But the activity of the state courts as compared with that of the federal courts would be so small and their influence so slight that they could hardly fail to be dominated by the latter, and the federal decisions would thus exercise a vastly greater force than at present for the unification of the law.

We may conclude, then, that there is more reason

[1] Briggs *v.* French, 2 Sumner, 251.

[2] Haracovic *v.* Standard Oil Company, 105 Fed. Rep. 785, and cases cited.

than at first blush would appear, for believing that under the constitution, as it now stands, it is in the power of Congress to exercise a tremendous influence on the unification of the law. Through the exercise of its power under the commerce clause to regulate the legal relations of shippers and carriers and employer and employees in interstate and foreign commerce, to charter corporations for the purpose of engaging in foreign and interstate commerce and to determine their legal relations, and by its prohibitions to influence the conditions of labor and through the exercise of its power to lay down the law to be applied in controversies before the United States courts between citizens of different states, and citizens and aliens, Congress may, it is believed, take long steps toward securing that national law, the necessity of securing which would seem to be growing more pressing every day.

The views which have been advanced with regard to the powers of Congress both under the commerce clause and the judicial article of the United States constitution are views, which, it ought to be said, are in all probability not universally, or perhaps even generally, accepted. They are, in fact, opposed to the historical tradition which has sprung up with regard to that instrument. Owing to the extreme individualism which has been characteristic of American political ideas, and to the states' rights reaction which followed the death of Chief Justice Marshall, there has been a tendency during the past sixty or seventy years either for Congress not to exercise powers which are without doubt within its competence, or for lawyers generally to question the propriety,

if not the constitutionality, of action on the part of government whether state or national.

One advantage which this individualistic theory has had, however, has been, as has been intimated, to lay the foundation of more effective Congressional action when the need for it has been felt. For the very denial of the power of the states to take action carried with it as an almost logical result the recognition of the power of Congress. This statement is particularly true of the cases in which the power of the states to regulate commerce was denied. The denial of that power was made because the subject attempted to be regulated was a part of that commerce which was by the constitution subject to the regulation of Congress. The denial of the right of the states was thus an assertion of the right of Congress.

In a number of instances in which powers have been claimed for Congress it may not, however, be said that the right of the states has been denied. We have in these instances no decisions even thus indirectly recognizing Congressional authority. In these cases the attempt has been made to show that that authority exists. But the claim cannot be made that the competence of the federal government has been proved beyond the peradventure of a doubt. If Congress should attempt to exercise the powers in question, and the constitutionality of such attempts should be brought before the Supreme Court, the cases would be cases of first impression, and the court would be necessarily called upon, as it was in the early history of the country, to take a position either on the side of national supremacy or on that of states rights. Probably the decisions rendered would not always

be, as they have not always been in the past, made by a unanimous court. Probably, also, the dissenting opinions would be from the viewpoint of logic or even from the viewpoint of history quite as satisfactory and convincing as the opinions of the majority. Really, the actual decisions reached would be made as the result of the personal political beliefs of the members of the court. The justices of the Supreme Court are, notwithstanding their exalted position, after all is said, only men. Some of them would think that present conditions require an extension of national power; some of them, on the other hand, would deprecate any such action and would believe that the maintenance of the powers of the states in their present condition is necessary to our welfare as a nation.

On this account too much emphasis cannot be laid upon the proposition that the constitution did, as a matter of fact, give to the federal government a sphere of action whose limits are to be laid down, not as a result of an acceptance of the historical tradition of constitutional power of the last sixty or seventy years, but rather as a result of a consideration of the present needs of the country. These should be permitted to influence the interpretation of the provisions of the constitution purposely left very general in character. It is submitted that such a theory of constitutional interpretation, and only such a theory, will permit us so to develop our political system as to bring it into accord with the facts of modern American life.

CHAPTER V

CONSTITUTIONALITY OF POLITICAL REFORM

I. The Separation of Governmental Powers

The political organization provided in 1787 for the government of the United States was set forth in broad outline, at any rate, in the constitution. It was based upon the separation of the legislative, executive, and judicial powers. A bicameral legislature was established, one house of which should represent the states, the other of which should be elected by the people of the various districts into which the states were, for this purpose, to be divided. The only officers to be elected by the people were the members of the House of Representatives. The constitution did not itself, however, fix the qualifications of the voters who should elect these officers, but left that matter to be determined by the states by providing that "electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature."

All the other officers of the United States government were to be chosen either by executive appointment or as a result of the action of authorities of the state governments. Thus, the President and Vice President were to be chosen by electors to be selected by each of the states in such manner as the legislature thereof might direct, while the members of the United States

Senate representing each state were to be "chosen by the legislature thereof."

Owing to the fact that the people of the states possessed under the constitution the power to fix the qualifications of the electors for their own legislatures and, as a consequence, also those of the electors for members of the House of Representatives, the conditions of suffrage for electors for the only popularly elective officers of the United States were until soon after the Civil War a purely state matter. The fourteenth and fifteenth amendments have, it is true, somewhat limited this power of the states. But within the limits of those amendments the states are still supreme. As state constitutions are, comparatively speaking, easily amended, the qualifications for suffrage are also easily changed and, as a matter of fact, have been frequently and greatly modified during the past century.

Notwithstanding the provisions of the constitution evidently attempting to prevent the people from electing either the President or senators, the people have, through the adoption of extra-legal methods of political action, succeeded in changing the method of choosing the president so as to make what we call the presidential election a really popular election. A similar movement has been set on foot with considerable success in the case of the United States senators. In the one case the presidential electors, in the other the state legislatures, which under the constitution have the legal power of choice, have been reduced to the position of ministerial bodies which merely register the determination of the people of the states represented by them. In both these instances it

will be noticed that a real change has been made in the political organization of the United States government, not by constitutional amendment, but by a sort of popular agreement, without the sanction of law, that the game of politics shall be played in accordance with a new set of rules. He would, therefore, be a rash man who would venture to say that the United States constitution, difficult of amendment as it is, absolutely precludes changes — even important changes — in our political organization. The application of the recall, *e.g.* to members of both houses of Congress through a somewhat similar method as is now being applied in order to secure the election of senators in some of the states, is by no means inconceivable.

It has been said that the political organization provided for by the United States constitution was based upon the principle of the separation of the legislative, executive, and judicial powers of government. Mr. Justice Miller of the Supreme Court of the United States said in Kilbourn *v.* Thompson:[1] —

"It is believed to be one of the chief merits of the American system of written constitutional law that all the powers intrusted to government, whether state or national, are divided into three grand departments — the executive, the legislative, and judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the power confided to the others, but that each shall by the law of its

[1] 103 U. S. 168.

creation be limited to the exercise of the powers appropriate to its own department and no other."

Mr. Justice Miller's statement that the principle of the separation of powers is at the basis of the state governments, must not, however, be understood as indicating that the constitution of the United States makes this principle obligatory upon the states. It is indeed true that the United States constitution mentions several times both a state legislature[1] and a state executive authority,[2] while mention is made at any rate of state judges.[3] But the Supreme Court has held in a number of cases that the constitution does not prevent the grant of any power to any authority in the state government.[4] The only constitutional obligation on this subject imposed upon the power of the state legislatures to organize the state governments as they see fit is to be found in state constitutions and is not of great importance, since state constitutions are easily amended.

But wherever the constitutional rule is to be found, it is, as a matter of fact, at the basis of the system of government of both the United States and the states. It is furthermore at the same time a political principle and also, because the courts may declare an act of the legislature unconstitutional, a rule of law. But both as a principle of political science and as a rule

[1] *E.g.* Art. I, Sec. 2, Par. 1; Sec. 4, Par. 1; Art. II, Sec. 1, Par. 2; Art. IV, Sec. 4.

[2] Art. I, Sec. 2, Par. 4; Sec. 3, Par. 1; Art. IV, Sec. 2, Par. 2; Sec. 4.

[3] Art. VI.

[4] Satterlee *v.* Mathewson, 2 Peters, 380; Consolidated Rendering Co. *v.* Vermont, 207 U. S. 541; Dreyer *v.* Illinois, 187 U. S. 71; Ughebanks *v.* Armstrong, 208 U. S. 481.

of law, its force is being much weakened. The success that the people of this country have had in bringing it about that the President is elected as a result of a popular vote, the constitution, to the contrary notwithstanding, has seriously weakened the force of the principle as a principle of political science. For, as every one knows, the President at the present time exercises an enormous influence over the legislation of Congress. In fact, all really important bills are known as administration bills. Few projects of law have any chance of enactment by Congress which are opposed by the President. In the states as well, governors are influencing more and more the legislatures, and in some cases are even bending them to the executive will against their wishes. The widespread movement throughout the country in favor of what is known as the "commission form of city government," which abandons completely the distinction between the legislative and executive authorities in city government, is also evidence of the belief of a large portion of our people that the principle of the separation of powers is inapplicable to the conditions existing in our municipalities.

The force of the principle as a rule of law is also being weakened. With the development of the more complex conditions characteristic of modern life, it has been felt imperatively necessary to depart at any rate from the strict application of the principle in other directions, and the courts have in a series of cases been called upon to determine whether the departures attempted in concrete cases are constitutionally permissible. These decisions may be classed under two general heads.

In the first place, the legislature has felt that it is impossible for it to regulate in all their details the matters which at present need regulation. It has therefore attempted to delegate to executive and administrative authorities the power to issue regulations supplementary to and in execution of the statutes which it itself has adopted and which, it may perhaps be said, are more general in character than they once were. In discussing this question of the right of the legislature to delegate its power of regulation, we must be careful to distinguish between regulations of a purely local and those of a general character. For it is universally admitted by the state courts that the state constitutions must be interpreted in the light of our history. Inasmuch as it has always been the rule both in England and this country that local corporations have the right to pass local by-laws, the legislature is regarded as having the right, notwithstanding the adoption of the principle of the separation of powers, to authorize the local corporations to pass regulations with regard to their local affairs.[1]

When, however, we come to the relations existing between the legislature and central executive or administrative officers, conditions are quite different. For the constitutions have vested the legislative power in the legislature and the executive power in the President or governor, and in some cases have expressly forbidden the one authority to exercise the power vested in the other. The result has been

[1] See Fox *v.* McDonald, 101 Ala. 51; Morris *v.* City of Columbus, 102 Ga. 792. As to the extent to which such decentralization of the state government may go, see *infra*, 228.

that all the earlier and, indeed, some of the recent cases have laid down the rule without qualification that the constitution impliedly, at any rate, forbids the legislature to delegate to executive or administrative officers the legislative power, and have regarded as unconstitutional the attempts referred to of the legislature to authorize executive and administrative authorities to issue regulations. Such decisions are rather more common in the state than in the federal courts. There is, however, a tendency, particularly in the recent decisions of the United States Supreme Court, to recognize such action upon the part of the legislature as constitutional. Congress has found it impossible itself to regulate all the administrative details of the federal government, and, as time goes on, is more and more frequently, by express provision of statute, enacting that details shall be cared for by regulations to be issued by the heads of the executive departments. Such statutes have usually been upheld by the Supreme Court of the United States on the theory, not that Congress may delegate legislative power, but that if it lays down the general principles which will control the subject in question, it may vest the President or the heads of executive departments with the power, through supplementary regulations, to regulate the details for which Congress finds it difficult, if not impossible, to provide.[1]

In some instances the state courts take the same view. Thus the New York Court of Appeals holds [2]

[1] Boske *v.* Comingore, 177 U. S. 459; *In re* Kollock, 165 U. S. 526; Buttfield *v.* Stranahan, 192 U. S. 470.

[2] Village of Saratoga Springs *v.* Saratoga Springs Gas, etc., Co., 191 N. Y. 123.

that it is constitutional for the state legislature to vest public service commissions with the authority to provide "reasonable rates" which may be charged by public service companies. The statement that the rate shall be reasonable is supposed to be a sufficient statement of the general principle to be followed in the regulations.[1]

The branch of state administration in which the tendency, to recognize a power in the legislature to authorize administrative authorities to issue regulations having the binding force of law on all individuals affected thereby, is most noticeable, is that of the public health. Most states at the present time have state boards of health which have the right under the law to issue health regulations of force either throughout the whole state or in some part thereof. By such regulations, when so authorized, these boards may, *e.g.* when smallpox is prevalent, impose the obligation to be vaccinated either upon all persons, or upon pupils in schools under the penalty of being forbidden to attend school.[2]

It would seem, therefore, that the more complex conditions of modern American society, *i.e.* as compared with what formerly existed, have brought it about that large powers really legislative in character may be vested in executive and administrative officers in spite of the existence of the principle of the separation of powers as a doctrine of American constitutional law, and that, further, the end is not yet. In modifying the position which they formerly took,

[1] See also Blue *v.* Beach, 155 Ind. 121, as to the power to authorize administrative boards to issue regulations.

[2] Blue *v.* Beach, *loc. cit.*

the courts are only bringing our law into accord with that of foreign countries, where such ordinance powers have for a long time been regarded as a necessary adjunct of executive or administrative authority.

In the second place, it has been deemed desirable to vest executive or administrative authorities with large discretion in the performance of acts of special individual application which have an important effect on individual rights. Here again the federal courts have perhaps gone farther than the state courts in regarding as constitutional statutes which attempt to confer such powers upon administrative officers. The policy of the government of the United States within the last few years has been to exclude from entrance into the country certain classes of aliens, particularly the Chinese, and the courts have regarded as due process of law very arbitrary action upon the part of federal administrative officers when authorized thereto by Congress. At the present time administrative officers may decide finally without appeal to the courts such questions as whether a Chinaman is authorized under the law to enter the country, even where the claim to enter is based upon the allegation that the would-be immigrant is a natural-born American citizen.[1] The same rule has been applied in the case of the attempted importation into the country of articles which have been found by an administrative officer, in accordance with the statute, to be forbidden the right of importation, while in the case of an alleged attempt to use the post office for a purpose forbidden by law, it has been held that statutes giving power

[1] United States *v.* Ju Toy, 198 U. S. 253; see also Lem Moon Sing *v.* United States, 158 U. S. 538.

to postal officials to deny the use of the mails to persons found by such officers to be improperly using the mails, vest powers of final decision in such officers.[1] Perhaps the strongest case is the one recently decided[2] in which it was held that it was constitutional for Congress to grant to an administrative officer the power to impose an administrative penalty in the nature of a fine upon a steamship company which such officer had decided had willfully violated the law prohibiting the bringing to this country of any alien afflicted with a loathsome disease.[3]

In the states such powers are rarely given to administrative officers except in health and tax matters, but in these cases are sometimes, particularly in tax cases, regarded as constitutionally granted if a previous hearing has been accorded to the person affected by the action of the administrative officer.[4]

Apart from the sanitary and tax administration, — and even here it should be said that the action of health officers is not usually regarded as final and conclusive, but is often subject in one way or another to judicial review,[5] — the courts do not favor the grant of such judicial or quasi-judicial powers to administrative officers. Thus the attempt to give to administrative officers the power to determine the question

[1] Buttfield *v.* Stranahan, 192 U. S. 470; Bates & Guild Co. *v* Payne, 194 U. S. 107.

[2] Oceanic Steam Navigation Co. *v.* Stranahan, 214 U. S. 520.

[3] See also on the general principle, Union Bridge *v.* United States, 204 U. S. 364; Monongahela Bridge Co. *v.* United States, 216 U. S. 177.

[4] Raymond *v.* Fish, 51 Conn. 80; Metropolitan Board of Health *v.* Heister, 37 N. Y. 661; Barhyte *v.* Shepherd, 35 N. Y. 238; Palmer *v.* McMahon, 133 U. S. 660.

[5] See Lowe *v.* Conroy, 120 Wis. 151.

of land titles under a statute providing for the so-called Torrens system of registering such titles has been held to be unconstitutional, because attempting to confer judicial power upon an administrative officer.[1] Furthermore, the fifth and fourteenth amendments of the United States constitution, the one limiting the United States, the other, the state governments, prevent the respective governments from depriving a person of his life, liberty, or property without due process of law. This process must in certain cases be judicial process, as in the case of the forfeiture of property of great value.[2] The attempt to confer on administrative officers power to forfeit such property summarily is therefore improper. Thus, again, one may not be imprisoned for contempt except by judicial process.[3]

Attention should, however, be called to the fact that early in the history of our government it was decided that the due process of law, without which no one can be deprived of his life, liberty, or property, was not necessarily judicial process, but might be administrative process. These cases deal almost entirely with attempts upon the part of the government to recover balances either due from revenue officers or for taxes, and the decisions are largely, if not entirely, based upon the idea that, such summary administrative methods having always been employed in these cases, the constitutional provision requiring

[1] People *v.* Chase, 165 Ill. 527.

[2] Cf. Lawton *v.* Steele, 152 U. S. 133.

[3] Langenberg *v.* Decker, 131 Ind. 471. See also Railway Co. *v.* Minnesota, 134 U. S. 418, where it would seem to be held that railway rates may not be fixed by administrative process.

due process of law must be regarded as having been adopted with such practices in mind.[1]

It may therefore safely be said that a tendency is noticeable in the decisions of the courts, particularly with regard to those parts of our administrative system which present the most complex and difficult problems, to abandon certainly the strict application of the principle of the separation of powers whenever the demand for administrative efficiency would seem to make such action desirable, and it may be expected that this tendency will continue and even increase in force if it is apprehended that even conservative social reform is impossible under the former conception of the proper relations of governmental authorities. If the state courts oppose these attempts to depart from the principle of the separation of powers, it is altogether probable that state constitutions will be amended in those particulars where amendment in this direction seems specially desirable. Thus Michigan has amended her constitution so as to permit provision to be made by the legislature for indeterminate sentences, a law providing for which had been held unconstitutional as vesting judicial power in nonjudicial authorities.[2] It is, of course, possible that such amendments might be regarded by the state courts as improper under the fourteenth amendment of the constitution of the United States providing that no one shall be deprived of his liberty without

[1] Murray's Lessee *v.* Hoboken Land & Improvement Co., 18 How. U. S. 272; Commonwealth *v.* Byrne, 20 Grattan, 165.

[2] See *In re* Manaca, 146 Mich. 697, and other cases cited in Dodd, "The Growth of Judicial Power," *Pol. Sci. Quar.*, Vol. XXV, pp. 193, 202.

due process of law, but, as has been pointed out, Congress may provide for an appeal from such decisions to the Supreme Court of the United States,[1] and that body has in a number of instances expressed its opinion that due process of law as applied to liberty may mean different things at different times and in different conditions.[2] Perhaps the most remarkable statement of this character made in a Supreme Court opinion is that made by Mr. Justice Mathews in Hurtado *v.* California,[3] where it was held that due process of law permitted the presentation of criminal charges by information and did not make indictment necessary. In the course of the opinion it was said:—

"The constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of

[1] *Supra* p. 31.

[2] See Ughbanks *v.* Armstrong, 208 U. S. 481; and Dreyer *v.* Illinois, 187 U. S. 71, both upholding the constitutionality of indeterminate sentences. In the latter case the court says: "Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government is for the state to determine. And its determination one way or the other cannot be an element in the inquiry whether the due process of law prescribed by the fourteenth amendment has been respected by the state or its representatives when dealing with matters involving life or liberty."

[3] 110 U. S. 516.

the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe and which has given us that fundamental maxim of distributive justice — *suum cuique tribuere.* There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mold and shape it into new and not less useful forms."[1]

It is difficult to believe after reading such words that the Supreme Court will take so narrow a view of the due process of law required of the states by the fourteenth amendment as to cause it to declare unconstitutional a state law or state constitutional amendment merely providing for a departure from the principle of the separation of powers in a state government.

This consideration of the question whether the constitution of the United States requires that the state governments shall be based upon the principle of the separation of powers is liable at any moment to become an extremely important one. For the proposal has already been made in one of the states of the Northwest to substitute for the present form of state government a form resembling in its essential characteristics the commission form of government, which has been so widely applied in the case of cities.

[1] See also Missouri *v.* Lewis, 101 U. S. 22, for a somewhat similar opinion from Mr. Justice Bradley, and Willoughby, "The Constitutional Law of the United States," Chapter XLVI.

II. Republican Form of Government

Another important change in the form of state government which seems to be growing in popular favor is to be noticed in the adoption of the referendum, and initiative and recall. These devices, while perhaps strictly speaking not violative of the principle of the separation of powers, certainly modify very seriously old-time conceptions of legislative power. Generally speaking, it has been held that in the absence of special state constitutional provision, the legislature may not delegate to the people of the state the right to legislate,[1] but that under similar conditions and because of historical considerations powers of local legislation may be vested by the legislature in local corporations, in the people thereof, or in local officers.[2] To obviate the constitutional objection to the referendum and initiative, as applied to the people of the state generally, some of the more recent state constitutions have either authorized the legislature to provide for these methods of legislation, or have made express provision for them in either state or local matters, or both, and both legislatures and constitutions have in a few instances provided for the recall, particularly in municipal government.

Where these methods of political action have been provided for in the state constitutions, naturally no question as to their constitutionality from the point

[1] Barto *v.* Himrod, 8 N. Y. 483.

[2] State *v.* Farkner, 94 Iowa, 1; see Oberholtzer, "The Referendum in America." See also Lindsay, "Reciprocal Legislation," *Pol. Sci. Quar.*, Vol. XXV, p. 435.

of view of the state constitution may be raised. It has, however, sometimes been contended that they are unconstitutional from the point of view of the federal constitution, either as inconsistent with the republican form of government which the United States is, under the federal constitution, to guarantee to every state,[1] or as resulting in depriving some person of property without due process of law, contrary to the provisions of the fourteenth amendment.

Are these new democratic devices unconstitutional as inconsistent with a republican form of government? What is a republican form of government is not defined in the constitution, nor is it stated therein what authority in the government has the power of determining the question. The Supreme Court in Luther *v.* Borden[2] has, however, indicated that it is Congress to which the power of determination is given. Mr. Chief Justice Taney, who delivered the opinion of the court in this case, said: —

"Under this article of the constitution it rests with Congress to decide what government is the established one in a state. For, as the United States guarantee to each state a republican government, Congress must necessarily decide what government is established in the state before it can determine whether it is republican or not. And when the senators and representatives of a state are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government and could not be questioned in a judicial tribunal."[3]

[1] Const. Art. IV, Sec. 4. [2] 7 How. 1.

[3] See also Texas *v.* White, 7 Wall. 700; *In re* Duncan, 139 U. S. 449 and Taylor *v.* Marshall and Beckham, 178 U. S. 548, approving the view of Chief Justice Taney.

In another part of the opinion he disapproves of the contention that the courts are not bound by the decision of Congress or its delegate, in the facts of the particular case the President, saying that the guarantee of the constitution as so interpreted is "a guarantee of anarchy and not of order." These quotations are further more than dicta. They embody one of the essential *rationes decidendi* in the case, and have therefore the force of law. So that we must conclude that as yet the law is that what is a republican form of government under the United States constitution is to be determined by Congress, whose action is binding upon the Supreme Court.[1]

Congress, up to the present time, has not taken action as to the initiative, referendum, or recall, except by admitting senators and representatives from states where these methods of political action were adopted and practiced. If the view of Mr. Chief Justice Taney as to the powers of Congress is correct, we may then say that the referendum, initiative, and recall have been held to be consistent with a republican form of government by the only authority under the constitution of the United States having the power to determine the question.

In a recent case, however,[2] the Supreme Court expresses *obiter* a doubt as to whether the fixing of rates by a local referendum ordinance would not be a taking of property without due process of law, saying:—

[1] But see *infra*, p. 283, for certain expressions of the Supreme Court in later decisions which perhaps indicate its opinion that it has independent power in the premises.

[2] Home Telephone Co. *v.* Los Angeles, 211 U. S. 265.

"There are certainly grave objections to the exercise of such a power, requiring a careful and minute investigation of facts and figures, by the general body of the people, however intelligent and right minded. But the ordinance [before the court] was not adopted in this manner in the case, and it will be time enough for the courts of the states and of the United States to consider, when that is done, whether the objections only go to the expediency of such a method of regulation or reach deeper and affect its constitutionality."

As under the law, upheld in this decision, on petition of fifteen per cent of the voters of the city, any ordinance proposed had to be submitted to the people and might be by them adopted, it may be said that this case actually decided that the existence of the possibility of an initiative and referendum will not render a law or ordinance passed while such possibility exists unconstitutional from the point of view of the federal constitution.

While this case did not decide that the exercise of legislative power through the initiative and referendum was or was not constitutional, it did apparently indicate that in the opinion of the court the recall was constitutional. The court said in this case in answer to the objection that by the charter of the city twenty-five per cent of the electors might recall a member of the council and require him to stand for election:—

"Nevertheless, he takes part in the rate-making function under his personal responsibility as an officer, and it cannot be presumed, as a matter of law, that the keener sense of dependence upon the will of the people, which this feature of his tenure of office brings to him, will distort his judgment and sense of justice. It would be conceivable, of course, that the members of the legislature themselves might be subjected to the same process of recall, but it hardly would be contended that that fact would

lessen the legislative power vested in them by the constitution and laws of the state."

It may therefore be said that the recall, and probably both the initiative and referendum as well, are constitutional from the point of view of the federal constitution, which, as interpreted, offers no obstacle to change from representative to democratic government if such a change should approve itself to the people of the United States.

In a number of the states in which the referendum, initiative, and recall have been adopted, provision has been made, usually in the state constitution, for the grant to cities of very wide powers of local government. Cities may thus frame their own charters themselves, provide for their own organization, and determine their own sphere of activity. It has sometimes been objected [1] that the grant of powers of this character might result in the practical formation of a new state within the jurisdiction of an existing state which would not be proper under the United States constitution.[2] Such an objection to what is really but a decentralization of the state government confounds the sovereignty of the state with its governmental organization, and loses sight of the fact that, so long as the people of the state are at liberty through their power of amending the state constitution to provide at any time for a centralization of the functions of state government which by their former action they had merely decentralized, there cannot be said to have been a new state formed in an existing state. Furthermore, the United States Su-

[1] See *e.g.* opinion in People *v.* Sours, 31 Col. 369.
[2] Art. IV, Sec. 3.

preme Court has indicated its approval of the constitutionality of these "freeholders' charters," as they are called, in City of St. Louis *v.* Western Union Telegraph Co,[1] where it said:—

"In pursuance of these provisions of the constitution a charter was prepared and adopted and is therefore the 'organic law' of the city of St. Louis, and the powers granted by it, so far as they are in harmony with the constitution and laws of the state, and have not been set aside by any act of the general assembly, are the powers vested in the city. And this charter is an organic act and is to be construed as organic acts are construed. The city is in a very just sense an 'imperium in imperio.' Its powers are self-appointed, and the reserved control in the general assembly does not take away this peculiar feature of its charter."

Most of the demands for political reform, so far as that is concerned with the mere forms of our government, can thus be met under our supposedly rather inelastic constitution. Amendment of state constitutions, legislative action, judicial decision, and change in habits of political action all contribute to permit us to adapt our political system to the changes in social conditions which have necessarily accompanied our growth as a nation.

The point in which change will probably be most difficult, and in which change is for some reasons most imperative, is in the extent of the power vested in executive and administrative offices. The conception of the due process of law required by the fifth and fourteenth amendments in order that any person may be deprived of his life, liberty, or property, is based more than it should be on the simple conditions of life which existed when the country was established. Not-

[1] 149 U. S. 465.

withstanding the fact that historically due process of law was not necessarily judicial process, the courts have been reluctant to extend the rule that one may be deprived of his life, liberty, or property by administrative process beyond the concrete instances for which historical justification can be found. This view is, however, more characteristic of the state courts than of the Supreme Court of the United States. It is not, therefore, as has been pointed out, an insuperable obstacle to change. The result is that efficient administrative action, particularly in the state governments, is often impaired either by the necessity for judicial process or by the extensive judicial control over administrative action which is often regarded as a necessary part of the due process required by the constitution. Judicial review in collateral proceedings of the determinations of administrative officers, such as health officers and public service commissioners and the restraint of administrative action through the issue of the injunction to such officers by the courts, all tend to make our administration less effective than it should be.

The attitude of the courts toward this question is in many cases undoubtedly due to the informality of existing administrative procedure. Indeed, this informality is in many instances so great as to result in an almost complete lack of any procedure at all to be followed by administrative officers in the making of the determinations which the courts[1] insist upon reviewing. When we develop an administrative procedure which is reasonably regardful of private rights,

[1] Cf. Bowman, "American Administrative Tribunals," *Pol. Sci. Quar.*, Vol. XXI, p. 620.

e.g. gives notice and a hearing to the person affected by the administrative determination, it may well be that the courts will change their attitude and come to the conclusion that the changed and complex conditions of modern life in comparatively congested districts, such as those in which we are even now living in the United States, should have an effect both on the constitutional rights of individuals and on the powers and procedure of administrative authorities in the same way that the peculiar history and economic and geographical conditions of the people living in our tropical dependencies were permitted to have an influence on the position which those people were recognized as occupying in our constitutional law. How this may be done need not now be suggested, much less pointed out, but we may with confidence trust that a way can be found by that court which formulated the wise and far-seeing constitutional policy embodied in the Insular cases, provided, of course, that that court is desirous of solving the problem in the way in which other nations in conditions similar to those in which we are now living have attempted to solve it.

III. Government Ownership

Changes in the character of our government may arise, however, not only as a result of modifications of the relations of the different public authorities, one with another, but as well because of an increase in the functions to be discharged by those authorities. Let us therefore consider the constitutionality of attempts to increase the functions of government through the adoption of a policy of public ownership

and operation. It is hardly necessary to point out that the powers of a state in the American system are not to any serious extent dependent upon the federal constitution. For a state possesses all powers which have not been expressly or impliedly conferred upon the government of the United States by the federal constitution, and which the states have not by that instrument been forbidden to exercise. The powers which states may not constitutionally exercise are, in the first place, powers which at the time of the adoption of the federal constitution it was believed experience had shown would be more advantageously exercised by the federal government, such as the power to establish post offices and to regulate foreign and interstate commerce; and, in the second place, powers whose exercise it was believed imperiled private rights, such as the power to pass a law impairing the obligation of a contract.

The most important provisions of the constitution of the United States which may possibly prevent a state from entering upon a régime of public ownership are those granting powers to Congress, such as the power to establish post offices and the commerce power. But as these provisions, while impliedly denying powers to the states, for the most part positively grant them to the United States, they are not in reality an obstacle to the adoption of a policy of public ownership.

There is, however, one clause in the constitution which, while conceivably restrictive of the powers of the states, does not enlarge the powers of the federal government. This is the clause to which reference has been made and which declares that the United

States shall guarantee to every state a republican form of government. What the purport of this provision is, has not as yet been exactly determined by judicial decision. At first it was apparently believed, as has been shown, that the authority in the United States government under this clause was vested in the Congress, and that body passed laws which as interpreted by the Supreme Court vested large powers in the President to determine in case of trouble in any state which of the contending governments was republican in character.[1] But in one or two recent cases the Supreme Court has shown a tendency to adopt the theory that it itself has powers under this provision to some extent independent of any action which Congress may take. Thus, in Miner *v.* Happersett[2] the court says that "the guaranty necessarily implies a duty on the part of the states themselves to provide such a government," apparently intimating that it has some power of supervision in this respect, although it holds that a state which does not give the suffrage to women may still have a republican form of government. Again, in South Carolina *v.* United States,[3] it says: "There is a large and growing movement in this country in favor of the acquisition and management by the public of what are termed public utilities, including not merely therein the supply of gas and water, but also the entire railroad system," and asks the question, "Should the state by taking into possession these public utilities lose its republican form of government?" Of course, these statements are merely *obiter dicta*, but they certainly evidence a

[1] Luther *v.* Borden, 7 How. 1. See also Texas *v.* White, 7 Wall. 700, *supra*, p. 225. [2] 21 Wall. 162. [3] 199 U. S. 437

belief upon the part of the court that it has some power in the premises which is independent of Congress. It is difficult, however, to believe that the Supreme Court, even if it should decide that it had jurisdiction, would make the republican or non-republican character of the government of a state depend upon the extent of the functions which it discharges. The term "republican" would seem to refer to the form of the government rather than to the extent of its activity.

Apart, then, from the rather indefinite control over the states which the Congress of the United States or the Supreme Court may possess under the clause of the federal constitution, in which the United States guarantees to every state a republican form of government, the states have the right to enter upon a policy of public ownership. The only limitations are to be found where they have contracted this right away. Where a city clearly binds itself not to compete with a company to which it has granted a franchise having a definite fixed term, it loses the power which otherwise it possesses.[1] But its intention to make such a contract must be clear and unmistakable,[2] and its power to make such a contract must be unquestionable.[3]

The United States government is also authorized by the constitution to adopt a policy of public ownership as a necessary and proper means for carrying into effect any power conferred upon it by the constitution. Thus it may construct and probably operate means

[1] Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1; Vicksburg *v.* Vicksburg Water Co., 202 U. S. 453.

[2] Knoxville Water Co. *v.* Knoxville, 200 U. S. 22.

[3] Home Telephone Co. *v.* Los Angeles, 211 U. S. 265.

of transportation like wagon roads[1] and canals.[2] Inasmuch as Congress is the judge as to what are necessary and proper means,[3] it is difficult to find any constitutional objection to a policy of public ownership, provided it is adopted as a means to carry into effect a power granted by the constitution, such as the power to regulate commerce. Thus, there is no obstacle to be found in the United States constitution to a policy of government ownership on the part of either the state or the United States governments.

Finally, the general provisions of the state constitutions would not seem to limit the powers of the state governments in this respect so far as the exercise of these powers does not result in a compulsion used by the state upon the individual to avail himself of the opportunities afforded by the activity of the government. States and municipalities with state authorization have undertaken all sorts of quasi-commercial enterprises either directly or through the medium of corporations of which the state was the sole stockholder. Thus the states or the municipalities have built and operated canals and railways, waterworks, electric light and gas works, and have organized banks and quasi-commercial monopolies, such as the dispensaries of South Carolina, and their powers have never been denied except in one or two instances. One is to be found in the case of a bill before the Massachusetts legislature providing that the city of Boston might establish a public coal yard. In accordance

[1] Indiana *v.* United States, 148 U. S. 148.
[2] Wilson *v.* Shaw, 204 U. S. 24.
[3] McCulloch *v.* Maryland, 4 Wheaton, 316.

with the provision in the Massachusetts constitution, the opinion of the Supreme Court was asked, and it declared its opinion that such act was unconstitutional.[1] Again, the Supreme Court of Michigan refused to permit the city of Detroit to adopt a policy of municipal ownership and operation of street railways because of the provision in the state constitution which forbade the state to engage in internal improvements.[2] The right to establish and operate public waterworks,[3] gas works,[4] electric light works [5] and railways [6] has been recognized by judicial decision.[7]

There would seem, therefore, to be no constitutional objection to the provision by the state, either in its central or its local organization, of a system of public insurance against death, sickness, accident, or fire which was based on the voluntary coöperation of individuals, or perhaps classes of individuals, such, for example, as the system adopted in New Zealand. The only possible objection which might be made to such a system would be, in case any resort to public funds were made, that the power of taxation through whose exercise such funds were obtained was being used for a private purpose. This subject will be discussed in another chapter. It is enough to say here that it is improbable that the Supreme Court of the United States would reverse the decisions of the state courts

[1] Opinion of the Justices, 182 Mass. 665.

[2] Atty. Gen. *v.* Pingree, 113 Mich. 395.

[3] Bailey *v.* Mayor, 3 Hill, 433.

[4] Western Savings Fund Society *v.* Philadelphia, 31 Pa. St. 175.

[5] Jacksonville Electric Light Co. *v.* Jacksonville, 36 Fla. 229.

[6] Printing Association *v.* Rapid Transit Coms., 152 N. Y. 257; Walker *v.* Cincinnati, 21 Ohio, St. 14.

[7] See also Pond, "Municipal Control of Public Utilities," *Columbia Uuiversity Studies in History*, etc. Vol. XXV, No. 1, Chapter X.

in favor of the constitutionality of such a system, since it has more than once evidenced its belief that while not actually concluded by such decisions, it should accord them the greatest possible respect. Furthermore, the Supreme Court has indicated that the character of the purpose of taxation as public or not, is in large measure dependent upon the local conditions in which it is exercised. It is possible that the state courts would not take so liberal a view either because of the peculiar and more stringent provisions of state constitutions, or because they are less reluctant than is the Supreme Court to declare acts of the state legislatures unconstitutional. But it is to be remembered that for reasons already set forth the decisions of state courts are not really serious permanent obstacles to social reform.

It is perhaps desirable to consider for a few moments the constitutionality of schemes of state insurance in which insurance is compulsory rather than voluntary, as is the case in Germany, where an obligation is imposed on both employer and employed to provide for the insurance of persons employed in certain occupations. As no such scheme has ever been adopted in the United States, we naturally have few, if any, decisions exactly in point. The Supreme Court of Ohio has held, however, that the compulsory retention of a portion of the salaries of teachers for the formation of a pension fund is unconstitutional under a constitution which provided for uniformity of taxation, since it in effect imposed a tax on a special class in the community.[1] Generally, the formation of official pension funds in this manner is regarded as

[1] State *v.* Hubbard, 65 O. St. 574.

perfectly proper. For the amount of pay deducted is considered as always being in the public treasury, and therefore as public rather than private property.[1] The recognition of the propriety of deduction of pay for the formation of official pension funds does not, however, necessarily involve the recognition of the propriety of the compulsory deduction from the wages or salary of private persons. For deductions from official salaries may be justified as an exercise of the power which all governments have over their own officers — a power which might not be regarded under our system of constitutional restrictions as properly exercised over ordinary citizens.

It would appear to be possible, however, to justify such deductions under the power of taxation if there were no special provisions in the constitutions requiring a strict uniformity of taxation. Probably the fourteenth amendment would not be regarded as prohibiting such taxation. For the Supreme Court has time and again announced the rule that that amendment does not prevent classification of a reasonable character. And it is difficult to see how it would be unreasonable to impose a special tax on a specified class of persons whose occupation made it appear to the legislature that it was desirable that they be taxed. In Bell's Gap Railroad Company *v.* Pennsylvania[2] in which it was decided that a state might select for taxation railway bonds owned by resident holders and might make the railway company its agent for the collection of the tax by obliging it to deduct the tax from the interest due the bondholder, the court said: —

[1] See Pennie *v.* Reis, 182 U. S. 464.

[2] 134 U. S. 237.

"The provision in the fourteenth amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state 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 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 or the people of the state in framing their constitution. But 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. . . . We think we are safe in saying that the fourteenth amendment was not intended to compel the state to adopt an iron rule of equal taxation."

The difficulty in justifying such a system of state insurance based in any way on taxation would arise when we come to consider the payment of the insurance to the person entitled by the act of the legislature thereto. For it might be objected that the power of taxation was being used for a private purpose. What has been already said with regard to the constitutionality of schemes of voluntary state insurance is of force here.

A recent decision of the Supreme Court of the United States takes a long step, however, in the direction of recognizing the constitutionality under the police power of the states of schemes of compulsory insurance, even where the premium is paid by the person insured. This is the case of Noble State Bank *v.* Has-

kell,[1] which upheld a state law providing for a bank depositors guaranty fund. The fund was made up of assessments on the banks. The court said in upholding the act: —

"In the first place it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what in its immediate purpose is a private use. . . . And in the next, it would seem that there may be other cases besides the everyday one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. . . . It may be said in a general way that the police power extends to all the great public needs.[2] It may be put forth in aid of what is sanctioned by usage as held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

Another method in which the sphere of activity of the state has been increased of recent years is to be found in the establishment of state bureaus of employment. In some instances, these bureaus have been carried on in the same manner as private employment bureaus, *i.e.* a fee has been demanded of persons either seeking employment, or of employers. In such a case such bureaus may perhaps be regarded as instances of government ownership. In other instances, the services of these government bureaus have been offered without payment to employer or employee. In such a case such bureaus might more properly be regarded as instances of government aid. But whatever may be the character of such government employment agencies, it is difficult to see on what ground their constitutionality could be ques-

[1] 31 S. C. R. 186. [2] Camfield *v.* United States, 107 U. S. 518.

tioned. For even where the services which they render are given without payment, they might well be regarded as a part of the general charitable administration in that their purpose and effect are to diminish unemployment, which is one of the most fruitful causes of pauperism. It is probably on this account that, although such bureaus exist in a number of states, no question of their constitutionality has been raised in the courts, which in all probability would regard any appropriation of public money made for carrying them on as an expenditure of money for a public purpose.[1]

It may therefore be said that our constitutions offer few, if any, obstacles to a very substantial increase of the functions of government, either state or national. Notwithstanding our constitutions, we have the power to make great changes in both the character and the amount of work we devolve upon it. The questions arising in connection with these subjects are thus questions of political and economic expediency rather than of constitutional power.

[1] Sometimes the attempt has been made in this country to provide for the public licensing of private employment agencies. The requirement of such licenses has been held to be constitutional by the Court of Appeals of the state of New York (People *ex rel.* Armstrong *v.* Warden, 183 N. Y. 223), although the Supreme Court of the state of Washington has held unconstitutional a city ordinance providing for licenses in such cases and for the imposition of a special criminal penalty on the licensees for making false representations to those seeking employment. The basis of the decision was that an ordinance selecting the keepers of employment agencies for punishment in these cases, while exempting from punishment other persons guilty of misrepresentation, was a denial of the equal protection of the laws provided for by the fourteenth amendment to the constitution of the United States. (Spokane *v.* Wacha, 51 Wash. 3231.)

CHAPTER VI

THE CONSTITUTIONALITY OF GOVERNMENT REGULATION

THE main demands of social reform, so far as they are included within the general head of government regulation, are labor regulations, including within that term the regulation of the law determining the liability of employers to employed; the regulation of the use of land and of buildings in cities; the regulation of "property affected with a public interest," as it is called; the use of the power of taxation for social ends; and the regulation of monopoly, either in processes of production or distribution.

I. LABOR REGULATIONS

Labor regulations may be classified under four heads: first, those which attempt to secure, as, *e.g.*, through the adoption of safety appliances, healthful and safe conditions in which labor is to be carried on; second, those limiting the hours of labor; third, those changing the liability of employer to employee; and fourth, those regulating either the amount of wages, or the manner in which they may be paid.

Regulations attempting to secure safe and healthful conditions for the laboring classes have uniformly been upheld by the Supreme Court, even where their enforcement has necessitated the expenditure of con-

siderable sums of money by employers. Such would seem to be the law as expressed in Holden *v.* Hardy,[1] decided in 1897, where a series of state statutes regulating the business of mining are referred to with approval. In its opinion in this case the court says: —

"While the business of mining coal and manufacturing iron began in Pennsylvania as early as 1716, and in Virginia, North Carolina, and Massachusetts even earlier than this, both mining and manufacturing were carried on in such a limited way, and by such primitive methods, that no special laws were considered necessary prior to the adoption of the constitution for the protection of operators; but in the vast proportions which these industries have since assumed, it has been found that they can no longer be carried on with due regard to the safety and health of those engaged in them, without special provision against the dangers necessarily incident to these employments. In consequence of this, laws have been enacted in most of the states designed to meet those exigencies and to secure the safety of persons peculiarly exposed to these dangers. Within this general category are ordinances providing for fire escapes for hotels, theaters, factories, and other large buildings, a municipal inspection of boilers and appliances designed to secure passengers upon railways and steamboats against the dangers necessarily incident to these methods of transportation. In states where manufacturing is carried on to a large extent, provision is made for the protection of dangerous machinery against accidental contact, for the cleanliness and ventilation of working rooms, for the guarding of well holes, stairways, elevator shafts, and for the employment of sanitary appliances. In others, where mining is the principal industry, special provision is made for shoring up of dangerous walls, for ventilation shafts, bore holes, escapement shafts, means of signaling the surface for the supply of fresh air, and the elimination, as far as possible, of dangerous gases, for safe means of hoisting and lowering cages, for limitation upon the number of persons permitted to enter a cage, that cages shall be covered, and that there shall be fences and gates around the

[1] 169 U. S. 366.

top of the shaft, besides other similar precautions." After giving a list of such acts the court says: "These statutes have been repeatedly enforced by the courts of several states, their validity assumed, and, so far as we are informed, they have been uniformly held to be constitutional."

In the cases arising under the Safety Appliances Acts of Congress, the constitutionality of such legislation has also been assumed.[1]

In a number of instances, however, the state courts have declared unconstitutional laws whose purpose was apparently to protect the public health, because they believed the laws were too broad in their application and imposed unreasonable limitations on the use of property, or because they were so framed as to affect too narrow a class of persons, and therefore were believed to deny the equal protection of the laws. Thus in New York a law prohibiting the manufacture of cigars in specified classes of tenement houses in cities having more than a certain population was declared unconstitutional.[2] Thus again, in Illinois an act was declared unconstitutional which "required mine owners to provide washrooms at the top of each coal mine for the use of their employees, on the ground that this was an improper discrimination in favor of miners." [3] As in the New York case, the court seemed

[1] See *supra*, p. 59.

[2] *In re* Jacobs, 98 N. Y. 98. In this case the court apparently did not think that it could take into consideration the peculiar conditions existing in the cities of New York and Brooklyn, which were the only cities affected by the act, although in other cases it has regarded the exemption of particular localities from the operation of statutes as a matter entirely within the discretion of the legislature. See *e.g.* People *v.* Havnor, 149 N. Y. 195.

[3] Dodd, "The Growth of Judicial Power," *Pol. Sci. Quar.*, Vol. XXIV, p. 195, citing Starne *v.* People, 222 Ill. 189.

to be unwilling to consider the peculiar conditions present in the case, — in this instance bituminous coal mining, — and placed its decision partly, at any rate, upon the ground that "the legislature cannot ameliorate the coal miners' condition under the guise of the police power and leave others unaided who suffer from like causes."

In the second place, we find statutes which also, with the alleged purpose of protecting the health or safety of workmen, limit the number of hours during which employment is permitted. The statement of the law on this subject, as developed by the Supreme Court of the United States, is a subject of some difficulty. We have three important cases, which, in the order of the time of their decision, are Holden *v.* Hardy,[1] Lochner *v.* New York,[2] and Muller *v.* Oregon.[3]

The last of these cases held constitutional a state law limiting the hours of labor for women in factories, laundries, etc., to ten hours per day, and sixty hours per week. The court was influenced in its decision by the peculiar physical constitution of women, and while this decision may stand as well for the proposition that a reasonable limitation of the hours of labor of children, as well as of women, is constitutional, since the sanitary reasons for the law are very apparent, it cannot be regarded as, in any way, outlining the position of the court as to similar laws limiting the hours of labor of adult men.

The position of the court as to adult men must be derived from a consideration of the other two cases. In the first of these cases, the question involved was

[1] 169 U. S. 366. [2] 198 U. S. 45. [3] 208 U. S. 212.

the constitutionality of a state law limiting the hours of labor to eight per day of all laborers, even adult men, in underground mines, or in smelters, or other institutions for the reduction or refining of ores or metals, excepting cases of emergency where life or property is in imminent danger. The court upheld the law, Mr. Justice Brewer and Mr. Justice Peckham dissenting, on the theory that the employments affected by the law —

"when too long pursued, the legislature has judged to be detrimental to the health of the employees, and so long as there are reasonable grounds for believing that this is so, its decisions upon the subject cannot be reviewed by the federal courts." The court adds that "while the general experience of mankind may justify us in believing that men may engage in ordinary employments more than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight, and is frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gases, generated by the processes of refining or smelting."[1]

In the case of Lochner *v.* New York, the question before the court was the constitutionality of a law limiting to ten a day the hours of labor permitted in a bakery. In an opinion given by Mr. Justice Peckham, with four justices dissenting, the court held the act unconstitutional on the theory that "the trade of a baker, in and of itself, is not an unhealthy one to the degree which would authorize the legislature to interfere with the right to labor, with the right of free

[1] See also Soon Hing *v.* Crowley, 113 U. S. 703, which upheld a law forbidding one employed in a laundry to wash or iron between 10 P.M. and 6 A.M.

contract on the part of the individual, either as employer or as employee."

A comparison of these two decisions would lead to the conclusion reached by Professor Henry R. Seager [1] that "the question of the constitutionality of a restrictive labor law is inseparably connected with the question of the wisdom of such a law." What this means is, that the court must be convinced of this wisdom. What the courts actually do in cases in which they declare a law of this sort unconstitutional, is to substitute their ideas of wisdom for those of the legislature, although they continually say that this is not the case.[2]

There have been few attempts made in this country similar to those made in Australia to do away with "sweating," as it is called, either by providing for the placing of labels upon all goods manufactured, *e.g.*, in tenement houses, or, by prohibiting work therein, or the subletting of contracts in trades like the garment trades where sweating is particularly liable to occur. We have not as yet had any decisions on any of these questions in the United States Supreme Court because of the fact that, in the cases mentioned, state laws of this character have usually been declared unconstitutional, or because the matter would appear to be within the prohibition of a decision of the Supreme Court made with regard to some other matter.

[1] "The Attitude of American Courts towards Restrictive Labor Legislation," *Pol. Sci. Quar.*, Vol. XIX, p. 589.

[2] Since the above was written the Supreme Court in the case of Baltimore and Ohio Railroad Co. *v.* Interstate Commerce Commission has upheld the constitutionality of an act of Congress limiting the hours of labor of persons employed in the operation of railways engaged in interstate commerce.

Thus, the New York Court of Appeals has held that it is unconstitutional for the legislature to provide that, in certain cities of the state where in the opinion of the legislature conditions seemed to demand it, articles shall not be made in the homes of the inhabitants of those cities. This decision was made in the case of a law prohibiting the manufacture of cigars in certain kinds of tenement houses in the cities of New York and Brooklyn. It is possible that the decision is based upon a denial of the equal protection of the laws rather than upon any deprivation of liberty, but it is altogether probable that it would be regarded as a precedent in favor of the proposition that the legislature may not, where considerations of health are not clearly at issue, prohibit work of any sort in the homes of the people.[1]

The Court of Appeals of the state of New York has also held that a law is unconstitutional which provides under a criminal penalty that articles made in state prisons and offered for sale shall be labeled "convict made."[2] The decision was reached by a bare majority, three of the judges who concurred with the writer of the majority opinion, Judge O'Brien, concurring upon the ground that the statute conflicted with the commerce clause of the federal constitution, as the articles for selling which the defendant was prosecuted had been made in a state prison in Ohio. The case therefore stands for the proposition that a state may not impose, upon persons offering goods made in a state prison of another state, the obligation to affix to such articles the label

[1] *In re* Jacobs, 98 N. Y. 98.
[2] People *v.* Hawkins, 157 N. Y. 1.

"convict made." Judge O'Brien, however, placed his decision on another ground, viz. that it was a taking of property without due process of law to impose upon a person offering articles for sale the obligation to attach to them a label which would detract from their value. He says: —

"The question is reduced to the simple inquiry whether the legislature under the guise of the police power can regulate the price of labor by depressing, through the penalties of the criminal law, the price of goods in the market made by one class of workmen and correspondingly enhancing the goods made by another class. If the statute does not tend to produce that result, there is no reason or excuse for its existence, and it would be a useless and arbitrary interference with the liberty of the individual without any possible reason or motive behind it. The law is now defended upon the ground that it was intended to accomplish, and in fact does tend to promote, that very result. If the police power extends to the protection of certain workmen in their wages against the competition of other workmen in penal institutions, why not extend it to other forms of competition? Why not give to the women, the weaker sex, who are often the victims of improvidence and want, a preference by statute over the men? Why confine such legislation to scrubbing brushes and like articles made in prisons, when multitudes of men engaged in farming, mercantile pursuits, and almost every vocation in life are struggling against competition? If the statute now under consideration is a valid exercise of the police power, I am unable to give any reason why the legislature may not interfere in all the cases I have mentioned to help those who need help at the expense of those who do not."

If this is the law, and none of the minority expressed any dissent from this portion of the majority opinion, any attempt to provide for the labeling so as to show their origin, of garments made, *e. g.*, in tenement houses, except in so far as such a provision might be used for the protection of the public health, would be un-

constitutional. The mere prevention of "sweated" labor may not constitutionally be secured through statute.

Finally, the Supreme Court of the United States has held in Allgeyer *v.* Louisiana [1] and Lochner *v.* New York,[2] that the liberty of which one may not be deprived without due process of law includes the liberty to contract except where that liberty has been limited through the exercise of the police power in the interest of the public health and safety, and in that of protecting the weaker members of society, such as coal miners in their dealings with their employers.[3] If, therefore, the subletting of garment-making contracts cannot be shown to have an appreciable effect upon the public health or to be in the interest of a class of employees in a position of economic disadvantage over against their employers, it is difficult to see how laws prohibiting the subletting of such contracts could be regarded as a constitutional exercise of the police power. While it would probably be impossible to show that the carrying home of work was in and of itself and in all cases prejudicial to the public health, it would perhaps be possible to prove to a court that in conditions such as exist, *e.g.*, in the tenement house district in New York City, the doing of work on garments in the home, combined with the subletting of garment work contracts, did put those who actually did the work on such garments at such an economic disadvantage as to bring them within the rule laid down by the Supreme Court.[4]

[1] 165 U. S. 578. [2] 198 U. S. 45.
[3] See Knoxville Iron Co. *v.* Harbison, 183 U. S. 13.
[4] *Ibid.*

The third class of statutes which have been passed in the attempt to regulate labor conditions are those which change the existing law as to the liability of employers to employed. The Anglo-American law as to this liability contains three rules which would seem to have been adopted with the idea of protecting the interests of the employer rather than those of the employed. They were furthermore adopted at a time when the political influence of the employed was not as great as that of the employer, and when it was considered expedient, if not necessary, to encourage where possible the investment of capital in industrial enterprises. They are, first, that an employer is not liable to an employee for the damage caused by a co-servant; second, that the contributory negligence of an employee shall be an absolute bar to the recovery from an employer of damages in cases in which the employee, as well as the employer, has been guilty of negligence; and, finally, that where an employee has knowledge of unsafe conditions, and notwithstanding that knowledge continues his work, he is to be deemed to have assumed the risk of those conditions. There would seem to be no constitutional objection to the change of any of these rules by statute,[1] and to forbidding the employer to evade the liability by contracting to that effect with his employees.[2]

[1] Tullis *v.* Lake Erie & Ry. Co., 175 U. S. 348; El Paso N. E. Ry. Co. *v.* Guitierez, 215 U. S. 87; Hyde *v.* Southern Ry. Co., 31 App. D. C. 466; Johnson *v.* Southern Pacific Ry. Co., 196 U. S. 1; Schlemmer *v.* Buffalo, Rochester & Pittsburg Ry. Co., 205 U. S. 1; Employers' Liability cases, 207 U. S. 463, particularly remarks by Mr. Justice White, *supra.* In some of the state courts such laws have, however, been held to be unconstitutional.

[2] Atlantic Coast Line *v.* Riverside Mills, 31 S. C. Rep. 164.

It may therefore safely be said that, as the law now stands, there is no constitutional objection based upon the constitution of the United States, to statutes which modify the rules of the private law as to the employers' liability for the acts of a coservant, the contributory negligence of the employee, and the assumption of risk by the employee.

Several progressive nations, such as Great Britain, Belgium, and New Zealand, have in large measure abandoned the idea of employers' liability, and have adopted that of workingmen's compensation. As this latter method of compensating workingmen for damages resulting from accidents is based upon the theory that the liability of the employer is independent of any negligence on his part, and exists even where the only negligence is that of the employee to whom the compensation is awarded, the question has arisen whether a law making provision for it would not be regarded as depriving the employer of his property without due process of law. While the question has not as yet been decided by the Supreme Court in the United States, those who have studied it would seem to be of the opinion that the compensation idea is applicable in the United States only to inherently dangerous occupations. In such occupations it is perhaps justified on the theory under which the law makes the owner of an inherently dangerous animal or one who follows a dangerous pursuit, *e.g.* the manufacture of explosives, absolutely responsible for the damages such animal or occupation has caused, regardless of the freedom from negligence of the defendant in the suit. The New York Court of Appeals

has recently declared such a law to be unconstitutional.[1]

Finally, in a few instances the attempt has been made, as, *e.g.*, in New Zealand, to regulate by means of compulsory arbitration of labor disputes the wages to be paid to workingmen. There are no decisions directly in point upon the constitutionality of such legislation in the United States. But while legislation providing for voluntary arbitration or conciliation by public officers would seem to be proper,[2] it is difficult to see how compulsory arbitration could be justified under the powers of legislation possessed by either Congress or the state legislatures. For, because of either the thirteenth, fifth, or fourteenth amendments to the United States constitution, most laws, whether of Congress or of the state legislatures, are regarded as unconstitutional, which attempt either to force under criminal penalties individuals to carry out a labor contract, or to control the freedom of action of private employers by forbidding them in their employment or discharge of employees from discriminating against a man because he is or is not a member of a union. The constitutionality of all legislation giving a preference to union labor is expressly denied in Adair *v.* United States,[3] while statements made in the opinion, as well as in opinions in other cases, would seem to hold that most attempts to compel men to work, or employers to employ them, on stated conditions are improper. In this case the defendant Adair was indicted for having, contrary

[1] See Ives *v.* South Buffalo Ry. Co., 201 N. Y. 271.

[2] See Mr. Justice Moody's dissenting opinion in Employers' Liability cases, *supra*, p. 57.

[3] 208 U. S. 161.

to an act of Congress, dismissed from the service of the railroad company of which he was manager one Coppage because of his membership in a labor organization. The fact of dismissal for the reason alleged was admitted. Mr. Justice Harlan, in writing the majority opinion of the court, Mr. Justice McKenna and Mr. Justice Holmes dissenting, held the act of Congress unconstitutional under the fifth amendment, which provides that "no person shall . . . be deprived of his life, liberty, or property without due process of law." He said: —

"The right of a person to sell his labor upon such terms as he deems proper, is in its essence the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer for whatever reason to dispense with the services of such employee. It was the legal right of the defendant Adair — however unwise such a course might have been — to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so, — however unwise such a course on his part might have been, — to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can justify in a free land."

This rather broad statement of the position of employer and employed is somewhat modified by the almost immediately succeeding sentence. Mr. Justice Harlan adds: —

"Of course, if the parties by contract fix the period of service, and prescribe the conditions upon which the contract may

be terminated, such contract would control the rights of the parties as between themselves, and for any violation of those provisions the party wronged would have his appropriate civil action. And it may be — but upon that point we express no opinion — that in case of a labor contract between an employer engaged in interstate commerce and his employee, Congress could make it a crime for either party without sufficient or just excuse or notice to disregard the terms of such contract or refuse to perform it."

Some such result would seem to have been accomplished by the Anti-Trust Act of 1890, which makes illegal any contract, combination, or agreement in restraint of interstate and foreign commerce. This act did not punish criminally combinations in the nature of strikes, but in both the Debs case[1] and in the Danbury Hatters case[2] the court recognized a power in the United States government to protect through its courts the freedom of interstate commerce. In the Debs case the court says that the "scope and purpose of the bill" of injunction, the issue of which was sustained, "was only to restrain forcible obstructions of the highways along which interstate commerce travels and the mails are carried," but in the Danbury Hatters case the acts complained of apparently did not consist of force, but were confined to a peaceful strike accompanied by a boycott. Mr. Chief Justice Fuller, who delivered the opinion of the court, said expressly that the decisions of the court "hold in effect that the Anti-Trust Law has a broader application than the prohibition of restraints of trade unlawful at common law."

But while Congress has thus probably wide power

[1] *In re* Debs, 158 U. S. 564.
[2] Loeve *v.* Lawlor, 208 U. S. 274.

of regulating the actions of employers and employed engaged in interstate commerce, never with one exception have the United States courts gone so far as to hold that employees may be actually forced to keep at work or employers be forced to retain them. Indeed, Mr. Justice Harlan when on circuit once said:

> "It would be an invasion of one's natural liberty to compel him to work for or to remain in the personal service of another. One who is placed in such a restraint is in a condition of involuntary servitude — a condition which the supreme law of the land says shall not exist within the United States, or in any place subject to their jurisdiction."[1]

The same principle is laid down in the recent decision of the Supreme Court in Bailey *v.* Alabama.[2] In this case, an act of a state legislature was held to be unconstitutional as providing for involuntary servitude contrary to the thirteenth amendment and the United States peonage law. The act attempted to punish criminally as fraud the breach without just cause of a contract to labor, where the laborer received an advance of money or other personal property with intent to defraud, and provided that the breach of the contract without returning the advance should be *prima facie* evidence of the intent to defraud. The act was regarded as indirectly providing for involuntary servitude, since "its natural and inevitable effect is to expose to conviction for crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt; and judging its purpose by its effect, it seeks in this way to provide means of compulsion through which performance of such service may be secured."

[1] Arthur *v.* Oakes, 63 Fed. 310, 317. [2] 31 S. C. Rep. 145.

It is, however, conceivable that the court would consider as proper a law prohibiting strikes and lockouts in the case of undertakings like railways and other public service corporations, because of their intimate connection with the public interests. It has been held partly for this reason, although it must be admitted that the court in this case was also influenced by historical considerations, that a seaman may be punished criminally for breaking his contract.[1]

Apart possibly from the case of public service enterprises, it is difficult to see how, in the face of these decisions, the courts can be expected to hold constitutional laws providing for compulsory arbitration the fixing of wages by public authority, or the carrying out of a labor contract, by means of a criminal penalty for refusing to observe the law arbitration decision or contract without which such laws would be futile.

No attempt has been made in this country to fix a minimum wage for ordinary employees, as has been done in Australia, and there is little doubt that any law making such an attempt would be unconstitutional as infringing the freedom of contract. But the Supreme Court of the United States has recognized a right in the state legislature and in Congress, respectively, to fix the rates of pay and the hours of labor of persons employed on public works or the works of the municipal corporations within the limits of a state.[2] In a number of states, however, laws have been passed prohibiting the payment of wages in kind, or regulating in some other way the methods of paying wages

[1] Robertson *v.* Baldwin, 165 U. S. 275.

[2] Atkins *v.* Kansas, 191 U. S. 207; Ellis *v.* United States, 206 U. S. 246.

in particular industries. There has been considerable conflict in the state courts as to the constitutionality of such legislation, but the Supreme Court has upheld state statutes which have regulated the method of paying employees by providing for the cashing of coal orders when presented by the miners to their employers,[1] and for the weighing of coal without screening where miners are paid by the weight of coal.[2]

II. Regulation of the Use of Property in Urban Districts

The congestion of population within urban districts and the consequent or attendant unsanitary conditions in which such population is living have become an object of solicitude upon the part of the governments of the most progressive peoples. The purpose of most of the regulations which have been adopted has been through some limitation imposed upon the uncontrolled or intensive use of land either to remedy existing evil conditions or to prevent their duplication in those portions of the cities where building operations have not as yet begun on a large scale.

The character of the regulations which have been adopted, however, has depended to some extent upon the state of the private law as to real property. Thus in England the private law doctrine of ancient lights has made unnecessary resort to very drastic measures

[1] Knoxville Iron Co. *v.* Harbison, 185 U. S. 13. This is an interesting case, as it recognizes that the police power of the states may be used to protect those classes of the community who are at an economic disadvantage over against their employers.

[2] McLean *v.* Arkansas, 211 U. S. 539.

of a police character. Sufficient air and light for the need of an urban population are, in the main, secured through reliance on individual property owners to protect the rights recognized by the law as theirs against encroachment on the part of other owners. In the United States, however, where the doctrine of ancient lights is not generally recognized, almost no reliance whatever can be placed on the individual action of property owners in the prevention of a too intensive use of land.

There would seem, however, to be no objection to the adoption by legislation of the English doctrine. This would seem to follow by analogy from the decisions in matters of dower rights which have almost universally adopted the view that such rights, as inchoate and not vested rights, may be prospectively cut off by legislation. The right to build so as to obstruct the light and air of adjoining property may also perhaps be regarded until its exercise as an inchoate right of which the property owner may be deprived without compensation. As, however, the English doctrine would not have any great immediate effect on the problem of congestion unless the prescription period were made quite short, the question arises as to what would probably be the attitude of the courts if such action were taken. It is, of course, impossible to prophesy what that attitude would be. It may, however, be said that the courts ordinarily accord considerable liberty to the legislature in the fixing of prescription and limitation periods,[1] and there would seem to be no reason for a departure from this rule in this

[1] See Terry *v.* Anderson, 95 U. S. 628, and remarks of Mr. Justice Miller in Mitchell *v.* Clark, 110 U. S. 633.

case unless the period were made so short as to amount to a virtual taking of property.

In the absence of such a change in American real estate law as has been outlined, the intensive use of land can be prevented only by a much more drastic government regulation; and, indeed, whatever may be the private law of real estate in this respect, it may safely be said that all successful attempts to secure sanitary conditions for urban populations are based on some government regulation, of either the area of land which may be built upon, or the heights to which buildings may be erected, or both.

Further, all countries, in which the urban problem has assumed importance, have made attempts to regulate the structural character of the buildings erected in cities, and in many cases have passed regulations which have a retroactive effect. In so far as such regulation is regarded as directly furthering the public health and safety, it is upheld by the Supreme Court as a justifiable exercise of the police power of the state. This is the doctrine of Barbier *v.* Connolly [1] and Welch *v.* Swazey.[2] Indeed, the decisions of the United States Supreme Court are so emphatic as to the right of the state, notwithstanding the provisions of the fourteenth amendment to regulate the use of land and the construction of buildings in cities in the interest of the public health and safety, that almost no cases are carried to that court on appeal from the decisions of the state courts, although those decisions also go very far in the recognition of those powers of legislation in the state legislature. A good example of the decisions of the state courts may

[1] 113 U. S. 27. [2] 214 U. S. 91.

perhaps be found in Health Department of the City of New York *v.* Trinity Church.[1] In this case it was held that the legislature might constitutionally provide that every tenement house in the city of New York should, when required by the city health department be provided with running water on each floor, and that the fact that compliance with such an order involved the owner of the house in expense, was no reason for treating the act as improper.[2]

The regulations with regard to the construction of buildings in the interest of the public safety have not, however, been considered as sufficient to secure the end sought, and of recent years attempts have been made both in this country and foreign countries to differentiate residence and business districts by imposing limitations on the height to which buildings

[1] 145 N. Y. 32.

[2] See also Tenement House Department *v.* Moeschen, 179 N. Y. 325, where it was held that the legislature might provide with retroactive effect for certain structural requirements whose observance necessitated the expenditure of quite an amount of money by house owners. But see Bonnett *v.* Vallier, 136 Wis. 193, in which it was held that a law regulating prospectively the construction of tenement and lodging houses was unconstitutional, because imposing unreasonable limitations on the use of property. In this case, the law applied to all the cities, villages, and towns of the state, and among other things required that the buildings affected by it should have courts six feet in width. The plans of a building, a tenement house, which was to be erected in the city of Milwaukee, provided a court only three feet in width, and an injunction suit was brought to prevent the officers intrusted with the execution of the law from interfering with the construction of the building. The court was influenced in its determination by the fact that the law applied to the whole state, required plumbing appliances which, on account of the absence of water and sewers, it would be impossible in many parts of the state to provide, and contained drastic criminal penalties for violation of its provisions.

may be built which differ in different districts. The objection has been made to such legislation that it denies the equal protection of the laws, as well as deprives the owner of his property without due process of law. There is only one case in the Supreme Court of the United States which is directly in point. This is, Welch *v.* Swazey.[1] In this case the legislature of Massachusetts provided for a division of the City of Boston into two districts. In one, the height of the buildings was limited to 125 feet; in the other to 80 feet. The act was upheld as a proper exercise of the police power.

The decision is interesting for two reasons. In the first place, the court recognized that the division of the city into two districts for the purposes of building police regulations was proper. The court indicated further that it would follow the decision of the highest state courts as to the propriety of the limits assigned to the districts, as it considered that it did not itself have sufficient knowledge of local conditions to reach an intelligent conclusion upon this point.

In the second place, the court, while recognizing as proper in the conditions of the case the limitations as to height of buildings, did not commit itself to the general proposition that all legislative regulation of building is proper. Its position on this point would seem to be similar to that which it has taken with regard to labor legislation, viz. that the constitutionality of the state's action is in large measure dependent upon the Supreme Court's conception of the reasonableness of such action in the conditions of the case.

We have no adjudications upon the power of the

[1] 214 U. S. 91.

legislature to provide, as is done in the German cities, that factories or other particular classes of buildings shall not be erected in certain districts where such factories do not come within the conception of nuisances. While it is possible that the conception of nuisance may be so widened as to uphold the constitutionality of statutes aimed at securing in this manner a proper distribution of a city's population, in the present state of our constitutional law it is, to say the least, extremely doubtful whether the courts would uphold the propriety of such legislation on this ground. It is conceivable, however, that the desired end might be accomplished through the grant of the power to license factories or other specified occupations in certain districts. For the Supreme Court has recognized as constitutional the grant of very wide discretionary powers to license where the exercise of such powers is intended to protect the public health or safety, and has not been in the interest of some particular class in the community.[1]

In some cases in this country the attempt has been made to classify buildings, not so much from the point of view of their geographical location, as from that of the purpose for which they are used. Thus, in the state of New York there is a law called the Tenement House Law which applies to all tenement houses in cities of the first class — such houses being defined as houses in which at least three families are living. This law imposes restrictions on tenement houses which are not imposed on other buildings, and has, as has been said, been upheld by the state courts,

[1] Wilson *v.* Eureka City, 173 U. S. 32; Fischer *v.* St. Louis, 194 U. S. 61.

although it has not been passed upon by the Supreme Court of the United States.

It is very commonly believed that mere building regulations, *i.e.* those affecting the height and construction of buildings or of particular classes of buildings and the percentage of the lot which they may occupy, are insufficient, and the attempt has frequently been made to prevent room congestion by providing that rooms shall not be occupied by so many persons as to give each occupant less than a minimum number of cubic feet of air space. If these laws apply equally to all houses of the same class, there would seem to be no constitutional objection to them, but it has been held in some of the state courts that such a law, applying only to lodging houses and not to hotels and boarding houses as well, is unconstitutional as denying the equal protection of the laws.[1] The retroactive character of such legislation would not apparently render it unconstitutional.[2]

III. Property affected with a Public Interest

The effect of the commerce clause of the federal constitution upon the constitutionality of government regulation of quasi-public enterprises has already been treated. All that need be said here is that the exclusive power of Congress to regulate foreign and interstate commerce, does not interfere with the police power of the state, except so far as action taken under that power is inconsistent with action taken by Congress; and that the police power of the state

[1] Bailey *v.* People, 196 Ill. 28.

[2] Tenement House Dept. *v.* Moeschen, 179 N. Y. 325.

justifies the regulation of all quasi-public enterprises which are not engaged in interstate commerce.

But the powers of both the states and of the United States are also limited by the provisions of either the fourteenth or fifth amendments forbidding those governments to deprive any person of his life, liberty, or property without due process of law, while the powers of the states are further limited by the provision of the federal constitution that no state shall pass a law impairing the obligation of a contract.

The Supreme Court of the United States has, from the viewpoint of these limitations, upheld as a justifiable exercise of the general police power almost every sort of regulation of the services carried on by quasi-public enterprises, which has attempted to promote the safety, health and convenience of the public.[1]

But government regulation consists not merely in the attempt to promote the health, safety, and convenience of the public, but includes as well the fixing of the rates which may be charged for quasi-public services.

The statement of the constitutional power of the government in the regulation of rates must, as has

[1] See Johnson *v.* Southern Pacific Co., 196 U. S. 1; Schlemmer *v.* Buffalo, Rochester, & Pittsburgh R. R. Co., 205 U. S. 1, which impliedly recognized the constitutionality of the Safety Appliances Acts of Congress, and Railroad Company *v.* Fuller, 17 Wallace, 560; Henning-ton *v.* Georgia, 163 U. S. 299; Nashville Chattanooga, etc., Railway *v.* Alabama, 128 U. S. 96; N. Y. N. H. & H. Ry. Co. *v.* New York, 165 U. S. 628, which upheld the police power of the state. There are, however, a few cases which hold that states may not pass unreasonable regulations in the interest of the convenience of passengers which, *e.g.*, oblige interstate trains to stop at particular places already provided with train accommodations; see *e.g.* Cleveland, etc., Ry. Co. *v.* Illinois, 177 U. S. 514.

been intimated, be made with all the provisions of the constitution in mind. The first question that arises is as to the effect upon the power of government rate regulation of the prohibition to deprive any person of his property without due process of law.

When the first attempt at rate regulation was made in the early seventies, it was contended that any such attempt was improper. But it was determined in the first case coming before the Supreme Court that in principle government rate regulation of quasi-public enterprises — or, as the court expressed it, "of property affected with a public interest" — was constitutional.[1] In Munn *v.* Illinois, two principles were laid down: first, that the rate charged for the use of property affected with a public use could be regulated by the legislature; and second, that the courts could not revise the decision of the legislature as to what was a reasonable rate.[2]

In reaching this decision the court determined, it is true, that a grain elevator or warehouse which stored grain for hire was affected with a public interest, and therefore subject to regulation. But beyond reaffirming the principle laid down by Chief Justice Hale that when private property "is affected with a public interest, it ceases to be *privati juris* only," and giving examples of such property as, *e.g.*, that of ferries, common carriers, hackmen, bakers, millers, wharfingers and innkeepers, the court did not in its opinion throw much light on the question, what is property

[1] Munn *v.* Illinois, 94 U. S. 113; see also Budd *v.* New York, 143 U. S. 517.

[2] This last point was particularly emphasized in Budd *v.* New York.

affected with a public interest. Mr. Chief Justice Waite laid down the general rule as follows :

"Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

The broad way in which the rule is stated would apparently recognize a right in the legislature both to regulate the use and the price charged for the use of property affected with a public interest, and itself to determine what is such property. The legislature might thus regulate the rent to be charged for property in cities where such rent had become a matter vitally affecting the public interest, or, as the English Parliament has done, provide for some official method of fixing agricultural rents where agrarian questions had assumed great importance, as they have apparently assumed in Ireland.

Let us now see by a study of the later decisions of the Supreme Court whether the application of the rule as stated by Mr. Chief Justice Waite has been limited since the decision in Munn *v.* Illinois.

In the Sinking Fund cases[1] Mr. Justice Bradley, who had concurred in the majority opinion in the Munn case, said with reference to it :

"We held that when an employment or business becomes a matter of such public interest and importance as to create a

[1] 99 U. S. 700, 747.

common charge or burden upon the citizen; in other words, when it becomes a practical monopoly to which the citizen is compelled to resort and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power."

This statement, though made in a dissenting opinion was approved by the court in Budd *v.* New York.[1] In the more recent cases on the subject, however, the criterion of practical monopoly has been abandoned,[2] and the attempt is made, as in Cotting *v.* Kansas City Stockyards Company,[3] to distinguish between two classes of property subject to rate regulation: first, those "in which a public service is distinctly intended and rendered," apparently placing in this class common carriers and such enterprises as gas and water enterprises, — enterprises to which government powers like the power of eminent domain have been granted; and second, "those in which without any intent of public service the owners have placed their property in such a position that the public has an interest in its use." With regard to the first class, Mr. Justice Brewer considers that the powers of the state are greater than with regard to the second, but even in the case of the second class he believes that they "cannot claim immunity from all state regulation." In the case of the second class, *e.g.*, government regulation may be directed only to securing a reasonable charge

[1] 143 U. S. 517. See also Spring Valley Waterworks *v.* Schattler, 110 U. S. 347, 354.

[2] Brass *v.* Stoesser, 153 U. S. 391.

[3] 183 U. S. 79, which adds to property "affected with a public interest" "stockyards at which cattle are received for the purpose of exposing and have the same exposed for sale or feeding and doing business for a compensation."

without regard to the profits on the investment; in the case of the former, the rate, although a reasonable charge for the service rendered, may be reduced if the profits are exorbitant.

If we consider that in the case of the second class, *i.e.* those which do not render a public service like that rendered by a common carrier or public service corporation, the affectation with a public interest is to be determined, as was intimated in Munn *v.* Illinois, by the fact that they have become "of public consequence and affect the community at large," we have a constitutional basis for the regulation of the rates charged by a great corporation dealing in ordinary commodities, particularly where such a corporation has "a practical monopoly." If it be said that such a corporation is not affected with a public interest because it does not render a service, but sells a commodity, it may be answered that there is no legal or economic distinction between the rendering of a service and the sale of a commodity. The sale of food products such as bread has, *e.g.*, long been regulated by the government. If again it be said that a corporation dealing in a commodity is not obliged to sell to all comers, it may be answered that the obligation to render a service or to sell a commodity to every one applying is not the reason for the regulation. Thus in Budd *v.* New York there was no obligation imposed by law upon the elevator owner to render services to every one asking for them, and the regulation of the rates demanded for the services rendered was upheld; and in Brass *v.* Stoesser[1] the obligation to render the service was imposed on persons, who

[1] 153 U. S. 391.

formerly were under no obligation, by the very law which fixed the rate.

Property is then affected with a public interest when, by reason of the fact that it is a practical monopoly or is of interest to the public owing to the conditions surrounding it, the legislature has provided for its regulation. There are, few if any, cases in which the courts have reversed the determinations of the legislature as to what is property affected with a public interest,[1] where the action of the legislature has not been violative of some constitutional provision like the one preventing a state from denying to any one within its jurisdiction the equal protection of the laws.[2]

There is therefore ground for the belief that the prices charged by great corporations engaged in the manufacture and sale of commodities are subject to government regulation. Thus, in State *v.* Drayton[3] a law was declared constitutional which punished the intentional discrimination, for the purpose of destroying the business of a competitor in any locality, between different sections, communities, or cities by selling a commodity at a lower rate in one section than in another, after making due allowance for actual cost of transportation. The court said, in answer to the contention that the act violated the fourteenth amendment and was not a proper exercise of the police power: —

"The legislature, as we must conclusively presume, acted upon the fullest investigation, and upon what appeared to it to be rea-

[1] See cases cited in Budd *v.* New York, 143 N. Y. 517; McGehee, "Due Process of Law," p. 315; and Brass *v.* Stoesser, 153 U. S. 391.

[2] *E.g.* see Cotting *v.* Kansas City Stockyards Co., 183 U. S. 79.

[3] 82 Neb. 254.

sonable grounds, and, as must be also assumed, has determined that the prohibition of the reduction of the price of commodities in general use in any particular locality for the purpose of destroying the business of a competitor in such locality and discriminating 'between different sections, communities, or cities, by underselling at the point of competition for the purpose named would be conducive to 'the general welfare' of the people compelled to purchase such commodities, and by the act in question has sought to remedy the evil. Has it not the power to do so? . . . When we take into consideration that it is not the act itself, but the act coupled with the purpose of destroying the business and property of others, which is declared criminal, we find little trouble in arriving at the conclusion that the statute is within the power of the legislature and is therefore valid."

The court apparently bases its decision, however, rather on the general police power than upon the power to regulate property affected with a public interest.[1]

Whether the courts will regard with favor an attempt on the part of the legislature to regulate the rents of property in either rural or urban districts where the question of rents has become one of vital interest to the community affected, it is of course impossible to say. But that such a power exists is certainly the logical effect of the decisions of the Supreme Court of the United States with regard to the power of the legislature over property affected with a public interest. It is well also to remember that the British Parliament has regulated agricultural rents in Ireland, while in the early part of the nineteenth century the agrarian question became so important in the state of New York that there was placed in the state constitution adopted in 1846 the

[1] See also State *v.* Central Lumber Co. (S. D.), 123 N. W. 504.

provision that "no lease or grant of agricultural land for a longer period than twelve years, hereafter made, in which shall be reserved any rent or service of any kind shall be valid."[1] In Baltimore, as well, abuses having developed in connection with perpetual ground rents, have led to the imposition by law of a limitation upon the right of leasing land.

The second principle laid down in Munn *v.* Illinois and Budd *v.* New York, viz. that the fixing of the rate is a matter of legislative discretion, has since been modified. In later cases the court has held that the fixing of a rate so low as to make it impossible to obtain a fair return from the property would have the effect of depriving the owner of his property without due process of law, and would therefore be unconstitutional.[2] In the two latest cases on the subject,[3] the court has stated its view as to what is a return which is not so low as to result in confiscation. It has thus held that six per cent in conditions so different as those existing in New York City, on the one hand, and Knoxville, Tennesee, on the other, is not confiscatory. In the Knoxville case the court, further, refused to be governed, in its determination as to the amount of property upon which the required rate was to be paid, by the nominal capitalization of the company, saying: "Bonds and preferred and common stock issued under such conditions [*i.e.* in excess of value furnished] afford neither measure of, nor guide to, the value of the property," and, in both the Knox-

[1] Const. Art. 1, Sec. 14; Const. 1894, Art. 1, Sec. 13.

[2] See *e.g.* Smyth *v.* Ames, 169 U. S. 466.

[3] City of Knoxville *v.* Knoxville Water Co., 212 U. S. 1; Willcox *v.* Consolidated Gas Co., *ibid*, 19.

ville case and the New York case, held that that amount was to be determined by an ascertainment of the actual value of the plant at the time the regulatory act went into effect. Finally, in the Knoxville case, no allowance for the value of any franchise was made by the court. In the New York case the court did permit a value to be given to the franchises, but only because the act of the state legislature authorizing the consolidation of the companies put a value on the franchises, and this was regarded as a contract whose obligation could not be impaired by subsequent legislation.

In the second place, the power of a state may be limited by the provision in the constitution prohibiting a state from passing any law impairing the obligation of a contract. Even where a law regulating rates would not deprive any person of his property without due process of law, it might be unconstitutional as impairing the obligation of a contract. The Supreme Court, however, does not regard with favor the idea that the state can contract away for all time its power to regulate rates, which is regarded as a part of the police power,[1] and has seldom, if ever, held that a railway or other similar corporation has a contract with the state unamendable by the legislature in accordance with which it is relieved forever from the regulatory power of the legislature as to rates.[2]

But the court has held that the legislature may authorize municipal corporations to make for a fixed

[1] Stone *v.* Farmers Loan & Trust Co., 116 U. S. 307; Covington, etc., Turnpike Co. *v.* Sandford, 164 U. S. 578, 587.

[2] See note, 62 Am. St. Rep. 295.

term of a reasonable length contracts with public service companies in accordance with which certain rates may be charged, and that attempts on the part of such municipal corporations to modify by ordinance the terms of such contracts are invalid.[1] Any attempt upon the part of a municipal corporation to make such contract when not clearly authorized thereto by the state legislature, will, however, be ineffectual.[2]

IV. Regulation by Taxation

It has been said that the modern program of social reform makes use of the power of taxation for social rather than fiscal purposes. Thus progressive rates of taxation are imposed with the idea of discouraging the accumulation of large fortunes; or taxes are imposed on land alone; while improvements on the land are exempted; or taxes are imposed on the increment of land values, not so much in the belief that larger amounts of money will be realized thereby, but in order that encouragement may be given to building, while the holding of land for rise in value may be discouraged, and in order that the congested population conditions incident to urban life may be remedied.

Are these purposes of taxation improper, and are these various kinds of taxation unconstitutional, as depriving the taxpayer of his property without due process of law, or as denying him the equal protection of the laws? In order to answer these questions, we must have recourse to the fundamental principles

[1] Detroit *v.* Detroit Citizens St. Ry. Co., 184 U. S. 368; Minneapolis *v.* Minneapolis St. Ry. Co., 215 U. S. 417.

[2] Home Telephone, etc., Co. *v.* Los Angeles, 211 U. S. 65.

of taxation, some of which are regarded as so axiomatic that we have no provisions in the constitutions regarding them and no, or almost no, decisions exactly in point.

One of these fundamental principles is that the courts have no control over the motives which may lead legislatures to impose taxes, provided the purpose for which the money raised is spent is a public one. Thus the legislature may impose a protective tariff if it sees fit, with the purpose of encouraging home manufactures, or it may impose a tax with the idea of destroying the occupation subjected to the tax. The first enunciation of the principle that the power to tax is the power to destroy was made by Marshal in the celebrated case of McCulloch *v.* Maryland,[1] where it was made one of the *rationes decidendi*, and may therefore be regarded as one of the things actually decided. Later the principle was even more clearly formulated and enunciated in Veazie Bank *v.* Fenno,[2] where the power to tax was exercised for the purpose of destroying the note circulation of state banks. So, we may say, the legislative authority may resort to the power of taxation for any motive which seems to it to be proper, provided its action violates no other constitutional principle, as, *e.g.*, that the purpose for which money raised by taxation must be public.

In the second place, in the absence of specific constitutional restriction, the legislative authority may select for taxation such objects, classes of individuals, processes, operations, and occupations as it sees fit, and, as a corollary, may exempt such as it sees fit.

[1] 4 Wheaton, 316. [2] 8 Wall. 533.

The only universal constitutional principle which may be said to limit the powers of the legislature in this respect is that which provides for uniformity of taxation, or equal protection of the laws. This principle has been held, however, not in and of itself to limit seriously the power of the legislature. Thus, the Supreme Court has held that the legislative authority may provide for reasonable classification of taxable subjects, *i.e.* may tax railways, while exempting other corporations;[1] may tax corporations, while exempting other individuals;[2] may tax the transfer of property by will, while exempting other transfers of property;[3] may tax sales at exchanges while exempting other sales;[4] and so on, *ad infinitum.*

The Supreme Court has furthermore held that classification is proper where it is based on a variation of rate rather than on a variation in the subjects taxed, and that therefore progressive taxation is proper, *i.e.* that the rate may vary inversely or directly in accordance with some reasonable standard. The most notable example is found in the taxation of inheritances where the rate may vary inversely with the degree of relationship of the legatee to the deceased, or directly with the amount of the legacy.[5] There is probably one limitation, however, upon this power of classification, viz. that taxability, or the rate of taxation, may not be made dependent upon the character of the ownership of property, *i.e.* prop-

[1] Kentucky R. R. Tax cases, 115 U. S. 321.

[2] Home Ins. Co. *v.* New York, 134 U. S. 194.

[3] Orr *v.* Gilman, 183 U. S. 278; Knowlton *v.* Moore, 178 U. S. 41

[4] Nicol *v.* Ames, 173 U. S. 509.

[5] Magoun *v.* Illinois, etc., Bank, 170 U. S. 283; Knowlton *v.* Moore, 178 U. S. 41.

erty may not be selected for taxation because it is owned by a nonresident, or because it is the property of a corporation, where the property of residents or individuals, respectively, is not taxed.[1]

Furthermore, under the specific limitations of certain state constitutions, it is unquestionably the case that less freedom is accorded the legislature. Thus, where the constitution specifically provides for uniformity of taxation, all property except certain minor exemptions must be taxed, and progressive rates of taxation are sometimes regarded as improper.

In the third place, the rate of taxation adopted is, in the absence of specific constitutional provisions, absolutely in the discretion of the legislature. It is partly, at any rate, because of the existence of this principle that the power to tax is the power to destroy.

These being the fundamental principles with regard to taxation, what is the answer we are to give to the question as to the constitutionality of the more important taxes which modern social reformers demand should be imposed? These taxes are income taxes, taxes on the unimproved value of land, taxes on the increment of land value, and, finally, taxes having progressive rates.

First, the income tax. It may be assumed without argument that the only income tax which need be discussed is a federal income tax. The constitutionality of such a tax is dependent upon the meaning which is given a special provision of the federal constitution, viz. that which provides that direct

[1] See *e.g.* Matter of Pell, 171 N. Y. 48; County of Santa Clara *v.* Southern Pac. R. R. Co., 18 Fed. 385.

taxes shall be apportioned among the several states in accordance with population. As an apportioned income tax would work such injustice that no Congress would even consider its adoption, our question resolves itself into whether an unapportioned federal income tax is a direct tax, and, therefore, unconstitutional. The last income tax cases decided this question in the affirmative so far as the income which was taxed was derived from property either real or personal. But recent cases have recognized that a tax on the incomes of persons or a class of persons such as corporations engaged in business is not direct, and therefore, although not apportioned, is proper.[1] The reasoning of the court in these as well as former cases would lead to the conclusion that a tax on income derived from labor also is proper.[2]

We may therefore say that a federal income tax on the income of accumulated wealth, not apportioned among the states, is not constitutional. Such wealth can be reached by a federal unapportioned tax only indirectly through the taxation of the businesses in which such wealth is invested.

Second, taxes on the unimproved value of land. There would seem to be no objection based upon the federal constitution to these taxes, provided that when imposed by the federal government they are apportioned among the states according to population. Inasmuch as the value of land is in large measure dependent on population, and varies almost directly with the population, a federal apportioned

[1] Spreckles Sugar Refining Co. *v.* McClain, 192 U. S. 397; Flint *v.* Stone Tracy Co., Sup. Court, October term, 1910.

[2] Springer *v.* United States, 102 U. S. 586.

tax on the unimproved value of land would not work serious injustice.

State taxes of this character might, however, be regarded as improper under the provisions of certain state constitutions, but in other states would be upheld as a result of the application of the principle according to the legislature absolute discretion in the selection of the things to be taxed. [1]

The same reasons which would render constitutional taxes on the unimproved value of land, would also justify the imposition of different tax rates on the land value and on the value of the improvements on the land. That is, there is no constitutional objection to either of these taxes based on the federal constitution, and none from the point of view of the state constitution in those states like New York which do not require strict conformity in taxation.

Third, taxes on the increment of land value. What has been said with regard to the power of the federal government to impose taxes on the unimproved value of land may be repeated with regard to taxes on the increment of land value. Both taxes would be on land, both would therefore be direct, and both would have to be apportioned. It is possible that profits derived from the sale of land might be taxed as corporate profits under a federal corporation tax, without apportionment.

When, however, we come to a consideration of the power of the states, the conditions are somewhat different. At a very early time in our history resort

[1] See *e.g.* People *v.* Ronner, 185 N. Y. 285, where an act of the legislature of the state of New York was upheld as constitutional which selected mortgages for taxation at a special rate.

was had to a method of taxation which has since come to be known as assessment for local benefit. It was justified from the point of view of expediency on the theory that property specially benefited by some local improvement should be specially taxed for that improvement. It was justified from the point of view of its constitutionality on the theory that the legislature had almost unlimited discretion in the distribution of the burden of taxation, and could therefore determine that particular property should be selected for taxation for particular purposes. This, *e.g.*, is the view of the Court of Appeals of the state of New York, in which this method originated.[1] It is also the view which was subsequently taken by the Supreme Court of the United States.[2] It is not, however, the view approved by the courts of most of the states, which have claimed the right to review the determination of the legislature that particular property was benefited by particular improvements.

In states, therefore, where a strict uniformity in property taxation is required, an increment of land value tax which did not provide for the expenditure of the proceeds of the tax in such a way as, in the opinion of the court, to benefit the land whose increment of value was taxed, might conceivably be regarded as either violating the principle of uniformity, if considered as a tax pure and simple, or as not benefiting the property, if considered as an assessment for local benefit.

But from the point of view of the federal consti-

[1] People *v.* Mayor, 4 N. Y. 419.

[2] French *v.* Barber Asphalt Paving Co., 181 U. S. 324.

tution, there would apparently be no objection to such a tax. In states having a liberal constitution, like that of New York, it would be upheld as a tax pure and simple, and if the proceeds of the tax were devoted to undertakings which could be shown to benefit the property taxed, it could be upheld in other states as a local assessment.

It would seem, therefore, that everywhere throughout the country, a tax on the increment of land value in a city would be proper if the proceeds of the tax were placed in a fund from which improvements shown to benefit the whole city should be paid for, particularly if the tax were low. For, under these conditions, it would not be said in a particular case that the tax imposed exceeded the benefit conferred, which might be presumed from the actual increment of value of the land upon which the tax was imposed.

In states like New York, where it could be justified as a tax pure and simple, the rate might be made much higher, for it would not be so necessary to show a direct relation between the increment of value and the benefit.

Fourth, progressive taxation. There is no constitutional objection imposed by the federal constitution to progressive taxation. The provision that duties, imposts, and excises shall be uniform throughout the United States has been held by the Supreme Court to require merely geographical uniformity,[1] and progressive inheritance taxation has been upheld, although it must be admitted that the court has intimated that the progression might be so excessive, or be dependent upon such unreasonable conditions, as to be improper.

[1] Knowlton *v.* Moore, 178 U. S. 41.

The court thus has said: "It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person accompanied with an arbitrary provision that the rate of tax should be fixed with reference to the sum of the property of another, thus bringing about the profound inequality, which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie our constitutional system." [1] This was said with regard to the contention that the act of Congress under consideration fixed the rate of tax imposed on a given legacy in accordance with the size of the entire estate of which the legacy had been a part. The court held that the act could not be given that interpretation, and therefore did not consider itself called upon to decide upon the constitutionality of such an act. So all we have on this question is an expression of doubt as to whether the rate of tax imposed on a distributive share in an estate may be made to vary with the amount of the entire estate.

The Supreme Court of the United States has also decided that the federal constitution imposes no obstacle to progressive taxation by states, provided that the classification upon which the progression is based is reasonable. What is a reasonable classification is not stated, but it has been held or intimated that neither individuals nor classes may be selected for taxation, where the classification is based on race, religion, residence, or any other arbitrary basis.[2] In the Magoun case it was held that the rate might

[1] Knowlton *v.* Moore, 178 U. S. 41.
[2] Magoun *v.* Illinois, etc., Bank, 170 U. S. 283.

progress directly with the amount of the legacy, and inversely with the degree of relationship to the deceased. It may therefore be said that progressive taxation, based on the value of the distributive shares of an estate, is perfectly proper so far as concerns the federal constitution.

State constitutions, however, are sometimes construed as forbidding it,[1] but, as has been said, state constitutions may be amended, and if state courts take a more conservative view of the federal constitution than does the Supreme Court, it is competent for Congress to enlarge the appellate jurisdiction of that court so as to permit it to bring the conservative courts into line.

There are, therefore, few, if any, permanent constitutional objections to the imposition of those taxes whose imposition is demanded by social reformers of the present day. The most important tax which may not be imposed at the present time is an unapportioned general income tax levied by the federal government. But, as has been pointed out, the income from business may be taxed, and in this manner most accumulated wealth outside of land could be reached by an unapportioned tax, while the increment of land value, and even the income from land value, could be taxed by means of an apportioned federal tax.

V. Regulation of Monopoly

The power of the legislative department of the government to prohibit arrangements in the form of contracts, agreements, or otherwise in restraint of

[1] See *e.g.* State *v.* Switzler, 143 Mo. 287.

trade has always been admitted in the United States. Indeed, the policy of American law has from an early time been to discourage the restraint of trade. Thus the courts have refused to recognize the enforceability by civil action of agreements whose purpose or effect was in their opinion to limit production or to control prices,[1] have punished criminally under general statutes forbidding conspiracies combinations of persons engaged in trade which stifled competition, or under which competition might be stifled;[2] and in a number of cases have dissolved corporations which have either joined in a combination or have been organized for the purpose of monopoly, where the law either prohibited conspiracies in restraint of trade or provided that corporations could be formed for any lawful purpose.[3]

The assignment to Congress of the power to regulate commerce with foreign nations and among the several states, and the consequent division of the field of commerce into two parts, into one of which the states were not to enter, and the other of which was closed to the national government, naturally has resulted in the imposition of limitations on the exercise of governmental power which have caused a certain amount of embarrassment. At the same time, the fundamental theory that commerce or trade may be regulated in the interest of securing some desired result, *e.g.* competition, has been rather strengthened

[1] Craft *v.* McConaughy, 79 Ill. 346; Nester *v.* The Continental Brewing Co., 161 Pa. St., 473.

[2] People *v.* Sheldon, 139 N. Y. 251.

[3] State *v.* Standard Oil Co., 49 Ohio, 137; People *v.* Chicago Gas Trust Co., 130 Ill. 268; Distilling & Catttle Feeding Co., *v.* People, 156 Ill. 448; People *v.* The Milk Exchange, 145 N. Y. 267.

or emphasized than weakened by the insertion in the federal constitution of the commerce clause.

There are, however, other clauses in the federal constitution which may be regarded as limiting the extent both of the regulatory power of Congress over foreign and interstate commerce, expressly recognized in the constitution, and of the power of the states over intrastate commerce, which judicial interpretation of the constitution has accorded to them.

Thus neither the federal nor the state government may deprive any person of his life, liberty, or property without due process of law, while the states may not deny to any person within their jurisdiction the equal protection of the laws.[1] What the effect of the fifth amendment is upon the power of Congress to prevent combinations in restraint of foreign and interstate commerce, has not been decided. It would appear that the limitation would affect rather the methods which Congress may adopt in order to secure the desired result than the rule of conduct which it may lay down. Up to the present time the controversy has been waged almost exclusively over the question whether Congress has, as a matter of fact, attempted to prohibit all restraint of commerce or only unreasonable restraint. It is probably impossible at the present day to say whether the Anti-Trust Act of 1890, which is practically the only attempt Congress has made to prevent restraints of commerce, prevents all restraints or only unreasonable restraints. In United States *v.* Trans-Missouri Freight Association[2] and United States *v.* Joint Traffic Association[3] it would seem that the view of the Supreme Court was that all restraints of

[1] Amendments V and XIV. [2] 166 U. S. 290. [3] 171 U. S. 505.

trade had been prohibited, but in the Northern Securities case[1] the adherence of Mr. Justice Brewer to the opinion of the four who believed the Northern Securities Company had acted illegally, was given under the belief that the restraint complained of both in that case and in the other cases which have been mentioned was unreasonable, and in the recently decided Standard Oil Company and American Tobacco Company cases the majority opinion laid great stress on the view that the restraint prohibited was only an unreasonable one. It is worthy of note, however, that the prosecution in most of the cases arising under the Anti-Trust Act has been successful.

Most of the methods which have been provided to prevent the restraint of commerce have been approved by the Supreme Court. Thus, in Continental Wall Paper Company *v.* Voight[2] the first section of the United States Anti-Trust Act making contracts in restraint of trade illegal was applied so as to prevent a combination from recovering the purchase price of goods sold a purchaser under a contract of sale in restraint of trade; in the Northern Securities case the equity jurisdiction of the United States in the issue of restraining orders was upheld, and in Montague & Co. *v.* Lowry[3] the action for threefold damages suffered by one injured by the unlawful restraint was sustained. As yet, however, we have no determination by the Supreme Court as to the constitutionality of the provision of the Anti-Trust Act imposing a criminal punishment upon those violating the act, or of that decreeing the forfeiture and condemnation of any property owned under any

[1] 193 U. S. 197. [2] 212 U. S. 227. [3] 193 U. S. 38.

illegal combination and being the subject thereof and being in course of transportation from one state to another or to a foreign country. But the logic of the decision in Waters-Pierce Company *v.* Texas, [1] which upheld a large criminal penalty for violation of a state anti-trust act, would seem to prove the constitutionality of the criminal provisions of the United States Anti-Trust Act.

The power reserved by the states to regulate intrastate commerce has also always been regarded as justifying the passage of anti-trust acts by the State legislatures provided such acts did not in the opinion of the courts violate the provisions of the fourteenth amendment or similar provisions in the state constitutions. There are some decisions in the state courts which seriously limit the effectiveness of these acts attempting to prevent restraint of intrastate commerce. These decisions are not, however, of great importance since, as has been pointed out, either the state constitutions may be amended, or the power may be given by Congress of appealing to the Supreme Court from the decisions of state courts holding unconstitutional from the point of view of the federal constitutions acts of the state legislature.

Here as elsewhere the important question is what is the attitude of the Supreme Court of the United States towards the acts of state legislatures attempting to prevent restraints of intrastate commerce. Our discussion here must be directed in the first place to the consideration of the effect of the fourteenth amendment upon the power of the state to forbid combinations in restraint of trade. It may be said

[1] 212 U. S. 86.

that the fourteenth amendment does not in any way limit the power of the state to provide for the rule of competition or to forbid restraints of strictly intrastate commerce, provided the rule is made applicable to all persons in similar conditions.[1] One of the latest decisions of the court upon this subject, viz. Grenada Lumber Co. *v.* Mississippi [2] held that the fourteenth amendment was not violated by a state statute which was so interpreted by the state court as to authorize the dissolution of a voluntary association of retail lumber dealers, because the purpose of such association as expressed in its articles of agreement was to "buy only from manufacturers and wholesalers who do not sell direct to consumers" and "not to buy from lumber commission merchants, agents, and brokers who sell to consumers." [3]

The power of a state, somewhat arbitrary in character to prevent a foreign corporation from engaging within its borders in intrastate business, furthermore, has been held to free a state from the limitations of the fourteenth amendment, in the sense that it permits the state to take action with regard to foreign

[1] Thus the Supreme Court held unconstitutional as denying the equal protection of the laws a state anti-trust act which exempted from its provisions agricultural products or live stock while in the hands of the producer or raiser. Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540, 556.

[2] 217 U. S. 433.

[3] See also Smiley *v.* Kansas, 196 U. S. 447; National Cotton Oil Co. *v.* Texas., 197 U. S. 115. These cases hold acts constitutional which made illegal combinations among manufacturers and buyers to lower the price of products which they wished to buy. See also Standard Oil Co. *v.* Kentucky, 217 U. S. 413, where the transaction complained of was inducing merchants in the state by an agreement to give them three hundred gallons of oil to revoke orders on a rival company for oil to be shipped from another state.

corporations which it would not be authorized in taking with regard to natural persons. Thus, in Hammond Packing Company *v.* Arkansas [1] the court held constitutional an act under which a fine was imposed upon a foreign corporation, and a permit to such corporation to do business was revoked for joining in a combination made outside of the state in restraint of trade.

Finally, the Supreme Court has upheld most, if not all, the methods which have been provided by the states for enforcing such laws. Criminal penalties, forfeiture of the right to do business, decrees dissolving illegal associations, have been all upheld,[2] while in one of the most recent cases decided [3] it was held that different methods may be provided for corporations on the one hand and natural persons on the other.

Almost the only thing which a state may not do in the case of a combination made illegal under the law is to impose an unreasonably large fine. This would probably be the taking of property without due process of law.[4]

It may therefore be said that apart from some provisions in the state constitutions which either are peculiar in character or are interpreted peculiarly by

[1] 212 U. S. 322.

[2] Hammond Packing Company *v.* Arkansas, 212 U. S. 322; American Cotton Oil Company *v.* Texas, 197 U. S. 115; Smiley *v.* Kansas, 196 U.S. 447; Grenada Lumber Company *v.* Mississippi, 217 U. S. 433.

[3] Standard Oil Company *v.* Tennessee, 217 U. S. 413.

[4] See *Ex parte* Young, 209 U. S. 123; but see Waters-Pierce Oil Co. *v.* Texas, 212 U. S. 86, where a fine of over a million dollars was upheld as proper.

particular state courts, there are no limitations of any importance upon the power of either the states or the United States to prohibit combinations deemed to be in restraint of commerce, provided the regulations adopted are uniform and affect only that commerce which by the terms of the United States constitution is subject to regulation by the authority taking action.

It may be added, also, that the recent decisions of the Supreme Court would seem to evidence a disposition on the part of that body to extend the field of regulation open to Congress so as to include matters heretofore regarded as within the jurisdiction of states where their regulation appeared to be necessary to the effective regulation of what was unquestionably interstate or foreign commerce.

It is a difficult matter to derive any general principles from the decisions of the courts as to the constitutionality of government regulation, since so much depends upon the reasonableness of the regulation at issue. It may, however, be said, perhaps, that the widest powers of regulation in the interest of change in social conditions are to be found in the taxing power which has been, and may be, used by the competent government in our political system to produce desired social, rather than fiscal, results. It may also be said that where there is clearly a connection between social legislation and the public health or safety, the courts exhibit considerable unwillingness to declare such legislation unconstitutional, but that where this connection is not clearly evident, or where the purpose of the legislation is not so much to protect the public health and safety as to better

the economic condition of the laboring classes and to place them in a stronger position in their struggle with their employers, the tendency of the judicial mind is to consider such legislation as either class legislation or as infringing upon the rights of property or liberty which are conceived in terms of *laisser faire*.

Finally, it may be said that the courts seem in some, but not in all, instances to be willing to apply to modern conditions theories developed in the English law before the acceptance of *laisser faire* ideas — theories through whose application vast powers of regulation over property affected with a public interest and over attempts at monopoly and in restraint of trade are recognized as still possessed by either of the governments recognized in our constitution as competent to act.

It may therefore be hoped, if not expected, that as they come to have a clearer idea of the difference in present from former economic conditions, the courts may, as in the case of property affected with a public interest and of monopolies, come to the conclusion that the powers of the state may constitutionally be used to protect the weaker classes in the community from the dangers not merely of disease and unsafe conditions of labor, but as well from those which are attendant upon great economic dependence in an increasingly industrial society. It may be pointed out that in reaching such a conclusion they would not be departing greatly from the old English law, which offers examples, as in the case of the law of usury, of a desire to protect those members of society who were at an economic disadvantage in the struggle for existence.

CHAPTER VII

THE CONSTITUTIONALITY OF GOVERNMENT AID

I. Proper Purposes of Taxation

The question of the constitutionality of government aid to the needy classes in the community may arise because of the existence of the rule which forbids the exercise of the powers of taxation and eminent domain for any but a public purpose.

The general principle that the purpose for which taxes may be levied and property may be taken must be public is perfectly clear, but the principle is to be applied in the light of our history. For a long time prior to the adoption of the principle, both these powers had been used for purposes which could be considered as public, only if regard were had to the indirect advantages which the public secured from their exercise. Thus from a very early time in the history of both England and this country the taxing power had been used to provide funds for the support of the poor, while private persons under legislative authorization had been permitted to make use of water courses for the development of water power, which was to be used by them for purposes of private profit. These poor laws and these mill acts, as they were called, have been regarded as constitutional, notwithstanding the general rule of constitutional law to which allusion has been made.

As new conditions have appeared to make necessary attempts on the part of the legislature to accord aid to various classes of individuals in the community, the courts have been called upon to determine whether such attempts are forbidden by the principle requiring that the purpose of the legislature shall have been public, or whether they fairly come under some of the exceptions to the rule which have been shown always to have existed.

The validity of such attempts is to be determined in the first place by a consideration of the purpose and effect of the fourteenth amendment. There was nothing in the original constitution of the United States or in the original amendments thereto which could be regarded as limiting the taxing power of the states to public purposes. In Loan Association *v.* Topeka[1] it is true the Supreme Court affirmed a decision of the circuit court, which had obtained jurisdiction through diversity of citizenship, holding invalid certain bonds issued by a municipal corporation in aid of a private manufacturing enterprise. The grounds for the decision were that there are, as Mr. Justice Miller expressed it, certain —

"rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all a despotism. . . . To lay with one hand the power of the government on the property of the citizen and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes is none the less a robbery, because it is done under the forms of law and called taxation. . . . We have es-

[1] 20 Wall. 655.

tablished, we think beyond cavil, that there can be no lawful tax which is not levied for a public purpose."

This was said as to the meaning to be given to the constitution of the state of Kansas which the court was called upon to apply in the absence of decisions by the state courts interpreting it.[1]

Mr. Justice Clifford dissented from the conclusions of the court on the ground that: —

"Courts cannot nullify an act of the state legislature on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the constitution, where neither the terms nor the implications of the instrument disclose any such restriction. Such a power is denied to the courts, because to concede it would be to make the courts sovereign over both the constitution and the people and convert the government into a judicial despotism."

The views of Mr. Justice Clifford are approved in Fallbrook Irrigation District *v.* Bradley,[2] where it is said that, if an act of a state legislature does not violate some provision of the federal constitution, "there is no justification for the federal courts to run counter to the decisions of the highest state courts upon questions involving the construction of state statutes or constitutions, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law." The court, after making this statement, proceeds to decide the case before it on the theory that state taxation for a private purpose would be forbidden by the fourteenth amendment.

It may therefore be said that the employment by the state of the power of taxation for a private pur-

[1] See Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112–155.
[2] 164 U. S. 112.

pose is unconstitutional from the point of view of the United States constitution.

What now is the distinction made by the United States Supreme Court between a public purpose taxation for which is proper and a private purpose taxation for which is improper? In its decision of this question the Supreme Court has never overruled the decision of a state court that a given purpose, for which state taxes had been levied, was public in character.[1] Indeed, in Fallbrook Irrigation District *v.* Bradley[2] the court, while denying that the determinations of state courts are conclusive "upon the question as to what is due process of law, and as incident thereto, what is a public use," observed:[1] —

"It is obvious, however, that what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject matter in regard to which the character of the use is questioned." In this case the court held, for example, that irrigation was a public use in arid districts, and said: "The people of California and the members of her legislature must in the nature of things be more familiar with the facts and circumstances than can any one who is a stranger to her soil. This knowledge and familiarity must have their due weight with the state courts which are to pass upon the question of public use in the light of the facts which surround the subject in their own state. For these reasons, while not regarding the matter as concluded by these various declarations and acts and decisions of the people and legislature and courts of California, we yet, in the consideration of the subject, accord to and treat them with very great respect, and we regard the decisions as embodying the

[1] In Olcott *v.* Supervisors, 16 Wall. 689, the Supreme Court did, indeed, claim that it was not bound by the decisions of the state courts as to what is a public purpose for which taxes may be levied, and was of the opinion that a purpose was public which had been declared to be private by the state court. The case would appear, however, to have been decided on other grounds. [2] 164 U. S. 112.

deliberate judgment and matured thought of the courts of that state on this question."

The same position is taken by the court in Welch *v.* Swazey [1] where it is said that the court —

"feels the greatest reluctance in interfering with the well-considered judgments of the courts of a state whose people are to be affected by the operation of a law. The highest court of the state in which statutes of the kind under consideration [viz. statutes regulating the height of buildings in cities] are passed is more familiar with the particular causes which led to their passage (although they may be of a public nature) and with the general situation surrounding the subject matter of the legislation than this court can possibly be. We do not, of course, intend to say that under such circumstances the judgment of the state court upon the question will be regarded as conclusive, but simply that it is entitled to the very greatest respect, and will only be interfered with, in cases of this kind, where the decision is, in our judgment, plainly wrong." [2]

While the California case recognized differences due to climate and geographical conditions, this case from Massachusetts recognized that the same influence was to be accorded to social conditions. For what has been quoted was said with regard to a law passed to remedy through limitations imposed upon the height of buildings, the evils resulting from the uncontrolled use of land, in urban conditions such as exist in a great city like Boston.

Whether the court will carry this idea of the local autonomy of the states in deciding what should be the remedies to be applied to the evils attendant upon an intense industrial life under conditions of freedom of

[1] 214 U. S. 91.

[2] See also Wurts *v.* Hoagland, 114 U. S. 606, applying the same principle to the draining of swampy lands for which, even though the lands are in private hands, the power of taxation may be used.

individual action, of course cannot be said, but the logic of the argument cannot be avoided if the court can be brought to see that the differences in conditions due to the varied occupations of the people in different parts of the country are in reality just as great as the differences in climate and social conditions which were recognized in the opinions from which quotations have been given.[1]

It may therefore be concluded both from these opinions and from the absence of decisions overruling the determinations of state courts on the subject that each of the states has quite a large freedom of action in determining, in the circumstances and conditions existing within it, what purposes are public from the viewpoint of its power of taxation.

We are thus brought to a consideration, in the second place, of the decisions of the state courts as to what are public purposes for which the power of taxation may be exercised.

The state courts have been influenced in their determination of this question by the fact that the undertaking which was being aided by the exercise of the power of taxation was or was not in the control and management of private corporations or individuals. Where the control and management are private, they are more apt to regard the purpose as private than where such control is in the hands of the state or local authorities. Thus the Supreme Court of Ohio has

[1] See also Missouri *v.* Lewis, 101 U. S. 22, for a recognition of the principle that varying conditions of population may under the fourteenth amendment be subjected to different treatment by the states. See also Noble State Bank *v.* Haskell, 31 S. C. R. 186, upholding an assessment on banks to provide a bank depositors' guaranty fund. *Infra*, p. 324.

held that even under a constitution recognizing a duty upon the part of the state to support the indigent blind in public institutions it is improper for the legislature to grant out of public funds an allowance to an indigent blind person not supported in a public institution.[1]

When it is said that the courts are influenced by the fact that the undertaking is under private control, it is not meant to indicate that the character of the control is decisive. For it has frequently been held that where the character of the purpose is unquestionably public, the character of the control is immaterial. Thus the use of the taxing power to aid railway corporations has almost universally been upheld as constitutional.[2] It is usually where the character of the purpose is doubtful that the character of the control affects the decision.

In what now does doubt as to the character of the purpose consist? In answering this question we have, as has been intimated, to resort to history, which has such a potent influence on the decision of constitutional cases. Nowhere, perhaps, is the historical argument more forcibly expressed than in Loan Association *v.* Topeka,[3] where the court says: —

"In deciding whether, in the given case, the object for which the taxes are assessed falls upon one side or the other of this line, they [the courts] must be governed mainly by the course and usage of the government, the objects for which taxes have been

[1] Lucas Co. *v.* State, 75 Ohio St. 114. See also Wisconsin Keely Inst. Co. *v.* Milwaukee Co., 95 Wis. 153 where a payment to a private corporation for the cure of an indigent drunkard was declared to be improper. But see Mayor *v.* Keely Inst., 81 Md. 106; *In re* House, 46 Pac. (Col.) 117; and White *v.* Inebriates' Home, 141 N. Y. 123.

[2] See *e.g.* Olcott *v.* Supervisors, 16 Wall. 689.

[3] 20 Wall. 655.

customarily and by a long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people, may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation."

It follows, therefore, that the objects for which taxes have been levied in the past are public purposes from this point of view. Thus roads, schools, highways, and the protection of the peace, of the public health and safety, are all public purposes for which taxes may be levied. It is for this reason that taxes may be levied to aid the state or municipalities in providing for the public ownership and operation of what we call public utilities. For the question involved is not the character of the control, the constitutionality of which is to be determined from a consideration of other constitutional principles than that requiring the purpose of taxation to be public. What is here to be considered is the purpose for which the tax is levied which in the case of a municipally owned and operated street railway, *e.g.*, is the provision of public means of communication.

It is only when we come to the new functions, the discharge of which changed economic and social conditions make it seem necessary for the state in either its central or local organizations to assume, that we meet with difficulty. What criterion are we to adopt when we come to consider such subjects as old age, accident, and sickness insurance or pensions, which in some form would appear to be essential parts of

the program of social reform in Germany, England, and Australasia?

II. Pensions in Case of Old Age, Accident, or Sickness

As no attempt has been as yet made in this country to establish old age, sickness, and accident pensions, we have no decisions directly in point. We have, it is true, a few decisions on the subject of pensions to government employees. But they cannot be regarded when favorable as having any particular force, since such pensions are regarded rather as a part of the compensation attached to government employment than as gratuities.[1] Indeed, we have a few decisions which hold such pensions to be improper where they are awarded to persons who have already been retired from the public service,[2] or who, while in the public service, are not induced to continue in service as a result of their award.[3] On the other hand, the cases holding service pensions of this character to be unconstitutional cannot be regarded as deciding that old-age pensions, *e.g.*, are improper where such pensions are confined to the indigent, since no attempt has been made in providing for service pensions to confine them to those who are in pecuniary need.

In endeavoring to answer the question as to the constitutionality of old age, accident, and sickness pensions, we must study the cases which have been

[1] See *e.g.* Commonwealth *v.* Walton, 182 Pa. St. 373.
[2] See *e.g.* In the Matter of Mahon, 171 N. Y. 263.
[3] See State *v.* Ziegenheim, 144 Mo. 283.

decided as to doubtful purposes of taxation, — *i.e.* doubtful from the point of view of their being public or private, — and then try to reason by analogy from them to the question in hand. A study of the cases which have held purposes to be private and therefore to be improper purposes of taxation, can hardly fail to force the conclusion that any purpose is an improper purpose for taxation which consists in the grant of public monies to individuals who are not in the service of the government or who cannot be regarded, because of their poverty, as fit subjects of public charity. An old age, accident, or sickness pension which is not conditioned upon poverty would probably be regarded by the courts as unconstitutional where the funds from which it was paid were derived from taxation.

Nor would the benefits to the general social system which might conceivably be derived from such a pension have very great effect upon the attitude of the courts. Even if these advantages were conceded, the pensions would still be declared unconstitutional unless former decisions were overruled. For, very generally, the advantages derived by the public from the expenditure of public money do not make public the purpose of the taxes from which such money is obtained. In Lowell *v.* Boston [1] an act of the Massachusetts legislature which was passed soon after the Boston fire was under consideration. This act provided for an issue of city bonds to be ultimately paid for out of taxes, the proceeds of which bonds were to be loaned to individuals in order to enable them to rebuild in the burnt districts. The act was declared to be unconstitutional as providing for the

[1] 111 Mass. 454.

exercise of the power to tax for a private purpose. In the course of the opinion the court said: —

"Resulting advantage to the public does not of itself give to the means by which it is produced the character of a public use. . . . There is no public use or public service declared in the statute now under consideration, and we are of opinion that none can be found in the purposes of its provisions. . . . The fund raised is intended to be appropriated distributively, by separate loans to numerous individuals, each one of which will be independent of any relation to the others, or to any general purpose, except that of aiding individual enterprise in matters of private business. The property thus created will remain exclusively private property . . . with no obligation to render any service or duty to the commonwealth or to the city — except to repay the loan — or to the community at large or any part of it."

The court goes on to say that the fact that the city will be indirectly benefited through increase in trade and business does not affect the judicial aspect of the case in any way. This case has never been overruled, and has been approved, by the Supreme Court of the United States.[1] There is also a series of cases of which Loan Association *v.* Topeka is an example, holding that the issue of city or state bonds payable out of the proceeds of taxation to aid private manufacturing corporations is improper as providing taxation for a private purpose.

Lowell *v.* Boston and Loan Association *v.* Topeka were decided many years ago (1873 and 1874, respectively). But while there has been no indication of

[1] See also State *v.* Osawkee Township, 14 Kan. 418, which declared the grant of aid to poor farmers to purchase grain for seed and feed, in districts affected by drought, was not a public purpose. This case was decided in 1875, only two years after Lowell *v.* Boston. Cf. William Deering Co. *v.* Peterson, 75 Minn. 118.

an attempt to reverse them as to the particular points of the law which they decided, they have not been extended in their operation. There are also a number of cases further, some decided by the Supreme Court of the United States, which have extended the principle of the Railway Aid Bond cases so as to include mills for grinding grain which are open to all comers at a fixed toll,[1] thus recognizing large powers of social coöperation in local communities, as well as one case in a state court which has likewise somewhat extended the conception of public charity so as in districts affected by droughts and other calamities to permit the use of the taxing power to obtain capital for the purchase of seed corn by needy farmers, who, while not at the time paupers, were in great danger of becoming such did they not receive aid.[2]

But it will be noticed that none of the cases upon this subject has recognized the constitutionality of acts which make grants of public moneys derived from taxation to persons not either performing a public service similar to that performed by a public officer or a common carrier, or not assimilated to the position of paupers. In State *v.* Osawkee Township, in which the opinion was given by Judge Brewer, afterwards a member of the United States Supreme Court, the constitutionality of the act was denied because the recipients of the aid given were not actually paupers.

[1] See *e.g.* Burlington *v.* Beasley, 14 U. S. 310; Blair *v.* Cumming Co., 111 U. S. 363. These cases are also interesting as showing how closely the Supreme Court follows the decisions of state courts as to what are public purposes and therefore proper purposes for taxation in their respective states.

[2] North Dakota *v.* Nelson Co., 1 N. D. 88.

The only case which shows any tendency to regard as a public purpose the use of the power of taxation, with the idea of preventing pauperism, is the North Dakota case where it is said:

"If the destitute farmers of the frontier of North Dakota were now actually in the almshouses of the various counties in which they reside, all the adjudications of the courts, state or federal, upon this subject, could be marshaled as precedents in support of any taxation, however onerous, which might become necessary for their support. But is it not competent for the legislature to make small loans, secured by prospective crops, to those whose condition is so impoverished and desperate as to reasonably justify the fear that unless they receive help, they and their families will become a charge upon the counties in which they live?"

What now has been the attitude of the state courts towards the granting under present constitutional provisions of pensions or allowances to persons regarded as paupers? In answering this question, it would seem to be necessary to bear in mind the character of the control of the funds granted. If that is private, the tendency of the courts is, as has been pointed out, to regard the purpose as also private. Courts which recognize education as a proper purpose of taxation sometimes consider as improper the grant of public moneys to educational institutions under private control.[1] It is true that this question of grants of money to private schools is somewhat complicated by the fact that private educational institutions which desire public aid are usually at the same time sectarian institutions, and on that account for other constitutional reasons not proper recipients of public charity. But there are cases which have

[1] Jenkins *v.* Andover, 103 Mass. 94.

taken the same view with regard to charitable institutions under private control which have been established with the idea of offering aid to particular classes of indigent persons.[1] Opposed to them, however, is an imposing array of cases which refuse to apply in charitable matters the rule that the private character of the control necessarily makes the character of the purpose private.[2]

But even if we assume that the better rule is that public moneys may constitutionally be granted to private corporations established for charitable purposes, we have by no means proved that public moneys may be granted to indigent individuals. For corporations under such conditions are regarded as acting as agents of the state in discharging the public function of supporting the poor. They do not receive the funds granted them for their own benefit.

In order to uphold from a constitutional point of view the grant of pensions to individuals, we may attempt to show that such pensions are justified by the historical argument, as being a form of poor relief, and are not to be regarded as improper by the logic of the decisions rendered with regard to the propriety of particular attempts to provide poor relief.

May old age, accident, and sickness pensions granted to indigent persons properly be regarded as a form of outdoor relief? The cases on the subject of relief to paupers are legion, but the question as to the con-

[1] Such are the Keely Cure cases decided in Wisconsin, *e.g.* Wisconsin Keely Inst. Co. *v.* Milwaukee Co., 95 Wis. 153.

[2] Mayor *v.* Keely Inst., 81 Md. 106; *In re* House, 46 Pac. (Col.) 117; White *v.* Inebriates Home, 141 N. Y. 123; Shepherd's Fold *v.* New York, 96 N. Y. 137.

stitutionality of the numerous statutes providing for the grant of outdoor relief and regulating the respective relations of the persons receiving it, ordering it, and dispensing it has apparently not been raised. Such statutes are assumed to be constitutional, and the decisions have concerned themselves with determining the reciprocal rights and duties of individuals under the statutes.

On general principles we can therefore assume that such pensions, if granted to indigent persons under the limitations set forth, would be constitutional as a form of outdoor poor relief, unless the courts are of the opinion that the historical argument is inapplicable and that such pensions are evidence of an attempt to adopt for our free, independent, and self-supporting American population a new and unprecedented form of relief originating outside of England or the United States and, *e.g.*, in one of the paternalistic governments of Europe?

It must be admitted that certain remarks made in the course of deciding one or two concrete cases tend to force the conclusion that all the state courts, at any rate, are not as yet prepared to regard pensions even to indigent individuals as constitutionally proper in this land of individual freedom and private initiative. These cases are Lucas County *v.* State[1] and State *v.* Switzler.[2] In the former the legislature provided for granting to all adult blind persons "who have been residents of the state for five years and of the county one year, and have no property or means with which to support themselves" allowances not to exceed twenty-five dollars quarterly. The court

[1] 75 Ohio State, 114. [2] 143 Mo. 287.

declared the act to be unconstitutional largely on the ground that it provided for the expenditure of public funds for a private purpose and closed its argument by saying: —

"If the power of the legislature to confer an annuity upon any class of needy citizens is admitted upon the ground that its tendency will be to prevent them from becoming a public charge, innumerable classes may clamor for similar bounties, and if not upon equally meritorious ground, still on ground that is valid in point of law, and it is doubted that any line could be drawn short of an equal distribution of property."

The court was influenced in a negative way by the historical argument already touched upon. After quoting the formulation of it by Mr. Justice Miller in Loan Association *v.* Topeka, it remarked, "If that rule is applied here, it must be said that the act under consideration is without precedent in this state."

In the Missouri case the legislature passed an act providing for the levy of a progressive inheritance tax, which was regarded by the court as unconstitutional both because of its progressive character, and because of the purpose for which it was levied, viz. to provide fellowships in the State University for students dependent upon their own exertions for their education and "financially unable otherwise to obtain the same." In the course of the opinion the court took occasion to say that: —

"Paternalism, whether state or federal as the derivation of the term implies, is an assumption by the government of a quasi-fatherly relation to the citizen and his family, involving excessive governmental regulation of the private affairs and business methods and interests of the people, upon the theory that the people are incapable of managing their own affairs, and is perni-

cious in its tendencies. In a word, it minimizes the citizen and maximizes the government. Our federal and state governments are founded upon a principle wholly antagonistic to such a doctrine. Our fathers believed the people of these free and independent states were capable of self-government; a system in which the people are the sovereigns and the government their creatures to carry out their commands. Such a government is founded on the willingness and right of the people to take care of their own affairs and an indisposition to look to the government for everything. The citizen is the unit. It is his province to support the government and not the government's to support him. Under self-government we have advanced in all the elements of a great people more rapidly than any nation that has ever existed upon the earth, and there is greater need now than ever before in our history of adhering to it. Paternalism is a plant which should receive no nourishment upon the soil of Missouri."

It is to be noticed that the historical argument which is in large degree the controlling argument in these cases, when taken together with the insistence upon that political and economic theory known as *laisser faire*, to which is accorded an absolute and universal application at all times and under all circumstances, both makes social reform impossible, so far as its concrete measures cannot be justified by our own history, and regards political and economic conditions as static rather than progressive in character. The result of its universal application will be to fix upon the country for all time institutions, which, as has been pointed out, were established in the eighteenth century to deal with conditions then existing, but which may in this the twentieth century be unsuitable because of the economic, social, and political changes which have taken place in the last hundred years.

The emphasis given to this historical argument, furthermore, is not justified by the attitude of the Supreme Court of the United States. For Mr. Justice Miller after formulating the argument in his opinion in Loan Association *v.* Topeka was careful to indicate his feeling that it was not controlling by saying: "Though this may not be the only criterion of rightful taxation," while the court in its more recent decisions on what is due processs of law under the fourteenth amendment has shown very clearly that in its opinion the decision of the question is to be influenced by the geographical and social conditions attendant upon the particular case in which the question is raised.

Such an application of the historical argument, will, where the constitution is not easily susceptible of amendment, preclude the possibility of orderly and legal change in our conception of the powers of government, made necessary by changes in economic and social conditions, and may conceivably make unavoidable resort to revolutionary methods of change.

It may then be said that until the state constitutions have been changed and the state courts have decided that such changes are from the viewpoint of the federal constitution proper, there is no great likelihood that a system of state pensions in the case of old age, sickness, or accident which is based even on the indigence of the recipients of such pensions would be regarded as constitutional. Whether, where provisions have been inserted into the state constitutions making such pensions clearly constitutional, and the approval by the state courts of their propriety from the viewpoint of the federal constitution has been

secured, the United States Supreme Court will be guided by the decisions of the state courts, is a question about which we may indulge in an almost indefinite amount of speculation, but as to which a certain answer cannot be given. It is well, however, to remember that the Supreme Court has several times held that the due process of law and the equal protection of the laws required by the fourteenth amendment are not the same thing in all parts of the country. That body has already recognized that certain climatic and population conditions have the effect of making state laws constitutional which under different conditions might be regarded as improper. It does not seem a long step from this position to the further position that industrial, *i.e.* economic, rather than climatic and social conditions, shall have the same effect, and it is always to be borne in mind that the Supreme Court has said more than once that the decision of state legislatures and state courts, which have knowledge of local conditions, is entitled to the greatest respect and will not be overruled except in a perfectly clear case.

The states, however, are not the only authorities in our government which may conceivably wish to establish systems of pensions of the class under consideration. For in Great Britain and in the German Empire, which is a federal government like our own, it is the imperial and not the local government which has made provision for these pensions or something very like them. Can Congress constitutionally provide for such pensions?

The constitution of the United States contains no limitations upon the purposes for which federal taxes

may be levied, except those contained in Art. I, Sec. 8, Paragraph 1, which says: "Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States." Inasmuch as the government of the United States is regarded as one of enumerated powers, it is considered that the latter part of this clause does not contain a grant of new power, but rather imposes a limitation upon the purposes for which the taxing power may be used. So we may assume that the purposes of federal taxation are limited to paying the debts and providing for the common defense and general welfare.

We have, however, practically no judicial decisions upon the question of the propriety of the purposes of federal taxation, and naturally also none as to old age, sickness, and accident pensions. There are, it is true, a great number of cases construing the laws under which pensions have been granted to persons who at one time were soldiers or sailors of the United States. But in these cases the question of the constitutionality of this disposition of the public funds has not been discussed. On the contrary, the constitutionality has been assumed and the cases have been concerned with the nature of the right to the pension, which has been held to be a gratuity;[1] or with the criminal provisions of pension laws adopted with the idea of preventing the grant of the pensions to improper persons.[2] It is true that, since military pensions have been held to be gratuities, the power

[1] Walton *v.* Cotton, 19 Howard, 355; United States *v.* Teller, 107 U. S. 621.

[2] See *e.g.* Frisbie *v.* United States, 157 U. S. 160.

of Congress to provide for gratuitous allowances to private individuals out of public funds has been thus indirectly upheld; but it is to be remembered that these military pensions have been given to a class of persons who by reason of the services they have rendered have been regarded as having special claims to the bounty of the government.

The only cases which we have where the courts have been asked to exercise a control over the discretion of Congress in the expenditure of public funds derived through the exercise of the power of taxation are the Sugar Bounty case,[1] and the Panama Canal case.[2]

In both these cases the Supreme Court refused to take jurisdiction, and in the Panama Canal case the court said in reference to the demand of the plaintiff that the Secretary of the Treasury be enjoined from paying out money for the canal: "The magnitude of the plaintiff's demand is somewhat startling. . . . For the courts to interfere and at the instance of a citizen who does not disclose the amount of his interest, to stay the work of construction by stopping the payment of money from the Treasury of the United States therefor would be an exercise of judicial power which, to say the least, is novel and extraordinary."

An even stronger position is taken in the Sugar Bounty case. In this case Congress passed an act making an appropriation for the payment of the claims of those persons who, relying upon an act of Congress providing for the payment of bounties, had engaged in the manufacture of sugar. The bounty act was subsequently repealed, but this appropriation had been

[1] United States *v.* Realty Co., 163 U. S. 427.
[2] Wilson *v.* Shaw, 204 U. S. 24.

made in order to tide over the sugar manufacturers, who were regarded as having a moral claim against the government. The proper disbursing officer of the government, acting upon the theory that both the original bounty act and the subsequent appropriation act were unconstitutional as appropriating public funds for a private purpose, refused to pay the bounty, and a mandamus was asked to force him to make the payment. The lower court held the act to be unconstitutional and denied the motion. After this decision had been reached, the plaintiffs in the suit sued the United States government in one of the circuit courts of the United States acting as court of claims, which gave judgment for the plaintiffs, and the case was brought by writ of error to the United States Supreme Court. That court believing that the case could be decided without entering upon a discussion of the validity of the original sugar bounty acts, affirmed the judgment of the lower court. It did so on the theory that the "debts of the United States," to pay which Congress may by the constitution levy and collect taxes, include moral as well as legal obligations, saying: "Payments to individuals not of right or of a merely legal claim, but payments in the nature of gratuity, yet having some feature of moral obligation to support them, have been made by the government by virtue of the acts of Congress appropriating the public money, ever since its foundation. Some of the acts were based upon considerations of pure charity." It is, of course, a far cry from claims of this sort to old age, accident, and sickness pensions, and it is doubtful if the moral obligation upon which payments to individuals have

been based could be so extended as to include a moral obligation of the government to its needy classes. Yet that obligation has from time immemorial been recognized in the laws of England and this country with regard to poor relief.

Furthermore, if it is said that the granting of old age, sickness, and accident pensions is an unwarrantable extension of the activity of the federal government, it may be answered that such action is no more of an extension of that activity than the grant of bounties for the encouragement of manufacturing, which is subject to state rather than to federal regulation, or than the grant of money to educational institutions as is provided by the Morrill Act, or the gratuitous distribution of seeds to farmers.

Finally, it is to be remembered, as the court says in closing its opinion in this sugar bounty case, that —

> "in regard to the question whether the facts existing in any given case bring it within the description of that class of claims which Congress can and ought to recognize as founded upon equitable and moral considerations and grounded upon principles of right and justice, we think that generally such question must in its nature be one for Congress to decide for itself. Its decision recognizing such a claim and appropriating money for its payment can rarely, if ever, be the subject for review by the judicial branch of the government."

It must therefore be said that there is at least some ground to be found in the decided cases and our legislative precedents for holding that pensions in case of old age, sickness, or accident which are payable to indigent persons only may be provided for by the Congress of the United States. Even if this is not

the case, it would be difficult to find a judicial remedy by applying which the courts could interfere. The two cases from whose opinions quotations have been made would seem to indicate that the courts of the United States will not interfere to prevent the expenditure of public funds. And if the pensions were to be paid out of the proceeds of taxes which were levied for other purposes as well as for the payment of these pensions, the taxpayer could not bring the matter up through contesting on this ground the constitutionality of a tax which from other points of view was constitutional.

If a precedent is desired for the distribution by the national government of public property to the needy classes in order to subserve some social end conceived of as desirable, one need only point to the policy which has for so many years been followed by the government in its laws with regard to the public lands. Originally, the public domain was regarded as an asset to be used to pay the public debt and a portion of the current expense of the government. Later on, viz. in 1830, it was used to encourage settlement through the plan of preëmption in accordance with which bona fide settlers were permitted to take up land up to a maximum amount, viz. a quarter section, at the minimum price of $1.25 an acre. Still later, viz. in 1862, the Homestead Act was passed. Under this act land might be acquired for nothing by a five years' occupation, which might be commuted at stated periods by the payment of a regular purchase price. Finally, from the beginning of our history, land has been granted outright either to specified classes of persons such as soldiers,

or railway companies, or for specified purposes as in the case of the swamp land grants. The purpose of the government was twofold. It was first to develop the resources of the country; it was second to secure a class of small proprietors in the belief that such a class made a good economic basis for democratic government. Public property was granted to private persons not merely to develop the country, but to offer greater equality of economic opportunity to the less well-endowed classes of the community, and no attempt was made to declare unconstitutional the action of the government. It is, of course, true that Congress gets its power to legislate with regard to the public lands from a special clause in the constitution, but its discretion as to the purposes for which this power may be exercised is no greater than it is as to the purposes for which the power of taxation may be used.

Who, in view of the history of the public domain, will venture to say that the constitution limits the power of Congress to dispose of the public funds as it sees fit in order to promote what it considers to be the "public welfare of the United States" to provide for which the constitution specifically says the taxing power may be used?

Our conclusions then, as to the constitutionality of old age, accident, and sickness pensions are, assuming that the courts do not change their view: —

1. Such pensions when provided by state action are not prohibited by the fourteenth amendment or any other provision of the federal constitution, particularly if they are confined to indigent persons.

2. If not confined to indigent persons, they are

unconstitutional under the ordinary provisions of the state constitutions.

3. Even if confined to indigent persons, they are probably unconstitutional under the ordinary provisions of the state constitutions, although there is some reason for believing they might be justified as a form of outdoor poor relief.

4. There is much ground for the belief that such pensions, particularly if confined to indigent persons, might constitutionally be provided by the federal government.

III. Provision for the Housing of the Working Classes in Cities

The discussion of what are public purposes of taxation, which has already been had, cannot have failed to throw some light on the question of the constitutionality of advances of public funds to persons not actually in need to aid them, for example, in acquiring homes. It may hardly be claimed in the light of what we have seen that under the existing state constitutions the power of taxation may be used for this purpose. But it may be said of such schemes as well as of pensions that there is apparently no objection to them from the point of view of the limitations of the federal constitution on the expenditure of public funds if the funds to which resort is had are derived from other sources than taxation. If, *e.g.*, the states or municipalities had derived large funds from some system of public insurance which had been provided for the working or other classes, there would seem to be no constitutional objection

to their making use of them in the manner suggested, in the same way that Germany is now doing, with the twofold purpose of investment and social reform. Similar disposition might also be made of the surplus revenue from profitable quasi-commercial undertakings such as railways, gas, water and electric light works. The loaning to individuals of public funds not derived from taxation is not prohibited by the federal constitution, but is at the present time by most of the state constitutions. Indeed, the misuse of the power by the states is probably responsible for the provisions prohibiting it which we so commonly find. The state of New York, however, for many years loaned to individuals the fund known as the United States Deposit Fund, which originated in the distribution of the surplus of the United States government in 1837.

The constitutionality of such schemes may, however, be questioned from another point of view. For their successful realization would in most cases involve resort to the exercise by the government, either state or municipal, of the power of eminent domain, and this power, like the power of taxation, may be exercised only for public purposes. The question therefore naturally arises, — What purposes are public from the viewpoint of the constitutional limitations on the exercise of the power of eminent domain? At the outset, it must be noted that, because compensation must be paid to the party whose property is taken under the power of eminent domain, while no such compensation can in the nature of things be given when it is the power of taxation which is exercised, the courts are more apt to regard a purpose as public in

the former than in the latter case. Thus, while it is unquestionably unconstitutional to tax one person for the construction of a private factory not open to general public use, it is perfectly proper, on granting compensation, to give one riparian owner the right to build for the purposes of a private factory a dam, the necessary effect of which will be to deprive the riparian owners farther up the stream of property rights. This principle was apparently applied originally in the case of grist mills, which, it has been shown, are *quasi* public enterprises. But it was later applied to ordinary private factories, and this application of the principle was upheld partly at any rate on the ground of the general benefit the public derived from it, long before the adoption of the fourteenth amendment. Since the adoption of that amendment the constitutionality of such legislation has been upheld also by the Supreme Court.[1] It may therefore be said that that provision of the federal constitution was in this instance interpreted in the light of existing conditions and that the Mill Act cases, although showing that there are exceptions to the general rule, do not have great authority upon the question at issue.

Bearing in mind then that a purpose which may be private from the point of view of the power of taxation may be public from the point of view of the power of eminent domain, let us examine some of the cases which have decided what purposes are either public or private from the latter point of view. There are four classes of cases bearing on this point: —

In the first place, there are those which, like the Tax cases, hold that the purpose is public where the enter-

[1] Head *v.* Amoskeag Mfg. Co., 113 U. S. 9.

prise for which the property is condemned is one of which the public generally make use.[1]

The second class of cases includes those decided in view of peculiar and very stringent provisions of state constitutions strictly limiting the legislature in its power to grant the right of eminent domain to private persons. The cases in this class do not permit the exercise of the right of eminent domain for a purpose which does not benefit the public generally.[2]

The third class includes those cases which decide that under the ordinary constitutional provisions the power of eminent domain may not be given to a private person where the undertaking for which it is employed is not one of which the public may make use.[3]

Finally, there are the cases which, applying the principle at the bottom of the original Mill Acts, hold under the ordinary constitutional provisions that where the economic development of the country or the advantageous use of property requires, the legislature may on providing for compensation authorize one person to take the property of another for a private purpose, *i.e.* private in the sense that the

[1] A case of this sort is Cotton *v.* Miss. & Boom Co., 22 Minn. 372, where a law giving a boom company on the Mississippi River the right to condemn riparian rights was held to be constitutional.

[2] A good example of this class is Healy Lumber Company *v.* Morris, 33 Wash. 490, where an act of the legislature granting the right to condemn property for a lumber road or flume was held unconstitutional.

[3] See *e.g.* Matter of Eureka Basin & Mfg. Co., 96 N. Y. 42; see also Missouri Ry. Co. *v.* Nebraska, 164 U. S. 403, which held unconstitutional as using the power of eminent domain for a private purpose an act of a state legislature obliging a railway company to permit private persons to build a private grain elevator on its right of way.

general public does not have the right to make use of the undertaking for which the power of eminent domain is exercised.[1] It must be said, however, that apart from the Mill Act cases, these cases are very few in number. There are also other similar cases based on peculiar provisions of the state constitutions which, like the constitution of Colorado, specifically declare some particular occupation like mining to be a public one.

Such, however, is the doctrine which the Supreme Court of the United States applies to the decision whether under the fourteenth amendment a given purpose is a proper one for the exercise of the right of eminent domain. This practical result was reached as far back as 1884 in Head *v.* Amoskeag Mfg. Co.,[2] when the court, following the rule adopted in the New England States, based its decision that a mill act affecting merely private mills was constitutional on

[1] See *e.g.* The Hand Gold Mining Company *v.* Parker, 59 Ga. 419. In this case an act was held constitutional which gave a mining company the right on payment of damages to construct a flume or aqueduct over vacant lands in a specified county. The court justified its decision partly by the consideration that "the increased production of gold from the mines of Lumpkin County by the means as provided for in the defendant's charter, must necessarily be for the public good, inasmuch as it will increase for the use of the public a safe, sound, constitutional circulating medium, which is of vital importance to the permanent welfare and prosperity of the people of the State of Georgia as well as of the people of the United States." See also New Central Coal Co. *v.* Granges Creek Co., 37 Md. 537; and Turner *v.* Nye, 154 Mass. 579, where a statute was held constitutional which permitted one person for purposes of private fish culture to flood lands of another on the theory that the legislature could regulate the rights of owners of lands so as to provide for the most advantageous use thereof, even where one owner might as a result of the act be deprived of the title to his property against his will but upon compensation.

[2] 113 U. S. 9.

the ground that such a statute may be "considered as regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed with a due regard to the interests of all and the public good." The court in this case did not seem to think its decision required a consideration of what it called "the important and far-reaching question" whether the Mill Acts authorize a taking of private property for public use. In a later case, however, decided in 1904, viz. Clark *v.* Nash,[1] the court adopted the view that the grant by an act of the legislature to an individual of the right to condemn land for the purpose of a ditch to be used to convey water for either irrigation or mining was constitutional under the conditions present in the particular case. The most important fact which influenced the court would appear to have been the aridity of the region and the impossibility of the development of the resources of the state, viz. Utah, if the act were held unconstitutional. The court reiterates the statement it made in the Fallbrook Irrigation case that in the determination of these questions it must rely very largely on the decision of the legislature and courts of the state in which the case arises, as to the necessity or expediency of the legislation attacked.

In Strickland *v.* Highland Boy Mining Co.[2] the Supreme Court reaffirmed Clark *v.* Nash and upheld the exercise of the right of eminent domain for the purpose of an aerial railway to be used by a mine. It says of Clark *v.* Nash that

"in discussing what constitutes a public use it recognized the inadequacy of use by the general public as a universal test.

[1] 198 U. S. 361. [2] 200 U. S. 527.

While emphasizing the great caution necessary to be shown it proved that there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation which under other circumstances would be left wholly to voluntary consent. In such unusual circumstances there is nothing in the fourteenth amendment which prevents a state from requiring such concessions."[1]

Perhaps the farthest the Supreme Court has gone in upholding the exercise of the power of eminent domain by a state is in Offield *v.* New York, New Haven & Hartford Railroad.[2] In this case the court upheld a state law, authorizing a railway company which owns more than three fourths of the capital stock of any other railroad corporation, and which "cannot agree with the holders of outstanding stock for the purchase of the same, upon a finding by a judge of the Superior Court that such purchase will be for the public interest" to "cause such outstanding stock to be appraised." The act provided further that when the amount of such appraisal shall have been paid or deposited the stockholder or stockholders whose stock shall have been so appraised shall cease to have any interest therein and shall on demand surrender all certificates for such stock with duly executed powers of attorney for transfer thereon to the corporation applying for such appraisal. The court held that this statute did not deprive the stockholder of his property without due process of law and

[1] See also Byrnes *v.* Douglas, 27 C. C. A. 399, where the condemnation of property for a tunnel for a mine was held perfectly proper though without any consideration of the constitutionality of the proceeding from the view-point of the fourteenth amendment.

[2] 203 U. S. 372.

did not impair the obligation of a contract in that it abrogated the lease of one railroad by the other, since whatever value the lease gave the shares of stock would be represented in their appraisement.

The power of the state notwithstanding the fourteenth amendment to deprive a person of his property even without direct compensation, where the public good would seem to require it is also recognized in a recent case,[1] which upheld a state law making provision for a bank depositors' guaranty fund. This fund was formed from assessments levied upon all state banks to the extent of one per cent of their deposits, and in case the cash of an insolvent bank immediately available was not sufficient to pay depositors in full the state authorities were to withdraw from the fund and from additional assessments if required the amount needed to make up the deficiency. It was objected to this law that it deprived persons of their property without due process of law by taking private property for private use without compensation. In answer to this objection, the court, Mr. Justice Holmes delivering the opinion, says: —

"In the first place it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what in its immediate purpose is a private use [citing the cases just referred to] and in the next it would seem that there may be other cases beside the everyday one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See Ohio Oil Co. *v.* Indiana, 177 U. S. 190."[2]

[1] Noble State Bank *v.* Haskell, 31 S. C. R. 186.

[2] Another interesting expression by the Supreme Court of its opinion as to the effect of the fourteenth amendment on the power of

In all these cases both in the state courts and in the Supreme Court of the United States, it will be noted that the consideration appealing with particular force to the courts was the necessity of extending the conception of public purpose at the expense of rights in private property in order to secure the most advantageous development of the natural resources of the region. In New England this has consisted for the most part in the development of water power for manufacturing purposes. In the arid or mountainous regions of the West and middle West it has consisted in the development of the agricultural or mining industries. In none of these cases has the question been raised whether in the conditions of economic inequality incident to industrial and urban life the character of the purpose for which the right of eminent domain may be exercised may be influenced by those conditions, whether, in other words, the power may be used in order to secure not more effective production but more economic equality, *i.e.* more equality in distribution or opportunity.

The question here, as before, whether the Supreme Court will give the same effect to the peculiar economic conditions which are developed by our industrial civilization as it recognizes should be given to the

the states is to be found in Interstate &c. Railway Company *v.* Commonwealth, 207 U. S. 79, 87, where Mr. Justice Holmes says: "If the fourteenth amendment is not to be a greater hamper upon the established practices of States in common with other governments than I think was intended, they must be allowed a certain latitude in the minor adjustments of life even though by their action the burdens of a part of the community are somewhat increased. The traditions and habits of centuries were not intended to be overthrown when that amendment was passed."

peculiar economic conditions resulting from climatic and geographical situation, is one to which no certain answer can be given. But if it should recognize that economic or social conditions, are to have the same effect as climatic conditions, it can hardly be doubted that it would consider the power of eminent domain as used for a public purpose where it was used in such conditions of population congestion as exist, *e.g.*, in the city of New York to provide homes for the poorer classes in the community either at a moderate rental, or at a price and under such conditions of sale as would enable the needy classes to acquire homes. If an intimate connection can be shown between the enterprise for the purpose of which the power is exercised and the public health, an additional reason for upholding the constitutionality of the enterprise is of course secured. For considerations of health are very apt to control the decision of the court.

Intimately connected with this question is the question whether in order more effectively to carry out some local improvement or in order to participate in the increase in the value of the land due to the new improvement, a city, *e.g.*, may be authorized to condemn a larger amount of land than is absolutely necessary for the purposes of the specific improvement. This is what is known popularly as excess condemnation. This method is adopted in Germany and has been applied also in a few specific instances in England. It has rarely, however, been resorted to in the United States in such a manner as to make an adjudication upon the question at issue necessary, and as a result there are few cases exactly in point.

There are, however, a number of cases which hold that a city, which with the intention, *e.g.*, of making a park, has obtained land by the exercise of the right of eminent domain, and finds that it has more land on its hands than is necessary, may sell such lands to private persons.[1] These cases may not, however, be regarded as authorities for the general proposition that the legislature may provide for excess condemnation with the direct intention of using the excess condemned for a private purpose. Thus, in the Matter of the City of Rochester the court distinctly says in speaking of an act of the legislature which authorized the Park Commissioners of the city to sell at auction lands acquired by condemnation for a park which such commissioners should determine were not necessary for park purposes: —

"It is claimed that this provision is in conflict with the provision of the constitution respecting the taking of private property for public use, as it in fact authorizes the city to take it for a purpose not public. We think the objection without merit or substance. Of course the city would not take private property for the purpose of selling or dealing in it, but having once acquired it for a park and it becoming, in the course of time, unnecessary or useless for that purpose by the growth of the city or other changes in situation, a sale in the manner prescribed by the statute would be within the legitimate functions of the city as a municipal corporation and power to that end conferred by the state at any time or in the act authorizing the taking cannot invalidate the delegated right to exercise the right of eminent domain."

Furthermore, the question would appear to have been decided against the constitutionality of taking

[1] Brooklyn Park Com. *v.* Armstrong, 45 N. Y. 70; Matter of the City of Rochester, 127 N. Y. 243.

by condemnation any land in amount in excess of what is required for public purposes by Embury *v.* Conner.[1] It may therefore be said that excess condemnation is improper under the ordinary limitations of the state constitution. The very general belief that excess condemnation is unconstitutional under the state constitutional provisions is probably responsible for the fact that we have no decisions of the United States Supreme Court on the question.

It is, however, to be noticed that the same reasons which have led the Supreme Court of the United States to uphold the constitutionality of the Mill Acts and other similar legislation, viz. the desirability of permitting the power of the government to be so applied as to bring about the most profitable use of economic resources, would be present in the case of attempts upon the part of city governments, *e.g.*, to condemn an amount of land in excess of what was needed for a particular improvement. For in many cases it is only through such action that a city can most economically carry out its plan.

There is then considerable justification for the belief that our constitutional limitations are, if liberally interpreted, not a serious obstacle to the adoption of most of the measures which are being put into force by modern governments for the aid of the needy classes. The only point in which great doubt may be felt is as to the power of taxation whose use for anything but a distinctly public purpose has met with the disapproval of the courts.

[1] 3 N. Y. 511.

CHAPTER VIII

THE ATTITUDE OF THE COURTS TOWARDS MEASURES OF SOCIAL REFORM

THE discussion which has been had of the decisions of the courts as to the constitutionality of concrete proposals for political or social reform can hardly fail to have produced the impression that the Supreme Court of the United States has on the whole been more liberal than the state courts in its attitude towards the measures of regulation or positive interposition by the states which have been deemed requisite to remedy the evils attendant upon modern industrial civilization as it is seen in the United States. Seldom has the Supreme Court declared unconstitutional from the point of view of the federal constitution an act of a state legislature offering a remedy for social abuses which was not pretty clearly opposed to some specific provision of the constitution. The cases in which the Supreme Court has most frequently declared invalid state laws have been those in which the state legislatures have attempted to regulate what it regarded as foreign or interstate commerce,[1] or have imposed unreasonable burdens upon public service corporations [2] or fixed the rates to be charged

[1] See *e.g.* Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1, where the statute attempted, in the opinion of the court, to impose a tax on interstate commerce.

[2] See *e.g.* Illinois Central Ry. Co. *v.* Illinois, 163 U. S. 142, where the state attempted to force a fast interstate train to turn aside from the main route and stop at a place named in the statute.

for public service in violation of existing contracts, or so low as to result in a confiscation of property.[1] But even along these lines the later decisions of the court show a reluctance to recognize a contract that a certain rate may be charged, or a property right in either the power possessed by a public service corporation to charge a specific rate or in its franchise.[2]

It is of course true that the Supreme Court has been able to hold an act of a state legislature constitutional only where a similar decision has been reached by a state court. But it is not to be denied that state courts have held unconstitutional legislative acts which when coming before the Supreme Court from other states have been regarded as constitutional by that body. It is also true that state courts have sometimes been governed in their decisions by the provisions of state constitutions, but it is nevertheless the case that some if not most of the state courts have held more conservative views than the United States Supreme Court either of the federal constitution or of clauses in the state constitutions very similar to clauses in the federal constitution.

The reason for the greater conservatism of some of the state courts is probably to be found in the fact that the economic conditions of the particular states are less complex than those of the United States as a whole. The simple local conditions with which the particular state courts are acquainted have an influence on their views as to the constitutionality of

[1] See *e.g.* Minneapolis *v.* Minneapolis Street Ry. Co., 215 U. S. 417; Smyth *v.* Ames, 169 U. S. 406.

[2] See *e.g.* Knoxville Water Co. *v.* Knoxville, 212 U. S. 1; Consolidated Gas Co. *v.* Willcox, *ibid.* 19; Home Telephone Co. *v.* Los Angeles, 211 U. S. 265.

certain legislation. Thus it would be difficult for judges in a state that was not arid in character to consider that irrigation was a public purpose for which the power either of taxation or of eminent domain may be exercised. In the case of the United States Supreme Court, however, practically all kinds of climatic, geographical, and economic conditions have their representation, since all great sections of the country are as a rule represented in that body. Furthermore, the fact that the justices of the Supreme Court of the United States have a life tenure probably has the consequence of securing a court which has a greater consideration for the interests and needs of the public than would be the case were the judicial term a short one. For under present conditions, the judges of the state courts are almost always chosen from the bar, and members of the bar usually represent private rather than public interests. It is only after service on the bench has begun that prejudice and bias in favor of private interests cease. The longer the judicial service, the more easy is it for considerations of public interest to secure an influence on the judicial attitude of mind. It is quite commonly the case also for members of the Supreme Court to be selected from the bench rather than from the bar. They begin their service on the court thus with a greater sense of responsibility for the maintenance of public interests than does the ordinary state judge.

Up to the present time, however, it may not be said that even in the Supreme Court existing economic conditions have always been accorded the influence which they should have. Acts of Congress and of state legislatures are declared by that body to be un-

constitutional not because their enactment is thought undesirable or inexpedient but because they cannot be made to conform to a conception of the organization and powers of government which we have inherited from the eighteenth century.

There are thus, because of the attitude of either the Supreme Court or the state courts, certain measures of political and social reform which many believe to be absolutely necessary either now or in the future (if we may judge of their necessity by the legislative experience of other countries in similar conditions to those of the United States), but which we in the United States are probably precluded from adopting because of the attitude now taken by our courts towards our practically unamendable federal constitution. There are, it is true, not nearly so many of these measures as are popularly supposed to exist. But there are some. Among them may possibly be mentioned some which are apparently regarded as essential parts of a program of effective social reform: such as pensions or public insurance in case of old age, accident or sickness where the recipient of the pension or insurance is not actually a pauper and where the fund from which such pension or insurance is obtained is derived from taxation; the regulation of the hours of adult male labor in any but the evidently most harmful trades; effective regulation of the use of urban land; and the use of the powers of taxation and eminent domain for the purpose of furthering schemes to provide aid for the needy classes. Furthermore, it is somewhat doubtful whether without amendment of the federal constitution our political organization can develop in such a way as to be in accord with even

existing economic conditions, not to speak at all of the future. The distinction between interstate and intrastate commerce which has unfortunately been made as to land commerce, although it has practically been abandoned as to navigation or water commerce, is at the present time an almost insurmountable obstacle to change in the distribution of political powers between the federal government and the states, while any centralization of the private law of the country is commonly believed to be impossible of accomplishment except through the common action of the legislatures of the separate states — a method whose feasibility is under the most favorable conditions extremely doubtful and whose progress if begun is inevitably very slow.

Some of the measures which have been mentioned will naturally not be regarded by all as having the characteristic of pressing necessity. Others may be regarded by certain classes in the community as inexpedient under any conditions. But it is believed that there are few persons having the welfare of this country really at heart, or not blinded by prejudice or class interest, who will assert that the conditions of the American people are so peculiar that we should close for them the avenues open to other peoples through which orderly and progressive political development in accordance with changing economic and social conditions may proceed. Few can refrain from asking the question why Americans alone of all peoples should be denied the possibility of political and social change?

In order, however, that this possibility may exist in the constitutional conditions of the American

Republic the courts must be brought to see things as they are and to appreciate the responsibility which they assumed when they determined contrary to the experience of all other peoples that they had the constitutional right to overturn an act of the legislature.[1] That the courts have this constitutional power no one at the present time will deny. That under the political conditions now prevailing in this country they should continue to exercise this power most will admit. But it certainly may be demanded of the courts that they realize that their possession of this power is a trust which few if any other nations have been willing to impose upon judicial bodies.

We Americans have become so accustomed to seeing the courts revise the determinations of the legislatures that we are apt to overlook the fact that the power of courts to declare legislative acts unconstitutional is an extraordinary one, and to forget that its recognition as a doctrine of law was only secured after a struggle. The independence of the judiciary upon which this power is based is regarded quite commonly as one of the cardinal features of the principle of separation of powers, which, as has been shown, lies at the basis of our political system. It was introduced into our constitutional law in the belief that we were obeying the injunctions of the great French political philosopher, Montesquieu, who was supposed to have formulated the principle as a result of his observations of the English political institutions

[1] Judge Baldwin, although believing that this principle "rests in solid reason," says of it: "This right of a court to set itself up against a legislature, and of a court of one sovereign to set itself up against the legislature of another sovereign, is something which no other country in the world would tolerate." "The American Judiciary," p. 104.

of the early part of the eighteenth century; for the "Esprit des Lois" was first published in 1748. And yet a most cursory glance at those institutions will show that the English judiciary was never independent of Parliament. The Act of Settlement passed in 1701 which provided for what is known as the judicial tenure made the judges independent only of the crown, since it enacted that judges might be removed by the crown only upon the address of both houses of Parliament. The result in England was that while the judges made a few feeble attempts to claim the right to declare void acts of Parliament on the ground that they were violative of the judicial idea of natural right, they soon abandoned such attempts and for more than a century no English judge has dared so much as to hint that an act of Parliament does not have the force of law.

Under the influence of the doctrine of judicial independence, however, we gave to the judiciary in some of our early state constitutions a tenure more secure than that accorded to English judges. Thus the first constitution of New York provided that the judges should hold office during good behavior or until they attained the age of sixty years, subject only to removal as the result of conviction for mal and corrupt conduct, on impeachment proceedings, by a two-thirds vote of the court of impeachment, which consisted of the members of the Senate and of the higher judicial officers themselves. Such also is ordinarily believed to be the tenure given to the judges of the United States courts by the federal constitution.

The independent position thus accorded to the

judges gave them the opportunity to declare with impunity acts of the legislature unconstitutional. Of this opportunity they began to avail quite early in the history of the country. There were several reasons which caused the people to look with favor upon the assumption by the courts of this power. In the first place, the country had just emerged from a struggle against what was considered to be the exercise of arbitrary power, and its political thinkers had adopted with enthusiasm the theories of the natural rights of man and the social compact, both formulated as a protest against the exercise of arbitrary power. The courts were regarded by the people, largely because of historical reasons, as the protectors both of these rights and this compact. In the second place, the conflicting relations of the new federal government and the states made it seem necessary to provide a method for solving any difference of opinion that might arise, and Article VI of the United States constitution provided that the constitution and laws of the United States should be the supreme law of the land, anything in the laws of the states to the contrary notwithstanding. This article when taken together with the clauses of the judicial article of the constitution might well be regarded as giving the Supreme Court of the United States the power to declare acts of the state legislatures unconstitutional from the point of view of the federal constitution. It was, however, apparently regarded by the federal judges to authorize them as well to consider whether acts of Congress were violative of the federal constitution. The first expression of such a belief upon their part was made in 1792, when the judges of sev-

eral of the circuit courts of the United States sent letters to President Washington indicating that in their opinion an act recently passed by Congress was unconstitutional. In one of these they say: "To be obliged to act contrary either to the obvious directions of Congress, or to a constitutional principle, in our judgment equally obvious, excited feelings in us which we hope never to experience again." In another, that "we can never find ourselves in a more painful situation." [1] Apparently the Supreme Court took the same view of judicial power as early as 1794, and in that year actually declared unconstitutional an act of Congress.[2] This originally rather timid assertion of power, supported by little or no argument, was, however, changed when Marshall came to the bench. In the great case of Marbury *v.* Madison,[3] decided in 1803, Marshall takes the position that it is one of the necessary corollaries of a written constitution that the courts have the power to declare acts of the legislature void. Since 1803 the power has really not been questioned in the Supreme Court, although the decisions of that body in particular cases have often been criticised by members of the court. The power to declare acts of Congress unconstitutional was not, however, again exercised until 1864,[4] although the right to use the power was claimed from time to time.

In the meantime the Supreme Court had declared a number of acts of state legislatures unconstitutional.

[1] Heyburn's Case, 2 Dall. 409, note.

[2] United States *v.* Yale Todd, note to United States *v.* Ferreira, 13 How. 52.

[3] 1 Cranch, 137.

[4] Gordon *v.* United States, 2 Wall. 561, 117 U. S. 697.

The first instance of the exercise of this power was in 1809 with regard to an act of the legislature of Pennsylvania.[1] An act of Georgia was declared void in 1810,[2] while in 1819 the acts of three states were overturned, and since that time the Supreme Court of the United States has had little compunction in exercising this power. The frequency of its exercise has naturally been increased by the adoption of the fourteenth amendment which forbade a state to deprive any person of his life, liberty, or property without due process of law.

While the Supreme Court was, by declaring acts of state legislatures unconstitutional, accustoming the people of the United States to the rather novel idea of judicial supremacy over the legislature, the state courts were acting along the same lines and on account of the more detailed provisions of the state constitutions were called upon to act with great frequency. The exercise of the power was, however, not assumed by the state courts without a protest upon the part of the legislatures. In Rhode Island the judges were summoned before that body to explain their action, and the legislature refused to reëlect them, Rhode Island being one of the few states in which judges owed their positions to election by the legislature. In Ohio the attempt was made to impeach judges for having declared an act of the state legislature unconstitutional, but failed of success because one less than the two-thirds majority necessary to convict on impeachment was secured. In Georgia as late as 1815 the legislature after stating,

[1] United States *v.* Peters, 5 Cranch, 115.
[2] Fletcher *v.* Peck, 6 Cranch, 87.

in a protest against what it regarded as a usurpation of power upon the part of the judges, that "the extraordinary power of determining upon the constitutionality of an act of the state legislature, if yielded by the general assembly, whilst it is not given by the constitution or laws of the state, would be an abandonment of the dearest rights and liberties of the people, which we, their representatives, are bound to guard and protect inviolate," goes on to say: "yet we forbear to look with severity on the past in consequence of judicial precedents, calculated in some measure to extenuate the conduct of the judges and hope that for the future this explicit expression of public opinion will be obeyed." [1]

These rather sporadic attempts on the part of state legislatures to prevent the courts from exercising the power they claimed were thus unsuccessful, and the American people came to look apparently with approval upon the action of the judiciary. For in the revisions of the state constitutions in the early part of the nineteenth century they made no attempt to curb the judicial power.[2] In these constitutional revisions the people did, however, exhibit a desire to subject the judges to a greater popular control than was possible where they were appointed for good behavior. Change in the position of the federal judiciary was impossible on account of the difficulty of amending the federal constitution. But in 1832 the movement for an elective judiciary

[1] Baldwin, "The American Judiciary," p. 112.

[2] See opinion of Chief Justice Gibson, in Norris *v.* Clymer, 2 Pa. St. 281, as compared with his dissenting opinion in Eakin *v.* Raub, 12 Serg. & Rawle, 330.

with a shorter term than for good behavior began in the states, when Mississippi provided for the popular election of the judiciary, and by 1905 thirty three of the states had adopted this method. In some of the states, however, executive appointment of the judges still remained the rule. But in most of these states, the legislature acting with the executive as, *e.g.*, in Massachusetts, may remove judges from office as a result of a mere majority, or as in New York may act alone by a two-thirds vote, without anything in the nature of an impeachment trial. In a few states also, as in Vermont, judges are to be elected by the legislature for a short term, such as one or two years.

The kind of tenure possessed by judges seems, however, to have had little effect upon the exercise of the power to declare acts of the legislature unconstitutional. Even in Vermont, where their position has been least secure, they have ventured to exercise the power and have done so with impunity. Indeed, it may be said that of recent years judges are exercising their power with greater and greater frequency. A condition of what in the words of Mr. Justice Clifford of the United States Supreme Court may be called "judicial despotism"[1] has been reached, and as we have seen, acts of the legislature introducing what would seem to be reforms which are necessary if our law is to be in accord with our economic conditions are frequently declared unconstitutional.

The result is that the wisdom of according judges the power which they are now exercising is being more frequently questioned than ever before. Legal periodicals at the present time frequently contain

[1] *Supra*, p. 294.

articles which are subjecting judicial decisions on constitutional questions to a searching examination, public speeches denouncing some particular judicial determination are becoming more and more common, while finally it is seriously proposed in the constitution provided for Arizona and as an amendment to the constitution of California that judges be made subject to the operation of the new democratic device known as the recall, which permits a certain percentage of the voters to demand that an elective officer resubmit his name as a candidate for office before the expiration of the term for which he was elected.

It may therefore be apprehended that the judges may find their powers seriously limited or their tenure changed, unless they regard the function which they have assumed in the face of considerable opposition as one towards which their attitude should be somewhat different from that which they entertain towards their ordinary judicial duties. Even so great a supporter of the power of the courts to declare unconstitutional acts of the legislature as the late Professor Thayer says: —

"What really took place in adopting our theory of constitutional law was this: we introduced for the first time into the conduct of government through its great departments a judicial sanction, as among these departments — not full and complete, but partial. The judges were allowed, indirectly and in a degree, the power to revise the action of other departments and to pronounce it null. In simple truth, while this is a mere judicial function, it involves owing to the subject matter with which it deals, taking a part, a secondary part, in the political conduct of government. If that be so, then the judges must apply methods and principles that befit their task." [1]

[1] Thayer, "Legal Essays," p. 32.

The principle of *stare decisis* which has such force with American courts should be given a somewhat limited application. A decision of a concrete point under a certain set of economic conditions should not be regarded as having controlling force under economic conditions which have through the process of time been greatly changed. Principles of law which have been developed in certain geographical conditions should not be applied without modification in geographical conditions which are quite different in character. Such considerations have peculiar force with regard to such general constitutional limitations as those providing that life, liberty, or property shall not be taken without due process of law, else a narrow view due to the peculiar conditions existing at the time it was adopted will be given permanently to a provision which was properly framed in very general terms.

That the courts have in many cases adopted this method of constitutional interpretation may not be denied. The Supreme Court of the United States, for example, had this idea in mind when it reversed its decision that the admiralty jurisdiction of the federal courts extended only to tidal waters and adopted the view that this jurisdiction embraces the great rivers and lakes of the country. The same body applied this principle also when it came to the conclusion that the powers of taxation and eminent domain may in arid, mining, swampy, and mountainous districts be used for irrigation, water power, mining, and drainage purposes. But there is reason to believe that as yet the courts of this country generally, including even the Supreme Court itself, have not

been sufficiently convinced of the changing character of political, social, and economic conditions and of the necessity of corresponding flexibility in our law.

If this is the case, the question naturally arises, what can be done to induce the courts to adopt more liberal views as to constitutional intrepretation, which will be less radical than the recall or other similar methods of curbing judicial power, but which at the same time will insure the development of our constitutional law in a manner both progressive and orderly.

Most of the commentators on the constitution of the United State delight to point out that the judicial authority as organized in that instrument is the weakest of the three authorities for which provision is therein made. Accustomed as we are to seeing the federal courts at one time declaring the acts of Congress unconstitutional, at another enjoining the highest officers of the states from enforcing a state statute, we are apt to think of them as the most powerful and influential organs in our system of government. And we are right in our conclusions if we consider merely the provisions of the positive law as it now exists. For the federal courts may and often do ultimately determine for good or for evil the extent of power which we as an organized political community may exercise either in our central or our local organizations. But, if we cast our glance from that positive law, as it now exists, to the provisions of the federal constitution, we can hardly fail to realize that the commentators are right and that almost all of the great powers which the federal courts possess are theirs only because of the fact that their exercise of these powers has as a whole been satisfactory

to the people of the United States. For the extent of these powers is ultimately determined by Congress, which is the representative of the people.

The judicial article of the constitution [1] provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish. The Supreme Court is the only court which is provided for in the constitution and whose existence is not dependent on the will of Congress, All the other courts of the United States are dependent not merely for the powers which they exercise, but also for their very being, upon legislation. Once in the history of the country Congress abolished the inferior courts, and many and many a time has passed acts limiting their jurisdiction and changing their organization, which have been upheld as constitutional by the Supreme Court. Almost the only things which Congress may not do with regard to the inferior federal courts are to remove or provide for the removal from office of the judges thereof except through the method of impeachment and to diminish their compensation during their continuance in office. The tenure and compensation of the judges of the Supreme Court are accorded the same protection by the constitution.[2]

[1] Article III.

[2] It was once claimed in Congress that that body had the right to remove the United States judges for misbehavior, since the judicial article merely says that the judges shall hold during good behavior and the provision of the constitution relative to impeachment applies, not to the judges by name but to all civil officers. See Speech of Senator Stone made January 13, 1802. Eliot's "Debates," Vol. IV, pp. 443–444.

The position of the Supreme Court is somewhat but not much stronger than that of the inferior federal courts. It is of course true that the existence of the Supreme Court is provided for by the constitution, but the number of its members is to be determined by Congress, and appointment to fill vacancies in its membership is dependent upon the concurrent action of the President and Senate. It is also true that its original jurisdiction is fixed beyond the possibility of change by the constitution, but this jurisdiction is comparatively unimportant, relating only to cases affecting ambassadors, other public ministers and consuls, and those in which a state is a party, while its appellate jurisdiction is subject to such exceptions and is to be exercised under such regulations as Congress shall make.

Congress acting with the President may, by reducing the number of its judges and by the refusal to fill vacancies in its membership as they occur, condemn the Supreme Court to a slow if painless death, or while permitting it to remain in a formal state of existence may deprive it of all those powers whose exercise has made the court what it now is. Nor is the statement which has just been made a statement of the merely theoretical powers of Congress. It has been said that once in our history Congress destroyed the inferior courts. It may be added that once also in our history Congress deprived the Supreme Court of part of its appellate jurisdiction, fearing that it was about to declare unconstitutional an act of Congress, and the court held not only that this action was within the constitutional powers of Congress, but that the act deprived it of jurisdiction to decide a case

which had been argued before it and was at the time under advisement.[1] It was known to the court why Congress had taken this action, but in its opinion it said: "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the constitution; and the power to make exceptions to the appellate jurisdiction is given by express words."[2] At another time in the history of the country the President made such use of his power to fill vacancies in the membership of the Supreme Court that a case in which an act of Congress had been declared by the court unconstitutional was reversed and the view finally adopted into our law that Congress had the right to make the notes of the United States legal tender in the payment of debts contracted before the Legal Tender act was passed.[3]

These rather dramatic and exceptional episodes in the history of the court occurred, as is well known, during times of great political excitement, and on that account may not be regarded as indicating anything more than the extent of the constitutional power of Congress and of the influence of the President upon the court. In addition to them, however, there are almost numberless statutes passed by Congress from

[1] *Ex parte* McArdle, 7 Wall. 506.

[2] See Willoughby, "The Constitutional Law of the United States," p. 976.

[3] In Hepburn *v.* Griswold, 8 Wall. 603, decided in 1869, the court by a vote of five to three, one judgeship being vacant, held the Legal Tender act unconstitutional. In The Legal Tender Cases, 12 Wall. 457, decided in 1870, the court by a vote of five to four, the vacancy having been filled in the meantime, as well as another vacancy due to the retirement of Mr. Justice Grier, held the act was constitutional.

the very beginning of its history which have imposed limitations either directly or indirectly upon the appellate jurisdiction of the Supreme Court. Among others are the acts [1] limiting the appellate jurisdiction to cases in which the matter in controversy exceeds one thousand dollars and costs and where the decisions of the circuit courts of appeal is not made final, with certain enumerated exceptions; and also, an act limiting the appellate jurisdiction in admiralty cases to questions of law although the constitution permits the appeal, in case no action is taken by Congress, in all cases, and particularly provides for it in questions of fact as well as of law.

These limitations of the jurisdiction of the United States courts by act of Congress have always been upheld by the Supreme Court.[2] In the Francis Wright the court in deciding that Congress may limit the appellate jurisdiction to questions of law said: —

"What those powers (the appellate powers) shall be, and to what extent they shall be exercised, are and always have been proper subjects of legislative control. 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 re-examination and review while others are not. . . . The general power to regulate implies the power to regulate in all things."[3]

[1] 26 Stat. at Large, 826, Chap. 517; 29 Stat. at Large, 492, Chap. 68.

[2] See *Ex parte* McArdle, 7 Wall. 506; The Francis Wright, 106 U. S. 381.

[3] As to the power of Congress over the jurisdiction of the United States courts see remarks of Mr. Justice Daniel in Cary *v.* Curtis 3 How. 236. He says: "The judicial power of the United States, although it has its origin in the constitution, is (except in enumerated

It is interesting to ask the question whether Congress, in the exercise of its power to regulate the jurisdiction of the federal courts in general, and the appellate jurisdiction of the Supreme Court in particular, may provide that that jurisdiction shall not include the determination of the question of law whether an act of Congress is constitutional. It is true that the present judiciary act specifically provides that the appellate jurisdiction of the Supreme Court shall include "any case in which the constitutionality of any law of the United States . . . is drawn in question." But this may be regarded not as a grant of power but as a declaration of an existing rule of constitutional law. It was not contained in the original Judiciary Act. Its absence from that act, however, has no significance, as it had not been decided at the time of the passage of that act that the courts possessed such a power. It is also true that the dictum which has been quoted at length from The Francis Wright, is broad enough to justify such action on the part of Congress so far as concerns the appellate jurisdiction of the Supreme Court, but being merely dictum it naturally has not the force of law, and even as dictum it was made with regard to a totally different question, viz. whether Congress could distinguish between questions of fact and law in defining the appellate jurisdiction of the court in admiralty cases. It is to be remembered also that the distinction between questions of law and questions of fact had for a long time been made in other parts of the

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."

law. At the same time, the case itself is authority for the principle that Congress may limit the questions which may be raised and determined on appeal to the Supreme Court.

While the federal courts are in a weak position, the state courts are usually recognized in the state constitutions. These instruments often not merely provide for the existence of the courts but also regulate in considerable detail their jurisdiction which may not under these conditions be regulated by the state legislatures. But while the powers of the state courts are thus protected against legislative curtailment it must be remembered that state constitutions are, as has been pointed out, comparatively easy of amendment. Furthermore, in most of the states the tenure of the judges is quite different from that of the judges of the federal courts. While the latter are believed to hold during good behavior subject to removal only as the result of a conviction after a regular impeachment trial, in a number of the states the judges may, as has been shown, be removed by the legislature or the legislature and the executive, sometimes after a hearing as in New York, and sometimes with no formality at all as in Massachusetts.

The present constitution of New York thus provides that the removal of judges by the legislature shall be for cause and after an opportunity to be heard. The question arises as to whether such a provision provides for a regular judicial trial. The Court of Appeals has held not, in the case of similar provisions with regard to the removal of other than judicial officers.[1] The further question arises as to whether

[1] In the matter of Guden, 171 N. Y. 529.

the decision by a judge that an act of the legislature is unconstitutional is a sufficient cause for removal under such constitutional provisions. It must certainly be admitted that, in 1846, when the article was inserted in the constitution of the state of New York, such action would probably not have been so considered. But it is a matter of history, as has been shown, that in the early part of the nineteenth century before the legislatures had reconciled themselves to the exercise of this power by the courts, they both either actually impeached or attempted to remove judges and in one or two cases actually refused to elect judges who had declared acts of the legislature to be unconstitutional. There is, therefore, considerable reason for believing that the requirement of cause for removal could be construed as having been complied with where the attempt was made by the legislature to remove a judge who had declared an act of that body to be unconstitutional.

However that may be, it is certainly within the power of the people of a state to provide that their judges may be removed by the legislature. This is historically the tenure which judges have had for centuries in England, and had in the early part of the nineteenth century in this country and, as has been shown, is the tenure of some American judges at the present time. The fact that American judges have, notwithstanding the insecurity of their tenure, ventured at times to declare unconstitutional acts of the state legislature and have done so with impunity would lead to the conclusion that this extraordinary power which American judges possess and exercise is theirs after all only because the American people

have thought on the whole that it was best that they should have it. We may also conclude that if the American people change their mind as to the wisdom of such a principle, it would be comparatively easy in the case of the state judges by changing their tenure and by making them more dependent upon the legislature to provide a sanction by means of which any improper interference with legislative activity and a too insistent opposition to change might be discouraged.[1]

If the constitutional law of the states of the Union were so amended as to permit the legislature to remove judges who declared acts of the legislature unconstitutional, it would be possible to provide that removal for such cause should not disqualify a judge so removed for the office from which he had been removed. For the removal would not carry with it any stigma of misconduct. In such a case a judge if reëlected by the people, where popular election of judges was the rule, might properly consider that his views as to the constitutionality of legislative action were the views of the people who through such a method of referendum would be called upon to give the final decision on these constitutional questions. While such a method of settling these problems would naturally involve a violent break with the traditions of the immediate past, it is submitted that it would be an orderly constitutional method of action based upon the principle applied by the people, from whom we

[1] See Baldwin, "The American Judiciary," Chaps. VII and XXII, for an interesting description of the development of the idea that judges may declare unconstitutional legislative acts, and of the tenure of judicial office.

have received our law and political institutions, in the settlement of the most important constitutional problems. Such a method would probably be preferable to the application of the recall to judges. For the removal by the legislature would commonly be preceded by a more intelligent consideration of the question than would probably be possible in the case of the recall.

Finally, it is possible, without going so far as any of the methods suggested would necessitate, to provide that no court shall decide an act of a legislative body to be unconstitutional, unless the decision is reached by the unanimous action of the members of the court or by the action of any majority that might be determined upon. In the case of the state courts such provision could be adopted through the amendment of the state constitution. Such a provision would also really bring it about that our practice would accord with our theory, which is that in order that an act of the legislature be declared void by a court its unconstitutionality, like the guilt of a person charged with crime, must be clear beyond a reasonable doubt. Judge Baldwin says in referring to this theory of constitutional law: —

"As the judgments declaring a statute inconsistent with the constitution are often rendered by a divided court, this position seems practically untenable. The majority must concede that there is a reasonable doubt whether the statute may be consistent with the constitution, since some of their associates either must have such a doubt, or go further and hold that there is no inconsistency between the two documents."[1]

But it is well to consider whether such a provision

[1] The American Judiciary," p. 103.

could be incorporated into the law through mere legislative action. For because of the practical impossibility of amending the federal constitution the only way in which such a principle could probably be introduced into the constitutional law of the United States national government would be through Congressional legislation.

We must start our discussion of this question by recalling to mind certain fundamental principles of constitutional law. One of these is that in the absence of constitutional limitation the legislature has plenary power to organize the government. This power in the case of Congress is somewhat less than in the case of a state legislature, since the former is, while the latter is not, an authority of enumerated powers. It follows from the application of this principle that the legislature may organize the courts where their organization is not provided for in the constitution, and where the measures taken by the legislature do not involve the exercise of judicial power or interfere with the independence of the courts, for which provision is made at least in general terms by all American constitutions.

It has been seen that the federal constitution makes provision for one Supreme Court, and for inferior courts to be established by Congress, and it may be added that the constitution of the United States vests the judicial power of the United States in these bodies, and thus impliedly forbids authorities not courts to exercise such judicial power. Congress, however, from the beginning has had and has exercised the power to organize the courts of the United States. Thus, in 1789 by the judiciary act it provided

that the Supreme Court should be composed of six judges and that four of these should constitute a quorum of the court. The judiciary act recently passed by Congress provides that six shall constitute a quorum. The constitutionality of such action on the part of Congress has apparently not been doubted, and for that reason we have no decision by the Supreme Court upon the question. The court has, however, for a long time followed the practice of refusing to render a decision upon an important constitutional question in which the concurrence of a majority of its total membership had not been secured. This practice originated, it is said, in the refusal of a state court to recognize as binding a decision of the Supreme Court concurred in by less than a majority of its total membership.[1]

The precise question has, however, come up and been decided in New York. The constitution of the state provided that the Court of Appeals should consist of eight members, and the legislature provided that a quorum should consist of six. The court decided that a decision was valid where four of the judges concurred and three dissented, one judge being disqualified for interest. Their ground for this determination was that the conclusion had been concurred in by a majority of the quorum provided by the legislature. It is true that in this case the constitution expressly authorized the legislature to organize the court, but the court would seem to be of the opinion

[1] Baldwin, "The American Judiciary," p. 118, citing Green *v.* Biddle, 8 Wheaton, 1; Bodley *v.* Gaither, 3 Monroe (Ky.) 57; New York *v.* Miller, 8 Peters, 118; see also Mayor of New York *v.* Miln, 9 Peters, 85.

that the legislature would have had the power to organize the court in the absence of constitutional provision to that effect.[1]

Other cases recognizing power in the legislature to organize the courts even where the measures concerned have been directed to the methods by which courts may act are to be found in the cases which have upheld laws abolishing the necessity for unanimity in the case of verdicts of juries.[2] But it is doubtful if courts would regard with the same equanimity legislative action providing for unanimity on their part in constitutional questions which they have evidenced in the case of the abolition of the necessity for unanimity on the part of juries. There are a number of cases in which courts have repulsed with considerable heat attempts on the part of legislatures to dictate to them the methods of their action. Thus they have quite commonly denied the right of the legislature to provide that they shall hand down written opinions in all cases.[3]

Finally, we have two interesting cases where an attempt was made by the legislature to provide directly or indirectly the number of members whose concurrence should be necessary to a valid decision. In both cases the court considered the action of the legislature improper. The first was decided in New

[1] Oakley *v.* Aspinwall, 3 N. Y. 547.

[2] This was held to be proper first in Hess *v.* White, 9 Utah, 61. The constitutionality of such action was questioned in later cases, but the court adhered to its decision. Smith *v.* Salt Lake City R. R. Co., 13 Utah, 33.

[3] Vaughn *v.* Hark, 49 Ark. 160; Houston *v.* Williams, 13 Cal. 24. In this last case the opinion is written by Judge Field, afterwards a member of the Supreme Court of the United States, who waxed quite indignant at the action of the legislature.

Jersey, viz. Olopp *v.* Ely.[1] In this case the legislature provided that no judgment of the Supreme Court should be reversed by the court unless a majority of those members of the court who were competent to sit on the hearing and decision of the case should concur in such decision. The second case arose in Tennessee.[2] In this case the court held unconstitutional a statute providing that where the Supreme Court divided evenly on the question of the constitutionality of an act of the legislature the act should be held valid, otherwise, the decision of the lower court should be affirmed.

Although these cases are not exactly in point and cannot thus be regarded as decisive of the question at issue, at the same time they are indicative of the attitude of the courts towards attempts on the part of the legislature to exercise a control over their methods of arriving at a decision, notwithstanding their acceptance of the general principle that the legislature has in the absence of constitutional provision pretty wide control over judicial organization.

The result is that the only practical method of effectively limiting the power of the courts to declare unconstitutional acts of the legislature is through the process of constitutional amendment. Such amendment may take the form of making the tenure of judges more precarious than it ordinarily is in this country, or, of increasing the number of judges whose concurrence shall be necessary for the determination that an act of the legislature is unconstitutional.

[1] 27 N. J. L., 3 Dutch. 622.

[2] It was reported in Legal Reporter, May, 1877, and is referred to in the opinion in Perkins *v.* Scales, 2 Lea, 612.

On account of the great difficulty, if not absolute impossibility, of amending the federal constitution this method of action is impracticable in the case of federal courts. All that can be done in the case of these bodies is either to destroy them, which Congress may do by legislation in the case of inferior courts, or to limit their jurisdiction, as may be done by similar action in the case of all federal courts. Such action would, however, involve such serious consequences that it is inconceivable. The abolition of the lower federal courts would have the effect of depriving individuals of all judicial remedies in a number of important matters, while the serious limitation of the appellate jurisdiction of the Supreme Court would be our undoing as a nation. For that court has probably done more than any other governmental authority in bringing about such degree of national unity as we now enjoy.

Our only recourse, then, in the case of the federal courts is a persistent criticism of those of their decisions which evince a tendency to regard the constitution as a document to be given the same meaning at all times and under all conditions, and which fail to appreciate that the courts in our system of government have been accorded a really political function, and that, with our constitution in the position in which it actually is, courts should not absolutely block change although they may quite properly limit the rate at which it may proceed. For this reason the proposition which was made in the Senate of the United States that where the Supreme Court had by a mere majority vote declared an act of Congress to be unconstitutional, Congress should not feel itself precluded from later on

passing an act similar to the one which was disallowed, is one which might well be discussed with even greater fulness than was accorded to it in the session of 1909. For, as was then pointed out, the Supreme Court has on more than one occasion, either because of a change in its membership or because of a change in conditions, revised opinions which it has deliberately expressed.[1] Those who assert that by criticism of the Supreme Court we are attacking the foundations of our political system forget that we are living under a practically unamendable constitution and that unless it is proper to bring popular opinion to bear upon a governmental authority which has the power absolutely to prevent political change we may easily be tied up so tight in the bonds of constitutional limitation that either development will cease, and political death ensue, or those bonds will be broken by a shock that may at the same time threaten the foundations not merely of our political but even our social system.

Criticism of the federal courts, and particularly of the Supreme Court, finally, it is to be remembered, is no novel thing in our history. When the Supreme Court announced in Chisholm *v.* Georgia[2] that the federal courts could entertain a private suit against a state, its decision "created such a shock of surprise throughout the country" as the court itself later rather euphemistically said[3] that Congress immediately and almost unanimously framed an amendment to the constitution, later adopted by the states, which not only took away such jurisdiction from the United

[1] For an interesting discussion of this question, see Bowman, "Congress and the Supreme Court," *Pol. Sci. Quar.*, Vol. XXV, p. 20.

[2] 2 Dallas, 419.

[3] Hans *v.* Louisiana, 134 U. S. 1.

States courts in the future, but was made to apply to all suits of that character then before the courts. Both Jefferson and Jackson attacked the Supreme Court and particular members of it from the vantage ground of the presidency, and sarcastically advised that body to execute certain of the decisions which it had made. The decision of the court in the Dred Scott case was the occasion of an attack upon it by Lincoln, who even went so far as to assert that the court had conspired with the administration in framing a collusive suit, and led to the passage of hostile resolutions by state legislatures, one of which formally demanded that the court be reconstituted so that it would represent more than one section of the country.[1] Finally, the Supreme Court was bitterly attacked in Congress for its decision in the income tax cases.[2] It is by no means improbable that this severe, persistent, and continuous criticism of the court has been one of the influences which have brought it about that the court has on the whole been reasonably responsive to public opinion. In these days of rapid economic and social change, when it is more necessary than ever before that our law should be flexible and adapt itself with reasonable celerity to the changing phenomena of life, it is on this criticism amply justified by our history that we must rely if we are to hope for that orderly and progressive development which we regard as characteristic of modern civilization.

[1] For a collection of instances of criticism and denunciation by state legislatures of the decisions of the Supreme Court see Ames, "State Documents on Federal Relations," pp. 1, 93, 103, 105, 295, 304.

[2] See *e.g.* Bowman, "Congress and the Supreme Court," *Pol. Sci. Quar.*, Vol. XXV, p. 20.

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