

## IS OUR CONSTITUTION ADEQUATE FOR PRESENT DAY NEEDS?

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No other question, perhaps, has suggested itself to the minds of so many Americans in recent years as the one stated in the above title. Yet there are few more difficult to satisfactorily answer. The nature and extent of governmental power under the Constitution at the present time can only be determined and understood by a consideration of the nature and distribution of that power as originally provided by the framers of our Constitution, and of the construction and interpretation that has been placed upon that instrument throughout the period of its existence.

A Constitution, such as ours, is, and was intended to be, a bare outline of government—a fundamental charter, so to speak—setting forth in barest outline the nature of our governmental organization and the fundamental principles by which its operation is to be controlled, together with certain restrictions calculated to protect basic property rights and the fundamentals of human liberty. As such, it was clearly intended by its framers to be a flexible and living instrument, capable of adjusting itself to the vast and kaleidoscopic changes in conditions and needs that come with the passage of time and necessitate the assumption of new and previously undreamed of functions by both state and national government.

That fundamental conception was never better expressed than by two great Chief Justices of the United States Supreme Court in two important but widely divergent decisions.

The greatest exponent in our nation's history of the adequacy of national power under the Constitution to meet and deal with any emergency is none other than the universally revered Chief Justice John Marshall. He did more to shape the destinies of the new national government than perhaps any other man, and he was firmly convinced of two fundamental propositions. First, that the national government, or the Congress, under the Constitution, had, and of necessity must have, adequate powers to

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deal with national problems; and second, that the Constitution was intended to be a flexible document susceptible of being adjusted to the passage of time and changing social and economic conditions and needs. One hundred and eighteen years ago, in the great case of *McCulloch v. Maryland*,<sup>1</sup> he upheld the power of Congress to establish a national bank and denied the power of the states to destroy it by taxation. By that opinion he definitely established the doctrine that while the national government is one of enumerated powers, having such powers as are given to it by the Constitution in contrast with the states which have all powers not denied to them, nevertheless the national government has not only those powers which are specifically enumerated in the Constitution, but in addition has such implied powers as are reasonably incident to the powers specifically granted and reasonably necessary to make those granted powers effective.

That opinion of Mr. Chief Justice Marshall, characterized by William Draper Lewis in his work, *Great American Lawyers*, as "perhaps the most celebrated judicial utterance in the annals of the English speaking world,"<sup>2</sup> clearly set forth his conception of the Constitution and the nature of the powers which it conferred upon Congress. He made it clear that the fact that the powers of the national government as enumerated in the Constitution did not include that of creating corporations or establishing a national bank did not prevent Congress from doing either. He said

There is no phrase in the Constitution, which, like the Articles of Confederation, excludes incidental or implied powers; and which requires that everything shall be expressly or minutely described \* \* \*. The very nature of a constitution requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.<sup>3</sup>

In deciding such great questions of power, Justice Marshall asserted, "We must never forget that it is a constitution we are expounding,"<sup>4</sup> and emphasizing the necessary flexibility of a constitution, he asserted that the provisions under consideration

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1. (1819) 4 Wheat. 316, 4 L. ed. 579.

2. 2 Lewis, *Great American Lawyers* (1907) 363.

3. *McCulloch v. Maryland* (1819) 4 Wheat. 316, 407, 4 L. ed. 579, 601.

4. *Ibid.*

were "made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."<sup>5</sup>

One hundred and fifteen years later, in upholding the validity of the Minnesota Mortgage Moratorium legislation against the charges that it violated the contracts clause of the Constitution and the due process clause of the Fourteenth Amendment, another Chief Justice gave lucid expression to the same fundamental doctrine.<sup>6</sup> Any safe principle of constitutional construction, Chief Justice Hughes emphasized, must take into consideration the social and economic conditions and needs of the time and place—a constitution must adapt itself to present day needs. In no other way can social, economic, and governmental breakdown be avoided. The opinion quoted the now famous assertion of Mr. Chief Justice Marshall stated above, that "A constitution (is) intended to endure for ages to come, and, consequently \* \* \* (must) be adapted to the various crises of human affairs." A constitution that is not flexible and cannot meet the needs of changing conditions cannot thus endure.

Another great Justice speaking for the Court in similar vein sixty-five years after Marshall's opinion in *McCulloch v. Maryland* warned that we must ever bear in mind that our Constitution "was made for an indefinite and expanding future."<sup>7</sup> Other justices have given expression to the same conception from time to time throughout our history.

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5. 4 Wheat. 316, 415, 4 L. ed. 603.

6. Home Building & Loan Ass'n v. Blaisdell (1934) 290 U. S. 398, 54 S. Ct. 231, 78 L. ed. 413. Mr. Chief Justice Hughes' statements emphasizing the necessity that a constitution must adapt itself to present day needs are too long to quote, but may be garnered from the following pages: 290 U. S. 398, 435, 437, 439, 440, 442, 443, 444, 54 S. Ct. 231, 239, 240, 241, 242, 78 L. ed. 413, 427, 428, 429, 430, 431, 432. Cf. Mr. Justice Holmes in *Missouri v. Holland* (1920) 252 U. S. 416, 433, 40 S. Ct. 382, 383, 64 L. ed. 641, 648. "When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. \* \* \* The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."

7. Mr. Justice Matthews in *Hurtado v. California* (1884) 110 U. S. 516, 530, 531, 4 S. Ct. 111, 118, 28 L. ed. 232, 237. Cf. Mr. Justice Gray in *Juilliard v. Greenman* (1884) 111 U. S. 421, 439, 4 S. Ct. 122, 125, 28 L. ed. 204, 211: "A Constitution, establishing a frame of government, declaring fundamental principles, and creating a national sovereignty, and intended to endure for ages to come and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract."

It is a common and perhaps not unnatural reaction for those who are adversely affected by legislation, state or national, to immediately assert its unconstitutionality. Particularly is this true where economic or financial affairs are affected. One of the most widely used constitutional arguments is that a legislative act is contrary to the intention of the framers of the Constitution. But strange as it may seem, many who make this argument fail to take the trouble, by making a careful study of the debates in the Constitutional Convention of 1787, to ascertain first hand what the framers actually did intend. A partial reason for this neglect, perhaps, has been the inaccessibility of those debates during the early part of our history when reliance on hearsay became the accepted formula. The only report sufficiently full to base such a study upon was Madison's notes, and he steadfastly refused to permit their publication during his lifetime. The result was that nearly a full half-century elapsed after that memorable convention before the report of its proceedings saw the light of day.<sup>8</sup> During that half-century the intention of the framers was to be learned, by the general public at least, only from statements of the members made in after-years, when viewpoints had been changed by the exigencies of events connected with the development of political parties.

One illustration is sufficient to demonstrate the importance of this matter. James Madison himself, who played so important a part in the great Convention, and who was later to succeed Jefferson in the presidency and fall heir to the principles of Jeffersonian Democracy and the Doctrine of State Rights, in speaking before the Constitutional Convention, viewed with favor what he described as "that form of government which will most approximate the states to the condition of counties."<sup>9</sup> He further asserted that the objection

against an abolition of the state governments \* \* \* lay not against the probable abuse of the general power, but \* \* \* that the general government could not extend its care to all the minute objects which fall under the cognizance of the local jurisdictions. Were it practicable for the general gov-

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8. Yates, *Secret Proceedings and Debates*, published in 1821, covered only part of the Convention, up to July 5, and did not give a full report for the time covered. 1 Farrand, *Records of the Federal Convention* (1911) XIV.

9. 5 Elliot, *Debates on the Federal Constitution* (2d ed. 1901) 252.

ernment to extend its care to every requisite object without the cooperation of the state governments, the people would not be less free, as members of one great republic, than as members of thirteen small ones. Supposing, therefore, a tendency in the general government to absorb the state governments, no fatal consequences could result.<sup>10</sup>

*A far cry from the doctrine of state rights!* Also, it was Madison who seconded a motion by Pinckney, "that the national legislature should have authority to negative all [state] laws which they should judge to be improper," which he described as being the "mildest expedient that could be devised for preventing mischiefs"<sup>11</sup> at the hands of the states. Later he suggested as a possible substitute a negative on state laws by the Senate alone.<sup>12</sup> And again, Madison was among those who favored, on the floor of the Convention, a property qualification for membership in both houses of Congress.<sup>13</sup>

Thus, if we are to know what the framers intended, the only source of accurate information is the report of what they said on the floor of the Convention. The purposes and intentions of the same men as evidenced by word or deed in later years will not do.

Space will hardly permit any detailed and exhaustive examination in this article into the intention of the framers as demonstrated by the debates in the Constitutional Convention, but possibly a few powers might be briefly looked into.

Some of the greatest controversies in recent years over powers of Congress have centered upon the taxing power, the commerce clause, and the general welfare clause.

The power of taxation is conferred upon Congress in broad and general terms and the limitations upon its exercise are few. By the terms of the Constitution, Congress has "power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States."<sup>14</sup> The same language thus embraces also the so-called general welfare clause.

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10. *Id.* at 222.

11. *Id.* at 171.

12. *Id.* at 173.

13. *Id.* at 371. Madison agreed with Mason's proposal for a property qualification for membership in both houses of the national legislature, but moved that the word "landed" before the word "qualifications" be stricken out.

Much was said in the Constitutional debates about the exercise of the taxing power, and that which was said seems strangely out of accord with much that has been said in recent years calling for a restricted interpretation of that fundamental power.

The most heated of the discussions on the taxing power in the Convention centered around its use to prohibit the importation of slaves, all apparently admitting that it might be employed for that purpose. To provide against it, there was included in the Constitution, along with a restriction on direct prohibition by Congress prior to 1808, the further proviso that no tax be more than ten dollars per head.<sup>15</sup>

Thus, to prevent the opponents of slavery from using the taxing power to wipe out a great social evil by taxing the slave trade to death, special limitations had to be imposed.<sup>16</sup>

There also seems to be considerable significance attaching to the provision against direct taxes, except in proportion to the census, and the basis of representation in Congress. The North did not want slaves counted in representation but hoped Congress would later tax slavery out of existence in the states. The South wanted slaves counted in representation, for the very purpose, among others, of having sufficient voting power in Congress to prevent a tax upon slaveholding so heavy as to destroy it.

The resulting compromise was that, Article I, Section 2, of the Constitution, setting forth the organization of Congress, provides that representation and direct taxes shall be apportioned among the several states on the basis of numbers, which shall be determined by counting slaves at three-fifths of their number.

Later, in Article I, Section 9, placing limitations on the power of Congress, and alongside other tax restrictions, is the provision against a capitation or other direct tax except in proportion to the census.

Madison, speaking before the Virginia ratifying convention, and Abraham Baldwin of Georgia, also a member of the Constitutional Convention, speaking in the first Congress, both asserted, that the purpose of the provisions in the Constitution limiting any tax on importation of slaves to ten dollars per head, and that requiring direct taxes to be apportioned to the census,

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14. Art. I, sec. 8.

15. Art. I, sec. 9.

16. Brant, *Storm Over the Constitution* (1936) 172 et seq.

was to prevent Congress from laying such taxes on slaves as to compel emancipation.<sup>17</sup>

Madison, in the Virginia convention, addressing himself to the matter of Congress' power to prohibit slave importation after 1808, said, "A tax may be laid in the meantime, but it is limited, otherwise Congress might lay such a tax as would amount to a prohibition."<sup>18</sup>

The attitude of the first Congress, many of whose members were framers of the Constitution, is quite significant.

A revenue bill was before the House on May 13, 1789, and a motion was made to insert a provision imposing a tax of ten dollars on each slave imported, the proponent of the motion expressing sorrow that Congress could not prohibit the trade altogether prior to 1808, but "hoped such a duty as he moved would prevent, in some degree, this irrational and inhuman traffic."<sup>19</sup>

Roger Sherman (Connecticut), a framer, in addressing the Congress, approved the object of the motion—to discourage slavery—but objected to it being included in a revenue bill. He said the bill itself was one to raise revenue—the purpose of the motion was to correct a moral evil—and insisted it should be taken up as a separate bill on the "principle of humanity and policy."<sup>20</sup>

Madison agreed with Sherman that a tax levied to correct a moral evil should not be in a bill whose sole stated purpose was to raise revenue, and favored "accommodating the title to the contents."<sup>21</sup>

It appears to have been taken for granted by the framers of the Constitution that Congress could employ the power of taxation for purposes totally unrelated to the raising of revenue. That it could be used in the regulation or destruction of commerce, the protective tariff being not to raise revenue but to build up or bring profit to local manufacture; the regulation of morals;<sup>22</sup> and absent special restriction, to destroy the moral evil of slavery within the states.<sup>23</sup> In that connection it is to be

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17. 1 *Annals of Congress* (1834) 1243 (Feb. 12, 1790).

18. 3 Elliott, *Debates on the Federal Constitution* (2d. ed. 1901) 453.

19. 1 *Annals of Congress* (1834) 349. Motion introduced by Representative Parker of Virginia.

20. *Id.* at 351.

21. *Id.* at 352-355.

22. Brant, *Storm Over the Constitution* (1936) 169, 170; 5 Elliot, *Debates on the Federal Constitution* (2d ed. 1901) 447.

23. See Brant, *Storm Over the Constitution* (1936) Ch. 10, for a fuller discussion of the debates on the taxing power.

observed that slavery in the states, like the manufacture and sale of commodities in the states, like child labor in the states, like the production of coal within the states, or like agricultural production within the states, is a matter peculiarly within the police power of the states and as clearly beyond any power of direct regulatory control by Congress. The power was used for other than revenue purposes many times prior to the Child Labor Tax Case in 1922.<sup>24</sup> Since that time it has been much more narrowly restricted. In the last term, however, the validation of taxes involved in the National Fire Arms case<sup>25</sup> and in the Social Security cases<sup>26</sup> seems to indicate a possible reaffirmation of the earlier conception. Mr. Justice Cardozo quite appropriately reminded us recently that "our colonial forbears knew more about ways of taxing than some of their descendants seem to be willing to concede."<sup>27</sup>

The Constitution in general terms confers upon Congress power to regulate commerce with foreign nations and among the several states, and with the Indian tribes.<sup>28</sup>

It is abundantly clear from a study of the debates in the Constitutional Convention that the framers thought a complete and plenary power over commerce and trade was being bestowed upon Congress, which included a power to control all the incidents of interstate and foreign commerce in any manner that might be deemed for the best interests of all. By no means was the power thought to be restricted to the control of transportation across state lines.

Madison, for instance, asserted on the floor of the Convention that he was "more and more convinced that the regulation of all commerce was in its nature indivisible and ought to be wholly under one authority."<sup>29</sup>

When the power of Congress to establish mercantile monopolies was raised in the Convention, James Wilson asserted, "they

24. *Bailey v. Drexel Furniture Co.* (1922) 259 U. S. 20, 42 S. Ct. 449, 66 L. ed. 817.

25. *Sonzinsky v. United States* (1937) 300 U. S.—, 57 S. Ct. 554, 81 L. ed.—.

26. *Steward Machine Co. v. Davis* (1937) 300 U. S.—, 57 S. Ct. 883, 81 L. ed.—; *Helvering v. Davis* (1937) 300 U. S.—, 57 S. Ct. 904, 81 L. ed.—.

27. *Steward Machine Co. v. Davis* (1937) 300 U. S.—, 57 S. Ct. 883, 887, 81 L. ed.—.

28. Art. I, sec. 8.

29. 5 Elliot, *Debates on the Federal Constitution* (2d ed. 1901) 548.



are already included in the power to regulate trade and commerce."<sup>30</sup>

Elbridge Gerry of Massachusetts refused to sign the Constitution on the ground, among others, that "under the power over commerce, monopolies may be established."<sup>31</sup>

Space does not permit the multiplication of incidents or quotations, but until recent years the commerce power of Congress had enjoyed a continuously expanding use without serious interference by the Court.

The one great pronouncement on the commerce power, to which practically all subsequent cases refer, is the opinion of Mr. Chief Justice Marshall in *Gibbons v. Ogden*<sup>32</sup> in 1824. In that great case Chief Justice Marshall asserted that the power to regulate interstate and foreign commerce comprehends all trade and commerce except that which is "completely internal to a state" and "which does not extend to or affect other states." Continuing, he said the power to regulate commerce is a plenary power, and,

like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution \* \* \*. The power over commerce \* \* \* is vested in Congress as absolutely as it would be in a single government, [one in which there are no states] having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.<sup>33</sup>

This attitude of the great Chief Justice with respect to the commerce power was merely a reflection of his broader view concerning governmental powers generally, likewise expressed in other great cases like *McCulloch v. Maryland*<sup>34</sup> and in his memorable speech before the ratifying convention of Virginia.<sup>35</sup>

James Wilson of Pennsylvania, one of the outstanding figures of the Constitutional Convention and later a Justice of the United States Supreme Court, gave expression to a similar point of view, with apparent approval of the whole Convention, when he asserted on the Convention floor,

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30. Id. at 544.

31. Id. at 553.

32. (1824) 9 Wheat. 1, 6 L. ed. 23.

33. (1824) 9 Wheat. 1, 196, 197, 6 L. ed. 23, 70.

34. (1819) 4 Wheat. 316, 4 L. ed. 579.

35. 5 Elliot, *Debates on the Federal Constitution* (2d ed. 1901) 222-236.

Whatever object of government is confined in its nature and operation to a particular State ought to be subject to the separate government of the States; but whatever in its nature and operation extends beyond a particular State, ought to be comprehended within the federal jurisdiction.<sup>36</sup>

That same attitude expressed by Marshall with respect to the commerce power continued practically unbroken for almost a hundred years. Little by little and step by step the power of Congress was exercised to control more and more intimately various economic and social conditions whose relationship to interstate commerce brought them within the scope of this Congressional authority. During this period it came to be recognized that the power of Congress thus to regulate included the power to foster and protect.<sup>37</sup> Furthermore, matters not interstate in themselves,<sup>38</sup> or not commerce in the accepted sense,<sup>39</sup> were held to be within the scope of Congressional action if necessary to prevent obstruction or restriction of interstate commerce, or if so related to that which is interstate as to necessitate the extension of federal control thereto in order to protect or make effective the regulation of that which is interstate.<sup>40</sup> It was applied in an important way to regulate the relation between employer and employee engaged in interstate commerce, and upheld by a unanimous Supreme Court in the *Second Employers Liability Cases* in 1912.<sup>41</sup>

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36. 3 Farrand, *Records of the Federal Convention* (1911) 139, 140.

37. *Second Employers' Liability Cases* (1912) 223 U. S. 1, 32 S. Ct. 169, 56 L. ed. 327.

38. *Loewe v. Lawlor* (1908) 208 U. S. 274, 28 S. Ct. 301, 52 L. ed. 488; *United States v. Patten* (1913) 226 U. S. 525, 33 S. Ct. 141, 57 L. ed. 333; *Duplex Company v. Deering* (1921) 254 U. S. 443, 41 S. Ct. 172, 65 L. ed. 349; *Coronado Coal Co. v. United Mine Workers of America* (1925) 268 U. S. 295, 45 S. Ct. 551, 69 L. ed. 963; *United States v. Brims* (1926) 272 U. S. 549, 47 S. Ct. 169, 71 L. ed. 403; *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n* (1927) 274 U. S. 37, 47 S. Ct. 522, 71 L. ed. 916; *Standard Oil Co. (Indiana) v. United States* (1931) 283 U. S. 163, 51 S. Ct. 421, 75 L. ed. 926; *Local 167, International Brotherhood of Teamsters v. United States* (1934) 291 U. S. 293, 54 S. Ct. 396, 78 L. ed. 804.

39. *United States v. Fergar* (1919) 250 U. S. 199, 39 S. Ct. 445, 63 L. ed. 936.

40. *Southern Railway Co. v. United States* (1911) 222 U. S. 20, 32 S. Ct. 2, 56 L. ed. 72; *Second Employers' Liability Cases* (1912) 223 U. S. 1, 32 S. Ct. 169, 56 L. ed. 327; *Interstate Commerce Commission v. Goodrich Transportation Co.* (1912) 224 U. S. 194, 32 S. Ct. 436, 56 L. ed. 729; *Thornton v. United States* (1926) 271 U. S. 414, 46 S. Ct. 585, 70 L. ed. 1013; *United States v. New York Central Ry. Co.* (1926) 272 U. S. 457, 47 S. Ct. 130, 71 L. ed. 350.

41. 223 U. S. 1, 32 S. Ct. 169, 56 L. ed. 327.

Likewise, the Court sustained, as regulations of interstate commerce, acts of Congress which prohibited transportation of numerous commodities across state lines. The act of Congress outlawing lottery tickets from the channels of interstate commerce;<sup>42</sup> the Pure Food and Drug Act prohibiting transportation of impure or misbranded products in interstate commerce;<sup>43</sup> the White Slave Act prohibiting transportation of women and girls across state lines for immoral purposes<sup>44</sup>—all were upheld, and all were directed to the suppression of moral or economic evils in the states, in which the interstate transportation was a factor.<sup>45</sup>

Prior to those decisions certain states having local prohibition had attempted to exclude from their boundaries intoxicating liquor being shipped in from other states, or to prohibit its sale when brought in, in order to make their own prohibition laws effective.

In the since famous cases of *Bowman v. Railway*<sup>46</sup> in 1888 and *Leisy v. Hardin*<sup>47</sup> in 1890, the Supreme Court of the United States held that intoxicating liquor was a legitimate article of interstate commerce and that a state's attempt to keep the liquor out or to prevent its sale by the importer in the original package violated the commerce clause of the Constitution as a regulation of and burden upon interstate commerce, the regulation of which the Constitution confides to Congress.

In 1916, acting in reliance upon the cases just mentioned sustaining prohibition of transportation as within the power to regulate, Congress passed its first Child Labor Law prohibiting transportation in interstate commerce of child-made goods. By a division of five to four, the Supreme Court denied that Congress had any such power, and asserted that such a prohibition applied to the products of child labor was not a regulation of interstate commerce.<sup>48</sup> The basis of the purported distinction

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42. *Champion v. Ames* (1903) 188 U. S. 321, 23 S. Ct. 321, 47 L. ed. 492.

43. *Hipolite Egg Co. v. United States* (1911) 220 U. S. 45, 31 S. Ct. 364, 55 L. ed. 364.

44. *Hoke v. United States* (1913) 227 U. S. 308, 33 S. Ct. 281, 57 L. ed. 523; *Caminetti v. United States* (1917) 242 U. S. 470, 37 S. Ct. 192, 61 L. ed. 442.

45. Cf. *Brooks v. United States* (1925) 267 U. S. 432, 45 S. Ct. 345, 69 L. ed. 699.

46. *Bowman v. Chicago & N. W. Ry. Co.* (1888) 125 U. S. 465, 8 S. Ct. 689, 31 L. ed. 700.

47. 135 U. S. 100, 10 S. Ct. 681, 34 L. ed. 128.

48. *Hammer v. Dagenhart* (1918) 247 U. S. 251, 38 S. Ct. 529, 62 L. ed. 1101.

from the Lottery, White Slave, and Pure Food and Drugs cases was, to say the least, confusing. In those cases the purpose was said to be to protect from evil the states into which shipment was made, the interstate transportation being necessary to the evil, and that was held to constitute a regulation of interstate commerce within the power of Congress. In the Child Labor case, completely ignoring the economic evil produced in the state into which the goods were shipped, the Court said the purpose was solely to alleviate evil in the state from which the shipment was made and which preceded the transportation. This was held not to be a regulation of interstate commerce, and thus invalid. The distinction has been criticised by many, as it was by the dissenting judges, as being neither accurate in fact nor sound in theory. It stands today, however, after nineteen years as good law of the Supreme Court, though several cases subsequently decided seem to destroy completely the basis on which it purported to stand.<sup>49</sup> Thus we have the paradoxical spectacle of the states being without power to prohibit the importation, as was decided in the case of liquor just mentioned, because it *is* a regulation of interstate commerce, the national government lacking the power because it is *not* a regulation of interstate commerce. The niceties of reasoning by which the majority of the Court have purported to distinguish this case from others that have gone before, as well as some more recently determined, scarcely satisfy the Court itself and have left the average student unconvinced that the earlier doctrines of Marshall and of the founding fathers have not been departed from.

The result, of course, is our now thirteen year old attempt to adopt a Child Labor Amendment, the ultimate success of which is, to say the least, somewhat doubtful.

It would expend this article to undue length to attempt a complete and detailed review of all the more recent cases further

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49. Brooks v. United States (1925) 267 U. S. 432, 45 S. Ct. 345, 69 L. ed. 699; Gooch v. United States (1936) 297 U. S. 124, 57 S. Ct. 395, 80 L. ed. 522; Bailey v. United States (C. C. A. 10, 1934) 74 F. (2d) 451. Cf. In re Rahrer (1891) 140 U. S. 545, 11 S. Ct. 865, 35 L. ed. 572; Clark Distilling Co. v. Western Maryland Ry. Co. (1917) 242 U. S. 311, 37 S. Ct. 180, 61 L. ed. 326; United States v. Hill (1919) 248 U. S. 420, 39 S. Ct. 143, 63 L. ed. 337; Whitfield v. Ohio (1936) 297 U. S. 431, 56 S. Ct. 532, 80 L. ed. 778; Kentucky Whip & Collar Co. v. Illinois Central R. Co. (1937) 299 U. S. 334, 57 S. Ct. 277, 81 L. ed.—. See Corwin, The Power of Congress to Prohibit Commerce (1933) 18 Corn. L. Q. 477.

restricting the commerce power of Congress, though it may be noted in passing that in the *Railroad Retirement* case<sup>50</sup> of 1935, the Court again by a five to four division, and after a holding of invalidity on due process grounds, seemed to go out of its way to assert that no plan of compulsory retirement for employees in interstate commerce, involving the railways pensioning those retired, however reasonable in its provisions, could be a regulation of the interstate commerce in which those employees and their employers are engaged, so as to be within the power of Congress to enact.<sup>51</sup> The attitude of the five members of the Court making up the majority in that case, was quite obviously out of accord with that set forth in the unanimous opinion twenty-three years earlier in the *Second Employers' Liability Cases* referred to above.<sup>52</sup>

Among other recent cases that have appeared to narrow the previous application of the commerce power may be mentioned the *Schechter* case<sup>53</sup> involving the National Industrial Recovery Act, the invalidity of which was unanimously asserted because of too broad a delegation of power to the executive. The opinion is commonly thought to have gone beyond what was necessary to a decision by attempting to set up a direct and indirect test for determining what so affects interstate commerce as to bring it within the regulatory power of Congress.<sup>54</sup> The practical weakness of any such test and its restricting effect upon the power of Congress was clearly brought out in the dissent in the *Guffey Coal* case<sup>55</sup> in which the Court again so sharply divided. The use of any such test was completely abandoned in the recent *Railroad Labor*<sup>56</sup> and *Wagner Labor Relations*<sup>57</sup> cases which are

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50. *Railroad Retirement Board v. Alton R. Co.* (1935) 295 U. S. 330, 55 S. Ct. 753, 79 L. ed. 1468.

51. See Powell, *Commerce, Pensions, and Codes* (1935) 49 Harv. L. Rev. 1, 193.

52. (1912) 223 U. S. 1, 32 S. Ct. 169, 56 L. ed. 327.

53. *A. L. A. Schechter Poultry Corp. v. United States* (1935) 295 U. S. 495, 55 S. Ct. 837, 79 L. ed. 1570.

54. Powell, *Commerce, Pensions, and Codes* (1935) 49 Harv. L. Rev. 1, 193.

55. *Carter v. Carter Coal Co.* (1936) 298 U. S. 238, 56 S. Ct. 855, 80 L. ed. 1160.

56. *Virginian Ry. Co. v. System Federation No. 40* (1937) 300 U. S.—, 57 S. Ct. 592, 81 L. ed.—.

57. *National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937) 300 U. S.—, 57 S. Ct. 615, 81 L. ed.—; *National Labor Relations Board v. Fruehauf Trailer Co.* (1937) 300 U. S.—, 57 S. Ct. 642, 81 L. ed.—; *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.* (1937) 300 U. S.—, 57 S. Ct. 645, 81 L. ed.—.

fundamentally contrary to the Guffey Coal case, the *Railroad Retirement* case, and that part of the N. R. A. case just mentioned.

The general welfare clause of the Constitution, providing that Congress shall have power to lay and collect taxes to provide for the general welfare of the United States, has been the basis of innumerable acts of Congress appropriating public funds for an ever widening list of purposes, many of which manifestly were not directly contemplated by the framers of the Constitution, but clearly within the spirit and purpose which prompted the original formulation of the clause.

Without purporting authoritatively to define the meaning or limits of this provision of the Constitution, all departments of the government have uniformly supported a steadily expanding use of the power to appropriate for the general welfare. Practically all undertakings of the Department of Agriculture, as well as the creation of the Department itself, together with various schemes of federal aid to the states, always upon specified conditions, have been based upon this provision of the Constitution.<sup>58</sup> It remained, however, for the year 1936 to give us an express Supreme Court determination of the meaning of that clause in a decision that has perhaps received more adverse criticism than any since the ill-fated *Dred Scott* decision<sup>59</sup> just prior to the Civil War.

For the first time, the Court authoritatively decided that the doctrine early asserted by Hamilton and Story<sup>60</sup> set forth the proper interpretation. By this doctrine it was asserted that the general welfare clause confers upon Congress a power separate and distinct from the later enumerated powers, on the basis of which Congress has a substantive power to tax and to appropriate, limited only by the requirement that such powers shall be exercised to provide for the general welfare of the United States as distinguished from local welfare. Without doubt this was the conception put upon the clause by the framers of the Constitution. This, at first glance, appeared to be a very far-reaching and important determination, but the application of that doc-

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58. 1 Willoughby, *Constitutional Law of the United States* (2d ed. 1929) 97 et seq.; Brant, *Storm Over the Constitution* (1936) Ch. 9.

59. *Dred Scott v. Sanford* (1857) 19 How. 393, 15 L. ed. 691.

60. 1 Story, *Commentaries on the Constitution* (3d ed. 1858) Ch. 14, p. 639 et seq.

trine by the Court majority to the processing taxes involved in the famous A. A. A. case<sup>61</sup> largely destroyed its meaning. It seemed in reality to repudiate this Hamilton-Story doctrine and to give full application to that originally advocated by Madison,<sup>62</sup> that the general welfare clause, in effect, had no purpose but to occupy space, and that the power to tax and spend is directly limited to what is incident to the execution of the other enumerated powers of Congress—a power which Congress clearly would have had without the general welfare clause.

The power of Congress to levy an excise tax upon the processing of agricultural products was not questioned. Neither was the power to appropriate money for the benefit of agriculture. But the incidental power of exacting a promise to comply with the plan of acreage reduction in return for benefit payments, deemed necessary to make the broader plan really effective in behalf of the general welfare, was held to constitute an invasion of state rights and to invalidate the whole scheme.

As to the power to lay and collect taxes to provide for the general welfare, just as in the case of all other enumerated powers, the majority admitted that the Constitutional provision confers a substantive power, not limited to being exercised as incidental to the later enumerated powers, as was contended for by attorneys for the processors.

For the preceding 117 years, since the opinion of Mr. Chief Justice Marshall in the famous case of *McCulloch v. Maryland*,<sup>63</sup> it had been uniformly recognized that all enumerated powers carry with them such incidental powers as may be necessary and proper to make the granted powers effective. That doctrine, never previously departed from, had been, within a year, reasserted in its full vigor by the Court in a most far-reaching opinion in the famous Gold cases.<sup>64</sup>

The effect of Mr. Justice Roberts' majority opinion in the A. A. A. case, by denying that the power involved carries with it the reasonable incidents necessary to make the granted power

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61. *United States v. Butler* (1936) 297 U. S. 1, 56 S. Ct. 312, 80 L. ed. 477.

62. 1 Story, *Commentaries on the Constitution* (3d ed. 1858) Ch. 14.

63. (1819) 4 Wheat. 316, 4 L. ed. 579.

64. *Norman v. Baltimore & Ohio R. Co.* (1935) 294 U. S. 240, 55 S. Ct. 407, 79 L. ed. 885; *Nortz v. United States* (1935) 294 U. S. 317, 55 S. Ct. 428, 79 L. ed. 907; *Perry v. United States* (1935) 294 U. S. 330, 55 S. Ct. 432, 79 L. ed. 912.

effective, was to repudiate completely his own opening pronouncement that Hamilton and Story were right in asserting that the general welfare clause does constitute a substantive grant of power not limited by the enumerated powers which follow, and to deny application of Marshall's doctrine of implied powers to this provision of the Constitution.

Thus, while the general welfare clause was given a very broad scope when the Court was formulating its definition, when it came to its actual application it was restricted within extremely narrow limits.<sup>65</sup> As a result, we were to find that at a time when urgent economic problems affecting the nation as a whole and beyond the capacity of the individual states to control were calling for solution, the general welfare clause and the commerce clause, upon which the national government so largely depends for power to act, were being denied effective application by the Court.

It is a matter of no little interest to note in this connection that a proposed amendment to the Constitution was introduced in the last Congress declaring it to be "the intent of the Constitution that the legislative powers therein granted shall not be considered as diminished by any *implied* limitation \* \* \* and shall embrace all powers that reasonably can be implied from the powers \* \* \* expressly set forth."<sup>66</sup> The purpose clearly is twofold—to restore Marshall's doctrine of implied powers established by *McCulloch v. Maryland*, and also to re-establish his doctrine that powers granted may, as he said in the case of the commerce power, "be exercised to its utmost extent, and acknowledge no limitations other than are prescribed in the Constitution."<sup>67</sup> The effect of adopting such an amendment would have been to destroy the doctrine of implied limitations developed with and since the Child Labor cases, and require that those cases and the A. A. A. case, among others, be reversed.

One other field of controversy should be mentioned in this general survey, and that is the status of the due process of law

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65. For a more complete discussion of this problem by the present writer, see Howard, *The Supreme Court, the Constitution, and the A. A. A.* (1937) 25 Ky. L. J. 291.

66. Introduced by Representative Eicher of Iowa, February 25, 1937. H. J. Res. 248. Dig. Pub. Gen. Bills, 75th Cong., 1st. Sess., No. 5, p. 209; St. Louis Star-Times, March 3, 1937, p. 4: 1.

67. *Gibbons v. Ogden* (1824) 9 Wheat. 1, 196, 6 L. ed. 23, 70.



clauses contained in the Fifth and Fourteenth Amendments. The one restricts the power of the national government, the other that of the states, and both provide that no person shall be deprived of life, liberty or property without due process of law. The clause has been said by the Court to mean the same as its English counterpart—law of the land—in Magna Carta, from which it was derived. That English counterpart had, and still has, the sole purpose of guaranteeing proper methods of procedure. Such, also, has generally been conceded to have been the purpose and original meaning of the due process clause in the Amendments to our Constitution—the one adopted in 1791 and the other in 1868. But step by step in recent years the scope of application of the due process provision has been broadened by judicial decision until it no longer even remotely resembles its English counterpart.

In 1897, more than a hundred years after the adoption of the Fourteenth and thirty years after the Fifth Amendment, the Supreme Court, for the first time, broadened the term “liberty” to include liberty of contract.<sup>68</sup> Still later liberty of contract was held to be a property right,<sup>69</sup> and as such, along with other property rights, guaranteed to corporations as well as to natural persons.<sup>70</sup>

By this process of gradual judicial expansion, the due process clause has become the basis upon which the courts pass upon the merits of all legislative enactments, state and national, holding them valid or invalid by nothing more definite than the general standard of reasonableness.

When social and economic legislation involving controversial matters of policy is under consideration, whether one determines a measure to be a reasonable exercise of a state’s police power, for instance, or an arbitrary and unreasonable interference with private rights, not infrequently depends upon the social and economic outlook of the person (in this case the judge) making the determination.

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68. *Allgeyer v. Louisiana* (1897) 165 U. S. 578, 17 S. Ct. 427, 41 L. ed. 832.

69. *Holden v. Hardy* (1898) 169 U. S. 366, 18 S. Ct. 383, 42 L. ed. 780.

70. *Covington & Louisville Turnpike Road Co. v. Sandford* (1896) 164 U. S. 578, 17 S. Ct. 198, 41 L. ed. 560; *Kentucky Finance Corp. v. Paramount Auto Exchange* (1923) 262 U. S. 544, 43 S. Ct. 636, 67 L. ed. 1112; *Quaker City Cab. Co. v. Pennsylvania* (1928) 277 U. S. 389, 48 S. Ct. 553, 72 L. ed. 927. See 3 Willoughby, *Constitutional Law of the United States* (2d ed. 1929) Ch. 91.

Such indefinite standards as due process of law, like that of the general welfare clause involved in the A. A. A. case, having no certain and definite meaning, must be viewed as highly flexible and readily adaptable to changing conditions and needs, and a court must use great care in their application lest it substitute its judgment as to the wisdom and desirability of legislative acts for the judgment of the constitutionally created legislative bodies whose function it is to determine matters of policy. It has been in cases involving application of such provisions of the Constitution that the Court has most sharply divided. It is this situation which impelled Mr. Justice Stone in his dissent in the New York Minimum Wage case to charge that the majority were deciding the case on the ground of their "own personal economic predilections"<sup>71</sup> rather than by any compelling force in the Constitution, and again, in the A. A. A. case, to warn the majority against what he described as government by "judicial fiat," and the employment of a "tortured construction of the Constitution" to arrive at a conclusion in harmony with ideas of desirability entertained by a majority in sympathy with the notion that it is "the business of Courts to sit in judgment on the wisdom of legislative action."<sup>72</sup>

Further he asserted that the "courts are not the only agency of government that must be assumed to have the capacity to govern," and, like Mr. Justice Brandeis in an earlier dissent, thought the Court was setting itself up as a *super-legislature*,<sup>73</sup> exercising a veto power upon acts of Congress and the state legislatures alike. It was Mr. Justice Brandeis, in his memorable dissent a few years ago in the *New State Ice Company* case, who caustically warned the Court against erecting its own "prejudices into legal principles."<sup>74</sup>

It was by application of the due process clause of the Fourteenth Amendment that the Supreme Court outlawed several state taxing provisions a few years ago, all of which had long been recognized, judicially and otherwise, as valid methods of

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71. *Morehead v. New York ex rel. Tipaldo* (1936) 298 U. S. 587, 633, 56 S. Ct. 918, 933, 80 L. ed. 1347, 1367.

72. *United States v. Butler* (1936) 297 U. S. 1, 87, 56 S. Ct. 312, 328, 329, 80 L. ed. 477, 499.

73. *New State Ice Co. v. Liebmann* (1932) 285 U. S. 262, 300, 52 S. Ct. 371, 383, 76 L. ed. 747, 766.

74. See 285 U. S. at 311, 52 S. Ct. at 387, 76 L. ed. at 771.

raising revenue. In his dissent in the leading case of *Baldwin v. Missouri*, Mr. Justice Holmes gave lucid expression to what he considered a serious error by the Court majority.

I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the states. As the decisions now stand I see hardly any limit but the sky to the invalidating of those rights if they happen to strike the majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions.<sup>75</sup>

By the enlargement of its own power under the flexible and indefinite provisions of the Constitution, the Supreme Court narrowed the field of permissible state and national legislation at a time when economic necessity was demanding government action over a broader field than ever before. As a result of reading into the due process clause a meaning not originally accorded to it and clearly foreign to its English counterpart from which it was derived, the Court, by the end of its term in June, 1936, had stricken down state laws and acts of Congress until it had become impossible for either government to deal effectively with the major social and economic problems confronting the American people.

An interesting paradox upon the two-fold limitations on governmental power is to be found in two cases decided at its 1935 October term. In the case of *Colgate v. Harvey*,<sup>76</sup> a Vermont tax on interest received from loans made outside the state, while certain low interest loans made within the state went untaxed, was held invalid by a divided court of six to three. The ground of invalidation was violation of that part of the Fourteenth Amendment which says "no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States." Never before had it even been claimed that freedom from taxation was a privilege or immunity of United States citizenship. In turning a deaf ear to the urgent pleas of the three dissenting justices, Mr. Justice Sutherland emphasized

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75. (1930) 281 U. S. 586, 595, 50 S. Ct. 436, 439, 74 L. ed. 1056, 1061. For a discussion of this and similar taxation cases by the present writer, see Howard, *Recent Developments and Tendencies in the Taxation of Intangibles* (1931) 44 U. of Mo. Bull. L. Ser. 5.

76. (1935) 296 U. S. 404, 56 S. Ct. 252, 80 L. ed. 299.

the necessity of denying state power by saying, "As citizens of the United States, we are members of a single great community consisting of all the states united, and not of distinct communities consisting of the states severally."<sup>77</sup>

Exactly twenty days later, in striking down the Agricultural Adjustment Act of Congress as an invasion of state power, the same Court by the same six to three division, and again over a most vigorous dissent, found the nation-wide agricultural emergency to be only the "similarity of local conditions" giving rise to no national problem and neither calling for nor admitting of national control.<sup>78</sup>

By denying national power, as in the A. A. A. case, on the ground that there is no delegation of such power to Congress and on the further ground of an invasion of state rights, although having to do with a nation-wide problem no longer capable of effective control by action of the individual states, and by denying state power on the ground of limitations contained in the Constitution, what has been aptly characterized as a no-man's land in government was being marked by an ever widening boundary.

During this period of increasing limitations upon governmental power, the Supreme Court ruled on certain problems from the standpoint of both state and national action. Perhaps the best example is that of minimum wage legislation. In 1923, by a five to three division, Mr. Justice Brandeis not sitting, the power of Congress to so legislate for the District of Columbia was denied as a violation of due process, in an opinion that has received nothing but the most severe criticism.<sup>79</sup> It is of no little interest to note that an opposite result was twice prevented by mere accident. The first case which might have settled this problem was that of *Stettler v. O'Hara*,<sup>80</sup> coming up from the state of Oregon in 1917. For certain personal reasons Mr. Justice Brandeis thought he ought not to sit in the case. The result was an even division, four to four, affirming the Supreme Court of Oregon in upholding the statute, but no opinion was written and it was

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77. See 296 U. S. at 426, 56 S. Ct. at 257, 80 L. ed. at 309.

78. *United States v. Butler* (1936) 297 U. S. 1, 74, 75, 56 S. Ct. 312, 323, 80 L. ed. 477, 493.

79. *Adkins v. Children's Hospital* (1923) 261 U. S. 525, 43 S. Ct. 394, 67 L. ed. 735.

80. (1917) 243 U. S. 629, 37 S. Ct. 475, 61 L. ed. 937.

not regarded as a precedent for later cases. Had Mr. Justice Brandeis felt free to participate, the decision would have been five to four upholding validity and a precedent would have been set.

In 1921, the Minimum Wage Act of Congress for the District of Columbia was upheld by the Court of Appeals of the District, Justice Robb being absent because of illness. Upon recovery, and being opposed to validity, he sought a rehearing which was finally granted, though a rehearing had been denied by the court as constituted during his illness. The result was a two-year delay in reaching the Supreme Court. In the meantime the personnel of the Court had changed from what clearly appeared to be a majority favorable, to a majority opposed, to its validity.<sup>81</sup> Thus a second accident intervened to establish a doctrine of unconstitutionality profoundly affecting the life of an entire nation.<sup>82</sup> Had Justice Robb of the Court of Appeals of the District of Columbia been able to participate in the first determination of the case, the course of constitutional development would have been fundamentally different, at least for the next fourteen years.

In June, 1936, by a five to four division of the United States Supreme Court, the power of the State of New York to regulate wages of women employees was denied<sup>83</sup> as a violation of the due process clause of the Fourteenth Amendment, in reliance on the precedent established by the District of Columbia case.

Another interesting paradox in Supreme Court adjudication is to be found by comparing this New York Minimum Wage decision with that in the *A. A. A.* case decided at the same term. In the latter case the majority opinion found unconstitutional coercion in the offer to the farmer of a contract to reduce his acreage in return for a rental or benefit payment under the Agricultural Adjustment Act, which the Court admitted he was at liberty to accept or reject as might appear to his advantage. In the former case, however, the same Court, by substantially the same division, appeared to believe that an unemployed penniless widow with

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81. For an excellent discussion of this whole matter, see Powell, *The Judiciality of Minimum-Wage Legislation* (1924) 37 *Harv. L. Rev.* 545.

82. *Adkins v. Children's Hospital* (1923) 261 U. S. 525, 43 S. Ct. 394, 67 L. ed. 785.

83. *Morehead v. New York ex rel. Tipaldo* (1936) 298 U. S. 587, 56 S. Ct. 918, 80 L. ed. 1347.

dependent children would stand on a plane of free bargaining equality with the employment manager of a large corporation and that their liberty of contract with respect to wages could not be regulated by an exercise of the police power of the state. The due process clause, according to five members of the Court, required that that widow remain free to bargain for as low a wage as she might see fit.

As asserted by Mr. Justice Stone in his dissent, "there is grim irony in speaking of the freedom of contract of those who, because of their economic necessities, give their service for less than is needful to keep body and soul together."<sup>84</sup>

Equally striking, perhaps, by way of contrast with the finding of coercion in the A. A. A. case is the Court's earlier decision that a state legislature could not be permitted to interfere with the *free bargaining equality* of the two parties to a labor contract, when the employer, by his superior economic position, was able to induce the employee to sign an agreement not to join, or continue membership in, a labor union as the price of obtaining employment.<sup>85</sup>

During the last session of Congress, Senator Borah introduced a proposal to amend the Constitution by restoring the due process clause of the Fourteenth Amendment to its intended and original purpose to guarantee proper methods of procedure—the purpose which it did serve before being given its present enlarged meaning by the process of construction at the hands of the Supreme Court. Thus the man who is widely regarded as the most ardent and sincere defender of the Supreme Court and the Constitution in public life today finds it necessary to amend the Constitution to remove an undesirable and wholly unnecessary construction which the Supreme Court majority has engrafted upon our fundamental law. Further, he asserted, he would like to restore the word "person" as used in the Amendment to its original meaning of natural person and remove the Court's application of it to corporations, but he doubted the possibility of securing approval for that change.<sup>86</sup>

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84. See 298 U. S. at 632, 56 S. Ct. at 932, 80 L. ed. at 1366.

85. *Coppage v. Kansas* (1915) 236 U. S. 1, 35 S. Ct. 240, 59 L. ed. 441. Justices Van Devanter and McReynolds, and Mr. Chief Justice Hughes were on the Court at that time. The latter, then an associate justice, concurred in a dissenting opinion.

86. Introduced February 25, 1937. S. J. Res. 92, Dig. Pub. Gen. Bills, 75th Cong., 1st. Sess., No. 4, p. 52; *New York Times*, Feb. 26, 1937, p. 1: 8 and p. 4: 4, 5, 6.

A principal suggested reason for this proposed amendment was to remove from the Court's jurisdiction such state enactments as the minimum wage legislation just referred to. The proposal did not include application to the due process clause of the Fifth Amendment from which that in the Fourteenth was copied, so that, had it been submitted and ratified, the Court-created constitutional obstacles to similar legislation by Congress would not have been removed.

In all of this discussion one must bear in mind what the Court habitually asserts, that a strong presumption of constitutionality is to be indulged, and a legislative act is to be held unconstitutional only when the Court is inevitably impelled to that conclusion by the clear and controlling provisions of the Constitution—only when the measure is clearly invalid beyond all reasonable doubt is it to be set aside by the Court. According to the rather naive suggestion of Mr. Justice Roberts in the *A. A. A.* case,

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.<sup>87</sup>

This he followed with the more reasonable assertion that,

When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to Congress.<sup>88</sup>

Yet when the Justices, all presumed to be equally learned and equally devoted to what they conceive to be the basic principles of our Constitution, divide five to four, or six to three, and those who dissent charge that the majority are assuming the function

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87. *United States v. Butler* (1936) 297 U. S. 1, 62, 56 S. Ct. 312, 318, 80 L. ed. 477, 486. Contrast with this the statement of Mr. Justice McKenna in *Hall v. Geiger-Jones Co.* (1917) 242 U. S. 539, 548, 37 S. Ct. 217, 220, 61 L. ed. 480, 488, referring to the police power of the states: "We get no accurate idea of its limitations by opposing to it the declarations of the Fourteenth Amendment that no person shall be deprived of his life, liberty, or property without due process of law, or denied the equal protection of the laws. \* \* \* A stricter inquiry is necessary and we must consider what it is of life, liberty, and property that the Constitution protects."

88. *United States v. Butler* (1936) 297 U. S. 1, 67, 56 S. Ct. 312, 320, 80 L. ed. 477, 489.

of a super-legislature, and substituting their judgment as to wisdom and desirability for that of the body in which the Constitution has reposed the policy-forming function, the ordinary citizen is left confused. The introduction of the Borah amendment is a practical admission that the charge of the dissenting minority in these cases is not entirely unfounded.

Space does not permit a detailed review of all decisions in which legislative enactments have been held unconstitutional in the past few years, but it appears abundantly clear that both Congress and the state legislatures found it increasingly difficult to cope with present day needs under the Constitution as interpreted and applied during that period by the Supreme Court majority.

Whether the measures invalidated, both state and national, were wise or desirable from the standpoint of social and economic policy, or the opposite, is of no concern to the present discussion. Suffice it to say that the constitutionally created legislative bodies attempted to deal with problems considered by them to be exigent, and power was denied, not because of any clear prohibition in the Constitution, but because of considerations of policy and desirability grounded on such indefinite provisions as due process and general welfare.

It is, of course, familiar history that only two acts of Congress were held invalid prior to the Civil War. One of these decisions was of a technical nature and of minor importance in itself,<sup>89</sup> and the other, the *Dred Scott*<sup>90</sup> decision, helped in a large way to precipitate that tragic struggle. From an average of less than one act of Congress invalidated every three years up to 1920, and with a total for our national history to the present of perhaps not more than about sixteen or seventeen major reversals of Congress with respect to matters of social and economic importance to the whole people, eight such major reversals occurred in the period between January, 1935, and June, 1936.<sup>91</sup> Thus the

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89. *Marbury v. Madison* (1803) 1 Cranch 137, 2 L. ed. 60.

90. *Dred Scott v. Sanford* (1857) 19 How. 393, 15 L. ed. 691.

91. Perhaps no general agreement as to what constitutes such major reversals could be arrived at, but the following cases occur to the writer as proper to be included. The United States News for February 15, 1937, in a front page editorial, fixes the number at sixteen but does not list the cases. *Dred Scott v. Sanford* (1857) 19 How. 393, 15 L. ed. 691 (*Missouri Compromise*); *Hepburn v. Griswold* (1870) 8 Wall. 603, 19 L. ed. 513 (*legal tender*); *Pollock v. Farmers' Loan & Trust Co.* (1895) 157 U. S. 429,



intense and widespread interest that has been manifested in this problem during the past year or two is amply accounted for.

A brief resume of what has happened in recent years at the hands of the Supreme Court majority presents highly interesting data for study. If we go back to the two Child Labor cases<sup>92</sup> of 1918 and 1922, and the first minimum wage decision<sup>93</sup> of 1923, we find the background for the more recent adjudications. If, however, we restrict our view to the more recent past and look at that part of the N. R. A. decision,<sup>94</sup> the *Railroad Retirement* decision,<sup>95</sup> and the Guffey Coal decision,<sup>96</sup> which narrowed the commerce power; the A. A. A. decision<sup>97</sup> which substantially

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15 S. Ct. 673, 39 L. ed. 759 (income tax); Employers' Liability Cases (1908) 207 U. S. 463, 28 S. Ct. 141, 52 L. ed. 297 (employer-employee relation); *Adair v. United States* (1908) 208 U. S. 161, 28 S. Ct. 277, 52 L. ed. 436 (employer-employee relation); *Hammer v. Dagenhart* (1918) 247 U. S. 251, 38 S. Ct. 529, 62 L. ed. 1101 (child labor commerce case); *Eisner v. Macomber* (1920) 252 U. S. 189, 40 S. Ct. 189, 64 L. ed. 521 (income tax, stock dividends); *Bailey v. Drexel Furniture Co.* (1922) 259 U. S. 20, 42 S. Ct. 449, 66 L. ed. 817 (child labor tax case); *Adkins v. Children's Hospital* (1923) 261 U. S. 525, 43 S. Ct. 394, 67 L. ed. 785 (minimum wage); *Panama Refining Co. v. Ryan* (1935) 293 U. S. 388, 55 S. Ct. 241, 79 L. ed. 446 ("hot oil" case); *Perry v. United States* (1935) 294 U. S. 330, 55 S. Ct. 432, 79 L. ed. 912 (United States Gold Bonds); *Railroad Retirement Board v. Alton R. Co.* (1935) 295 U. S. 330, 55 S. Ct. 758, 79 L. ed. 1468 (railroad pensions); *Schechter Poultry Corporation v. United States* (1935) 295 U. S. 495, 55 S. Ct. 837, 70 L. ed. 1570 (N. R. A. case); *Louisville Joint Stock Land Bank v. Radford* (1935) 295 U. S. 555, 55 S. Ct. 854, 79 L. ed. 1593 (Frazier-Lemke Act); *United States v. Butler* (1936) 297 U. S. 1, 56 S. Ct. 312, 80 L. ed. 477 (A. A. A. case); *Carter v. Carter Coal Co.* (1936) 298 U. S. 238, 56 S. Ct. 855, 80 L. ed. 1160 (Guffey Coal case); *Ashton et al. v. Cameron County Water Improvement District No. 1* (1936) 298 U. S. 513, 56 S. Ct. 892, 80 L. ed. 1309 (municipal bankruptcy).

There may well be some difference of opinion about the matter of including *Eisner v. Macomber* in this list. It did constitute a major reversal of Congressional policy, but its effect may be considered sufficiently unimportant to exclude it from such a classification. It will be observed that eight of the remaining sixteen cases here listed were decided between January 1, 1935 and June 1, 1936. The immediate result of the holding of invalidity in the case of *Perry v. United States* was not of such great significance, but the constitutional question determined is, of course, vitally important.

92. *Hammer v. Dagenhart* (1918) 247 U. S. 251, 38 S. Ct. 529, 62 L. ed. 111; *Bailey v. Drexel Furniture Co.* (1922) 259 U. S. 20, 42 S. Ct. 449, 66 L. ed. 817.

93. *Adkins v. Children's Hospital* (1923) 261 U. S. 525, 43 S. Ct. 394, 67 L. ed. 785.

94. *Schechter Poultry Corp. v. United States* (1935) 295 U. S. 495, 55 S. Ct. 837, 79 L. ed. 1570.

95. *Railroad Retirement Board v. Alton Ry. Co.* (1935) 295 U. S. 330, 55 S. Ct. 758, 79 L. ed. 1468.

96. *Carter v. Carter Coal Co.* (1936) 298 U. S. 238, 56 S. Ct. 855, 80 L. ed. 1160.

97. *United States v. Butler* (1936) 297 U. S. 1, 56 S. Ct. 312, 80 L. ed. 477.

destroyed the general welfare clause; the limitations in the A. A. A. and Guffey Coal cases and the second Child Labor case upon the taxing power; and finally the complete outlawry, though fortunately not for all time, of any attempt, state or national, to regulate wages, by the minimum wage decisions<sup>98</sup> of 1923 and 1936, to mention only the most outstanding adjudications, we get the more immediate background upon which to base hopes and expectations for the future. This was the background which marked our progress up to the close of the Supreme Court term in June of 1936, which had not been altered when, on February 5, 1937, President Roosevelt electrified Congress and the nation with his judiciary reorganization proposal. Upon the basis of this background, one was led to ask what the prospect might be for the future. Several acts of the greatest importance were awaiting determination of their validity by the Court, including the Wagner Labor Relations Act, the Social Security Act, the Public Utility Holding Company Act, many aspects of the T. V. A., and the Securities and Exchange Commission Act. Numerous other problems were urgently calling for some sort of solution, among which might be mentioned the problems of unemployment, slum clearance, reforestation, drouth and flood control, crop insurance, farm tenantry, and other agricultural problems, wage and hour regulations, the elimination of sweatshops and child labor, and no doubt others of equal importance. So far as recently decided cases were to be taken as a guide, there was no effective legal power anywhere, state or national, with which to meet and solve most of these problems. In this modern day, no democratic government can long endure that cannot or will not find effective and constructive means of dealing with the pressing social and economic problems vitally affecting the welfare of the great body of its people.

Careful students of constitutional law have come to understand that the Constitution of the United States means what the judges say it means—and the judges change from time to time.<sup>99</sup>

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98. *Adkins v. Children's Hospital* (1923) 261 U. S. 525, 43 S. Ct. 394, 67 L. ed. 785; *Morehead v. New York ex rel. Tipaldo* (1936) 298 U. S. 587, 56 S. Ct. 918, 80 L. ed. 1347.

99. "We are under a constitution, but the Constitution is what the judges say it is \* \* \*." From a speech by Charles Evans Hughes (now Mr. Chief Justice Hughes) before Elmira Chamber of Commerce, Elmira, N. Y., May 3, 1907. Hughes, *Addresses and Papers* (1908) 139.

With this definition of the Constitution before us, which for all practical purposes must be the accepted one, it clearly appeared that we were faced with one of the major crises in the history of our government. Some type of change to relieve the tension which had developed in the past few years seemed to be a necessity. If the principles of democratic government are to prevail, means of making effective the will of the people as set forth by their chosen representatives must be devised. If present day social and economic ills are to be intelligently and effectively dealt with, legislatures, both state and national, must have greater freedom from judicial restraint in which to experiment with attempted remedies. The national government, it would seem, must be given power to deal with economic problems national in their scope before which both it and the states have found themselves helpless, and which, by their very nature, regardless of constitutional restrictions, are no longer capable of effective solution by action of the individual states. The proper method of achieving that result is a matter giving rise to widely divergent opinions, and should command calm and careful consideration. There were many who had long believed that the only real necessity was to restore powers to Congress which it already rightfully possessed under the Constitution—powers which the framers of that instrument apparently thought Congress would have, powers which the early justices, including Mr. Chief Justice Marshall, interpreted it as having, powers which a minority of the present Supreme Court have all along been able to find in the Constitution—but powers which, in recent years, appeared to dwindle away by the process of interpretation at the hands of a recent Supreme Court majority.

The American people are fond of tradition and precedent. Particularly is that true of matters legal or constitutional. In that field no other sources of authority are the objects of such universal veneration and respect as the intentions of the framers of our Constitution and the opinions of Mr. Chief Justice Marshall. Yet it would be extremely difficult for anyone to study carefully the debates in the Constitutional Convention and read with care the principal opinions of Mr. Chief Justice Marshall, such as *McCulloch v. Maryland*<sup>100</sup> and *Gibbons v. Ogden*,<sup>101</sup> with-

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100. (1819) 4 Wheat. 316, 4 L. ed. 579.

101. (1824) 9 Wheat. 1, 6 L. ed. 23.

out finding firmly embedded in both sources those principles of governmental and constitutional power which would sustain all acts of Congress held invalid in recent years by a divided Court. And few, indeed, have been those measures of major importance invalidated by the Court in this controversial period without a sharp division.

If this broader recognition of the powers of Congress were again embraced, and the Court should permanently recede from its extreme interpretation of the due process clauses, thereby curbing its own proneness to use those clauses as the bases for striking down state and national legislation with whose economic policy a majority of its members are not in accord, most of the constitutional uncertainties that tied the hands of state and nation in recent years would no longer seriously obstruct the legislative path.

Prior to March 29 of this year, however, there certainly were no indications that the Court was likely to steer its decisions in either of these directions. Assuming, as it seemed one must, that the Court as then constituted would continue to follow the course it had charted in the preceding two years, all persons interested in public affairs had come to consider what possible remedies might be available.

Innumerable proposals found their way into the halls of Congress in addition to the President's plan and the subsequently proposed Borah and Eicher amendments mentioned above. Each day the Congress remained in session seemed to bring forth a new crop.

Three general types of remedies were suggested:

First, by Constitutional amendment to enlarge the powers of Congress and modify the Court-created restrictions upon the states.

Second, restrict the power of judicial review.

Third, convert the existing liberal minority of the Court into a majority.

All had and still have their advocates, and all were met by objections.

A brief survey of the major crises of a similar nature in our past history, to observe how they were met, might not be inappropriate.

The *Dred Scott*<sup>102</sup> decision, protecting the institution of slavery, was overturned by the Civil War, followed by the so-called Civil War Amendments.

The first *Legal Tender*<sup>103</sup> decision was reversed within two years by the Court itself,<sup>104</sup> after a change in the size and membership of the Court which has never ceased to excite controversy.<sup>105</sup>

The Income Tax Amendment was necessary to overcome the five to four Supreme Court decision<sup>106</sup> which took away a power previously held to exist.<sup>107</sup> This required a period of eighteen years, fourteen of which were occupied in getting past the Senate by its required two-thirds majority.

Lastly the Child Labor Amendment was submitted to the states thirteen years ago because five members of the Supreme Court narrowed Marshall's and the framers' conception of the commerce clause.

The first minimum Wage decision of 1923 might be listed, which most students confidently expected to be overruled by the Court, which, after a lapse of thirteen years, was reaffirmed by a five to four division, and which was finally repudiated<sup>108</sup> on March 29, 1937, as a result of one Justice changing his vote. All of these decisions, like the recent controversial cases, found the court sharply divided.

The normal method of meeting the need for additional governmental power is to amend the Constitution. To adequately remedy the situation existing at the time under consideration and prevent its recurrence in the future might well require several amendments. It is no easy task to frame amendments to remedy such difficulties, as is evidenced by the fact that approximately one hundred forty amendments were proposed in Congress during its last two sessions, but there was no sufficient agreement to bring a single one to the point of being submitted

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102. *Dred Scott v. Sanford* (1857) 19 How. 393, 15 L. ed. 691.

103. *Hepburn v. Griswold* (1870) 8 Wall. 603, 19 L. ed. 513.

104. *Legal Tender Cases* (1871) 12 Wall. 457, 20 L. ed. 287.

105. See Ratner, *Was the Supreme Court Packed by President Grant?* (1935) 50 Pol. Sci. Q. 343.

106. *Pollock v. Farmers' Loan & Trust Co.* (1895) 157 U. S. 429, 15 S. Ct. 673, 39 L. ed. 436.

107. *Springer v. United States* (1880) 102 U. S. 586, 26 L. ed. 253.

108. *West Coast Hotel Co. v. Parrish* (1937) 300 U. S.—, 57 S. Ct. 578, 81 L. ed. —.

to the states for ratification. Any amendment can be blocked by thirteen states having less than five percent of the population, and the slowness in ratifying the Child Labor Amendment in the face of what appears to be an overwhelming popular demand, is thought by many to mark exclusive reliance on the process of amendment as a doubtful solution. When adopted, of course, each amendment is subject to construction and application by the Court, and some have been so unkind as to suggest that if it now takes an amendment to remove what the Court engrafted upon the due process clause and restore it to its original meaning, history might repeat itself in the case of a new amendment.

To restrict the power of judicial review, though nowhere conferred by the Constitution, is likely to come, and properly so, only as a last desperate resort. Such a proposal, however, was seriously urged at the last session of Congress in the case of the so-called Wheeler-Bone Amendment<sup>109</sup> empowering Congress to override a Supreme Court veto by a two-thirds vote. And there were other proposals directed to a similar purpose.

Finally, there has been the hope that, with the passage of a reasonable time and in the ordinary course of events, a liberally inclined chief executive would have the opportunity to fill a sufficient number of vacancies to convert the Brandeis-Stone-Cardozo minority into a majority. When and if that time should come, and the dominant group on the Court will again, like Chief Justice Marshall, study the provisions of the Constitution, with a sympathetic understanding of the purpose and intention of its framers, and rediscover as did Marshall that it is an instrument of progress, a flexible and living instrument, "intended to endure for ages to come and consequently to be adapted to the various crises of human affairs"—and at the same time restore the due process clauses at least partially to their originally intended meaning—then the protracted crisis of the past few years will have vanished and our Constitution will again have become adequate to meet substantially all the needs of a twentieth century government.

Thus, in answering the question "Is Our Constitution Adequate for Present Day Needs?" one finds the most important part of the question to be, "What constitution do we have in

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109. *New York Times*, Feb. 18, 1937, p. 1: 8, 2: 4; *United States News*, Feb. 22, 1937, p. 3: 5, 6, 7.

mind?" Do we mean the Constitution as it came from the framers in 1787, with the meaning they clearly thought it had; the Constitution as interpreted and applied by the early justices of the Supreme Court, and as during this controversial period it has been understood by Justices Brandeis, Stone, and Cardozo, more often than otherwise joined by Mr. Chief Justice Hughes making up a dissenting minority, and more recently joined by Mr. Justice Roberts to constitute a majority in some very important cases? Or do we mean the Constitution as it has been interpreted and applied by the prevailing majority during much of the period dealt with herein? If we mean the former, the proper answer to the question appears to be *yes*. If we mean the latter, the proper answer appears to be as clearly *no*. The change in personnel wrought by the substitution of Mr. Justice Black for Mr. Justice Van Devanter still leaves the situation uncertain, unless Mr. Chief Justice Hughes has made for himself a permanent abode with the liberal group on the Court. As to this last suggestion, time alone can remove the uncertainty.

The question uppermost in many minds as the 1937 October term of the Supreme Court gets under way has to do with the proper appraisal to place upon the liberal decisions of the 1936 term and what course they portend for the future.

March 29 of this year will ever be an important date in our constitutional development, as will also April 12 and May 24. Upon those dates the Court committed itself to a group of decisions of the exact type just asserted to be necessary if our Constitution as it now stands is adequately to meet the needs of present day government.

The Supreme Court majority, in recent years, over the bitter protests of a vigorous dissenting minority, has encroached upon the constitutionally-prescribed functions of legislative bodies, both state and national, by asserting the power to pass upon the wisdom and policy of legislative enactments. To use an expression found in dissenting opinions, it has become a *super-legislature*—thus constituting itself the ultimate legislative as well as judicial authority whose acts are subject to no review and from whose determinations there can be no appeal. In so doing, it has fundamentally changed our system of government as created by the Constitution. Whether the ill effects of that process of change are now being permanently eradicated, it is too early to judge with assurance.

Fourteen years ago there was engrafted upon our fundamental law what amounted, in effect, to a constitutional amendment, not by the regular amending process but by the determination of five members of the Supreme Court that minimum wage legislation was beyond the power of Congress in legislating for the District of Columbia.<sup>110</sup> Four of that five-man majority remained upon the Court until the recent retirement of Mr. Justice Van Devanter. The rest of the Justices are new with the exception of Mr. Justice Brandeis. June 1, 1936, those same four Justices, joined by Mr. Justice Roberts, held a similar act of New York to be a violation of the due process clause of the Fourteenth Amendment,<sup>111</sup> and reaffirmed the doctrine of the District of Columbia case. Less than ten months later, on March 29, 1937, Mr. Justice Roberts joined the four justices who dissented in the New York case the preceding June, to uphold the validity of an act of the State of Washington<sup>112</sup> almost identical in terms with the Act of Congress invalidated in 1923. The majority opinion, written by Mr. Chief Justice Hughes, expressly overruled the 1923 decision. The distinction suggested in some quarters between these two recent cases by virtue of the difference in the way they were presented, which allegedly renders them entirely consistent with each other, is rather difficult to accept after a careful study of the two opinions. The kindly concern of the Chief Justice for the difficult position in which his colleague must have found himself scarcely makes the suggestion more convincing.

In the light of these decisions, it is to be noted that what the Constitution meant in 1923, and continued to mean on June 1, 1936, it does not mean since noon of March 29, 1937. The meaning changed as a result of Mr. Justice Roberts changing his mind between the last two dates. Thus was removed from the Constitution the judicial amendment of 1923 by the same process by which it became a part of our fundamental law.

In no other government the world has yet seen may one man, holding the balance of power on a judicial tribunal, control the

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110. *Adkins v. Children's Hospital* (1923) 261 U. S. 525, 43 S. Ct. 394, 67 L. ed. 785.

111. *Morehead v. New York ex rel. Tipaldo* (1936) 298 U. S. 587, 56 S. Ct. 918, 80 L. ed. 1347.

112. *West Coast Hotel Co. v. Parrish* (1937) 300 U. S. —, 57 S. Ct. 578, 81 L. ed. —.



vicissitudes of government and the social and economic life of a whole people, as does the fifth man making up the majority of the United States Supreme Court when the Justices are closely divided upon some important issue. His is a greater power than that of Congress, or of the President, or of both combined.

It is no easy matter to secure a reversal of a major decision such as involved in the recent Minimum Wage case. Particularly is that true when the earlier decision has been so recently re-affirmed and when the reversal necessitates some member of the Court making a complete about-face on the issue. Whether this reversal of form on the part of Mr. Justice Roberts can be taken to indicate a definite and complete switch on his part from the conservative to the liberal wing of the Court is a question many would like to have answered. Such a change would put him back in line with his early performance upon the bench, when he joined in upholding disputed state legislation in the Minnesota Mortgage Moratorium case<sup>113</sup> and the New York Milk case,<sup>114</sup> both of which found the Court divided five to four. If such a realignment should turn out to be permanent, and be maintained in like manner with respect to other problems of due process, one very important aspect of the present controversy might well be silenced. The recent change in personnel definitely enhances this prospect.

Other important decisions were announced on this same date in March, 1937, but space will not permit their full discussion. One other case in the group, however, must be mentioned, along with the Wagner Labor Relations cases decided two weeks later. This is the unanimous validation by the Court of the National Railroad Labor Act<sup>115</sup> as applied to the regulation of relations between an employer railway and its so-called back-shop employees engaged in making heavy repairs upon locomotives and cars withdrawn from service for long periods. While these employees were not actually engaged in interstate commerce, their activities were held to have "such a relation to the other confessedly interstate activities" of the railway as to be regarded

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113. *Home Building & Loan Ass'n v. Blaisdell* (1934) 290 U. S. 398, 54 S. Ct. 231, 78 L. ed. 413.

114. *Nebbia v. People of State of New York* (1934) 291 U. S. 502, 54 S. Ct. 505, 78 L. ed. 940.

115. *Virginian Ry. Co. v. System Federation No. 40* (1937) 300 U. S. —, 57 S. Ct. 592, 81 L. ed. —.

by the Court as a part of them, and all taken together as being within the power of Congress over interstate commerce.

Even more significant for purposes of this discussion are the Wagner Labor Relations cases<sup>116</sup> decided April 12. With the exception of one case involving employees actually engaged in interstate bus transportation,<sup>117</sup> these cases involved five to four divisions by the Court, Mr. Justice Roberts joining with those justices who dissented so vigorously when similar problems were before the Court in the Guffey Coal<sup>118</sup> and *Railroad Retirement*<sup>119</sup> cases decided one and two years previously. Mr. Chief Justice Hughes, who also joined the liberal group in the Wagner cases, had written the dissent in the *Railroad Retirement* case and had partly concurred and partly dissented in the Guffey Coal case.

The Wagner Act, designed to eliminate industrial disputes and industrial strife affecting commerce arising from the denial by employers of the right of employees to organize, and from the refusal of employers to accept the procedure of collective bargaining, was upheld in its application to the relation of employer and employee in the Associated Press enterprise<sup>120</sup> and in the manufacture of steel products,<sup>121</sup> trailers,<sup>122</sup> and men's clothing.<sup>123</sup>

In each manufacturing case involved, there was presented the normal and ordinary production enterprise commonly described as local. The raw materials for the industry were drawn from various sources without the state, and the finished products were later sent in interstate commerce to markets in other states. These manufacturing enterprises were not held to be parts of

116. *National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937) 300 U. S. —, 57 S. Ct. 615, 81 L. ed. —; *National Labor Relations Board v. Fruehauf Trailer Co.* (1937) 300 U. S. —, 57 S. Ct. 642, 81 L. ed. —; *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.* (1937) 300 U. S. —, 57 S. Ct. 645, 81 L. ed. —.

117. *Virginia & Maryland Coach Co. v. National Labor Relations Board* (1937) 300 U. S. —, 57 S. Ct. 643, 81 L. ed. —.

118. *Carter v. Carter Coal Co.* (1936) 298 U. S. 238, 56 S. Ct. 855, 80 L. ed. 1160.

119. *Railroad Retirement Board v. Alton R. Co.* (1935) 295 U. S. 330, 55 S. Ct. 758, 79 L. ed. 1468.

120. *Associated Press v. National Labor Relations Board* (1937) 300 U. S. —, 57 S. Ct. 650, 81 L. ed. —.

121. *National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937) 300 U. S. —, 57 S. Ct. 615, 81 L. ed. —.

122. *National Labor Relations Board v. Fruehauf Trailer Co.* (1937) 300 U. S. —, 57 S. Ct. 642, 81 L. ed. —.

123. *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.* (1937) 300 U. S. —, 57 S. Ct. 645, 81 L. ed. —.

interstate commerce, but application of the statute thereto was permitted because of the relation to or effect upon interstate commerce of labor disputes in the manufacturing industry.

Mr. Chief Justice Hughes wrote the opinions. In the course of one he used this very significant language

The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation" for "its protection and advancement"; to adopt measures "to promote its growth and insure its safety"; "to foster, protect, control, and restrain." That power is plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it." Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.\* \* \*

The close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local.\* \* \*

When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?<sup>124</sup>

One month and six days less than a year prior to the Wagner decisions, the then Supreme Court majority outlawed as unconstitutional the Guffey Coal Control Act<sup>125</sup> on the ground that its labor provisions were not within the commerce power of Congress.

In the course of that opinion, Mr. Justice Sutherland, speaking for himself and Justice Roberts, McReynolds, Van Devanter, and

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124. *National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937) 300 U. S. —, 57 S. Ct. 615, 624-626, 81 L. ed. —.

125. *Carter v. Carter Coal Co.* (1936) 298 U. S. 238, 56 S. Ct. 855, 80 L. ed. 1160.

Butler, asserted that trade, referring to commerce as he had just defined it,

is a thing apart from the relation of employer and employee.  
 \* \* \* The effect of the labor provisions of the Act, including those in respect to minimum wages, wage agreements, *collective bargaining, and the Labor Board* and its powers, primarily falls upon production and not upon commerce.\* \* \* Production is a purely local activity.\* \* \* The local character of mining, of manufacturing, and of crop growing is a fact, and remains a fact, whatever may be done with the products.

Much stress is laid upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices; and it is insisted that interstate commerce is *greatly* affected thereby.\* \* \* The *conclusive answer* is that the evils are all *local evils* over which the federal government has no legislative control. The relation of employer and employee is a local relation.\* \* \* The employees are not engaged in or about commerce, but exclusively in producing a commodity. And the controversies and evils which it is the object of the act to regulate and minimize, are local controversies and evils.\* \* \* Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character.<sup>126</sup> (Italics supplied.)

It would be difficult to concoct language more all-inclusive than that just quoted, or better calculated to close the door to any possible reconsideration of the question in the future. Considerations of the degree to which the local industry may affect interstate commerce can find no place in this reasoning. That same reasoning would have been equally as applicable in the Wagner cases as in the Guffey case, and four members of the Court so applied it.

That the two decisions, and the opinions in which they are embodied, are fundamentally inconsistent is quite obvious. Yet the one did not purport to overrule the other.

The dissent of Mr. Justice McReynolds, speaking for himself and Justices Van Devanter, Sutherland, and Butler in the

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126. *Carter v. Carter Coal Co.* (1936) 298 U. S. 238, 303, 304, 308, 309, 56 S. Ct. 855, 869, 870, 871, 872, 80 L. ed. 1160, 1185, 1188.

Wagner cases, conforms closely to the Sutherland opinion in the Guffey case and insists that that decision should control.

Every consideration brought forward to uphold the act before us was applicable to support the acts held unconstitutional in causes decided within two years. And the lower courts rightly deemed them controlling.<sup>127</sup>

Many are the earlier cases with which the Wagner decisions are fully consistent, but to which the cases of the past two years restricting the commerce power are fundamentally contrary, such as the second *Coronado Coal* case<sup>128</sup> of 1925 applying the Sherman Anti-Trust Act to striking miners in the same sort of local industry as the miners involved in the Guffey case, or the *Second Employers' Liability Cases*<sup>129</sup> of 1912 to which a previous reference was made for purposes of contrast with the *Railroad Retirement* case. Many other cases might be mentioned.

The Wagner cases and the Railroad Labor case seem clearly inconsistent with the *Railroad Retirement* case of two years before, and largely, also, with such earlier cases as *Adair v. United States*<sup>130</sup> and *Coppage v. Kansas*.<sup>131</sup> Their reasoning conforms rather to that in the *Second Employers' Liability Cases* of 1912, and the dissent of Mr. Chief Justice Hughes in the *Railroad Retirement* case.

The direct and indirect test employed in the *Schechter* and Guffey cases is clearly abandoned, and the dissent in the Guffey case, so far as it deals with the same problem, seems to be substantially followed. The doctrine of earlier cases like *Stafford v. Wallace*,<sup>132</sup> upholding the National Stock Yards Act in 1922, the second *Coronado Coal* case, just referred to, and many others sustaining a power of Congress to regulate matters not a part of interstate commerce, but related to and affecting such commerce in an important way<sup>133</sup>—a doctrine seemingly departed

127. *National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937) 300 U. S. —, 57 S. Ct. 615, 630, 81 L. ed. —.

128. *Coronado Coal Co. v. United Mine Workers of America* (1925) 268 U. S. 295, 45 S. Ct. 551, 69 L. ed. 963.

129. (1912) 223 U. S. 1, 32 S. Ct. 169, 56 L. ed. 327.

130. (1908) 208 U. S. 161, 28 S. Ct. 277, 52 L. ed. 436.

131. (1915) 236 U. S. 1, 35 S. Ct. 240, 59 L. ed. 441. While this case involved the validity of a state law and in no way concerned the commerce power of Congress, its basic doctrines applicable to the relations of employers and employees are largely repudiated by these later cases.

132. (1922) 258 U. S. 495, 42 S. Ct. 397, 66 L. ed. 735.

133. *Swift & Co. v. United States* (1905) 196 U. S. 375, 25 S. Ct. 276, 49 L. ed. 518; *Loewe v. Lawlor* (1908) 208 U. S. 274, 28 S. Ct. 301, 52

from, or at least definitely limited in the *Schechter* and Guffey Coal cases—was, by these later cases, again asserted as the approved doctrine of the Court.

By largely repudiating the restricted commerce power doctrine adhered to during the preceding two years and reasserting that of the earlier period, the Court again placed itself in line with the conceptions of the framers of the Constitution and of Chief Justice Marshall as so broadly asserted in *Gibbons v. Ogden*,<sup>134</sup> which have continued for the most part throughout our history; the first Child Labor Case and the *Railroad Retirement, Schechter*, and Guffey Coal cases being the principal departures.

Chief Justice Marshall, it is well to remember, excepted from the power granted to Congress only that commerce which is "completely internal to a state," and "which does not extend to or affect other states."<sup>135</sup> The distinction between direct and indirect effects he did not find in the Constitution of his day. That was inserted from the judicial mind many years later.

A fitting climax to the memorable work of the 1936 term of the Supreme Court is to be found in its Social Security decisions. Taxing provisions of the Social Security Act were sustained against contentions not greatly unlike those successfully invoked in the A. A. A. case, that they were not in reality taxes at all; not excises, lacking uniformity throughout the United States as

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L. ed. 488; *Southern Railway Co. v. United States* (1911) 222 U. S. 20, 32 S. Ct. 2, 56 L. ed. 72; *Second Employers' Liability Cases* (1912) 223 U. S. 1, 32 S. Ct. 169, 56 L. ed. 327; *Interstate Commerce Commission v. Goodrich Transportation Co.* (1912) 224 U. S. 194, 32 S. Ct. 436, 56 L. ed. 729; *United States v. Patten* (1913) 226 U. S. 525, 33 S. Ct. 141, 57 L. ed. 333; *United States v. Ferger* (1919) 250 U. S. 199, 39 S. Ct. 445, 63 L. ed. 936; *Duplex Company v. Deering* (1921) 254 U. S. 443, 41 S. Ct. 172, 65 L. ed. 349; *Dahnke-Walker Milling Co. v. Bondurant* (1921) 257 U. S. 282, 42 S. Ct. 106, 66 L. ed. 239; *Lemke v. Farmers' Grain Co.* (1922) 258 U. S. 50, 42 S. Ct. 244, 66 L. ed. 458; *Stafford v. Wallace* (1922) 258 U. S. 495, 42 S. Ct. 397, 66 L. ed. 735; *Board of Trade v. Olsen* (1923) 262 U. S. 1, 43 S. Ct. 470, 67 L. ed. 839; *Coronado Coal Co. v. United Mine Workers of America* (1925) 268 U. S. 295, 45 S. Ct. 551, 69 L. ed. 963; *Thornton v. United States* (1926) 271 U. S. 414, 46 S. Ct. 585, 70 L. ed. 1013; *United States v. New York Central R. Co.* (1926) 272 U. S. 457, 47 S. Ct. 130, 71 L. ed. 350; *United States v. Brims* (1926) 272 U. S. 549, 47 S. Ct. 169, 71 L. ed. 403; *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n* (1927) 274 U. S. 37, 47 S. Ct. 522, 71 L. ed. 916; *Tagg Brothers & Moorhead v. United States* (1930) 280 U. S. 420, 50 S. Ct. 220, 74 L. ed. 524; *Standard Oil Co. (Indiana) v. United States* (1931) 283 U. S. 163, 51 S. Ct. 421, 75 L. ed. 926; *Local 167, International Brotherhood of Teamsters v. United States* (1934) 291 U. S. 293, 54 S. Ct. 396, 78 L. ed. 804.

134. (1824) 9 Wheat. 1, 6 L. ed. 23.

135. *Gibbons v. Ogden* (1824) 9 Wheat. 1, 196, 6 L. ed. 23, 70.

required by the Constitution; that the purpose was not revenue, but an unlawful invasion of the reserved powers of the states; and that the states, in submitting, yielded to unconstitutional coercion on the part of the national government.<sup>136</sup> In negating these contentions and in finding old age benefits and unemployment compensation to be proper considerations from the point of view of the general welfare,<sup>137</sup> the majority,<sup>138</sup> speaking through Mr. Justice Cardozo, left the A. A. A. decision in an even more precarious condition than it originally occupied, and, in effect, restored the general welfare clause to its original and proper place in the Constitution. To many of us, not convinced by the belabored opinion of Mr. Justice Roberts, the statement of Mr. Justice Cardozo seems merely to assert the obvious.

Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well being of the nation. What is critical or urgent changes with the times.<sup>139</sup>

As a matter of fact, the opinion of Mr. Justice Roberts in the A. A. A. case, asserting the nation-wide agricultural demoralization to be nothing but the similarity of local conditions, and national action in regard thereto to be an unwarranted invasion of state rights, seems to be thoroughly repudiated by the newly aligned majority of the Court in both the Social Security cases and the recent commerce power cases discussed above. The whole method of approach in these later cases is so completely different as to appear to preclude the possibility of such decisions as that in the A. A. A. case, and most of the other invalidating cases of the two-year reactionary period herein under discussion.

The larger effect of these most recent cases seems to be to

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136. *Steward Machine Co. v. Davis* (1937) 300 U. S. —, 57 S. Ct. 883, 886, 887, 81 L. ed. —.

137. In *Steward Machine Co. v. Davis* (1937) 300 U. S. —, 57 S. Ct. 883, 81 L. ed. —, and *Helvering v. Davis* (1937) 300 U. S. —, 57 S. Ct. 904, 81 L. ed. —, the Court upheld the contested provisions of the National Social Security Act. In *Carmichael v. Southern Coal & Coke Co.* (1937) 300 U. S. —, 57 S. Ct. 867, 81 L. ed. —, the Alabama Unemployment Compensation Act was sustained against the charges that it violated due process and amounted to a surrender of state power by coercion of the national government under its Social Security Act.

138. Justices Cardozo, Brandeis, Stone, Roberts, and Chief Justice Hughes. In the case of *Helvering v. Davis*, *supra*, only Justices McReynolds and Butler dissented, and no dissenting opinion was written.

139. *Helvering v. Davis* (1937) 300 U. S. —, 57 S. Ct. 904, 908, 909, 81 L. ed. —.

take up where the Court left off when the *Railroad Retirement*, the *Schechter*, the *Guffey*, and the *A. A. A.* cases came up for consideration, and to go forward on the basis of previous doctrine as though those cases had not been decided as they were.

None of those cases are specifically overruled, and no one can be sure their doctrines may not be reasserted in some future case and the doctrines of some of these later cases repudiated. This is exactly what happened in the due process field when *Lockner v. New York*<sup>140</sup> in 1905 departed from previous constitutional doctrines in an entirely indefensible opinion, only to be repudiated in principle (not by name) in *Bunting v. Oregon*<sup>141</sup> in 1917. The *Lockner* case doctrine was reestablished, apparently, by *Adkins v. Children's Hospital*<sup>142</sup> in 1923, the first minimum wage case, which in turn was not only repudiated but expressly overruled fourteen years later.<sup>143</sup>

Like the basic doctrines of *Holden v. Hardy*<sup>144</sup> and other cases prior to *Lockner v. New York*, and *Bunting v. Oregon* subsequently decided, which are now reestablished by the latest minimum wage decision, the doctrines of the *Wagner* and *Railroad Labor* cases, and the *Social Security* cases seem to be eminently sound—doctrines that reasonably may be expected ultimately to prevail.

Perhaps when the time comes to view the recent past from a more distant horizon, and one can look upon our constitutional development over the broad expanse of our national life, the reactionary decisions of recent years may assume the position of mere temporary departures from what, for the most part, has been a rather steady growth in the recognition of governmental power adequate to meet the needs of each generation in its turn. It is that prospect which stimulates confidence in the ultimate and abiding success of democratic government in this country.

The extent to which that confidence may be justified may depend in large measure upon the fundamental character of the change that is now being wrought at the hands of the newly aligned Supreme Court majority, and the permanence with which

140. (1905) 198 U. S. 45, 25 S. Ct. 539, 49 L. ed. 937.

141. (1917) 243 U. S. 426, 37 S. Ct. 435, 61 L. ed. 830.

142. (1923) 261 U. S. 525, 43 S. Ct. 394, 67 L. ed. 785.

143. *West Coast Hotel Co. v. Parrish* (1937) 300 U. S. —, 57 S. Ct. 578, 81 L. ed. —.

144. (1898) 169 U. S. 366, 18 S. Ct. 383, 42 L. ed. 780.



that change is adhered to. As to what may have occasioned this seeming fundamental change in outlook on the part of some members of the Court, it is not the purpose of this article to discuss. Whether it is to be at all permanent, no one can safely predict. By all reasonable criteria, such a fundamental change in outlook would seem likely to become permanent and far reaching only with further changes in the personnel of the Court. Until that time shall come, however, the question stated in the title of this article cannot be answered with complete assurance.