THE CONSTITUTION

AND WHAT IT MEANS TODAY

☆

CORWIN

THE CONSTITUTION

and what it means today

By Edward S. Corwin

PRINCETON UNIVERSITY PRESS, 1958

PRINCETON, NEW JERSEY

viable Constitutional Law appears is frequently a considerably foreshortened one.

The first of the crises referred to was the necessity which palpably confronted the official guardians of the Constitutions, following the Presidential Election of 1936, of providing the New Deal safe habitation within the Constitutional fold, a necessity which they met by returning to Chief Justice Marshall's sweeping conception of national supremacy, thereby discarding the century-old theory that the reserved powers of the States, or at least some of them, formed an independent limitation on national power. This retreat to Marshallian concepts comprises, in fact, the essence of the so-called Constitutional Revolution of 1937, the record of which is to be found in volume 301 of the United States Reports. How powerful and pervasive an organon of constitutional interpretation the doctrine of National Supremacy has since become was strikingly illustrated as recently as March 8, 1954 by the holding of the Court in Adams *v.* Maryland, that Congress has power to bar the production in State courts of incriminating evidence revealed in the course of a Congressional inquiry.

The second great crisis embraced our participation in two World Wars, which for present purposes may be lumped together, World War II being indeed only World War I writ large, when its principal outcome for our Constitutional law is assessed. I mean a constantly augmented flow of discretionary power into the hands of the President. In the Steel Seizure case, to be sure, the Court in 1952 professed to believe that it had found in the principle of the Separation of Powers a judicially enforceable concept in restraint of Presidential emergency power, but as I point out later in this volume, this was an empty gesture. If nature abhors a vacuum, so does an era of crisis, and a vacuum is all that Judicial Review has to offer in such a situation.

Then as to the operation upon our present-day Constitutional Law of ideological forces, the outstanding illustration is afforded by the tentative adoption in 1925, in the Gitlow case, of the theory that the "freedoms" which

are protected by Amendment I against Congress are available also against the States under the "due process of law" clause of Amendment XIV. Two years later this theory became the rule of the Court, and on the basis of it the Court today exercises a censorship of quite indefinite scope over local governmental action touching any and all social activities which involve speech or other modes of communication.

Of the recent decisions covered by this volume the most notable one is that in the Desegregation cases which was handed down on May 17. It has three outstanding features. First, it was rendered by a unanimous Court. Secondly, it was not based on the history of the constitutional clause involved, the "equal protection" clause of Amendment XIV. This was held, quite correctly, to be a Delphic oracle, ambiguous, equivocal. So recourse was had to certain scientific studies of the effect of racial discrimination on its victims.

Thirdly, the Court postponed any effort to implement its decision on merits. For the time being this is addressed primarily to the sensibilities of a world whose populations are everywhere fired by the notion of "equality." For it is this rather than the idea of "liberty," as would have been the case 100 years ago, which lies at the basis of the insurgent nationalism of our time. The problem of implementation, nevertheless, will have to be faced sooner or later. It will not be surprising if ultimately Congressional legislation under Section V of the XIV Amendment will become necessary.

In consequence of the annexation to Amendment XIV of much of the content of the Federal Bill of Rights and of the extension of national legislative power, especially along the route of the commerce clause, into the field of industrial regulation, with the result of touching State legislative power on more fronts than ever before, Judicial Review as exercised by the Supreme Court takes on today increasingly the character of a species of arbitration between competing social interests rather than of adjudication

CONTENTS

THE WAR AMENDMENTS

RECENT AMENDMENTS

Some Judicial Diversities

"IN the Constitution of the United States—the most wonderful instrument ever drawn by the hand of man—there is a comprehension and precision that is unparalleled; and I can truly say that after spending my life in studying it, I still daily find in it some new excellence."—JUSTICE JOHNSON. In Elkinson *v.* Deliesseline, 8 Federal Cases 593 (1823)

"THE subject is the execution of those great powers on which the welfare of a nation essentially depends. . . . This provision is made in a Constitution intended to endure for ages to come and, consequently, to be adapted to the various crises of human affairs."—CHIEF JUSTICE MARSHALL. In McCulloch *v.* Maryland, 4 Wheaton 316 (1819)

"IT [the Constitution] speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this Court and make it the mere reflex of the popular opinion or passion of the day."—CHIEF JUSTICE TANEY. In the Dred Scott Case, 19 Howard 393 (1857)

"WE read its [the Constitution's] words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government."—CHIEF JUSTICE STONE. In United States *v.* Classic, 313 U.S. 299 (1941)

"JUDICIAL power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing."—CHIEF JUSTICE MARSHALL. In Osborn *v.* U.S. Bank, 9 Wheaton 738 (1824)

"WE are under a Constitution, but the Constitution is what the judges say it is . . ."—FORMER CHIEF JUSTICE HUGHES when Governor of New York

---

"WHEN an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the

judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."—JUSTICE ROBERTS. In United States *v.* Butler, 297 U.S. 1 (1936)

"WHILE *unconstitutional exercise of power by the executive and legislative branches of the Government is subject to judicial restraint, the only check on our own exercise of power is our own sense of self-restraint.*"—JUSTICE STONE (dissenting), *ibid.*

"THE *glory and ornament of our system which distinguishes it from every other government on the face of the earth is that there is a great and mighty power hovering over the Constitution of the land to which has been delegated the awful responsibility of restraining all the coordinate departments of government within the walls of the governmental fabric which our fathers built for our protection and immunity.*"—CHIEF JUSTICE EDWARD DOUGLASS WHITE when Senator from Louisiana. In *Congressional Record*, 52nd Cong., 2nd Sess., p. 6516 (1894)

"JUDICIAL *review, itself a limitation on popular government, is a fundamental part of our constitutional scheme. But to the legislature no less than to courts is committed the guardianship of deeply cherished constitutional rights.*"—JUSTICE FRANKFURTER. In Minersville School Dist. *v.* Gobitis, 310 U.S. 586 (1940)

THE PREAMBLE

WE, THE PEOPLE OF THE UNITED STATES, IN ORDER TO FORM A MORE PERFECT UNION, ESTABLISH JUSTICE, INSURE DOMESTIC TRANQUILLITY, PROVIDE FOR THE COMMON DEFENSE, PROMOTE THE GENERAL WELFARE, AND SECURE THE BLESSINGS OF LIBERTY TO OURSELVES AND OUR POSTERITY, DO ORDAIN AND ESTABLISH THIS CONSTITUTION FOR THE UNITED STATES OF AMERICA

THE Preamble, strictly speaking, is not a part of the Constitution, but "walks before" it. By itself alone it can afford no basis for a claim either of governmental power or of private right.[1] It serves, nevertheless, two very important ends: first, it indicates the source from which the Constitution comes, from which it derives its claim to obedience, namely, the people of the United States; secondly, it states the great objects which the Constitution and the Government established by it are expected to promote: national unity, justice, peace at home and abroad, liberty, and the general welfare.[2]

"We, the People"

"We, the people of the United States," in other words, We, the citizens of the United States, whether voters or non-voters.[3] In theory the former represent and speak for the latter; actually from the very beginning of our national history, the constant tendency has been to extend the voting privilege more and more widely, until today, with the establishment of woman's suffrage, by the addition of the

[1] Jacobson *v.* Mass. 197 U.S. 11 (1905).

[2] "Its true office," says Story, "is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them." *Commentaries on the Constitution*, §462.

[3] "The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty." C. J. Taney, in Dred Scott *v.* Sanford, 19 How. at p. 404 (1857). On the relationship between citizenship and voting, *see* C. J. Chase in Minor *v.* Happersett, 21 Wall. 162 (1874).

Nineteenth Amendment to the Constitution (*see* p. 279), the terms voter and citizen have become practically interchangeable as applied to the adult American.

"Do ordain and establish," not *did* ordain and establish. As a *document* the Constitution came from the generation of 1787; as a *law* it derives its force and effect from the present generation of American citizens, and hence should be interpreted in the light of present conditions and with a view to meeting present problems.[4]

The term "United States" is used in the Constitution in various senses (*see e.g.* Article III, Section III). In the Preamble it signifies, as was just implied, the States which compose the Union, and whose voting citizens directly or indirectly choose the government at Washington and participate in amending the Constitution.[5]

The Framework of Government

Articles I, II, and III set up the framework of the National Government in accordance with the doctrine of the Separation of Powers of "the celebrated Montesquieu," which teaches that there are three, and only three, functions of government, the "legislative," the "executive" and the "judicial," and that these three functions should be exercised by distinct bodies of men in order to prevent an undue concentration of power. Latterly the importance of this doctrine as a working principle of government under the Constitution has been much diminished by the growth of Presidential leadership in legislation, by the increasing resort by Congress to the practice of delegating what amounts to legislative power to the President and other administrative agencies, and by the mergence in the latter of all three powers of government, according to earlier definitions thereof.[6]

[4] *See* the words of Chief Justice Marshall in 4 Wheat. 316, 421 (1819).

[5] The most comprehensive discussion of this subject is that by counsel and the Court in Downes *v.* Bidwell, the chief of the famous Insular Cases of 1901. *See* 182 U.S. 244 (1901).

[6] So broad a principle as the doctrine of the Separation of Powers has naturally received at times rather conflicting interpretations, occasionally from the same judges. *Cf.* in this connection C. J. Taft's opinion for the Court in *Ex parte* Grossman 267 U.S. at pp. 119-120 (1925), with the same Justice's opinion in Myers *v.* U.S., 272 U.S. at p. 116 (1926); *also* J. Black, for the Court, in Youngstown Sheet and Tube Co., 343 U.S. 579, at pp. 581, 585-589, with C. J. Vinson, for the minority, *ibid.* 683-700 (1952).

ARTICLE I

Article I defines the legislative powers of the United States, which it vests in Congress.

SECTION 1

¶ All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

"Law" in the Constitution

This seems to mean that no other branch of the Government except Congress may make laws; but as a matter of fact, by Article VI, ¶2, treaties which are made "under the authority of the United States" have for some purposes the force of laws, and the same has on a few occasions been held to be true of "executive agreements" entered into by the President by virtue of his diplomatic powers.[1] Also, of course, judicial decisions make law since later decisions may be, by the principle of *stare decisis*, based upon them. Indeed, the Supreme Court, by its decisions interpreting the Constitution, constantly alters the practical effect and application thereof. As Woodrow Wilson aptly put it, the Supreme Court is "a kind of Constitutional Convention in continuous session." Likewise, regulations laid down by the President, heads of departments, or administrative bodies, like the Interstate Commerce Commission, the Securities and Exchange Commission, and so on, are laws and will be treated by the courts as such when they are made in the exercise of authority validly "delegated" by Congress.

"A Government of Enumerated Powers"

From this section, in particular, is derived the doctrine that the National Government is one of "enumerated powers," a doctrine which was given classic expression by Chief Justice Marshall in 1819, in the following words: "This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its

[1] B. Altman & Co. *v.* U.S., 224 U.S. 583 (1912); United States *v.* Belmont, 301 U.S. 324 (1937); United States *v.* Pink, 315 U.S. 203 (1942). *Cf.* Tucker *v.* Alexandroff, 183 U.S. 424, both opinions (1902).

desire to cooperate in the maintenance of old-age pensions, unemployment insurance, maternal welfare work, vocational rehabilitation, and public health work, and in financial assistance to impoverished old age, dependent children, and the blind. Such legislation is, as we have seen, within the national taxing-spending power (*see* p. 29); but what of the objection that it "coerces" complying States into "abdicating" their powers? Speaking to this point in the Social Security Act cases, the Court has said: "The . . . contention confuses motive with coercion. . . . To hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." And again: "The United States and the state of Alabama are not alien governments. They coexist within the same territory. Unemployment is their common concern. Together the two statutes before us [the Act of Congress and the Alabama Act] embody a cooperative legislative effort by State and National Governments, for carrying out a public purpose common to both, which neither could fully achieve without the cooperation of the other. The Constitution does not prohibit such cooperation."[25]

In short, expansion of national power within recent years has been matched by *increased* governmental activity on the part of the States also, sometimes in cooperation with each other, sometimes in cooperation with the National Government, sometimes in cooperation with both.

In entering upon a compact to which Congress has given its consent a State accepts obligations of a legal character which the Court and/or Congress possess ample powers to enforce.[26] Nor will it avail a State to endeavor to read itself out of its obligations by pleading that it had no constitutional power to enter upon such an arrangement and has none to fulfill its duties thereunder.[27]

[25] Stewart Mach. Co. *v.* Davis, 301 U.S. 548 (1937); Carmichael *v.* So. Coal and Coke Co., 301 U.S. 495, 526 (1937).
[26] 246 U.S. 565 (1918).
[27] West Virginia *v.* Sims, 341 U.S. 22 (1951).

cipal responsibility seems to be simply his accountability, as Chief Justice Marshall expressed it, "to his country in his political character, and to his own conscience."[9]

ARTICLE III

This article completes the framework of the National Government by providing for "the judicial power of the United States."

SECTION 1

¶The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

Inherent Elements of "Judicial Power"

"Judicial power" is the power to decide "cases" and "controversies" in conformity with law and by the methods established by the usages and principles of law.[1]

Like "legislative" and "executive power" under the Constitution, "judicial power," too, is thought to connote certain incidental or "inherent" attributes. One of these is the ability to interpret the standing law, whether the Constitution, acts of Congress, or judicial precedents, with an authority to which both the other departments are constitutionally obliged to defer.[2] But "political questions" often afford an exception to this general rule,[3] as also do so-called "questions of fact," which are often left to administrative bodies, although their determination may affect the scope of the authority of such bodies very materially.[4] And closely related to this attribute of judicial power is another, which

[9] Marbury *v.* Madison, 1 Cranch 137, 166-167 (1803).

[1] Prentis *v.* Atl. Coast Line Co., 211 U.S. 210, 226 (1908). *See also* Muskrat *v.* U.S., 219 U.S. 346, 361 (1911).

[2] *See e.g.*, Federal Power Com'n *v.* Pacific Power and L. Co., 307 U.S. 156 (1939).

[3] On "political questions," *see* p. 140 below.

[4] Interstate Com. Com's'n *v.* Ill. C. R. Co., 215 U.S. 452 (1910); Interstate Com. Com's'n *v.* Union P. R.R. Co., 222 U.S. 541 (1912); Shields *v.* Utah Idaho Cent. R. Co., 305 U.S. 177 (1938); Sunshine Anthracite Coal Co. *v.* Adkins, 310 U.S. 381 (1940); Perkins *v.* Lukens Steel Co., 310 U.S. 113 (1940).

may be termed power of "finality of decision." The underlying idea is that when a court of the United States is entrusted with the determination of any question *whether* of law or of fact, its decision of such question cannot constitutionally be made reviewable except by a higher *court*, that is, cannot be made reviewable by either of the other two departments, or any agency thereof.[5] Thus, so long as the decisions of the Court of Claims as to amounts due claimants against the Government were subject to disallowance by the Secretary of the Treasury, it was held not to be a "court," with the result that the Supreme Court could not take appeals from it.[6] But the principle is not an altogether rigid one, for the Court of Claims is today regarded as a true court, stemming from Article III, §1 of the Constitution, despite the fact that its judgments have to be satisfied out of sums which only Congress can appropriate.[7] Also, the courts of the United States are today generally required to serve as adjuncts in the work of such administrative bodies as the Interstate Commerce Commission, the Federal Trade Commission, the National Labor Relations Board, etc., by backing up the valid findings of such tribunals with orders which those to whom they are addressed must obey if they do not want to go to jail for "contempt of court."[8]

Which calls attention to a third "inherent" judicial attribute, namely, the power of a court to vindicate its dignity and authority in the way just mentioned. This power

[5] For the start of this doctrine, *see* Hayburn's Case, decided in 1792, 2 Dall. 409, and especially the reporter's notes.

[6] *See* Gordon *v.* U.S., 117 U.S., appendix (1864).

[7] DeGroot *v.* U.S., 5 Wall. 419 (1867); 67 Stat. 26 (1953).

[8] The great leading case is Interstate Com. Com's'n *v.* Brimson, 154 U.S. 447 (1894). A recent decision inferentially sustains the right of Congress to confer the subpoena power upon administrative agencies. Justice Murphy dissented, saying he was "unable to approve the use of non-judicial subpoenas issued by administrative agents," but his protest was based on the great growth of administrative law "in the past few years," and not on the ground that the subpoena power was inherently or exclusively judicial. Oklahoma Press Pub. Co *v.* Walling, 327 U.S. 186 (1946).

Contempt of Court

was defined in general terms in the Judiciary Act of 1789 and further restricted by the Act of 1831, which limited punishable contempt to disobedience to any judicial process or decree and to misbehavior in the presence of the Court, "or so near thereto as to obstruct the administration of justice."[9] The purpose of the last clause was to get rid of a doctrine of the common law which, although it has the sanction of Blackstone, is otherwise of dubious authenticity, that criticism reflecting on the conduct of a judge in a pending case constituted contempt because of its tendency to draw into question the impartiality of the court and to "scandalize justice."[10] Eighty-five years later, nevertheless, the Supreme Court largely restored the discredited doctrine by an enlarged interpretation of the "so near thereto" clause.[11] But not only was this decision overturned in 1941,[12] but the Court a little later, by a vote of five Justices to four, ruled that for an utterance to be held in contempt simply in reliance on the common law, it must offer an "extremely serious" threat of causing a miscarriage of justice or of obstructing its orderly administration, otherwise the constitutional guaranty of freedom of press would be invaded.[13] Another limitation on the contempt power is that it exists for the protection of the processes of the Court, and thereby of justice. "The judge," the Court has said, "must banish the slightest personal impulse to reprisal, but he should not bend backward and impair the authority of the Court by too great leniency."[14] In Sacher *v.* United States,[15] an outgrowth of the trial of the Eleven Communists, this rule was adhered to. Here counsel for the defense engaged in practices designed to break down the judge and break up the trial. In order not to further the latter objective Judge Harold Medina deferred calling

[9] U.S. Code, tit. 28, §385; *ex parte* Robinson, 19 Wall. 505 (1874).

[10] *See* the bibliographical data in J. Douglas's opinion for the Court in Nye *v.* U.S., 313 U.S. 33 (1941).

[11] Toledo Newspaper Co. *v.* U.S., 247 U.S. 402 (1918).

[12] *See* note 10 above.

[13] Bridges *v.* Calif., 314 U.S. 252 (1941); followed in Pennekamp *v.* Fla., 328 U.S. 331 (1946).

[14] Cooke *v.* U.S., 267 U.S. 517, 539 (1925).

[15] Sacher *v.* U.S., 343 U.S. 171, 13-14 (1952); Dennis *v.* U.S., 341 U.S. 494 (1951).

sion was reversed by the new majority.[22] Though possessing all the formal attributes of a judicial tribunal, the Court today exercises such vast, and such undefined powers, in the censorship of legislation, both national and State, and in interpretation of the former, that the social philosophies of suggested appointees to it are quite legitimately a matter of great concern to the appointing authority, the President and Senate.[23]

The "inferior courts" covered by this section comprise today ten Circuit Courts of Appeals and eighty odd District Courts, with approximately 225 judges. Since they rest upon act of Congress alone, they may be abolished by Congress at any time; but whether their incumbents may be thus thrown out of office is at least debatable. When in 1802 Congress repealed an act of the previous year creating certain Circuit Courts of the United States, it also threw their judges out of office; but the Act of 1913, abolishing the Commerce Court, left its judges still judges of the United States.

The territorial courts, e.g., those of Hawaii and Alaska, do not exercise "judicial power of the United States," but a special judicial power conferred upon them by Congress, by virtue of its sovereign power over these places (*see* Article IV, Section III, ¶2). Their judges accordingly have a limited tenure and are removable by the President.[24]

"Legislative Courts"

Also, there are certain courts exercising jurisdiction over a limited class of cases, like the Court of Customs and Patent Appeals, which are regarded as "legislative," *not* "constitutional" courts. The powers of such courts sometimes embrace non-judicial elements, but any purely "judicial"

[22] Sidney Ratner, "Was the Supreme Court Packed by President Grant?" in 50 *Political Science Quarterly*, 343-358; Knox *v.* Lee, 12 Wall. 457.

[23] This was well understood by the Senatorial opponents of Mr. Hughes's appointment as Chief Justice. *See New York Times*, February 12-15, 1930; *and see* the data compiled by the late Senator Robinson in his answer to Senator Borah, respecting President Roosevelt's Court Proposal of February 5, 1937. *Ibid.*, March 31, 1937. The avowed utilization of "sociological data" by the Court in the Desegregation Cases confirms Senator Robinson's argument.

[24] American Ins. Co. *v.* Canter, 1 Pet. 511 (1828) is still the leading case on the constitutional status of territorial courts.

determination by them may be made appealable, if Congress wishes, to the regular national courts. Nevertheless, since they do not participate in "the judicial power of the United States" within the sense of this section, the tenure of their judges rests solely on act of Congress.[25]

The word "diminished" in this section was considered above in connection with Article II, Section I, ¶7.

SECTION II

¶1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; 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.

Categories of "Cases" and "Controversies"

The "cases" and "controversies" here enumerated fall into two categories; first, those jurisdiction over which "depends on the character of the cause," that is to say, the law to be enforced; second, those jurisdiction over which "depends entirely on the character of the parties."[1] In both instances, however, the jurisdiction described is only *potential*, except as to the *original* jurisdiction of the Supreme Court. Thus the lower federal courts derive *all* their jurisdiction immediately from acts of Congress, and the same is true of the Supreme Court as to its *appellate* jurisdiction.[2] Also, all writs by which jurisdiction is asserted or exercised are authorized by Congress.

[25] *Ex parte* Bakelite, 279 U.S. 438 (1929).

[1] Cohens *v.* Va., 6 Wheat. 264, 378 (1821).

[2] Turner *v.* Bk. of No. Am., 4 Dall. 8 (1798); Kline *v.* Burke Constr. Co., 260 U.S. 266 (1922); Durousseau *v.* U.S. 6 Cr. 307 (1810); *ex parte* McCardle, 7 Wall. 506 (1869); *The Francis Wright*, 105 U.S. 381 (1881); St. Louis and Iron Mountain R. R. *v.* Taylor, 210 U.S. 281 (1908); *also* Robert J. Harris, Jr., *The Judicial Power of the United States*, ch. II, for a review of controversies on this point (Louisiana State University Press, 1910).

Requirements of Same

"Controversies" are civil actions or suits; "cases" may be either civil or criminal. The connotations of these terms are otherwise substantially the same. Outstanding is the requirement of adverse litigants presenting an honest and antagonistic assertion of rights. Thus it is said to be "well settled" that "the Court will not pass upon the constitutionality of legislation . . . , upon the complaint of one who fails to show that he is injured by its operation, . . ."; also that, "litigants may challenge the constitutionality of a statute only insofar as it affects them."[3]

It would appear nevertheless that this rule has been at times "more honored in the breach than the observance." Thus in Pollock *v.* Farmers' Loan and Trust Co.,[4] the Supreme Court sustained the jurisdiction of a district court which had enjoined the company from paying an income tax even though the suit was brought by a stockholder against the company, thereby circumventing section 3224 of the Revised Statutes, which forbids the maintenance in any court of a suit "for the purpose of restraining the collection of any tax."[5] And forty years later its ability "to find adversity in the narrow crevices of casual disagreement" was well illustrated by Carter *v.* Carter Coal Co.,[6] where the president of the company brought suit against the company and its officials, among whom was Carter's father, vice-president of the company.[7] The Court entertained the suit and decided the case on its merits.

Of similar import is the concept of "real" or "substantial" interests. As a general rule, the interest of taxpayers in the general funds of the federal Treasury is insufficient to give them a standing in court to contest the expenditure of public funds on the ground that this interest "is shared

[3] Fleming *v.* Rhodes, 331 U.S. 100, 104 (1947). *See also* Blackmer *v.* U.S., 284 U.S. 421, 442 (1932); Virginian R. Co. *v.* System Federation, 300 U.S. 515 (1937); Carmichael *v.* Southern Coal & Coke Co., 301 U.S. 495, 513 (1937).

[4] 157 U.S. 429 (1895). English precedents favor this sort of jurisdiction. *See* Dodge *v.* Woolsey, 18 How. 331 (1856).

[5] *Cf.* Cheatham *et al. v.* U.S., 92 U.S. 85 (1875); and Snyder *v.* Marks, 109 U.S. 189 (1883).

[6] 298 U.S. 238 (1936).

[7] Robert L. Stern, "The Commerce Clause and the National Economy," 59 *Harvard Law Review*, 645, 667-668 (1948).

with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity."[8] Likewise, the Court has held that the general interest of a citizen in having the government administered by law does not give him standing to contest the validity of governmental action,[9] the importance of which observation also "depends," in the words of the immortal Sairey Gamp, "upon the application thereof." Recent cases involving the issue of religion in the schools reach divergent results on this point.[9a]

A third element of a "case" or "controversy" formerly much insisted upon is the doctrine that the party initiating it must be asking the Court for a remedy or "execution." This no longer represents the position of the Court; and by an act passed by Congress on June 14, 1934, Courts of the United States are authorized, "in cases of actual controversy," "to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."[10]

"Law" versus "Equity"

Whether a case is one "in law" or "in equity" is a mere matter of history, and depends today on the kind of remedy that is asked for. Criminal prosecutions and private actions for damages are cases "in law," since these were early decided in England in the regular law courts. An application for an injunction, on the other hand, was passed upon by the Lord Chancellor, as a matter of grace, and so is a *suit* "in equity." Heretofore the distinction between the two

[8] Massachusetts *v.* Mellon, 262 U.S. 447, 487 (1923). *See also* Williams *v.* Riley, 280 U.S. 78 (1929).

[9] Fairchild *v.* Hughes, 258 U.S. 126 (1922).

[9a] *See Constitution of the United States of America, Analysis and Interpretation* (Government Printing Office, 1953), 764-769.

[10] Fidelity Trust Co. *v.* Swope, 274 U.S. 123 (1927); U.S. Code, tit. 28, §400; Aetna Life Ins. Co. *v.* Haworth, 300 U.S. 227 (1937); and Alabama State Federation of Labor *v.* McAdory, 325 U.S. 450 (1945); Edwin M. Borchard, *Declaratory Judgments*, 249-303 (New York, 1934).

kinds of cases has been maintained in the field of national jurisdiction, as it is in most of the States, although the same courts dispense both "law" and "equity." By the Act of June 14, 1934, however, the Supreme Court is empowered to merge the two procedures "so as to secure one form of civil action . . . for both" in the District Courts of the United States and the Courts of the District of Columbia, and it has since adopted rules for this purpose which went into effect from the final adjournment of the Seventy-fifth Congress.[11]

"Political Questions"

A case is one "arising under this Constitution, the laws of the United States, and treaties" of the United States, when an interpretation of one or the other of these is required for its final decision.[12] But while the "judicial power" extends to *all* such cases, there is a certain category of them in which the Court does not usually claim full liberty of decision. These are cases involving so-called "political questions," the best example of which is furnished by questions respecting the rights or duties of the United States in relation to other nations. When the "political departments," Congress and the President, have passed upon such questions, the Court will generally accept their determinations as binding on itself in deciding cases.[13] Of course, it rests with the Supreme Court to say finally whether a question is "a political question" in this sense. (*See also* Article IV, Section IV.)

[11] U.S. Code, tit. 28, §723 (b) and (c).

[12] Cohens *v.* Va., 6 Wheat. 264, 379 (1821).

[13] 3 *Willoughby on the Constitution*, 1326-1329 (New York, 1929). The cases fall into several categories, some of which touch the problem of constitutional interpretation more directly than others: (1) Those that raise the issue of what proof is required that a statute has been enacted, or a constitutional amendment ratified; (2) questions arising out of the conduct of foreign relations; (3) the termination of wars, or rebellions; (4) the question of what constitutes a "republican form of government" and the right of a State to protection against invasion or domestic violence; (5) questions arising out of political actions of States in determining the mode of choosing Presidential Electors, State officials, and Congressional reapportionment; (6) suits brought by States to test their sovereign rights. *See* Melville Fuller Weston, "Political Questions," 38 *Harvard Law Review*, 296 (1925). Some outstanding cases are Foster *v.* Neilson, 2 Pet. 253 (1929); Luther *v.* Borden, 7 How. 1 (1849); Georgia *v.* Stanton, 6 Wall. 50 (1868); Coleman *v.* Miller, 307 U.S. 433 (1939); Colegrove *v.* Green, 328 U.S. 549 (1946), with which *cf.* McDougall *v.* Green, 335 U.S. 281 (1948); South *v.* Peters, 339 U.S. 276 (1950); National City Bank *v.* Republic of China, 348 U.S. 356 (1955).

"Judicial Review": Its Origin

Cases "arising under this Constitution" are cases in which the validity of an act of Congress or a treaty or of a legislative act or constitutional provision of a State, or of any official act whatsoever which purports to stem directly from the Constitution, is challenged with reference to it. This clause, in alliance with the Supremacy Clause (Article VI, par. 2), furnishes the constitutional warrant for that highly distinctive feature of American Government, Judicial Review. The initial source of judicial review, however, is much older than the Constitution and indeed of any American constitution. It traces back to the common law, certain principles of which were earlier deemed to be "fundamental" and to comprise a "higher law" which even Parliament could not alter. "And it appears," wrote Chief Justice Coke in 1610, in his famous dictum in Bonham's case, "that when an act of Parliament is against common right and reason . . . the common law will control it and adjudge such act to be void."[14] This idea first commended itself to Americans as offering an available weapon against the pretensions of Parliament in the agitation leading to the Revolution.[15] Thus in 1765 the royal governor of Massachusetts Province wrote his government that the prevailing argument against the Stamp Act was that it contravened "Magna Charta and the natural rights of Englishmen and therefore, according to Lord Coke," was "null and void";[16] and on the eve of the Declaration of Independence Judge William Cushing, later one of Washington's appointees to the original bench of the Supreme Court, charged a Massachusetts jury to ignore certain acts of Parliament as "void and inoperative," and was congratulated by John Adams for doing so. In fact, the Cokian doctrine was invoked by the Supreme Court of the United States as late as 1874.[17]

With, however, the establishment of the first written

[14] 8 Reps. 107, 118 (1610).

[15] *See* Quincy, *Early Massachusetts Reports*, 469-488.

[16] *Ibid.* 527.

[17] Loan Asso. *v.* Topeka, 20 Wall. 655, 662.

constitutions, a new basis for judicial review was suggested, the argument for which was elaborated by Hamilton, with the pending federal Constitution in mind, in *The Federalist*, No. 78, as follows: "The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body, and, in case of irreconcilable difference between the two, to prefer the will of the people declared in the constitution to that of the legislature as expressed in statute."

The Constitutional Basis of Judicial Review

The attention of the Federal Convention was drawn to judicial review as offering a means for securing the conformity of State laws and constitutional provisions with "the Supreme Law of the Land," comprising "this Constitution and the laws of Congress made in pursuance thereof, and the treaties made . . . under the authority of the United States," of which the State judiciaries were made the first line of defense, with, presumably, a final appeal to the Supreme Court.[18] Nor has judicial review on this basis ever been seriously contested.[19] Judicial review of acts of Congress has had a more difficult row to hoe, although it is clearly predicated in the clause of Article III now under discussion; and at any rate significant debate on the subject was concluded by Marshall's famous ruling in 1803, in Marbury *v.* Madison.[20] Not only has this decision never been disturbed, its influence soon spread into the States, with the result that long before the Civil War judicial review by State courts of local legislation was established under the local constitutions, and usually with far less textual support than the Constitution of the United States affords judicial review of acts of Congress.[21]

[18] *See* Cohens *v.* Va., 6 Wheat. 264 (1821).

[19] The right of the Supreme Court, however, to take appeals from the State judiciaries in cases covered by the Supremacy Clause was for a time disputed by the Virginia Court of Appeals. *See* preceding note; and Martin *v.* Hunter's Ressee, 1 Wheat. 304 (1814).

[20] 1 Cranch 137 (1803).

[21] On State judicial review prior to the Civil War, *see* the present writer's *Doctrine of Judicial Review*, 75-78 (Princeton Univ. Press, 1914).

Inasmuch as judicial review is exercised only in connection with the decision of *cases* and for the purpose of "finding the law of the case," it is intrinsically subject to the limitations adhering to the judicial function as such (*see* pp. 132-135). Hence the Court will not render advisory opinions at the request of the coordinate departments; and a self-denying ordinance which it adopted in 1793 to this effect has, perhaps with one exception, been observed ever since.[22]

Maxims Governing Its Exercise

Also, the Court has announced from time to time certain other self-restraining maxims which were evoked rather by its recognition of the extraordinary nature of judicial review than by judicial decorum as such. Thus it has said that it will intervene only in "clear cases" and only when the constitutional issue cannot be avoided.[23] The latter doctrine has sometimes led it to construe the challenged statute so narrowly as to impair greatly its intended operation;[24] the former doctrine is frequently equivocal, the application of it turning on the Court's "philosophy." Thus the Court has never exercised its censorship of legislation, whether national or State, more

[22] In 1793 the Supreme Court refused to grant the request of President Washington and Secretary of State Jefferson to construe the treaties and laws of the United States pertaining to questions of International Law arising out of the wars of the French Revolution. Charles Warren, *The Supreme Court in United States History*, I, 110-111 (Boston, 1922). For the full correspondence *see* 3 *Correspondence and Public Papers of John Jay* (1890-1893), 486 (edited by Henry Phelps Johnston). According to E. F. Albertsworth, "Advisory Functions in Federal Supreme Court," 23 *Georgetown Law Journal*, 643, 644-647 (May 1935), the Court rendered an advisory opinion to President Monroe in response to a request for legal advice on the power of the Government to appropriate federal funds for public improvements, by responding that Congress might do so under the war and postal powers. *See also* C. J. Hughes's letter to Senator Wheeler *in re* F.D.R.'s "Court packing" plan. Merlo Pusey, *Charles Evans Hughes*, II, 756-757 (New York, 1951).

[23] 1 *Willoughby on the Constitution*, 25-33, *passim* (New York, 1929).

[24] *See* in this connection United States *v.* E. C. Knight Co. ("The Sugar Trust Case"), 156 U.S. 1 (1895); United States *v.* Delaware and Hudson Co., 213 U.S. 366 (1909); and First Employers' Liability Cases, 207 U.S. 463 (1908). The Court may also treat an act of Congress as "severable" and sustain a part of it, while holding the rest void. Pollock *v.* Farmers' L. & T. Co., 157 U.S. 429 (1895). But on one occasion it disregarded a statement, thrice repeated in a statute, that certain sections of it were severable, and thereby contrived to overturn the entire act. Carter *v.* Carter Coal Co., 298 U.S. 238 (1936).

energetically than during the half century between 1887 and 1937, when its thinking was strongly colored by *laissez faire* concepts of the role of government. This point of view, translated into congenial constitutional doctrines, like that of "liberty of contract" and the exclusive right of the States to govern industrial relations, brought hundreds of State laws to grief, as well as an unusual number of Congressional enactments. Two persistent dissenters from this tendency were Justices Holmes and Brandeis, both of whom thrust forward maxims of judicial self-restraint in vain. The Court had converted judicial review, declared Justice Brandeis into the power of "a super-legislature," while Justice Holmes complained that he could discover "hardly any limit but the sky" to the power claimed by the Court to disallow State acts "which may happen to strike a majority" of its members "as for any reason undesirable."[25] Conversely, the so-called "Constitutional Revolution" of 1937 connotes a distinct lightening of judicial censorship in the economic realm, based on a new set of constitutional values. In short, judicial review is at any particular period a "function" of its own product, the constitutional law of the period.

Effect of *Laissez Faire* on

All of which considerations raise the question of the importance of the doctrine of *stare decisis* as an element of Constitutional Law. Story was strongly of the opinion that it was fully operative in that field. Whether, however, because of the difficulty of amending the Constitution or for cautionary reasons, the Court took the position as early as 1851 that it would reverse previous decisions on constitutional issues when convinced that they were "erroneous."[26] An outstanding instance of this nature was the decision in the Legal Tender cases, in 1870, reversing the decision which had been rendered in Hepburn *v.* Griswold fifteen months earlier;[27] and no less shattering to the pres-

[25] Burns Baking Co. *v.* Bryan, 264 U.S. 504, 534 (1924); Baldwin *v.* Mo., 281 U.S. 586, 595 (1930).

[26] The pioneer case on the point was *The Genessee Chief*, 12 How. 443 (1851) overturning *The Thomas Jefferson*, 10 Wheat. 428 (1825). *See* especially Ch. J. Taney's opinion, 12 How. at p. 456.

[27] 8 Wall. 603 (1869); Knox *v.* Lee, 12 Wall. 457 (1871).

tige of *stare decisis* in the constitutional field was the Income Tax decision of 1895,[28] in which the Court, accepting Joseph H. Choate's invitation to "correct a century of error," greatly expanded its interpretation of the "direct tax" clauses.

The "Constitutional Revolution" of 1937, just alluded to, produced numerous reversals of earlier precedents on the ground of "error," some of them, the late James M. Beck complained, without "the decent obsequies of a funeral oration."[29] In 1944 Justice Reed cited fourteen cases decided between March 27, 1937 and June 14, 1943 in which one or more prior constitutional decisions were overturned.[30] On the same occasion Justice Roberts expressed the opinion that adjudications of the Court were rapidly gravitating "into the same class as a restricted railroad ticket, good for this day and train only."[31] Certainly confession of error on such a scale by the official wielders of judicial review is not persuasive of its tendency to preserve the nation's Constitution.

"Stare Decisis" in Constitutional Law

Two other doctrinal limitations on judicial review are one which limits the *occasions* for judicial review and one which limits the *effect* of its exercise. The former is the doctrine of Political Questions, dealt with earlier (*see* p. 140 above). The latter is the doctrine, or theory, of Departmental Construction, which stems from the contention advanced by Jefferson and Jackson and endorsed by Lincoln, that while the Court is undoubtedly entitled to interpret the Constitution independently in the decision of cases, by the same token the other two "equal" branches of the Government are entitled to the like freedom in the exercise of their respective functions.[32] Actually, this claim was not pushed—some mythology to the contrary notwith-

[28] Pollock *v.* Farmers' Loan and Trust Co., 157 U.S. 429 and 158 U.S. 601 (1895).

[29] *Cong. Record*, March 24, 1934, p. 5480 (unofficial paging).

[30] Smith *v.* Allwright, 321 U.S. 649, 665 note 10 (1944).

[31] *Ibid.* 669.

[32] The classic statement of the doctrine of Departmental Construction occurs in President Jackson's famous Veto Message of July 10, 1832. 2 Richardson, *Messages and Papers of the President*, 582 (Washington, 1909).

standing—to the logical extreme of exonerating the President from the duty of enforcing the Court's decisions, and ordinarily acts of Congress also, unless and until they have been held by the Court to be "void."[33] Its intention was to assert for the President and Congress in their *legislative* capacity the right to shape new legislation in accordance with their independent views of constitutional requirements, unembarrassed by the judicial gloss. The brittleness of *stare decisis* in the Constitutional Law field goes far to support this contention.

Congressional Restraints on Judicial Review

The chief external restraint upon judicial review arises from Congress's unlimited control over the size of the Supreme Court and its equally unlimited control over the Court's appellate jurisdiction, as well as of the total jurisdiction of the lower federal courts. By virtue of the latter, Congress is in position to restrict the actual exercise of judicial review at times, or even to frustrate it altogether. Thus in 1869 it prevented the Court from passing on the constitutionality of the Reconstruction Acts by repealing the latter's jurisdiction over a case which had already been argued and was ready for decision,[34] and in World War II it confined the right to challenge the validity of provisions of the Emergency Price Control Act and of orders of the OPA under it to a single Emergency Court of Appeals and to the Supreme Court upon review of that court's judgments and orders.[35]

Judicial Review and National Supremacy

It frequently happens that cases "arising under this Constitution, the laws of the United States, and treaties" of the United States are first brought up in a State court, in consequence of a prosecution by the State itself under one of its own laws or of an action by a private plaintiff claiming something under a law of the State. If in such a case the defendant sets up a counter-claim under the Con-

[33] Charles Warren, *The Supreme Court in United States History*, II, 221-224 (Boston, 1922), where it is asserted that Andrew Jackson never said, "John Marshall has made his decision, now let him enforce it."

[34] *Ex parte* McCardle, 7 Wall. 506.

[35] U.S. Code, tit. 50, app. §924 (d); Lockerty *v.* Phillips, 319 U.S. 182 (1943); Yakus *v.* U.S., 321 U.S. 414 (1944); Bowles *v.* Willingham, 321 U.S. 503 (1944).

which chartered it, even when the corporation is being sued by a stockholder from another State.[70]

On the other hand, the word "State" in the clause was held by the Court, speaking by Chief Justice Marshall, in 1805, to be confined to "the members of the American confederacy," with the consequence that a citizen of the District of Columbia could not sue a citizen of Virginia on the ground of diversity of citizenship.[71] At the same time, the Chief Justice indicated that the subject was one for "legislative, not for judicial consideration"; and, apparently relying on this dictum, Congress in 1940 adopted an amendment to the Federal Judicial Code to extend the jurisdiction of federal district courts to civil actions involving no federal question "between citizens of different States or citizens of the District of Columbia . . . and any State or Territory."[72] This act was sustained by five Justices, but for widely different reasons, with the result that while the District of Columbia is still not a "State," its citizens may sue citizens of States in the absence of a federal question, not on the basis of any statable constitutional principle, but through the grace of what Justice Frankfurter has called "conflicting minorities in combination."[73]

The Diversity Clause and the D. of C.

Not surprisingly, the presence within the same territory of two autonomous jurisdictions has produced numerous clashes between them. In the vast majority of such cases the State courts involved have, since the boisterous days of Worcester *v.* Georgia, come off second best, thanks to the Supreme Court's vigorous application of the principle of National Supremacy. Nor have occasional legislative efforts to protect the local interest proved especially successful. By an act passed in 1793[74] Congress forbade the federal courts to enjoin proceedings in State courts, but that act is today honeycombed with exceptions. First, it has been held that an injunction will lie against proceedings in a State court

Clashes between Federal and State Courts

[70] Dodge *v.* Woolsey, 18 How. 331 (1855); Ohio and Miss. R.R. Co. *v.* Wheeler, 1 Bl. 286 (1861).

[71] Hepburn *v.* Ellzey, 2 Cr. 445 (1805).

[72] 54 Stat. 143; U.S. Code, tit. 28 §41 (1).

[73] National Mutual Ins. Co. *v.* Tidewater Transfer Co., 337 U.S. 582, 655 (1949).

[74] Stat. 335 (1793); 28 U.S.C.A. §2283.

to protect the lawfully acquired jurisdiction of a federal court against impairment or defeat.[75] This exception is notably applicable to cases where the federal court has taken possession of property which it may protect by injunction from interference by State courts.[76] Second, in order to prevent irreparable damage to persons and property the federal courts may restrain the legal officers of a State from taking proceedings to State courts to enforce State legislation alleged to be unconstitutional.[77] Nor does the prohibition of §265 of the Judicial Code [§720, Rev. Stat.] prevent injunctions restraining the execution of judgments in State courts obtained by fraud,[78] the restraint of proceedings in State courts in cases which have been removed to the federal courts,[79] nor, until lately, proceedings in State courts to relitigate issues previously adjudicated and finally settled by decrees of a federal court.[80] Nor has comity proved a more dependable reliance.[81]

In recent years, moreover, a new source of interference by federal courts in the domain of State judicial process has emerged in consequence, first, of the impact of the expanding concept of due process upon enforcement by the

[75] Freeman *v.* Howe, 24 How. 450 (1861); Julian *v.* Central Trust Co., 193 U.S. 93 (1904); Riverdale Cotton Mills *v.* Ala. & Ga. Mfg. Co., 198 U.S. 188 (1905); Looney *v.* Eastern Texas R. Co., 247 U.S. 214 (1918).

[76] Farmers' Loan & Trust Co. *v.* Lake St. Elev. R. Co., 177 U.S. 51 (1900); Riverdale Cotton Mills *v.* Ala. & Ga. Mfg. Co., 196 U.S. 188 (1905); Julian *v.* Central Trust Co., 193 U.S. 93 (1904); Kline *v.* Burke Construction Co., 260 U.S. 226 (1922). For a discussion of this rule *see* Toucey *v.* New York Life Ins. Co., 314 U.S. 118, 134-136 (1941).

[77] *Ex parte* Young, 209 U.S. 123 (1908), is the leading case.

[78] Arrowsmith *v.* Gleason, 129 U.S. 86 (1889); Marshall *v.* Holmes, 141 U.S. 589 (1891); Simon *v.* Southern R. Co., 236 U.S. 115 (1915).

[79] French *v.* Hay, 22 Wall. 231 (1875); Dietzsch *v.* Huidekoper, 103 U.S. 494 (1881); Madisonville Traction Co. *v.* St. Bernard Mining Co., 196 U.S. 239 (1905).

[80] The earlier cases are Root *v.* Woolworth, 150 U.S. 401 (1893); Prout *v.* Starr, 188 U.S. 537 (1903); Julian *v.* Central Trust Co., 193 U.S. 93 (1904). The more recent case referred to is Toucey *v.* New York Life Ins. Co., 314 U.S. 118 (1941). This was a 5-to-3 decision, in which J. Frankfurter spoke for the Court. JJ. Reed, Roberts and C. J. Vinson dissented.

[81] *Cf.* Riehle *v.* Margolies, 279 U.S. 218 (1929), and Brillhart *v.* Excess Ins. Co., 316 U.S. 491 (1942). On one occasion, however, comity blossomed into active cooperation. This was in the case of Ponzi *v.* Fessenden, 258 U.S. 259 (1922). There the Court upheld the right of the Attorney General of the United States to consent to the transfer on a writ of *habeas corpus* of a federal prisoner to a State court to be there put on trial upon a pending indictment.

States of their criminal laws, and, secondly, of the almost complete freedom claimed by the Supreme Court today "to decline to review decisions which, right or wrong, do not present questions of sufficient gravity." The natural product of these cooperating factors has been a vast increase in the number of petitions filed in federal district courts for the writ of *habeas corpus*, in the name of persons accused or convicted of crime in the States, in alleged violation of their constitutional rights. In a case decided in 1948 Justice Murphy, while favoring this increased availability of the writ, revealed that in the fiscal years 1944, 1945, and 1946 an average of 451 *habeas corpus* petitions were filed each year in federal district courts by persons in State custody, although an average of only six per cent resulted in a reversal of the conviction and release of the petitioner,[82] statistics which are confirmed in Justice Frankfurter's supplementary opinion in Brown *v.* Allen, decided February 9, 1953. In this opinion frank admission is made that "the writ has possibilities for evil as well as for good," that abuse of it "may undermine the orderly administration of justice," the responsibility for which "rests largely with the States," and in consequence "weaken the forces of authority that are essential for civilization."[83]

The *Habeas Corpus* Problem

¶2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

Jurisdiction is either original or appellate. In Marbury *v.* Madison, the case in which the Court first pronounced an act of Congress unconstitutional, it was held that Congress could not extend the original jurisdiction of the Supreme Court to other cases than those specified in the first sentence of this paragraph.[84] But, if a case "in which the State

[82] Wade *v.* Mayo, 334 U.S. 672, 682 (1948).

[83] Brown *v.* Allen, 344 U.S. 443 (1953). All quoted passages are from Justice Frankfurter's supplementary opinion, *ibid.*, 488-513.

[84] 1 Cr. 137 (1803). This holding was anticipated by CJ. Ellsworth in his opinion in Wiscart *v.* Dauchy, 3 Dall. 321 (1796).

ies.[49] This relationship obviously calls for the active fidelity of both categories of officialdom to the Constitution.

A "religious test" is one demanding the avowal or repudiation of certain religious beliefs. While no religious test may be required as a qualification for office under the United States, indulgence in immoral practices claiming the sanction of religious belief, such as polygamy, may be made a disqualification.[50] Contrariwise, alleged religious beliefs or moral scruples do not furnish ground for evasion of the ordinary duties of citizenship, like the payment of taxes or military service, although, of course, Congress may of its own volition grant exemptions on such grounds. The related subject of "religious freedom" is discussed immediately below. A "Religious Test"

"Oath or affirmation": This option was provided for the special benefit of Quakers.

ARTICLE VII

¶The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

The Articles of Confederation provided for their own amendment only by the unanimous consent of the thirteen States, given through their legislatures. The provision made for the going into effect of the Constitution upon its ratification by *nine* States, given through *conventions* called for the purpose, clearly indicates the establishment of the Constitution to have been, in the legal sense, an act of revolution. The Constitution an Act of Revolution

¶Done in convention by the unanimous consent of the States present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of

[49] Clark, *New Federalism*, cited above; Corwin, *Court Over Constitution*, 148-168 (Princeton University Press, 1938).

[50] Reynolds *v.* U.S., 98 U.S. 145 (1878); Mormon Church *v.* U.S., 136 U.S. 1 (1890), support this proposition, assuming they are still law of the land.

the independence of the United States of America the twelfth. In witness whereof we have hereunto subscribed our names.

George Washington, President, and Deputy from Virginia.
New Hampshire—John Langdon, Nicholas Gilman.
Massachusetts—Nathaniel Gorham, Rufus King.
Connecticut—William Samuel Johnson, Roger Sherman.
New York—Alexander Hamilton.
New Jersey—William Livingston, David Brearly, William Paterson, Jonathan Dayton.
Pennsylvania—Benjamin Franklin, Thomas Mifflin, Robert Morris, George Clymer, Thomas Fitzsimons, Jared Ingersoll, James Wilson, Gouverneur Morris.
Delaware—George Read, Gunning Bedford, Jr., John Dickinson, Richard Bassett, Jacob Broom.
Maryland—James McHenry, Daniel of St. Thomas Jenifer, Daniel Carroll.
Virginia—John Blair, James Madison, Jr.
North Carolina—William Blount, Richard Dobbs Spaight, Hugh Williamson.
South Carolina—John Rutledge, Charles Cotesworth Pinckney, Charles Pinckney, Pierce Butler.
Georgia—William Few, Abraham Baldwin.

ATTEST: WILLIAM JACKSON, *Secretary.*

AMENDMENTS[1]

The "Bill of Rights"

THE first ten amendments make up the so-called Bill of Rights of the National Constitution. They were designed to quiet the fears of mild opponents of the Constitution in its original form and were proposed to the State legislatures by the first Congress which assembled under the Constitution. They bind only the National Government and in no wise limit the powers of the States of their own independent force;[2] but the rights which they protect

[1] The first ten amendments were proposed in 1789 and adopted in 810 days. The Eleventh Amendment was proposed in 1794 and adopted in 339 days. The Twelfth Amendment was proposed in 1803 and adopted in 229 days. The Thirteenth Amendment was proposed in 1865 and adopted in 309 days. The Fourteenth Amendment was proposed in 1866 and

against the National Government are, nevertheless, today not infrequently claimable against State authority under the Court's interpretation of the "due process" clause of the Fourteenth Amendment.[3]

Also, the efficacy of the Bill of Rights as a restriction on the National Government is confined to the territorial limits of the United States, including within that term the "incorporated" territories (*see* p. 173), except when "fundamental rights" are involved, it being for the Supreme Court to say what rights are "fundamental" in this sense.[4] The right to trial by jury, an inherited feature of Anglo-American jurisprudence, is not such a right;[5] immunity from "cruel and unusual punishment" is.[6]

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

In the case of Gitlow *v.* New York, decided in 1925,[1] the Court, while affirming a conviction for violation of a State

adopted in 768 days. The Fifteenth Amendment was proposed in 1869 and adopted in 356 days. The Sixteenth Amendment was proposed in 1909 and adopted in 1278 days. The Seventeenth Amendment was proposed in 1912 and adopted in 359 days. The Eighteenth Amendment was proposed in 1917 and adopted in 396 days. The Nineteenth Amendment was proposed in 1919 and adopted in 444 days. The Twentieth Amendment was proposed in 1932 and adopted in 327 days. The Twenty-first Amendment was proposed in 1933 and adopted in 286 days. For these statistics, which were compiled by Hon. Everett M. Dirksen of Illinois, *see* the *New York Times*, February 21, 1937. Several of the amendments were, however, the outcome of many years of agitation.

[2] Barron *v.* Balt., 7 Pet. 243 (1833). According to Mr. Warren, "In at least twenty cases between 1877 and 1907, the Court was called upon to rule upon this point and to reaffirm Marshall's decision of 1833." "The New 'Liberty' under the Fourteenth Amendment," 39 *Harvard Law Review*, 431, 436 (1926).

[3] *See* Gitlow *v.* N.Y., 268 U.S. 652 (1925); Near *v.* Minn., 283 U.S. 697 (1931); Powell *v.* Ala., 287 U.S. 45 (1943); Palko *v.* Conn., 302 U.S. 319 (1937).

[4] Downes *v.* Bidwell, 182 U.S. 244 (1901).

[5] Dorr *v.* U.S., 195 U.S. 138 (1904).

[6] Weems *v.* U.S., 217 U.S. 349 (1910).

[1] 268 U.S. 652 (1925).

Extension of the "Freedoms" of Amendment I to the States

statute prohibiting the advocacy of criminal anarchy, declared: "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[2] This dictum became, two years later, accepted doctrine when the Court invalidated a State law on the ground that it abridged freedom of speech contrary to the due process clause of Amendment XIV.[3] Subsequent decisions have brought the other rights safeguarded by the First Amendment, freedom of religion,[4] freedom of the press,[5] and the right of peaceable assembly,[6] within the protection of the Fourteenth. In consequence of this development, cases dealing with the safeguarding of these rights against infringement by the States are at one or two points included in the ensuing discussion of the First Amendment, and especially those arising under the establishment of religion clause.

Two Views of "Establishment of Religion"

"An establishment of religion": Two theories regarding the meaning and intention of this clause have confronted each other in recent decisions of the Court. According to one, what the clause bans is the *preferential* treatment of any particular religion or sect by government in the United States. This theory has the support of Story, except for the fact that he regarded Congress as still free to prefer the Christian religion over other religions.[7] It is also supported by Cooley in his *Principles of Constitutional Law*, where it is said that the clause forbids "the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others."[8] This conception of the clause is, moreover, foreshadowed in the Northwest Ordinance of 1787, the third article of which reads: "Religion, morality,

[2] *Ibid.* 666.
[3] Fiske *v.* Kan., 274 U.S. 380 (1927).
[4] Cantwell *v.* Conn., 310 U.S. 296 (1940).
[5] Near *v.* Minn., 283 U.S. 697 (1931).
[6] DeJonge *v.* Ore., 299 U.S. 353 (1937).
[7] 2 Story, *Comms.*, §§1870-1879 (1833).
[8] Cooley, *Principles*, 224-225 (ed. of 1898).

and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[9] In short, religion as such is not excluded from the legitimate concerns of government, but quite the contrary.

The other theory was first voiced by Jefferson in a letter which he wrote a group of Baptists in Danbury, Connecticut in 1802. Here it is asserted that it was the purpose of the First Amendment to build "a wall of separation between Church and State."[10] Seventy-seven years later Chief Justice Waite, in speaking for the unanimous Court in the first Mormon Church case, in which the right of Congress to forbid polygamy in the territories was sustained, characterized this statement by Jefferson as "almost an authoritative declaration of the scope and effect of the amendment."[11]

In the first of a series of recent cases, a sharply divided Court, speaking by Justice Black, sustained, in 1947, the right of local authorities in New Jersey to provide free transportation for children attending parochial schools,[12] but accompanied its holding with these warning words, which appear to have had, at that time, the approval of most of the Justices: "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbe-

[9] H. S. Commager (ed.), *Documents of American History*, 128, 131 (3rd Ed., 1947).
[10] Saul K. Padover (ed.), *The Complete Jefferson*, 518-519 (1943).
[11] Reynolds *v.* U.S., 98 U.S. 145, 164 (1879). In his 2nd Inaugural Address, Jefferson expressed a very different, and presumably more carefully considered, opinion upon the purpose of Amendment I: "In matters of religion, I have considered that its free exercise is placed by the Constitution independent of the powers of the general government." This was said three years after the Danbury letter. 1 Richardson, *Messages and Papers of the Presidents*, 379 (Ed. of 1909).
[12] Everson *v.* Board of Education, 330 U.S. 1 (1947).

ments of their respective faiths, ashore and afloat, employing for the purpose property belonging to the United States and dedicated to the services of religion. Under the Servicemen's Readjustment Act of 1944, eligible veterans may receive training at government expense for the ministry in denominational schools. The schools of the District of Columbia have opening exercises which 'include a reading from the Bible without note or comment, and the Lord's Prayer.' "[17]

Justice Reed's views were not without effect. In 1952 the Court, six Justices to three, sustained a New York City "released time" program under which religious instruction must take place off the school grounds and numerous other features of the Champaign model are avoided.[18] Speaking for the majority, Justice Douglas said: "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. We find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."[19]

Concessions to the Religious Interest

Farther back, in 1899, the Court held that an agreement between the District of Columbia and the directors of a

[17] *Ibid.* 253-254. [18] Zorach *v.* Clauson, 343 U.S. 306 (1952).
[19] *Ibid.* 313-314. JJ. Black, Frankfurter, and Jackson dissented.

is a notification to plaintiffs in libel suits that if they are unlucky enough to be office holders or office seekers, they must be prepared to shoulder the almost impossible burden of showing defendant's "special malice."[34]

Blackstone Accepted, then Rejected

In 1907 the Court, speaking by Justice Holmes, rejected the contention that the Fourteenth Amendment rendered applicable against the States "a prohibition similar to that in the First," and at the same time endorsed Blackstone, in words drawn from an early Massachusetts case: "The preliminary freedom [i.e., from censorship] extends as well to the false as to the true; the subsequent punishment may extend to the true as to the false."[35] Even as late as 1922 Justice Pitney, speaking for the Court, said: "Neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restriction about 'freedom of speech' or the 'liberty of silence.' . . ."[36] Gitlow *v.* New York, in which this position was abandoned, came three years later.

The "Clear and Present Danger" Shibboleth

Meantime the so-called "clear and present danger doctrine" had made its appearance. This formula lays down the requirement that before an utterance can be penalized by government it must, ordinarily, have occurred "in such circumstances or have been of such a nature as to create a clear and present danger" that it would bring about "substantive evils" within the power of government to prevent.[37] The question whether these conditions exist is one of law for the courts, and ultimately for the Supreme Court, in enforcement of the First and/or the Fourteenth Amendment;[38] and in exercise of its power of review in these premises the Court is entitled to review broadly findings of facts of lower courts, whether State or federal.[39]

[34] *See* Edward S. Corwin, *Liberty against Government*, 157-159n. (Louisiana State Univ. Press, 1948); Cooley, *Constitutional Limitations*, ch. 12; Samuel A. Dawson, *Freedom of the Press, A Study of the Doctrine of "Qualified Privilege"* (Columbia Univ. Press, 1924).

[35] Patterson *v.* Colo., 205 U.S. 454, 461-462 (1907).

[36] Prudential Life Ins. Co. *v.* Cheek, 259 U.S. 530, 543 (1922).

[37] Schenck *v.* United States, 249 U.S. 47 (1919).

[38] *See* Justice Brandeis' concurring opinion in Whitney *v.* Calif., 274 U.S. 357 (1927); and cases reviewed below.

[39] Fiske *v.* Kansas, 274 U.S. 380 (1927).

The formula emerged in the course of a decision in 1919, holding that the circulation of certain documents constituted an "attempt," in the sense of the Espionage Act of 1917, to cause insubordination in the armed forces and to obstruct their recruitment.[40] Said Justice Holmes, speaking for the Court: "We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that have all the effect of force. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."[41]

Whether Justice Holmes actually intended here to add a new dimension to constitutional freedom of speech and press may be seriously questioned, inasmuch as in two similar cases following shortly after, in which he again spoke for the Court, and in which prosecutions under the Espionage Act were sustained, he did not allude to the formula.[42] Moreover, when a case did arise in which the formula might have made a difference, seven Justices declined to follow it.[43] This time, however, Justice Holmes, accompanied by Justice Brandeis, dissented on the ground that defendants' utterances did not create a clear and present danger of substantive evils. From this time forth in the course of the next twenty years, these two Justices filed numerous opinions, sometimes in dissent, sometimes in affirmation, of rulings of the Court in freedom of speech cases in which the "clear and present danger" test was

[40] Note 37 above.

[41] 249 U.S. at 52.

[42] The reference is to Frohwerk *v.* U.S., 249 U.S. 204; *and* Debs *v.* U.S., 249 U.S. 211.

[43] Abrams *v.* U.S., 250 U.S. 616 (1919).

who assist in the conduct of such meetings cannot be branded as criminals on that score. The question . . . is not as to the auspices under which the meeting is held but as to its purposes; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects."[66] Even so, the right is not unlimited. Under the common law any assemblage was unlawful which aroused the apprehensions of "men of firm and rational minds with families and property there," and it is not unlikely that the First Amendment takes this principle into account.[67]

The Right to Lobby

Furthermore, the right of petition too has expanded. It is no longer confined to demands for "a redress of grievances," in any accurate meaning of these words, but comprehends demands for an exercise by the government of its powers in furtherance of the interests and prosperity of the petitioners, and of their views on politically contentious matters. On this ground, two recent decisions of lower federal courts sitting in the District of Columbia have cast doubt on the constitutionality of the Federal Regulation of Lobbying Act of 1946, under which more than 2,000 lobbyists have registered and 495 organizations report lobbying contributions and expenditures.[68] In disposing of the second of these cases the Supreme Court indicated that while Congress undoubtedly possesses power to investigate the *modus operandi* of lobbying activities and their influence on public opinion, such inquiries may conceivably take such a range as to encounter the prohibitions of Amendment I.[69]

AMENDMENT II

A well-regulated militia being necessary to the security of a

[66] De Jonge *v.* Ore., 299 U.S. 353, 364-365 (1937). *See also* Hague *v.* Com. for Indust'l Organization, 307 U.S. 496 (1939).

[67] *See* a valuable article by J. M. Jarrett and V. A. Mund, "The Right of Assembly," 9 *New York University Law Quarterly Review*, 1-38 (1931). People *v.* Kerrick, 261 Pac. Rep. (Calif.) 756 (1927); and State *v.* Butterworth, 104 N.J.L. 579 (1928), are two modern cases on the subject which were thoroughly argued and carefully decided.

[68] U.S. Code, tit. 2, §§261-270; National Asso. of Manufacturers *v.* McGrath, 103 F. Supp. 510 (1952); Rumely *v.* U.S., 197 F. (2nd) 166, 174-175 (1952).

AMENDMENT XIV

SECTION 1

"The Great Fourteenth Amendment"

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The opening clause of this section makes national citizenship primary and State citizenship derivative therefrom. The definition it lays down of citizenship "at birth" is not, however, exhaustive, as was pointed out in connection with Congress's power to "establish an uniform rule of naturalization."

"Subject to the jurisdiction thereof": The children born to foreign diplomats in the United States are not subject to the jurisdiction of the United States, and so are not citizens of the United States. With this narrow exception all persons born in the United States are, by the principle of the Wong Kim Ark Case, entitled to claim citizenship of the United States.[1]

Judicial Repeal of the "Privileges and Immunities" Clause

"The privileges or immunities of citizens of the United States" were held in the famous Slaughter House cases, decided soon after the Fourteenth Amendment was added to the Constitution, to comprise only those privileges and immunities which the Constitution, the laws, and the treaties of the United States confer, such as the right to engage in interstate and foreign commerce, the right to appeal in proper cases to the national courts, the right to protection abroad, etc.; but not "the fundamental rights," which were said still to adhere exclusively to State citizenship.[2]

Following this line of reasoning, which renders the clause tautological, the Court ruled in 1920, in United States *v.* Wheeler,[3] that the right to reside quietly within the State

[1] 169 U.S. 649 (1898).
[2] 16 Wall. 36, 71, 77-79 (1873). *See also* Twining *v.* N.J., 211 U.S. 78, 97 (1908).
[3] 254 U.S. 281.

Judicial Supervision of the "Police Power" under Amendment XIV

The "police power" is the power of the State "to promote the public health, safety, morals, and general welfare"; or, as it has been more simply and comprehensively described, "the power to govern men and things."[14]

Under the present-day interpretation of "liberty," "property," and "due process of law," this power is today confronted at every turn by the Court's power of judicial review. Some statistics are pertinent in this connection. During the first ten years of the Fourteenth Amendment, hardly a dozen cases came before the Court under all of its clauses put together. During the next twenty years, when the laissez-faire conception of governmental functions was being translated by the Bar into the phraseology of Constitutional Law, and gradually embodied in the decisions of the Court, more than two hundred cases arose, most of them under the "due process of law" clause. During the ensuing twelve years this number was more than doubled—a ratio which still holds substantially.[15]

During this later period, moreover, an increasing rigor was to be discerned in the Court's standards, especially where legislation on social and economic questions was concerned. Prior to 1912 the Court had decided 98 cases involving this kind of legislation. "In only six of these did the Court hold the legislation unconstitutional. From 1913 to 1920 the Court decided 27 cases of this type and held seven laws invalid"; while between 1920 and 1930, out of 53 cases, the Court held against the legislation involved in fifteen.[16]

The same result appears from another angle when we compare an early case in this field of judicial review with a comparatively recent one. In Powell *v.* Pennsylvania,[17]

[14] License Cases, 5 How., 504, 583 (1847). *See also* Charles River Bridge Co. *v.* Warren Bridge, 11 Pet. 420, 547-548 (1837); the Slaughter House Cases, cited above in note 2; Barbier *v.* Connelly, 113 U.S. 27 (1885), and scores of other cases.

[15] Charles W. Collins, *The Fourteenth Amendment and the States*, 188-206 (Boston, 1912). *See also* Benjamin R. Twiss, *Lawyers and the Constitution, How Laissez Faire Came to the Supreme Court*, chs. II-VII (Princeton University Press, 1942).

[16] Professor (now Justice) Felix Frankfurter, "The Supreme Court and the Public," *Forum*, June 1930, p. 333.

[17] 127 U.S. 678 (1888).

decided in 1888, the Court sustained an act prohibiting the manufacture and sale of oleomargarine, taking the ground that it could not say, "from anything of which it may take judicial cognizance," that oleomargarine was not injurious to the health, and that this being the case the legislative determination of facts was conclusive. Thirty-six years later we find the Court setting aside a Nebraska statute requiring that bread be sold in pound and half-pound loaves, on its own independent finding that the allowance made by the statute for shrinkage of the loaves was too small. Entering upon an elaborate discussion of the entire process of bread-making the Court pronounced the act "unnecessary" for the protection of buyers against fraud, and "essentially unreasonable and arbitrary."[18] In short, the case furnishes a perfect example of what was above characterized as "broad review," and that in a connection with a case which had no apparent wide-reaching implications of any sort.

The Supreme Court as "a Superlegislature"

Commenting upon this general development, the late Professor Kales once suggested that attorneys arguing "due process cases" before the Court ought to address the justices not as "Your Honors," but as "Your Lordships."[19] Similarly Senator Borah, in the Senate debate on Mr. Hughes's nomination for Chief Justice, declared that the Supreme Court had become, under the Fourteenth Amendment, "economic dictator in the United States";[20] and in the Bread case, just mentioned, Justice Brandeis, dissenting, characterized the Court as "a superlegislature," while similar views were expressed by the late Justice Holmes shortly before his retirement from the Court.

No doubt there was an element of exaggeration in some, or even all, of these expressions—no doubt, too, it would be rather difficult to indicate very precisely just wherein the exaggeration lay. The Court, of course, has no power to initiate legislation; and even before it can "veto" an

[18] Burns Baking Co. *v.* Bryan, 264 U.S. 504 (1924). *See also* Weaver *v.* Palmer Bros., 270 U.S. 402 (1926).
[19] 12 *American Political Science Review*, 241 (1918).
[20] *New York Times*, February 12, 1930.

act it must wait for a case to arise under it. Yet a case is sure to arise sooner or later, and under modern practice sooner *rather* than later. One difference which lawyers are apt to stress between the point of view of a court exercising the power of judicial review and an executive exercising the veto power, is that which is supposed to result from the doctrine of *stare decisis*. A court, it is said, is apt to reflect that a present decision will be a future precedent. But then, executives are apt so to reflect too; while the fact is that in the field of constitutional law the doctrine of *stare decisis* is today very shaky.[21]

"Social Philosophies" of the Justices

The really distinctive thing about the Supreme Court considered as a governing body is that its make-up usually changes very gradually, so that for considerable intervals it will be found to be under the sway of a particular "social philosophy," the operation of which in important cases becomes a matter of fairly easy prediction on the part of those who follow the Court's work with some care. The Court which set aside the Income Tax Act of 1894 and which retired the Sherman Act into disuse for some years by its decision in the Sugar Trust case[22] was also the Court which ten years later in Lochner *v.* New York[23] held void as "unreasonable and arbitrary" an act regulating the hours of labor in bakeries. But another decade, and a "liberal" court sustained without apparent effort a general ten-hour law[24] and upheld compulsory workmen's compensation.[25] Then from 1920 followed a Court of conservative outlook, a Court prone to take a decidedly astringent view of all governmental powers except its own, and to frown upon legislative projects, whether State or national, which were calculated to curtail freedom of business judgment. The outlook

[21] *See* Professor Powell's words in 32 *Columbia Law Review*, 768 (1932); *also* J. Brandeis' dissenting opinion in Burnet *v.* Coronado Oil and Gas Co., 285 U.S. 393, 405-409 and notes (1932); *also* J. Jackson's opinion for the Court in Helvering *v.* Griffiths, 318 U.S. 371, note 52 (1943); *also* J. Reed's opinion for the Court in Smith *v.* Allwright, 321 U.S. 649, 665, note 10 (1944); *also* J. Roberts, in the same case, at p. 669.
[22] United States *v.* E. C. Knight Co., 156 U.S. 1 (1895).
[23] 198 U.S. 45 (1905).
[24] Bunting *v.* Ore., 243 U.S. 426 (1917).
[25] New York Central R. R. Co. *v.* White, 243 U.S. 188 (1917).

of the present Court, on the other hand, stems from "the Constitutional Revolution" of 1937, and is in general favorable to governmental activity at all levels. In fact, since 1940 the Court has revamped our Constitutional Law pretty thoroughly.[26]

Summing up: In consequence of the modern doctrine of due process of law as "reasonable law," *judicial review ceases to have definite, statable limits*; and while the extent to which the Court will recanvass the factual justification of a statute under the "due process" clauses of the Constitution often varies considerably as between cases, yet this is a matter which in the last analysis depends upon the Court's own discretion, and on nothing else.

Rate and Price Regulation

In the famous case of Munn *v.* Illinois[27] which was decided in 1876, the Court ruled that the State's police power extended to the regulation of the prices set by "businesses affected with a public interest"; and it later held that whether a business was of this character depended on circumstances. Thus the rental of houses in the City of Washington during wartime was held to be such a business, as was the insurance business normally.[28] Later, however, the Court virtually contracted the term to public utilities,[29] holding, as we saw earlier, that their charges were subject to regulation so long as the price fixed by public authority yielded "a fair return on the value of that which is used for the benefit of the public" (*see* pp. 34-35). Then in Nebbia *v.* New York,[30] which was decided early in 1934, the Court, again altering its approach, laid down the doctrine that there is no closed category of "businesses affected with a public interest," but that the State by virtue of its police power may regulate prices whenever it is "reasonably necessary" for it to do so in the public interest; and on this basis was sustained a New York statute providing for the regulation of milk prices in that State. Commenting at the time on this decision, the late Hon. James M. Beck declared, with some exaggeration, however, that the Court had "calmly discarded its decisions of fifty years," without even paying "those decisions the obsequious respect of a funeral oration."[31] Subsequent decisions further illustrate the new outlook.[32]

[26] The closest parallel to recent sweeping changes in the Court's membership is that which occurred during the two years immediately following Marshall's death, when a new Chief Justice and five new Associate Justices came to the Bench. On the "constitutional revolution" which ensued in consequence, see Warren, *The Supreme Court in United States History*, II, ch. 2. It should be noted, however, that the "constitutional revolution" which has taken place since 1937 was really launched before any change in the Court's personnel. The proof of this is to be found in Volume 301 of the *United States Supreme Court Reports*, with which it is interesting to compare Volume XI of Peter's *Reports*, exactly 100 years earlier. *See* further the present writer's *Constitutional Revolution, Ltd.* (Claremont Colleges, Claremont, 1941).

[27] 94 U.S. 113.

[28] Block *v.* Hirsh, 256 U.S. 135 (1921); German Alliance Co. *v.* Lewis, 233 U.S. 389 (1914).

[29] Wolff Packing Co. *v.* C't of Indust'l Relations, 262 U.S. 522 (1923).

Freedom of Speech and Press

During and after the first World War many State legislatures passed acts imposing restraints upon freedom of speech, press, and teaching and learning. In deciding the question whether such measures were within the police power the Court came early to adopt the theory that the word "liberty" of the Fourteenth Amendment covers such freedoms and hence protects them against "unreasonable" State acts. A statute forbidding the teaching of subjects in any but the English language was held void as to private schools,[33] as was also an act which, by requiring that all children attend the public schools, practically forbade their attending private schools.[34] On the other hand, the Court sustained legislation penalizing advocacy of the use of violence to bring about social and political change,[35] though it later qualified its endorsement with the doctrine that for a person to be validly held under such an act his inflammatory words must have come near to inciting to actual violence—the "clear and present danger" doctrine,

[30] 291 U.S. 502 (1934).

[31] *Congressional Record*, March 24, 1934, p. 5480 (unofficial paging).

[32] Highland Farms Dairy *v.* Agnew, 300 U.S. 608 (1937); Townsend *v.* Yeomans, 301 U.S. 441 (1937); Olsen *v.* Neb., 313 U.S. 236 (1941); Federal Power Commission *v.* Hope Natural Gas Co., 320 U.S. 591 (1944).

[33] Meyer *v.* Neb., 262 U.S. 380 (1923).

[34] Pierce *v.* Society of Sisters, 268 U.S. 510 (1925).

[35] Gitlow *v.* N.Y., 268 U.S. 652 (1925); Whitney *v.* Calif., 274 U.S. 357 (1927).

in short.[36] Nor may people be punished for participating in a meeting under the auspices of an organization which is charged with advocating violence as a political method, so long as the meeting itself was orderly and did not advocate illegal action.[37] Likewise, a statute which forbade in all circumstances the carrying of a red flag as a symbol of opposition to government was set aside;[38] also one which, as interpreted by the highest State court, made punishable the joining of an organization teaching the inevitability of "the class struggle."[39] Nor may a State authorize a previous restraint upon scandalous and defamatory publications by the device of authorizing its courts to enjoin them as "nuisances";[40] and by the same token a municipality may not require a license for the peaceable distribution of books, pamphlets, and handbills.[41] Indeed, a municipality may not, with the object of keeping the streets from being littered, penalize the distribution of such matter to passers-by in the streets, the Court being of the opinion that "any burden imposed upon the public authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of freedom of speech and press."[42]

The Rights of Labor under the Amendment

The cases just summarized treat freedom of speech and press primarily as a *political* right. Certain other decisions of recent date treat it as an adjunct of the "rights of labor." A commencement in this direction was made in the Hague Case,[43] before mentioned (*see* p. 249), the decision in which was rested by two of the Justices on the due process clause of Amendment XIV. But the really creative cases for this significant development are Thornhill *v.* Alabama,[44] decided in 1940, and American Federation of La-

[36] Herndon *v.* Lowry, 301 U.S. 242 (1937).
[37] De Jonge *v.* Ore., 299 U.S. 353 (1936).
[38] Stromberg *v.* Calif., 282 U.S. 359 (1930).
[39] Fiske *v.* Kan., 274 U.S. 380 (1927).
[40] Near *v.* Minn., 283 U.S. 697 (1931).
[41] Schneider *v.* Irvington, 308 U.S. 147 (1939).
[42] *Ibid.*, 162. *See also* Lovell *v.* Griffin, 303 U.S. 444 (1938); Jamison *v.* Texas, 318 U.S. 413 (1943); and Marsh *v.* Ala., 326 U.S. 501 (1946). *Cf.* Valentine *v.* Chrestensen, 316 U.S. 52 (1942).
[43] Hague *v.* Com. for Indust'l Organization, 307 U.S. 496 (1940).
[44] 310 U.S. 88.

a benefit of a sort which the Court has denied to employers in Labor Relations cases.[50]

Limits on the Right to Picket

For a brief period, moreover, strangers to the employer were accorded an almost equal "freedom of communication" by picketing.[51] Subsequent cases, however, have recognized that, "while picketing has an ingredient of communication it cannot dogmatically be equated with the constitutionally protected freedom of speech."[52] Without dissent the Court has held that a State may enjoin picketing designed to coerce the employer to violate State law by refusing to sell ice to non-union peddlers,[53] by interfering with the right of his employees to decide whether or not to join a union,[54] or by choosing a specified proportion of his employees from one race, irrespective of merit.[55] By close divisions, it also sustained the right of a State to forbid the "conscription of neutrals" by the picketing of a restaurant solely because the owner had contracted for the erection of a building (not connected with the restaurant and located some distance away) by a contractor who employed non-union men;[56] or the picketing of a shop operated by the owner without employees to induce him to observe certain closing hours.[57] In this last case Justice Black distinguished Thornhill *v.* Alabama and other prior cases, saying: "It has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. . . . Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements

[50] Thomas *v.* Collins, 323 U.S. 513, 545, 556 (1945).
[51] American Federation of Labor *v.* Swing, 312 U.S. 321 (1941); Bakery and Pastry Drivers *v.* Wohl, 315 U.S. 769 (1942); Cafeteria Employees Union *v.* Gus Angelos, 320 U.S. 293 (1943).
[52] Teamsters Union *v.* Hanke, 339 U.S. 470, 474 (1950).
[53] Giboney *v.* Empire Storage Co., 336 U.S. 490 (1949).
[54] Building Service Union *v.* Gazzam, 339 U.S. 532 (1950).
[55] Hughes *v.* Superior Court, 339 U.S. 460 (1950).
[56] Carpenters Union *v.* Ritter's Cafe, 315 U.S. 722, 728 (1942).
[57] Giboney *v.* Empire Storage Co., 336 U.S. 490 (1949).

teachers! If, as is generally understood, one man's right to swing his fists stops just short of where another man's nose begins, a somewhat similar rule must be presumed to hold in the field of religious activities. As Justice Jackson sensibly suggested, the Court ought to ask itself what would be the effect "if the right given these Witnesses should be exercised by all sects and denominations."[69] Unfortunately, in United States *v.* Ballard (*see* p. 195) Justice Jackson himself takes leave of common sense to indulge some high-flown doubts that were evidently suggested to him by a perusal of William James's *The Will to Believe.*[70] There is, nevertheless, one point on which the Court appears to have achieved unity, to wit, on the proposition that the Constitution does not protect people in uttering obscene, profane, or libellous words—"fighting words"—even when uttered with pious intent.[71]

"Clear and Present Danger": Contempt of Court

Another matter regarding which the Court's attitude was influenced by the "clear and present danger" formula was that of contempt of court. In 1907 the Court, speaking by Justice Holmes, refused to review the conviction of an editor for contempt of court in publishing articles and cartoons criticizing the action of the court in a pending case.[72] It took the position that even if freedom of the press was protected against abridgment by the State, a publication tending to obstruct the administration of justice was punishable, irrespective of its truth. In recent years the Court not only has taken jurisdiction of cases of this order but has scrutinized the facts with great care and has not hesitated to reverse the action of State courts. Bridges *v.* California[73] is the leading case. Enlarging upon the idea that "clear and present danger" is an appropriate guide in determining whether comment on pending cases can be punished, Justice Black said: "We cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials, and that to preserve judicial impartiality, it is necessary for

[69] Douglas *v.* Jeannette, 319 U.S. 157, 180 (1943).
[70] 322 U.S. 78, 93-94 (1944).
[71] Chaplinsky *v.* N.H., 315 U.S. 568 (1942).
[72] Patterson *v.* Colo., 265 U.S. 455. [73] 314 U.S. 252 (1941).

judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases. We must therefore turn to the particular utterances here in question and the circumstances of their publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify summary punishment."[74] Speaking on behalf of four dissenting members, Justice Frankfurter objected: "A trial is not a 'free trade in ideas,' nor is the best test of truth in a courtroom 'the power of the thought to get itself accepted in the competition of the market.' . . . We cannot read into the Fourteenth Amendment the freedom of speech and of the press protected by the First Amendment and at the same time read out age-old means employed by states for securing the calm course of justice."[75] On the whole, nevertheless, the Bridges case seems still to be law of the land.[76]

Parks and Streets as Public Forums

Incidental to certain of the cases above reviewed, the main feature of others, is the protection which the Court has erected in recent years for those who desire to use the streets and the public parks as theatres of discussion, agitation, and propaganda dissemination. In 1897 the Court had unanimously sustained an ordinance of the city of Boston which provided that "no person shall, in or upon any of the public grounds, make any public address," etc., "except in accordance with a permit of the Mayor," quoting with approval the following language from the decision of the Massachusetts Supreme Judicial Court in the same case: "For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in the house. When no proprietary right interferes the legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the less step of limiting the public use to certain

[74] *Ibid.* 271. [75] 314 U.S. 283-284 (1941).

[76] *See* Pennekamp *v.* Fla., 328 U.S. 331 (1946); and Craig *v.* Hecht, 331 U.S. 367 (1947).

"Equal Protection of the Laws" and Legislative Classifications

"Equal protection of the laws": This clause was originally intended for the benefit of the Negro freedmen; but in the famous case of Yick Wo *v.* Hopkins, decided in 1886, its protection was extended to Chinese residents of the United States, and at about the same time corporations were also declared to be "persons" within the meaning of the amendment.[101] The clause does not automatically rule out legislative classifications. Indeed, substantially all legislation involves classification of some sort.[102] What the clause appears to require today is that *any* classification of "persons" shall be reasonably relevant to the recognized purposes of good government; and furthermore, that there shall be *no* distinction made on the sole basis of race or alienage as to certain rights. Thus, it is reasonable as a measure for protecting game to deny aliens the use of shotguns, but it is not reasonable to deny them the right to work for a living.[103]

Then in 1896 it was held in Plessy *v.* Ferguson[104] that it was reasonable for a State to require, in the interest of minimizing occasions for race friction, that white and colored persons travelling by rail be assigned separate coaches, the quality of the accommodations afforded the two races being substantially equal; and in due course the same ruling was extended to public supported institutions of learning.[105] This enlarged application of the "separate but equal" formula is no longer law of the land. It was first repudiated by the Court as to professional schools and schools of higher learning on the ground that for financial and other reasons, such as scarcity of available teaching talent, it was impossible for certain States to provide equal facilities for the two

101 Yick Wo *v.* Hopkins, 118 U.S. 356 (1886); Santa Clara County *v.* So. Pac. R.R. Co., 118 U.S. 394 (1886).

102 *See e.g.*, Mo., Kan. and Tex. R. Co. *v.* May, 194 U.S. 267 (1904), and Lindsley *v.* Natural Carbonic Gas Co., 220 U.S. 61 (1911). *Also*, compare Buck *v.* Bell, 274 U.S. 200 (1927), and Skinner *v.* Okla., 316 U.S. 535 (1942). In the former a sterilization statute applicable to mental defectives in State institutions was sustained; in the latter a similar act applicable to triple offenders was held void.

103 Patsone *v.* Pa., 232 U.S. 139 (1914); Truax *v.* Raich, 239 U.S. 33 (1915).

104 163 U.S. 537.

105 Cummings *v.* C'ty B'd of Educ., 175 U.S. 528 (1899); Gong Lum *v.* Rice, 275 U.S. 78 (1927).

races in these fields of instruction.[106] Moreover, said the Court, in 1950, speaking with reference to a segregated Negro law school, such an institution could not offer its students "those qualities which are incapable of objective measurement but which make for greatness in a law school."[107] In a group of cases decided on May 17, 1954, it was held that like considerations "apply with added force to children in grade and high schools. To separate them," said Chief Justice Warren, speaking for a unanimous Court, "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status. In the community that may affect their hearts and minds in a way unlikely ever to be undone. . . . We conclude that in the field of education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[108] Subsequent orders of the Court touching cases still pending suggest that the ultimate rule may be that all services provided at public expense must be available on a non-segregation basis.

106 Missouri *ex rel.* Gaines *v.* Canada, 305 U.S. 337 (1938), Sipuel *v.* Okla., 332 U.S. 631 (1948); Sweatt *v.* Painter, 339 U.S. 629 (1950); McLaurin *v.* Okla. St. Regents, 339 U.S. 637 (1950).

107 339 U.S. at 634.

108 The cases originated in Kansas, South Carolina, Virginia, and Delaware. They first reached the Court in 1952 and were put over for reargument in the 1953 term. Of this reargument the Chief Justice remarked: It "was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered, exhaustively, consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment.

"This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced.

"At best, they are inconclusive. The most avid proponents of the post-war Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.'

"Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. . . .

"An additional reason for the inclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race was illiterate. In fact, any education of Negroes was forbidden by law in some states.

overtly through statutory enactment, or covertly through inequitable administration of their electoral laws or by toleration of discriminatory membership practices of political parties. Of several such devices, one of the first to be held unconstitutional was the "grandfather clause." Without expressly disfranchising the Negro, but with a view to facilitating the permanent placement of white residents on the voting lists while continuing to interpose severe obstacles upon Negroes seeking qualification as voters, several States, beginning in 1895, enacted temporary laws whereby persons who were voters, or descendants of voters on January 1, 1867, could be registered notwithstanding their inability to meet any literacy requirements. Unable because of the date to avail themselves of the same exemption, Negroes were thus left exposed to disfranchisement on grounds of illiteracy while whites no less illiterate were enabled to become permanent voters. With the achievement of this intended result, most States permitted their laws to lapse; but Oklahoma's grandfather clause was enacted as a permanent amendment to the State constitution; and when presented with an opportunity to pass on its validity, a unanimous Court condemned the standard of voting thus established as recreating and perpetuating "the very conditions which the [Fifteenth] Amendment was intended to destroy."[3] Nor, when Oklahoma in 1916 followed up this defeat with a statute which provided that all persons, except those who voted in 1914, who were qualified to vote in 1916 but who failed to register between April 30 and May 11, 1916 should be perpetually disfranchised, did the Court experience any difficulty in holding the same to be repugnant to the amendment.[4] That amendment, Justice Frankfurter declared, "nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race."[5]

[3] Guinn & Beal *v.* U.S., 238 U.S. 347, 360, 363-364 (1915).
[4] Lane *v.* Wilson, 307 U.S. 268 (1939). [5] *Ibid.* 275.

by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

[2] The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of Electors appointed; and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

AMENDMENT XIII

SECTION 1

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2

Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV

SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.