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THE RELEVANCE OF LEGISLATIVE FACTS IN CONSTITUTIONAL LAW

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I. JUDICIAL POWER AND POLITICAL POWER

The current focus of American constitutional law on the dramatic issues of civil rights and civil liberties [1] has concentrated public attention on results—the upholding of the public accommodations section of the Civil Rights Act, the invalidation of the Connecticut anti-birth control statute, the outlawing of Bible reading in the public schools, the requirement of "one person, one vote." However, important as the results in these cases are in shaping the nature of American society, popular concentration on outcome has served to obscure the less obtrusive but equally important questions of judicial methodology—of the function of courts in the governmental process—which underlie these decisions, and which may, in the long run, prove equally essential to the future development of the nation.

The vital role that the federal courts, and particularly the Supreme Court, play in the governmental process is easily forgotten. Although it is no longer doubted that courts make law, it is still difficult to

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[1] *E.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); United States v. Brown, 381 U.S. 437 (1965); Zemel v. Rusk, 381 U.S. 1 (1965); Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Aptheker v. Secretary, 378 U.S. 500 (1964); Escobedo v. Illinois, 378 U.S. 478 (1964); Malloy v. Hogan, 378 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); Griffin v. School Bd., 377 U.S. 218 (1964); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Engel v. Vitale, 370 U.S. 421 (1962); Baker v. Carr, 369 U.S. 186 (1962).

comprehend that the law making authority of judges is a legitimate and significant part of the political power of government. Judicial law making is "undemocratic"; it represents government by a handful of men, appointed for life, and sheltered, although not entirely, from the pressures of public demand. It is haphazard and unsystematic, for it is contingent upon the presentation of an appropriate case raising the appropriate questions of constitutional or legal interpretation. It is, in Mr. Justice Holmes' phrase, "confined from molar to molecular motions," [2] by the stubborn fact that, for all the points of convergence, law is not the same as other aspects of politics. Thus a court cannot simply set out to establish justice or to create the good society but rather must heed the peculiarly legal requirements of stability, consistency, adherence to precedent and adherence to the language of the statutes or constitutional provisions that come before it. Nevertheless, despite these limitations and despite the fact that its political functions are distinct from and considerably narrower than those of the executive and legislative branches, the judiciary remains a part of the policy making sphere of government with unique and inescapable responsibilities of its own. Its task is to insure that the legal system is always directed toward coincidence with the society's best conceptions of justice, to legitimate governmental power when the public interest demands the exercise of that power, and to protect constitutional rights against needless incursions by government or, in some cases, individuals. Accordingly the federal government's postwar policy of active protection of civil rights was given its impetus by the judiciary, because the Court's position of semi-isolation from politics gave it the freedom that the political branches did not possess to begin the equation of law and justice.

The possession of political authority, however, is quite clearly unsettling for members of the Supreme Court, who are as well aware of their fallibility as they are of the finality of their judgments. Consequently they are particularly sensitive to charges of result orientation—which is by no means thought to be exclusively the layman's approach to constitutional law. Often they have sought to insulate themselves from such charges by invoking either of two doctrines of constitutional adjudication that purportedly treat results as entirely irrelevant to the decision making process: the doctrine of judicial self-restraint, most closely associated with the late Mr. Justice Frankfurter; and that of constitutional absolutism, whose principal and most outspoken proponent has been Mr. Justice Black.[3]

[2] Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

[3] The central concept of judicial self-restraint was given its classic statement by James Bradley Thayer, who in 1893 declared that a court was bound to defer to the

A strong defense may be made for either of these doctrines as the beginning of an approach to constitutional jurisprudence. The danger is that in its zeal to avoid the exercise of political power, the Court will convert either of these salutary attitudes into a hard and fast rule, under which decisions would be made on the basis of preconceived formulas by a tribunal which had deliberately blinded itself to social realities so that they could not influence its judgments. The alternative—and, it would appear, the only alternative that reasonably can be expected to lead to an enlightened constitutional jurisprudence—is that judges overcome their sometimes almost pathological distrust of themselves and recognize that they do have a legitimate political function to perform. This function can only be successfully carried out if the Court consciously strives to inform itself as fully as possible of the factual setting of each case and the social consequences likely to flow from each decision.

II. Courts, Facts and the Constitution

The examination of existing factual reality is a task for courts as well as legislatures. Certain objections, however, are traditionally raised to judicial consideration of facts. These objections are based on either or both of two assumptions—that courts cannot, or else should not, venture deeply into this area.

They cannot, it is sometimes said, because "the factual determinations involved are enormously difficult and time-consuming, and quite unsuitable for the judicial process." [4] Yet making factual determinations has always been an integral part of judicial decision making. In those cases in which the law is settled beyond dispute, the courts

judgment of the legislature on constitutional questions except "when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question." Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 144 (1894). If taken literally, of course, which none of the advocates of self-restraint has ever done, this doctrine would require the practical abandonment of judicial review, for it is hardly likely that presumably rational legislators would ever make a mistake on a constitutional question that would be "so clear that it is not open to rational question." See C. L. Black, The People and the Court 193-215 (1960). Constitutional absolutism, although commonly considered to be a doctrine of judicial activism because the frequent result of its application is the invalidation of legislation, may lay claim, when carried to its logical extreme, to being even more restrained than self-restraint. The central concept of absolutism is unswerving judicial obedience to the commands of the Constitution. When legislation violates a constitutional provision, the judge has no choice but to declare the law unconstitutional despite any other considerations which might militate in its favor. On the other hand, when the legislation infringes no express constitutional prohibition, the judge must uphold it despite all evidence that it creates pernicious social effects without serving any real social purpose. See the opinions of Mr. Justice Black, dissenting, in Griswold v. Connecticut, 381 U.S. 479, 507 (1965); El Paso v. Simmons, 379 U.S. 497, 517 (1965).

[4] Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 913 (1963).

must determine whether, as a matter of fact, the actions of the parties fall within the scope of the law; and such a determination cannot be avoided because it would be "enormously difficult and time-consuming." However, there is a recognized distinction between the determination of such adjudicative facts, which deal with particular circumstances, relating the actions of the parties to the law, and legislative facts, which deal with general problems and demonstrate a need for legislation; while consideration of the former is normally conceded to be within the province of the judiciary, consideration of the latter is usually said to be the task of the legislature. But, as Professor Paul Freund has noted, this distinction, "like most categorizations, will have to give a little at the seams." [5] To the extent that the legislature, in most instances quite properly, specifies the particular acts that are to be proscribed or required in order to carry out the general policy, it is making decisions of an adjudicative nature. Similarly, when courts examine the public need underlying a piece of legislation or attempt to discern the policy which it embodies, they are considering legislative facts, again in most instances quite properly.

Conscious consideration of legislative facts is often nothing less than essential to the proper accomplishment of judicial tasks. In cases involving questions of statutory interpretation, courts should understand the nature of the evil that the legislature was seeking to correct and the manner in which it was seeking to correct it.[6] Furthermore, to the extent that the legislature employs vague language in its enactments, achievement of the public purpose would seem to require judicial familiarity with legislative facts.[7]

However, it is in the area of constitutional interpretation that the difficulties involved in judicial consideration of legislative facts are considered to be insuperable by those who support reliance on mechanistic formulas for decision making. For example, Professor Charles Reich, in a vigorous defense of Mr. Justice Black's absolutist position on the Bill of Rights, asks the typical question: "[I]s this a task which judges are qualified to undertake? Courts have no sources

[5] Freund, *Review of Facts in Constitutional Cases*, in SUPREME COURT AND SUPREME LAW 47, 48 (Cahn ed. 1954).

[6] See Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213-46 (1934). Professor Landis argued that courts should not only apply statutes in those situations directly covered by their terms, but should reason from them by analogy to establish law in related areas, in the same way that judicial precedents are employed to control cases that are analogous, but not identical. Clearly courts which attempt to cooperate with the legislature in this way must be fully cognizant of the social reasons underlying the enactments in question.

[7] See Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1265-67 (1947). See also Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947); Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930); Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 882-85 (1930).

of information other than the records before them, and judges have no special knowledge to assist them in evaluating information of a social and political nature if they were able to obtain it." [8] Professor Reich promptly goes on to suggest that this inadequacy is not limited to the judiciary, asking doubtfully whether an accurate evaluation of factual reality, social needs, and competing interests is "an undertaking which is capable of being performed by anyone, however expert." [9] The implications of this position are clear—human beings, no matter how wise or expert, are fallible; knowledge and factual data, no matter how carefully acquired, are incomplete, and therefore, since the accurate evaluation of social and political information requires omniscience and prescience, the task is beyond the capacity of mortal men, be they judges, scholars, or experts, and ought not to be attempted by them. Presumably, even legislators have no business attempting to legislate. Thus, judges should not attempt "to resolve these conflicts by the exercise of judgment," [10] but should, instead, adopt a frame of reference entirely independent of subjective considerations; in Mr. Justice Black's and Professor Reich's case, "that frame of reference should be the words of the Constitution itself." [11]

Even if one concedes the fallibility of the judiciary and the inevitable incompleteness of information, there is still something more than a trifle dissatisfying about the proposition that men ought not to exercise judgment, ought not to do the best they can to resolve human conflicts on the basis of the best information they can gather but ought rather to recognize their fallibility, eschew their judgment, and render decisions on the basis of fixed rules and formulas hopefully, but not necessarily, applicable to the situation at hand. The Constitution obviously provides the primary frame of reference in constitutional litigation, but as Professor Alexander Bickel replied to Professor Reich in a somewhat different context: "I would find myself most uncomfortable . . . living under a document which in matters by hypothesis of fundamental importance governs me without recourse, saving only the improbability of a ridiculous amendment procedure. I would feel terribly uncomfortable living in a society . . . in which a document governs conduct beyond the possibility of the exercise of contemporary human judgment." [12]

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[8] Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 740 (1963); see Emerson, *supra* note 4, at 913.

[9] Reich, *supra* note 8, at 740.

[10] *Id.* at 737.

[11] *Id.* at 744.

[12] *Arthur Garfield Hays Conference: The Proper Role of the United States Supreme Court in Civil Liberties Cases*, 10 WAYNE L. REV. 457, 475 (1964).

The denial of the propriety of judicial judgment, however, is more closely related to the second of the two assumptions noted above—that courts, in constitutional cases at least, should, regardless of the feasibility, refrain from considering legislative facts. This assumption grows out of the doctrine of separation of powers. The function of a court in a constitutional case, the argument goes, is to decide the constitutionality of a statute, not to question the legislature's judgment as to the need for it or to attempt to discover whether its social effects are desirable. It is this position which the proponents of judicial self-restraint advocate. As Mr. Justice Frankfurter asserted in the second flag salute case: "If the function of this Court is to be essentially no different from that of a legislature, if the considerations governing constitutional construction are to be substantially those that underlie legislation, then indeed judges should not have life tenure and they should be made directly responsible to the electorate." [13] Mr. Justice Black has arrived at the same conclusion, although for reasons altogether different from Mr. Justice Frankfurter's deference to the legislature. "I most certainly cannot agree," he has declared, "that constitutional law is simply a matter of what the Justices of this Court decide is not harmful for the country, and therefore is 'reasonable.' " [14] Mr. Justice Frankfurter often declined to look at facts the more easily to uphold legislation; Mr. Justice Black often has declined the more easily to be able to strike it down. Thus the defenders of judicial self-restraint and constitutional absolutism unite on this common ground: the common ground of mechanical jurisprudence. For, at bottom, either position requires acceptance of the theory that constitutional questions can be decided by merely holding the words of the statute up against the applicable constitutional provision, and deciding on that basis alone whether the statute is permissible.[15] It was the prevalence of this belief in mechanical jurisprudence at the start of the century that led Dean Roscoe Pound to criticize judicial willingness to invalidate welfare legislation as an abridgment of "liberty of contract" despite underlying social need, and to decry "the sharp line between law and fact in our legal system which requires constitutionality, as a legal question, to be tried by artificial criteria of general application and prevents effective judicial investigation or consideration of the situations of fact behind or bearing upon the statutes." [16]

In exactly the same vein as Dean Pound, Professor Felix Frankfurter, writing in 1924 in defense of the refusal of the federal courts

[13] Board of Educ. v. Barnette, 319 U.S. 624, 652 (1943) (Frankfurter, J., dissenting).
[14] El Paso v. Simmons, 379 U.S. 497, 533 (1965) (Black, J., dissenting).
[15] *Cf.* United States v. Butler, 297 U.S. 1, 62 (1936).
[16] Pound, *Liberty of Contract*, 18 YALE L.J. 454, 458 (1909).

to issue advisory opinions, hailed this practice as wise precisely because it permitted constitutional cases to be decided, not as abstract questions of formal law, but in the clear light of facts demonstrating the actual effects of the challenged law upon the society. He observed: "Concepts like 'liberty' and 'due process' are too vague in themselves to solve issues. They derive meaning only if referred to adequate human facts. Facts and facts again are decisive." [17] It is, of course, striking that Professor Frankfurter, writing in the 1920's, was so insistent upon the examination of facts, while Justice Frankfurter, serving on the Court after the New Deal revolution of 1937, often proved reluctant to consider them. This inconsistency, however, is not as perplexing as it might at first appear. Facts can be used to provide the basis for the constitutionality, as well as the unconstitutionality, of legislation. Prior to 1937, when the Supreme Court was not above striking down social welfare laws on the basis of the due process clause or the tenth amendment, as unreasonable, or arbitrary, or not treating a proper subject of governmental concern, it tended to give notoriously scant attention to available factual information that demonstrated conclusively that the laws in question were reasonable and dealt with matters which were quite properly within the scope of public concern.[18] Here the advocates of judicial self-restraint justifiably urged the Court not to blind itself to the facts. When, on the other hand, judicial self-restraint in economic cases became the order of the day, and civil liberties cases became the primary focus of the Supreme Court's attention, the facts that were presented to the Court often were presented for the purpose of showing, not that the challenged law was reasonable, but that it was unreasonable, or abridged individual freedom without effectively meeting a real social need. It was these facts which the advocates of self-restraint wished to dismiss as irrelevant to the purposes of judicial concern, for, it was argued, these facts had to do with the question of the wisdom or appropriateness of legislation—a matter within the exclusive province of the legislature.[19]

It may readily be granted that questions relative to the wisdom or appropriateness of, or the public interest or public need behind, legislative enactments are usually settled finally by legislative judgment. If questions of constitutional authority are not raised, such legislative

[17] Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1004-05 (1924).

[18] See, *e.g.*, Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936); Adkins v. Children's Hosp., 261 U.S. 525 (1923); Lochner v. New York, 198 U.S. 45 (1905).

[19] See, *e.g.*, Flemming v. Nestor, 363 U.S. 603 (1960); Barenblatt v. United States, 360 U.S. 109 (1959); Shelton v. Tucker, 364 U.S. 479, 490-96 (1960) (Frankfurter, J., dissenting); Board of Educ. v. Barnette, 319 U.S. 624, 646-71 (1943) (Frankfurter, J., dissenting).

facts are not material to the validity of the statute. If the authority to enact a federal law is found within the delegated powers of Congress, and the law cannot reasonably be said to violate any of the constitutional prohibitions on congressional action, it is enough that Congress has seen a need and has acted to meet it.[20] But where the exercise of legislative power approaches a constitutionally prohibited area, as in legislation restricting speech, the question of need becomes crucial, and no sound constitutional judgment can be made except by consideration of legislative facts. A law which appears on its face or in application to constitute an abridgment of speech—or a prohibition of the free exercise of religion, or a denial of the equal protection of the laws by a state, or a state obstruction of interstate commerce, or that has any other effect that the federal or state governments are constitutionally forbidden to achieve—must be justified in terms of an overriding public need relative to the extent of the abridgment. Unless the Court is to adopt the absolutist position, and refuse to accept any justification for the law, or to decline to enforce the constitutional prohibition by adopting the position of self-restraint and accepting any superfically plausible justification, it must examine the sufficiency of the justification put forward. This may perhaps be described as questioning the judgment of the legislature as to the wisdom or appropriateness of the legislature's enactments, but it is nonetheless an unavoidable exercise of the Court's political responsibility.

Doubtful constitutional questions can never be answered entirely irrespective of legislative considerations of public need. Interpretation of the provisions of the Constitution must be carried out with full attention paid to the practical effect of choosing one construction over others. This is no less true for the apparently absolute provisions (except perhaps for those expressed with mathematical precision) than for those which are plainly vague and flexible. It is precisely because the society could not tolerate a literal construction of the first amendment that considerations of social expediency have played an important role in its interpretation. Likewise even though Congress and the states are forbidden to enact ex post facto laws and bills of attainder,

[20] There is a distinction between "need" and "purpose" which should be noted. The existence of a need for a law is not always constitutionally relevant, the existence of a purpose is. In other words, an unnecessary law may be enacted for a valid purpose, and is not unconstitutional simply because it is unnecessary. Thus, John Marshall, in upholding the constitutionality of the national bank, declared: "But were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been justly observed, is to be discussed in another place." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819). A purposeless law, on the other hand, raises due process questions. As Professor Louis Henkin has noted: "Due process of law demands that legislation have a proper public purpose; only an apparent, rational, utilitarian social purpose satisfies due process." Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 402 (1963).

and these prohibitions are not apparently qualified by considerations of public need, from very early in American constitutional history, the Supreme Court has ruled that the prohibitions against ex post facto laws are not to be read literally so as to bar all retrospective legislation but are to apply only to laws imposing, increasing, or making less difficult the imposition of punishment for a past act. Not the least of the Court's reasons for so deciding was the recognition of the existence of a valid public need for retrospective enactments in areas other than criminal law.[21] Nor has the Court defined "bill of attainder" so as to include all laws which operate with harshly adverse effect upon specified or readily identifiable individuals or groups. Such laws have been held to be constitutionally permissible when enacted as a means of regulating, in the public interest, an activity which is properly subject to legislative authority;[22] they are to be deemed prohibited as bills of attainder when their purpose is not valid regulation but rather infliction of punishment.[23] In other words, only those laws are normally to be considered bills of attainder which are punitive. A nonpunitive regulatory law would not be invalid unless no substantial public need existed beyond the desire to impose a penalty.[24]

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[21] Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798). In his opinion in that case, Mr. Justice Chase stated: "[I]t is a good general rule, that a law should have no retrospect: but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement. . . . [S]uch laws may be proper or necessary, as the case may be." *Id.* at 391. In the same case, Mr. Justice Iredell declared: "The policy, the reason and humanity of the prohibition, do not . . . extend to civil cases, to cases that merely affect the private property of citizens. Some of the most necessary and important acts of legislation are, on the contrary, founded upon the principle, that private rights must yield to public exigencies." *Id.* at 400.

[22] See, *e.g.*, Hawker v. New York, 170 U.S. 189 (1898), upholding a New York law making it a crime for a person convicted of a felony to practice medicine in the state thereafter. Although convicted felons constitute a readily identifiable group, and permanent exclusion from the practice of medicine may easily be construed as punishment of the doctors affected, the Court held that the law was not a bill of attainder because it was a mere exercise of the valid power of the state to establish qualifications for those whom it would license to practice medicine. The Court said: "The State is not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character." *Id.* at 196. Similarly, in DeVeau v. Braisted, 363 U.S. 144 (1960), the Court upheld a New York law disqualifying convicted felons from holding office in waterfront labor organizations. It rejected the claim that the law was invalid as a bill of attainder or ex post facto law, refusing to strike it down because it "was felt to be a *much-needed scheme of regulation of the waterfront.*" *Id.* at 160. (Emphasis added.)

[23] See United States v. Lovett, 328 U.S. 303 (1946); Ex parte Garland, 71 U.S. (4 Wall.) 333 (1876); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1876). The test for distinguishing punishment from regulation was well stated by the Court in Flemming v. Nestor, 363 U.S. 603, 614 (1960). See text accompanying note 70 *infra*.

[24] *But see* the puzzling decision in United States v. Brown, 381 U.S. 437 (1965), in which the Court apparently abandoned the test set down in Flemming v. Nestor, *supra* note 23, in declaring unconstitutional as a bill of attainder § 504 of the Landrum-Griffin Act of 1959, 73 Stat. 519, 536, 29 U.S.C. § 504 (1964), prohibiting members of the Communist Party from holding office in a labor union during the period of their membership or for five years after its termination. Although the Court conceded the validity of Congress's desire to minimize the danger of political strikes, this provision was held to be a bill of attainder because "it designates in no uncertain

Similar examples may be drawn from diverse sections of the Constitution. Certainly the Court's rejection of the literal construction of the fifth amendment's guarantee against compulsory self-incrimination, in order to uphold statutes authorizing compulsion in exchange for adequate guarantees of immunity against prosecution, was based largely on an awareness of the genuine public need to obtain such testimony.[25] Even after this part of the fifth amendment was held to be applicable to the states through the fourteenth,[26] the Court refused to hold that state immunity statutes were unconstitutional because of the inability of states to guarantee immunity against a federal prosecution that might be made possible by the compelled testimony. The Court evidently was originally prepared to hold such state laws unconstitutional on these grounds, but instead declared that states could grant immunity which would be enforced by an exclusionary rule prohibiting federal prosecution of a witness through the use of his compelled testimony. It adopted this course rather than the course of invalidation, although the latter would have appeared to be more directly in line with the command of the fifth amendment, "in order [both] to implement this constitutional rule and accommodate the interest of the State and Federal Governments in investigating and prosecuting crime." [27]

terms the persons who possess the feared characteristics and therefore cannot hold union office without incurring criminal liability—members of the Communist party." 381 U.S. at 450. Mr. Chief Justice Warren, writing for the majority in the 5-4 decision, made no effort to distinguish such cases as Hawker v. New York or DeVeau v. Braisted, discussed note 22 *supra*, upholding statutes which also "designate[d] in no uncertain terms the persons who possess the feared characteristics and therefore cannot [practice medicine or] hold union office"—convicted felons—and unconvincingly attempted to distinguish Board of Governors v. Agnew, 329 U.S. 441 (1947), which upheld an application of the "conflict of interest" provision of the Banking Act of 1933, § 32, 48 Stat. 194, as amended, 12 U.S.C. § 78 (1964), prohibiting a person closely connected with a stock underwriting firm from serving as an officer or director of a federal reserve bank, by contending that that provision applied "to *any* man—not just certain men or members of a certain political party." 381 U.S. at 454. As Mr. Justice White pointed out in his dissent, however, "§ 504 applies to *any* man who occupies the two positions of labor union leader and member of the Communist Party." *Id.* at 467. Since the Court in *Brown*, failed to discuss the *Hawker* and *DeVeau* cases, and totally failed even to mention that the very same sentence of § 504 disqualifying members of the Communist Party from holding union office also imposed the same disqualification on persons convicted of various felonies, it is possible that the majority would not employ the reasoning used in this case to invalidate as bills of attainder laws barring felons from certain activities. As Mr. Justice White again remarked, this apparent inconsistency "would lead one to inquire whether the Court's reasoning does not contain some flaw that explains such perverse results." *Id.* at 472.

[25] See Brown v. Walker, 161 U.S. 591, 596 (1896): "It can only be said in general that the clause should be construed, as it was doubtless designed, to effect a practical and beneficent purpose—not . . . to unduly impede, hinder or obstruct the administration of criminal justice." This judgment was reaffirmed in Ullmann v. United States, 350 U.S. 422 (1956).

[26] Malloy v. Hogan, 378 U.S. 1 (1964).

[27] Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964). It requires little perspicacity to discern that the Court's judgment in this case was not the one it originally intended to hand down. The entire thrust of its opinion, up until the last three pages, which read very much like an afterthought, points quite certainly to the

With reference to the contract clause of article I, section 10, the Court recognized early the folly of reading this prohibition against the states with the uncompromising strictness on which John Marshall insisted. It has refused to concede the applicability of this clause in situations in which its invocation would operate to deprive the states of power to take necessary action in the public interest or to protect the health and welfare of its citizens.[28] In the Minnesota Mortgage Moratorium case of 1934, the Court even permitted the state to pursue a reasonable plan aimed at alleviating the devastating effects of the depression, although as Mr. Justice Sutherland accurately pointed out in dissent, the prohibition of mortgage moratoria was one of the specific reasons for the inclusion of the contract clause in the Constitution.[29]

conclusion that state immunity statutes must fall. Moreover, the concurring opinion of Mr. Justice White, *id.* at 92-107, was very clearly written originally as a dissent, with only the necessary superficial changes made to convert it into a concurrence. As it stands, it is a very strange concurring opinion, indeed, for it is devoted to a vigorous denunciation of a course the majority did not take. One can surmise, with considerable confidence, that after the original opinions were circulated, the majority Justices became convinced of the soundness of Mr. Justice White's argument that immunity statutes were vital to the effective conduct of law enforcement and investigation activities in the states, and changed their position accordingly.

[28] El Paso v. Simmons, 379 U.S. 497 (1965); East New York Sav. Bank v. Hahn, 326 U.S. 230 (1945); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934); Stone v. Mississippi, 101 U.S. 814 (1880); Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827).

[29] Home Bldg. & Loan Ass'n v. Blaisdell, *supra* note 28, at 453-54 (Sutherland, J., dissenting). Mr. Justice Black, with admirable consistency, has objected to denying absoluteness to the contract clause no less than to the first amendment. See El Paso v. Simmons, *supra* note 28, at 517-35 (Black, J., dissenting). However, as in the case of the first amendment, where he would apply absolutely something other than the literal meaning, he is also unwilling to apply absolutely the literal meaning of the contract clause. Conceding that the Texas legislation in question (which, among other things, amended existing law to require purchasers of public lands forfeited to the state for non-payment of interest, if they wished to reinstate their claim, to do so within five years from the time of forfeiture, whereas previously they could have reinstated at any time prior to resale), was supported by "a valid public purpose"—a "need to clear titles and stabilize the market in land"—he would not have interpreted the contract clause so as to prevent the state from achieving that purpose. Instead, he would simply have required the state to provide just compensation. *Id.* at 533-35. In other words, he would read the clause as stating: "No state shall . . . pass any . . . Law impairing the obligation of Contracts . . . without just compensation." That may be a reasonable way of construing the contract clause, but it is not what the contract clause says. The plain words of the clause are far less liberal and far more restrictive of the states. Although he has elsewhere tersely observed that: "The Founders gave no . . . amending power to this Court," Bell v. Maryland, 378 U.S. 226, 342 (1964) (Black, J., dissenting), and in El Paso v. Simmons, *supra*, deplored the fact that "this Court's judgment as to 'reasonableness' of a law impairing or even repudiating a valid contract becomes the measure of the Contract Clause's protection," 379 U.S. at 529, he is himself clearly willing to undertake some slight amending of the Constitution in the name of reasonableness. In point of fact, of course, Mr. Justice Black's *Simmons* position is not consistent with his earlier views on the scope of the contract clause. See Wood v. Lovett, 313 U.S. 362, 372-86 (1941) (Black, J., dissenting). In that case, he dissented, joined by Justices Douglas and Murphy, from a decision striking down, on the basis of the contract clause, an Arkansas statute repealing an earlier state law prohibiting courts from setting aside the sale of property obtained by the state because of nonpayment of taxes. After quoting with obvious approval various passages from *Blaisdell* declaring that the question in contract clause cases was "one of reasonableness," and that "the prohibition is not an absolute one and is not to be read with literal exactness like a

It must be granted that constitutional arguments based on necessity may be open to suspicion. Mr. Justice Jackson, in rejecting the government's contention in the steel seizure case of 1952, thus commented: "The plea is for a resulting power to deal with a crisis or an emergency according to the necessities of the case, the unarticulated assumption being that necessity knows no law." [30] Because of its ready availability to totalitarian regimes to justify abandonment of the rule of law, the idea that "necessity knows no law" excites a natural abhorrence. But one need not accept all implications of this idea—although it is certainly true that as necessity becomes increasingly desperate for individuals or nations it becomes increasingly unrealistic to expect strict observance of settled legal rules, a fact that Mr. Justice Jackson expressly recognized elsewhere.[31] What must be conceded is that law must be kept abreast of social necessity, and that just as Congress has the responsibility of keeping statutory rules in line with current social needs, the Supreme Court has the responsibility of insuring that the Constitution does not become an insurmountable barrier to the accomplishment of valid and essential national goals.

However, when the Court accepts something other than a literal interpretation of the Constitution in order to accommodate it to the

mathematical formula," *id.* at 382, he declared that that decision "represented a realistic appreciation of the fact that ours is an evolving society and that the general words of the contract clause were not intended to reduce the legislative branch of government to helpless impotency," *id.* at 383. In El Paso v. Simmons, *supra* at 527 n.17, Mr. Justice Black conceded that he had dissented in *Wood v. Lovett* but added: "Even had my dissent prevailed, however, that case would not have supported the Court's holding in the case before us." Just why it would not have supported it is not made clear.

[30] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646 (1952) (Jackson, J., concurring). The decision in this case, invalidating President Truman's effort to avoid a steel strike and maintain uninterrupted steel production during the Korean War by seizing the steel industry, does not really represent, as it might appear, an instance in which the Court forthrightly refused to sacrifice constitutional limitations to the necessities of national crisis. In this case, Congress had refused to acquiesce in the President's action, indicating its firm belief that seizure was *not* necessary, and various alternative means of averting the strike were readily available. Had there been general agreement in Congress that the President's action *was* necessary to preserve the military capacity of the nation in wartime, and had alternative means not been available, one does not have to read very deeply into the opinions of at least four of the six Justices comprising the majority (including Mr. Justice Jackson) to be convinced that the Court's ruling would have gone the other way. Mr. Justice Jackson, in fact, earlier in his opinion, stated that in the absence of congressional opposition to presidential action, "any actual test of power *is likely to depend on the imperatives of events* and contemporary imponderables rather than on abstract theories of law." *Id.* at 637. (Emphasis added.)

[31] Korematsu v. United States, 323 U.S. 214, 242-48 (1944) (Jackson, J., dissenting). The *Korematsu* decision and Mr. Justice Jackson's opinion in that case have been severely criticised—see, *e.g.*, Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945), reprinted in ROSTOW, THE SOVEREIGN PREROGATIVE 193-266 (1962)—and from the vantage point of the present it is simply impossible to defend the Court's ruling. Nevertheless, the most devastating criticism of *Korematsu* has always been that the exclusion policy was totally unnecessary, and that that fact was, or should have been, apparent to the Court. It would be far more difficult to condemn the decision if one were forced to concede that the war might not have been won had the Government been denied the power to carry out the exclusion.

urgent necessities of the time, it often has to face the charge that it is amending the Constitution rather than interpreting it. Among those most likely to make this accusation are dissenting Justices who happen to take a different view of the reasonableness or necessity of the legislation at hand. For example, when the Court upheld the act of Congress conferring jurisdiction on the federal judiciary to hear nonfederal cases arising between citizens of a state and citizens of the District of Columbia,[32] despite the fact that the diversity clause of article III only extends federal jurisdiction to controversies "between Citizens of different States," Mr. Justice Frankfurter, in dissent, was quick to retort that while the vague phrases of the Constitution that "were purposely left to gather meaning from experience" might be made adaptable to changing social conditions, no flexibility should be recognized where the framers had been "explicit and specific." [33] "Precisely because 'it is *a constitution* we are expounding,' " he declared, "we ought not to take liberties with it." [34]

But mere disapproval of judicial "amendment" of the Constitution begs the fundamental question. To the general proposition that the Court is not authorized to amend the Constitution, all may agree, just as all may agree with the general proposition that the proper function of the courts is adjudicating, not legislating. Yet it is universally recognized that the process of adjudication inevitably carries with it a not inconsiderable responsibility for setting policy—*i.e.*, for legislating. Courts, in deciding whether an existing precedent should be treated as controlling or distinguished, in deciding among various plausible interpretations of the language of a statute or simply in deciding between plaintiff and defendant where a persuasive case can be made for either side, are engaged in law making, and no pious incantation of the doctrine of separation of powers can or should obscure that fact.[35]

[32] 54 Stat. 143 (1940) (now 28 U.S.C. § 1332(b) (1964)).

[33] National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646-47 (1949) (Frankfurter, J., dissenting). Despite his normal posture of deference to the legislature, this is one of a number of cases in which Mr. Justice Frankfurter dissented from the judgment of the Court upholding an act of Congress against a constitutional challenge. See also Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); Screws v. United States, 325 U.S. 91 (1945). At least one unfriendly commentator has suggested that questions of governmental form (federalism and separation of powers) were of greater importance to him than questions of substantive content of legislation, with the result that his dedicated deference in cases involving the latter type of question did not extend to cases involving the former. Rodell, *For Every Justice Deference Is a Sometime Thing*, 50 GEO. L.J. 700, 706-07 (1962).

[34] National Mut. Ins. Co. v. Tidewater Transfer Co., *supra* note 33, at 647. A similar exchange occurred in the debate between Justices Goldberg and Black over the unresolved, and, since the passage of the Civil Rights Act of 1964, apparently moot, question of whether the fourteenth amendment, of itself, barred states from prosecuting Negroes for "sit ins" at privately owned places of public accommodation. See Bell v. Maryland, 378 U.S. 226, 315, 341-42 (1964).

[35] Among many revealing works on the judicial process, see CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); FRANK, LAW AND THE MODERN MIND (1930); LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).

Similarly, the judicial task of constitutional interpretation involves Constitution making. In one sense each decision which gives a definitive construction to a particular provision of the Constitution may be said to amend it—at least to the extent of clarifying it and foreclosing other potentially acceptable alternative interpretations. Unless one chooses to pretend that the construction chosen by the Supreme Court has been hidden in the text all along, and has only been "found" by the Court, the Constitution must undergo some change when one of its provisions is authoritatively interpreted. Rejecting the view that judicial affirmation of a social custom is not law making, John Dewey once stated that "something happens when a custom becomes a law," and that the judicial action involved contains "an element which is additive and in a sense . . . creative." [36] This idea may be appropriately transferred to the area of constitutional law. Something indeed happens when the Supreme Court interprets a constitutional provision of sufficiently doubtful meaning that a legal dispute has arisen regarding it, and that something is in the nature of a change, "an element which is additive and in a sense . . . creative."

This is not to say that the Court should be free to rewrite the Constitution at will, ignoring what it chooses to ignore and inserting what it chooses to insert. Max Radin's admonition, made with regard to the limits of statutory interpretation, has validity for constitutional law: "Words are certainly not crystals, as Mr. Justice Holmes has wisely and properly warned us, but they are after all not portmanteaus. We can not quite put anything we like into them." [37] But, within the limits of reasonableness and prudence, the Supreme Court must be, and has been, prepared to construe the provisions of the Constitution strictly or liberally, to apply its terms (or to refuse to apply them) to novel situations, in order not to allow a section or a phrase to defeat those basic purposes set forth by the framers themselves in the Preamble: "[T]o form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."

Technically, judicial interpretation and reinterpretation of the Constitution may be characterized as "amendment." But, if so defined, the Supreme Court has an entirely proper role in the "amending" process. The words of the Constitution, as Mr. Justice Holmes remarked in a famous passage, "must be considered in the light of our

[36] Dewey, Book Review, 28 COLUM. L. REV. 832, 833 (1928); *cf.* ALLEN, LAW IN THE MAKING 152-56 (7th ed. 1964).

[37] Radin, *supra* note 7, at 866. (Footnote omitted.) Holmes' aphorism is from Towne v. Eisner, 245 U.S. 418, 425 (1918).

whole experience and not merely in that of what was said a hundred years ago." [38] Surely, if the Court had not undertaken the task of continual "amendment" through reinterpretation, the document of 1787 could not have survived to the present day in recognizable form. If the nation had had to rely on what John Marshall described as the "unwieldly and cumbrous machinery of procuring a recommendation from two-thirds of Congress and the assent of three-fourths of . . . [the] States" [39] for every revision of emphasis or construction, the Constitution would either have taken on the "prolixity of a legal code" or have stagnated. Even those simple changes required solely by the passage of time would have been rendered enormously troublesome. The interpretive function of the Court, it was noted by Mr. Justice Jackson, is marked by "its indispensability to government under a written Constitution." [40]

Evidence of the importance of judicial interpretation in constitutional change is the Supreme Court's traditional use of *stare decisis* in the realm of constitutional law. If the Court lacked power to effect any changes in the Constitution, *stare decisis* should be particularly strong in this area, for judicial abandonment of a constitutional interpretation can alter the meaning of the document as fully as formal amendment. The accepted attitude, however, is that *stare decisis* is to be less binding in constitutional decisions than in those involving the interpretation of a statute [41] since change through reinterpretation is not only simpler but qualitatively different from change through formal amendment. This distinction has been best described by Edward H. Levi:

> It may be suggested that the doctrine should be otherwise; that as with legislation so with a constitution, the interpretation ought to remain fixed in order to permit the people through legislative machinery, such as the constitutional convention or the amending process, to make a change. But the answer lies not only in the difficulties of obtaining an amendment, nor the difficult position of a court which obdurately refuses to interpret common words in a way ordinary citizens believe to be proper. The more complete answer is that a written constitution must be enormously ambiguous in its general provisions. If there has been an incorrect interpretation of the words, an amendment would come close to repeating the

[38] Missouri v. Holland, 252 U.S. 416, 433 (1920).

[39] Barron v. Baltimore, 32 U.S. (7 Pet.) 153, 158 (1833).

[40] JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 26 (1955). The quotation, which was originally part of a lecture delivered in 1946 to the Ministry of Justice of France, continued: "It is difficult to see how the provisions of a 150-year-old written document can have much vitality if there is not some permanent institution to translate them into current commands and to see to their contemporary application." *Ibid.*

[41] See the discussion of this point by Mr. Justice Brandeis in Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405-10 (1932) (dissenting opinion).

> same words. What is desired is a different emphasis, not different language. This is tantamount to saying that what is required is a different interpretation rather than an amendment.[42]

The history of the first amendment provides an excellent illustration of the wisdom of Professor Levi's observation. Who would wish to amend that amendment? Who would wish to clutter its simplicity with an attempt at an exhaustive list of the exceptions that must be made to the rule that "Congress [or state legislatures] shall make no law"? The first amendment embodies the ideal of freedom for the individual, and if the constitutional dignity of that ideal is not to be buried in needless verbiage, an amended version of it "would come close to repeating the same words." The courts remain then as the medium to transmute that ideal into working rules of practical operation.

First amendment absolutists, it should be noted, despite their insistence to the contrary, are not uninfluenced by the needs of present society. Although Mr. Justice Black in his James Madison lecture heaped scorn upon judges who would allow social considerations to affect their interpretation of unequivocal constitutional language,[43] his own interpretation of the first amendment is so affected. In *Cox v. Louisiana*, for example, he would have upheld the convictions of the civil rights demonstrators. He justified his position by stating that the first and fourteenth amendments cannot "grant a constitutional right to engage in the conduct of picketing or patrolling," because: "Were the law otherwise, people on the streets, in their homes and anywhere else could be compelled to listen against their will to speakers they did not want to hear."[44] But, on his own terms, how can he make such a statement? On his own terms, a judge must treat as absolutely irrelevant all considerations related to the social consequences that may be anticipated from the absolutist interpretation of constitutional provisions in general, and the first amendment in particular. If the first amendment is absolute, then, beyond doubt, people may be "compelled to listen against their will to speakers they [do] not want to hear." If this is absurd and socially disastrous, it can be no concern of the judge who takes his commands only from the words of the Constitution. For the truly absolutist judge, only the amending process is available to correct manifest deficiencies. Mr. Justice Black, as judge, does not subscribe to his own constitutional theory in this

[42] LEVI, *op. cit. supra* note 35, at 42.

[43] Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865, 876-79 (1960).

[44] 379 U.S. 559, 578 (1965) (separate opinion).

area, and quite rightly. A judicially modified first amendment provides greater hope for the protection of freedom of expression than would the patchwork provision, filled with numerous exceptions, that would result if the members of the Court were to force reliance on the amending process to correct the absurdities, inequities, and injustices that would follow from an absolutist interpretation.

Departures from the literal interpretation of constitutional provisions are, of course, not only resorted to for the purpose of validating legislation. The due process clauses of the fifth and fourteenth amendments have done yeoman service for years in the cause of invalidating legislation which could not be said to be prohibited by any specific provision of the Constitution. It is striking that while substantive due process is looked on with general disfavor because of the uses to which it was put in the half century between the 1880's and the 1930's,[45] the doctrine, to the surprise of many, was not abandoned after Roosevelt appointees came to dominate the Court in the 1940's, but was merely transferred from the area of the protection of economic rights and liberties to that of the protection of civil rights and liberties.[46] The incorporation of the first amendment and considerable segments of the remainder of the Bill of Rights into the fourteenth amendment is simply substantive due process in its new guise,[47] although a majority of the Court now seems disturbed by this discovery. Recently it has made an unconvincing effort to assert that there is no resemblance whatever between earlier substantive due process and the present incorporation procedure, even when that which is incorporated is not merely the literal meaning of certain provisions of the Bill of Rights, but meanings that are to be found in "penumbras, formed by emanations from those guarantees that help give them life and substance." [48]

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[45] See, *e.g.*, Hamilton, *The Path of Due Process of Law*, in THE CONSTITUTION RECONSIDERED 167 (Read ed. 1938). Perhaps the most eloquent statement of disapproval of the excesses of substantive due process may be found in the dissenting opinion of Mr. Justice Holmes in Truax v. Corrigan, 257 U.S. 312, 344 (1921):

> There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect.

[46] See generally PRITCHETT, THE ROOSEVELT COURT 91-136 (1948).

[47] See Green, *The Bill of Rights, The Fourteenth Amendment, and the Supreme Court*, 46 MICH. L. REV. 869 (1948); Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926). The most recent decisions of the Supreme Court extending the list of incorporated provisions are: Pointer v. Texas, 380 U.S. 400 (1965) (confrontation of witnesses); Malloy v. Hogan, 378 U.S. 1 (1964) (compulsory self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (assistance of counsel); Robinson v. California, 370 U.S. 660 (1962) (cruel and unusual punishment).

[48] Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

But surely it cannot reasonably be denied that when the fourteenth amendment, which forbids states to "deprive any person of life, liberty, or property, without due process of law," is judicially interpreted to prohibit states from abridging freedom of speech, just as much substantive content is added to the amendment as when it is interpreted to prohibit states from abridging freedom of contract, and this is no less true merely because, elsewhere in the Constitution, the first amendment prohibits the *federal* government from abridging the freedom of speech. If the incorporation of the plain meaning of the provisions of the Bill of Rights is substantive due process, it is clearly also substantive due process when that which is incorporated is not the plain meaning of the provision but its penumbral emanations.

Thus while the result arrived at by the Court in striking down the Connecticut anti-contraceptive statute would appear sound, it was not so because the Court followed an inexorable command of the Constitution in that case any more than it did in the freedom of contract cases.[49] Rather the Court's result seems sound because, unlike maximum hour legislation, the Connecticut statute served a social purpose that was minimal, if indeed it existed at all, at the cost of denying even to married couples the right to use contraceptives, and even if pregnancy were likely to result in serious illness or death to the wife.[50] When persons with standing to challenge the constitutionality of a statute present facts to demonstrate that the statute inflicts grave personal hardship and is lacking in social purpose, and when the government cannot rebut that argument, the Court is on sound ground in striking down the statute on the basis of the due process clause. That substantive due process is here to stay was made clear when the Court could find no better reason for invalidating public school segregation in the District of Columbia,[51] a practice not forbidden by any express provision of the Constitution, or for protecting the right to travel,[52] a right not expressly secured.[53]

[49] This was highlighted by the dissent of Mr. Justice Black, who, with Mr. Justice Stewart, argued that nothing in the Constitution specifically guaranteed the right of privacy, and that nothing in the due process clause authorized the Court to strike down a law merely because it thought it unwise or unjust. *Id.* at 508-13 (dissenting opinion).

[50] *Cf.* Poe v. Ullman, 367 U.S. 497, 498-500 (1961); *id.* at 545-55 (Harlan, J., dissenting).

[51] Bolling v. Sharpe, 347 U.S. 497 (1954).

[52] Aptheker v. Secretary, 378 U.S. 500 (1964); Kent v. Dulles, 357 U.S. 116 (1958).

[53] It is interesting to follow the variations in the positions taken by Mr. Justice Black on the question of the incorporation of the Bill of Rights into the fourteenth amendment. While, in his first months on the Court, he silently concurred in Mr. Justice Cardozo's opinion in Palko v. Connecticut, 302 U.S. 319 (1937), which declared that only those provisions of the Bill of Rights which "have been found to be implicit in the concept of ordered liberty" were to be absorbed into the fourteenth amendment, *id.* at 325, he apparently later realized that this rule of substantive due

When the Court relies on one of the due process clauses to invalidate state or federal legislation, it is keeping the Constitution abreast of its best conceptions of fairness and justice—and fairness and justice may certainly be classified as urgent public needs. The freedom of contract decisions were not intolerable because they represented substantive due process, but because the justice that the members of the Court believed they were preserving was, in fact, a manifest injustice. Decisions such as *Lochner v. New York* [54] simply demonstrate how far out of touch the majority of the Justices were with the social realities of the industrial revolution. The answer to *Lochner*, however, is not to scrap substantive due process any more than to scrap judicial review. Courts may make erroneous decisions. If, however, their mistakes result even after an attempt to decide on the basis of social realities, they will likely be fewer and milder than the mistakes based on a conception of the judicial function that denies them the right to judge. It may be comforting to the judges to pretend that their errors in constitutional cases are not of their own making but simply reflect the errors of the framers, but it is a dangerous delusion. Morris Raphael Cohen, writing at a time when the notorious heyday of freedom of contract was still a fresh memory, recorded ideas which remain pertinent today:

> If, however, there are any principles of political science which enlightened experience makes clear, they are (1) that the worst form of government is that which separates power from responsibility, and (2) that the weakest government is that which has relatively little access to the sources of information. And does not the fiction that the courts only follow the words of the Constitution in fact relieve them of the

process was highly subjective. See Braden, *The Search for Objectivity in Constitutional Law*, 57 YALE L.J. 571, 589-93 (1948). Therefore, in order to maintain a position of constitutional absolutism, he attempted to argue that the entire Bill of Rights was incorporated into the fourteenth amendment, not because of fundamental fairness, but simply because that was the intention of the framers of the amendment. Adamson v. California, 332 U.S. 46, 68 (1947) (dissenting opinion). This argument was based on historical evidence, the validity of which was dubious at best. See Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949). It has never been accepted by a majority of the Court, which has continued to employ the *Palko* test. Although Mr. Justice Black has stated that he still adheres to the views that he expressed in *Adamson*, Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865, 866 (1960), he has sufficiently succumbed to the majority view that he has been able to write opinions for the Court in recent incorporation decisions using the selective incorporation language of *Palko*. Pointer v. Texas, 380 U.S. 400, 403 (1965); Gideon v. Wainwright, 372 U.S. 335, 342 (1963). His acceptance of selective incorporation is somewhat surprising since the practice requires a subjective decision as to which provisions of the Bill of Rights are fundamental and which are not. See Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963). He explained this in a footnote to his dissent in Griswold v. Connecticut, *supra* at 526 n.21, by stating that he "agreed to follow" the *Palko* rule as a second-best method that would "make [at least some of the] Bill of Rights safeguards applicable to the States."

[54] 198 U.S. 45 (1905).

> responsibility, and (2) that the weakest government is that it not also true that this fiction that the courts decide only questions of law prevents us from organizing the courts so that they could have the opportunity of making adequate investigation into the actual facts on which they have to pass? Do we want our judges to be not only irresponsible to any earthly power, but also independent of adequate knowledge of the social consequences of their decisions? [55]

III. Constitutional Prohibitions and the Presumption of Constitutionality

Recognition of the propriety of judicial examination of legislative facts in constitutional cases, even for the purpose of ascertaining the extent of the public need for a challenged statute, is hardly a novel development. The necessity of such examination to the adequate performance of the functions of the federal courts was established, with regard to acts of Congress (once the Supreme Court had successfully asserted the existence of the power of judicial review), by the presence of the "necessary and proper" clause in article I, section 8 of the Constitution. By the terms of this clause, if the federal courts were to have the responsibility of reviewing the constitutionality of congressional legislation when appropriately challenged in litigation, they had the inevitable responsibility of determining whether a law not plainly within the scope of a delegated power was, in fact, "necessary and proper" to the execution of such a power. And "necessary" refers to need. Although the historic decision in *McCulloch v. Maryland*,[56] of course, wisely rejected the argument that "necessary" be interpreted as meaning "absolutely or indispensably necessary," adopting instead a far more permissive and flexible interpretation,[57] the Court could not avoid considering and ruling on the question of whether a national bank was necessary, in the sense of being appropriate, to the execution of Congress's delegated powers. Had it not been appropriate, said Marshall, "it would become the painful duty of this tribunal . . . to say, that such an act was not the law of the land." [58]

The permissiveness which the Marshall Court read into the "necessary and proper" clause is entirely fitting when the question involved is simply whether or not a congressional act is within the scope of the powers delegated to the federal government. As Marshall noted,

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[55] Cohen, The Faith of a Liberal 192-93 (1946).

[56] 17 U.S. (4 Wheat.) 316, 413-21 (1819).

[57] The Court declared: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 421. (Footnote omitted.)

[58] *Id.* at 423.

such permissiveness is essential if federal power is to be kept adequate to meet the changing needs of society over a period of decades and centuries, and if the Constitution is "to be adapted to the various *crises* of human affairs." [59] However, when the question involves a constitutional prohibition, permissiveness alone is insufficient, and the question of public need may become crucial. Here the qualification of "absolutely or indispensably necessary" may prove a more meaningful standard for constitutional judgment. For example, while it is true that a relatively insignificant abridgment of freedom of speech, such as a restriction on the use of sound trucks, may be permissible for reasons of appropriateness and convenience, serious abridgments, such as punishment for the expression of an idea, should only be upheld as constitutional in that very rare case where it can reasonably be shown that the abridgment is "absolutely or indispensably necessary" in the public interest, as a means of averting an immediate threat of serious public disorder.

If standards of constitutionality are variable, the presumption of constitutionality must also vary.[60] The mere willingness of the courts to examine legislative facts demonstrates that the presumption of constitutionality traditionally accorded to the acts of the legislature is not conclusive.[61] Nevertheless, it is hardly necessary that the presumption be abandoned. It *is* necessary, however, that it be treated as rebuttable and that full opportunity be given for the presentation of evidence that would tend to refute it. Where no constitutional prohibition is encountered but only an allegation that Congress has exceeded its authority, the presumption should be at its strongest, and the party challenging the statute must show that the legislation is wholly inappropriate to the proper exercise of any of the powers of government. Recent decisions on the scope of the war, commerce and taxing powers of the federal government would indicate that this is a formidable task indeed.[62]

But rare is the case where a challenged statute is only alleged to be in excess of legislative authority. A law without a proper and valid public purpose is by definition a violation of substantive due

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[59] *Id.* at 415 (emphasis in original).

[60] There is no reason to assume that the presumption of constitutionality is of equal strength in all cases. There is obviously a stronger basis for such a presumption in the case of a federal tariff, for example, than in the case of a federal censorship law. See Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUPREME COURT REV. 75, 86-95.

[61] Freund, *Review of Facts in Constitutional Cases*, in SUPREME COURT AND SUPREME LAW 49 (Cahn ed. 1954).

[62] Regarding the commerce power, see Katzenbach v. McClung, 379 U.S. 294 (1964), upholding Title II of the Civil Rights Act of 1964, 78 Stat. 241, 42 U.S.C. § 2000(a) (1964). In its decision upholding the ban on racial discrimination in a restaurant whose only apparent connection with interstate commerce was that a sub-

process, and a litigant who is deprived of liberty or property is certain to raise a due process claim at least. The mere addition of such a claim, of course, would not of itself appreciably weaken the presumption of constitutionality, for the burden of proof would still lie with the party challenging the statute to demonstrate that, in the words of Holmes's famous dissent in *Lochner v. New York*,[63] "a rational and fair man necessarily would admit that the statute . . . infringe[d] fundamental principles as they have been understood by the traditions of our people and our law," or, more simply, that it was unreasonable—that it deprived persons of liberty or property without serving a genuine public purpose.[64] Similarly, a claim that the challenged statute violated an express constitutional prohibition would not by the mere fact of its assertion measurably affect the presumption unless it could be shown that the violation was not trivial, that it might have serious effects on individuals or on the public, or that the public purpose said to be served was not sufficiently great. In either the case of the substantive due process claim or the claim involving the express constitutional prohibition, however, the presumption afforded the statute would become progressively weaker as the magnitude of the social interest the legislature was seeking to protect became smaller, or as the social importance of the guarantee being abridged, or the degree of its abridgment, became greater.

According to the doctrine of "preferred position," a presumption of unconstitutionality may be said to be appropriate when a law is challenged as an abridgment of freedom of expression.[65] It would seem unnecessary, however, to place the burden of proof on the government from the outset if the Court is willing to weigh carefully the evidence that the law constitutes too great an abridgment of a protected liberty

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stantial portion of the food it purchased came from out of state, a unanimous Court declared:

> [W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end. . . .
>
> The absence of direct evidence connecting discriminatory restaurant service with the flow of interstate food, a factor on which appellees place much reliance, is not, given the evidence as to the effect of such practices on other aspects of commerce, a crucial matter.
>
> The power of Congress in this field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere.

379 U.S. at 303-05. Regarding the war power, see Woods v. Miller, 333 U.S. 138 (1948); Korematsu v. United States, 323 U.S. 214 (1944). Regarding the taxing power, see United States v. Kahriger, 345 U.S. 22 (1953).

[63] 198 U.S. 45, 76 (1905) (dissenting opinion).

[64] "The requirements of due process are a function not only of the extent of the governmental restriction imposed, but also of the extent of the necessity for the restriction." Zemel v. Rusk, 381 U.S. 1, 14 (1965). (Footnote omitted.)

[65] See BLACK, THE PEOPLE AND THE COURT 215-22 (1960).

for the social purpose it is claimed to serve. Mr. Justice Stone's *Carolene Products* footnote speaks only of a "narrower" presumption of constitutionality,[66] and Mr. Justice Rutledge, in *Thomas v. Collins*, described the presumption as being "balanced" by the preferred position conceded to first amendment freedoms.[67] These conceptions would seem more appropriate than a complete reversal of the presumption. Since, in such cases, the presumption is offset, or "balanced," by the existence of a general or express constitutional prohibition, the task of the Court must be to weigh the degree of public necessity underlying the statute against the seriousness of the violation of a constitutional prohibition and to make its decision regarding constitutionality on the basis of the *preponderance* of the factual evidence.

It would be a serious error for the Court to raise the presumption of constitutionality to such a level of conclusiveness that it decides constitutional questions irrespective of the weight of contradictory factual evidence. It would be an equally serious error to reverse the presumption and automatically to treat as unconstitutional any statute which appears in any way to trench upon rights protected by a constitutional prohibition, regardless of the factual data that the government may present to demonstrate the public need for the law or the limited extent of its actual abridgment of these rights. The latter error is inherent in constitutional absolutism, and its manifestations may be found in the freedom of contract decisions of the old Court and in the exaggerated protection given to freedom of speech in the days of the primacy of the doctrine of "preferred position."[68] The former error is the hallmark of judicial self-restraint, and it results in the incapacity of the courts to enforce constitutional guarantees against the encroachment of the political branches.

An outstanding example of the abuse of the presumption of constitutionality to uphold a statute was presented in the 1960 case of *Flemming v. Nestor*.[69] The case concerned the constitutionality of section 202(n) of the Social Security Act, as amended in 1954, which provided for the termination of social security benefit payments to any alien deported for one of fourteen reasons, including past membership in the Communist Party, and under which the old age benefits of an

[66] United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

[67] 323 U.S. 516, 529-30 (1945).

[68] See BERNS, FREEDOM, VIRTUE AND THE FIRST AMENDMENT 73-128 (1957).

[69] 363 U.S. 603 (1960).

alien, who had belonged to the Party in the 1930's and who had been deported for that reason in 1956, had been halted. The basic constitutional contentions that were raised were that section 202(n) inflicted punishment without a trial, and that it constituted an ex post facto law and bill of attainder. The Court properly recognized that the crucial constitutional test was whether the statute was intended to impose punishment, and the test for identifying punishment put forward by Mr. Justice Harlan for the five to four majority was unexceptionable:

> Where the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected. The contrary is the case where the statute in question is evidently aimed at the person or class of persons disqualified.[70]

In other words, if the purpose of section 202(n) was related to the administration and functioning of the social security system or to any other proper governmental purpose, it did not impose punishment and was, therefore, constitutional even though those deprived were made to suffer a serious loss. If, on the other hand, the provision had no relationship to a valid governmental purpose but was enacted merely as an expression of congressional disapproval of the acts leading to deportation, it would constitute punishment and would be invalid. However, after having stated the test, Mr. Justice Harlan, second at the time only to Mr. Justice Frankfurter in his devotion to self-restraint, proceeded to answer the questions it posed, not by a consideration of the available evidence that could have led the Court to believe that Congress had one or the other purpose in mind, but simply by pointing to the presumption of constitutionality. He refused to consider any factor that would tend to show that the law served an invalid purpose on the ground that consideration of such factors would not constitute faithful adherence to the presumption's requirements.[71] Thus, under this use of the presumption, if any reason at all could be suggested for believing that Congress was concerned with the regulation of social security or the protection of the economy rather than with the misdeeds of those otherwise eligible for benefit payments, the Court must then assume that that was the reason underlying the enactment, regardless of the strength of the evidence or the cogency

[70] *Id.* at 614.

[71] We observe initially that only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground. . . . Moreover, the presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it.

Id. at 617.

of the arguments demonstrating that Congress merely desired to penalize persons deported for what it deemed to be the wrong reason.

Moreover, Mr. Justice Harlan made it clear that if the government was not prepared to suggest any reasoning by which the statute could be upheld, the Court would supply the necessary imaginativeness. Even in the face of the fact that benefits were not cut off in the case of citizens or aliens voluntarily living outside the country or in the case of aliens who were deported for reasons not generally considered reprehensible, and in the absence of *any* positive evidence that Congress had a valid purpose in mind, the Court still said that it was *possible* that the termination of payments only to those aliens deported for the commission of reprehensible acts might have been intended to meet a public need and not further to penalize the deportees—and if it was possible, all evidence of its improbability must be rejected as irrelevant.[72] Thus, under the banner of judicial self-restraint, the Court raised the presumption of constitutionality to an insurmountable level. It denied its own capacity to enforce the constitutional prohibitions against the legislative imposition of punishment by denying to itself the power to exercise judgment and, thereby, to carry out its judicial function properly. It may be conceded that the presumption would indeed have required upholding the statute if any adequate reasoning could have been advanced to support a genuine belief that section 202(n) was intended to serve a valid purpose—for example, protect the balance of payments, strengthen the economy or improve social security. But completely to substitute the presumption for such reasoning is nothing less than an abdication of judicial duty. For it is all but impossible not to believe that upon full consideration of all the data available to the Court "a rational and fair man necessarily would admit that the statute . . . infringe[d] fundamental principles as they have been understood by the traditions of our people and our law." [73]

IV. The Presumption of Constitutionality and the Application of Statutes

The presumption of constitutionality permits the Supreme Court to extend to legislatures, both federal and state, the deference that courts are normally expected to concede to their policy determinations. There is thus sound basis for its observance, provided that it is not employed entirely in the place of judgment. No such strong basis for the entertainment of the presumption exists, however, when the Court

[72] "[W]e cannot with confidence reject all those alternatives which imaginativeness can bring to mind, save that one which might require the invalidation of the statute." *Id.* at 621.

[73] Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

is not being asked to overturn all or part of a statute together with the legislative policy it embodies but is, instead, faced with a challenge to the constitutionality of a particular application of a statute. The difference is that the application need not be an actual reflection of legislative policy. As Kenneth Karst has noted, "when there is no judgment by a legislature at all, as in cases of abuse of power by law enforcement officials, there is little justification for any presumption of constitutionality." [74]

This distinction can, however, easily be exaggerated. In a period of the ever increasing complexity of subjects governmentally regulated and thus of a mounting need for flexibility in governmental response, Congress and the state legislatures have necessarily come to rely to a very great extent on administrative expertise "to fill up the details" of legislation drafted in general terms.[75] It would, of course, be a grave mistake to assume that administrative rule making under such conditions is somehow less legitimate than direct legislative action, or that the decision by a legislature to turn a problem over to the administration with only vague standards to serve as a guide does not manifest a genuine policy determination that the matter be settled by administrative discretion. Therefore, it would be entirely improper for the courts simply to abandon the presumption of constitutionality when dealing with administrative law making, and to suggest, as was the vogue not long ago, that all policy decisions by administrators constitute a usurpation of authority.[76] In fact the Supreme Court has not taken this course, and has expressly conceded to administrative regulations an entitlement to the presumption equivalent to that of statutes.[77]

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[74] Karst, *supra* note 60, at 87.

[75] The quoted phrase belongs to Mr. Chief Justice Marshall. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).

[76] See, *e.g.*, HEWART, THE NEW DESPOTISM (1929).

[77] It is urged that this rebuttable presumption of the existence of a state of facts sufficient to justify the exertion of the police power attaches only to acts of legislature; and that where the regulation is the act of an administrative body, no such presumption exists, so that the burden of proving the justifying facts is upon him who seeks to sustain the validity of the regulation. The contention is without support in authority or reason, and rests upon misconception. Every exertion of the police power, either by the legislature or by an administrative body, is an exercise of delegated power. Where it is by a statute, the legislature has acted under power delegated to it through the Constitution. Where the regulation is by an order of an administrative body, that body acts under a delegation from the legislature. The question of law may, of course, always be raised whether the legislature had power to delegate the authority exercised. . . . But where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies.

Mr. Justice Brandeis in Pacific States Box & Basket Co. v. White, 296 U.S. 176, 185-86 (1935).

Nevertheless where administrative application brings a statute which is on its face innocuous into an area where it threatens to abridge or restrict rights deemed worthy of active judicial protection, the Court should hesitate before leaping to the conclusion that the administrative action at hand is an accurate reflection of legislative policy and is, therefore, worthy of an equivalent degree of deference. Before deciding, the Court must seek answers to such questions as whether the particular application that raises constitutional questions is essential to the accomplishment of the purposes of the statute, or merely useful, or unnecessary; whether the potential abridgment was contemplated by the legislature; and, as always, whether the application can be justified by the urgency of the public need relative to the degree and significance of the abridgment.

At the federal level, the perfect examples of administrative overzealousness deserving of judicial rebuke were the two thousand prosecutions brought during World War I under the Espionage Act of 1917.[78] The act, among other things, prohibited willful attempts to cause insubordination and disloyalty in the armed forces, and willful obstruction of the recruiting or enlistment service[79] and, in these respects, raised no constitutional problems whatever. However the acts which led to prosecutions under these provisions generally did not involve genuine attempts to cause insubordination or obstruct recruiting, but were general statements of opposition to the war or to conscription, often made in private conversation and not necessarily to members of the armed forces or to potential draftees.[80] It would now be generally conceded that the bulk of these Espionage Act prosecutions raised valid questions under the first amendment precisely because of the absence of any real threat to the interests protected by the statute that could have resulted from the statements for which the defendants were brought to trial. The great virtue of the "clear and present danger" test, pressed by Justices Holmes and Brandeis as a response to the rash of convictions obtained in that period, was that it permitted a constitutional attack on the application of a statute without requiring an attack on the validity of the statute itself.[81] Thus, when

[78] See CHAFEE, FREEDOM OF SPEECH 42-106 (1920).

[79] 40 Stat. 219 (1917), as amended, 18 U.S.C. § 2388(a) (1964).

[80] CHAFEE, *op. cit. supra* note 78, at 56-66. A particularly bizarre example was the conviction and imprisonment for three years of the producer of a film on the American Revolution, patterned after "Birth of a Nation", and entitled "The Spirit of '76.'" Because the film portrayed British atrocities, it was charged that he had willfully attempted to cause insubordination in the armed forces by presenting to the public a motion picture calculated "to arouse antagonism, hatred, and emnity" between the United States and its military ally, Great Britain. Goldstein v. United States, 258 Fed. 908, 909 (9th Cir. 1919).

[81] See Cushman, *"Clear and Present Danger" in Free Speech Cases: A Study in Judicial Semantics*, in ESSAYS IN POLITICAL THEORY 316 (Konvitz & Murphy ed. 1948).

the Hughes Court of the 1930's decided to apply the spirit if not the language of the "clear and present danger" test,[82] it made clear that the application of otherwise valid state syndicalism or anti-insurrection statutes to a speaker, writer or distributor of literature would be constitutional only when there was some clear evidence that danger of rioting or other disorder was genuinely to be feared. In other words, when the speech or writing was merely unorthodox or simply expressed ideas offensive to the majority, no public need for suppression would exist, and thus the laws could not be constitutionally applied.

The legislative policy underlying state syndicalism statutes and such federal laws as the Espionage Act may in reality be no more tolerant than the administrative decision leading to the prosecutions, but the legislature—constitutionally required to generalize—must normally phrase its policies in a more tolerant manner. The legislature may enact a law against insurrection, or violent overthrow of the government, or attempts to cause insubordination, with a majority of its members fully believing that any agitating speech or expression of offensively unorthodox ideas would constitute a violation. However, that belief will not normally find its way into the language of the law, and the common result will be a deliberately repressive law expressed in terms which are, in themselves, unexceptionable. Here, the Court may freely presume the constitutionality of the goals expressed in the legislation, but should be under no compulsion to uphold the particular applications of the general law. Since the administration is forced to particularize, the Court's focus may be on its actions even though they are faithful to the actual legislative desires.

Another very similar means by which the Court can protect against unnecessary abridgment of constitutional rights without upsetting the presumption of constitutionality is the technique of statutory interpretation. This alternative, since it avoids a constitutional judgment, would normally be preferable to the invalidation of an application of a statute, but would not be available when the narrow construction would destroy or seriously undermine the statute or when the statute had already been authoritatively construed, as is generally the case when the Supreme Court is asked to rule on the constitutionality of state legislation. Thus in a constitutional case involving a federal law which is susceptible to more than one tenable construction, the Court can fall back on the assumption, often altogether gratuitous, that Congress, ever mindful of constitutional limitations, intended the narrower and perhaps somewhat distorted construction that would not infringe upon constitutional rights, and that the administrative body

[82] *E.g.*, Herndon v. Lowry, 301 U.S. 242 (1937); DeJonge v. Oregon, 299 U.S. 353 (1937).

alone was in error in applying the broad construction that threatened such an infringement.[83] This, of course, leaves the way open for Congress to insist upon the broader construction by an unequivocal redrafting of the law, but such a response is not normally to be anticipated [84] since the Court has in effect warned that the new draft will probably be struck down.

If the claim for the broader construction of the statute is not frivolous, the selection of the narrower construction for constitutional reasons may very likely rest on the Court's conception of public need based on conclusions drawn from legislative facts. Where the narrow construction of the statute eliminates the constitutional problems altogether, its adoption might indicate that the Court can see no public need for the statute in its broadest terms that would be sufficient to warrant the impairment of constitutional rights that might take place if the broad construction were accepted.[85] If, on the other hand, the adoption of the narrow construction merely alleviates but does not eliminate the constitutional problems, the Court may see no public need to dilute the pertinent provision of the Constitution to such an extent that it would accommodate the broad interpretation urged upon it. It may either foresee sufficient potential need for a more limited application to warrant refusal to invalidate the law on its face, or it may deem it impolitic directly to challenge the proponents of the law through an open declaration of unconstitutionality. In any case, the accepted procedure is for the Court to note that the broad construction would raise "grave constitutional questions," and then to demonstrate that other interpretations are at least plausible. Since rejection of the

[83] The technique of avoiding constitutional questions through statutory interpretation appeared to be a favorite of the Warren Court until 1959 in civil liberties cases involving the application of congressional acts or resolutions. See, *e.g.*, Greene v. McElroy, 360 U.S. 474 (1959); Dayton v. Dulles, 357 U.S. 144 (1958); Kent v. Dulles, 357 U.S. 116 (1958); Yates v. United States, 354 U.S. 298 (1957); Cole v. Young, 351 U.S. 536 (1956); United States v. Rumely, 345 U.S. 41 (1953). The same technique was also employed frequently in this period in cases involving the application of executive orders. See, *e.g.*, Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957); Peters v. Hobby, 349 U.S. 331 (1955). See generally PRITCHETT, THE POLITICAL OFFENDER AND THE WARREN COURT (1958); Beaney, *Civil Liberties and Statutory Construction*, 8 J. PUB. L. 66 (1959).

[84] See Note, *Congressional Reversal of Supreme Court Decisions: 1945-1957*, 71 HARV. L. REV. 1324 (1958), where it is shown that, with few exceptions, Congress appears to correct the Supreme Court on matters of statutory interpretation only on the infrequent occasions when there is no significant opposition to, or when there are powerful interest groups behind, the reversal of the Court. Of course, only a very small percentage of these cases involve statutes whose interpretation raises constitutional considerations; in such cases, one would expect that the difficulties in the way of congressional reversal would be almost insurmountable.

[85] *E.g.*, United States v. Harriss, 347 U.S. 612 (1954). The Court narrowly construed the Federal Regulation of Lobbying Act, 60 Stat. 839-42 (1946), 2 U.S.C. §§ 261-70 (1964), to apply only to those making direct contacts with members of Congress and rejected the contention that the act was intended to regulate attempts to influence the passage or defeat of legislation by appeals to the general public. By adopting this construction, first amendment questions were avoided.

broad construction would normally render the statute inapplicable in the case at hand, it would not be necessary for the Court—provided constitutional questions still remain—to express itself on the validity of any narrower construction, although in a case involving a statute that had already been upheld, the Court would be under some obligation to explain why the broader construction would raise constitutional doubts not settled by the previous decisions.

Thus, to use another example from the area of freedom of expression, Congress, in the Smith Act,[86] made it unlawful to teach or advocate the violent overthrow of the government, and the constitutionality of this provision of the statute was upheld as applied to members of the Communist Party in *Dennis v. United States*.[87] In *Yates v. United States*,[88] however, the Court found that the judge's charge to the jury in a trial of fourteen Communists for conspiracy to teach and advocate violent overthrow permitted a verdict of guilty even if the advocacy involved were mere advocacy of overthrow as an abstract doctrine rather than as a call to future action.[89] The question that the Court then ostensibly set out to answer was whether Congress, in enacting the Smith Act, had intended to prohibit the advocacy of abstract doctrine. The majority concluded that Congress had not, on the ground that such a prohibition would have entered "a constitutional danger zone," which "we should not assume that Congress chose to disregard." [90] But inasmuch as the first amendment certainly makes no explicit distinction between these two types of advocacy, and since the Court, in *Yates*, conceded that advocacy of action was constitutionally punishable because of the need of the government to protect itself,[91] the only possible justification for erecting the boundary of the "constitutional danger zone" somewhere between them would be that the Court could foresee no real public need for the punishment of mere doctrinal advocacy that would be sufficient to warrant an abridgment of speech.

Regardless of the lack of rigor with which the facts were found by the Court, the constitutional question presented here was one of legislative fact. If the government had been able to present enough facts to the Court to demonstrate that the public need for suppressing doctrinal advocacy was as great as the need for suppressing advocacy of action, the same theory that permitted suppression of the latter in the

[86] 54 Stat. 670-71 (1940), as amended, 18 U.S.C. § 2385 (1964).
[87] 341 U.S. 494 (1951).
[88] 354 U.S. 298 (1957).
[89] *Id.* at 312-18.
[90] *Id.* at 319.
[91] *Id.* at 321.

face of the absolute language of the first amendment would have required the removal of doctrinal advocacy from the constitutional danger zone. Conversely, if it could be shown that the public need for prohibiting advocacy of action was so slight that it could never warrant an abridgment of the freedom of speech as great as that imposed by the Smith Act, it would follow that the provisions of that statute prohibiting advocacy of overthrow would be moved into the danger zone in their entirety, and could be struck down on their face. One may well understand, however, why the Supreme Court might hesitate to make a ruling of such finality on this question. It is at least conceivable that the threat of violent overthrow may become real at some time in the future, and the Court ought not to be expected to nullify once and for all a law that might, under those circumstances, prove essential for the protection of the public.

V. Legislative Facts and Constitutional Decisions: The Case of Commerce

The problem faced by challengers and defenders of legislation in a constitutional case is to be allowed to bring sufficient facts before the courts to persuade them of the soundness of their contentions, for when the question of constitutionality is not obvious, "the validity of the legislation depends on the conclusions reached by the court with reference to . . . question[s] of fact." [92] The sole purpose of the Brandeis brief filed by Louis Brandeis as counsel for the state of Oregon in the *Muller* case,[93] and which was successful in persuading a majority of the Court of the reasonableness of state legislation regulating the maximum hours of employment of women in industry, was to focus judicial consciousness on present facts rather than previous precedents.[94] And, although the doctrine of freedom of contract that the Brandeis brief was originally designed to combat has long since been discarded, the importance of questions of fact in the adjudication of constitutional claims has not been the least diminished. Thus the Brandeis brief has not lost its usefulness in constitutional law, for it remains a device by which a large amount of data can be assembled, organized and presented for judicial consideration in digestable form. Although two basic difficulties have been seen as arising from the use of the legal brief for the presentation of constitutionally relevant factual data, neither seems serious. First, the form of the brief and reply brief is not always the best means of making data available for accurate ap-

[92] Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 Harv. L. Rev. 6 (1924).

[93] Muller v. Oregon, 208 U.S. 412 (1908).

[94] See Mason, Brandeis: A Free Man's Life 245-54 (1946).

praisal by the courts.[95] But the use of the brief surely ought not to preclude a trial of the legislative facts, if only because fuller examination would be preferable. The important factor is that courts be as fully apprised as possible of pertinent legislative fact; the ingenuity of advocates and the stimulation of advocacy may well be able to overcome technical difficulties. Where an adequate trial of the facts is not held, however, and the appellate courts find it necessary to be more fully informed on factual questions, a remand to the lower court for a more thorough trial would be entirely in order.[96]

Second, and considerably more significant, is Professor Paul Freund's observation that the Brandeis brief "is designed to support legislation rather than to undermine it—to vindicate an experiment, not to veto it." [97] For implicit in the original concept of the brief was the understanding that it was not necessary to prove the validity of the conclusions drawn by the legislature from the data it contained, but simply to show that the legislature had a reasonable basis for arriving at its conclusion—to show that a reasonable relationship existed between the provisions of the challenged statute and a proper legislative objective.[98] Thus any material presented in a reply brief for the purpose of demonstrating the invalidity of the legislative conclusions would be entirely irrelevant, for once it had been shown that the legislature had a reasonable basis for its belief, the presumption of constitutionality would sustain the statute. But this maximum reliance on the presumption of constitutionality would be appropriate only when the presumption is at its strongest—when the challenge to the constitutionality of the statute is based solely on a claim that the law, if federal, is outside the scope of the delegated powers of Congress, or else that it is not related to a proper public purpose, which was, incidentally, the primary claim in the liberty of contract cases.[99] When the presumption is balanced, either partially or completely, by virtue of the law's potential abridgment of a constitutionally protected right, factual data tending to undermine the statute by showing that the

[95] FREUND, ON UNDERSTANDING THE SUPREME COURT 87-92 (1949); Karst, *supra* note 60, at 100-03.

[96] See, *e.g.*, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); cases cited in the dissenting opinion of Mr. Justice Frankfurter in H. P. Hood & Sons v. DuMond, 336 U.S. 525, 574 (1949).

[97] Freund, *supra* note 61.

[98] MASON, *op. cit. supra* note 94, at 248.

[99] Liberty of contract was, of course, in the eyes of the *Lochner* Court, a right as firmly protected by the Constitution as any other, and more firmly protected than rights such as freedom of expression which are now conceded particular importance. Nevertheless, liberty of contract was admittedly subject to so many limitations in the public interest that the real argument in these cases was whether the challenged law bore a relation to a real public purpose, and the constitutionality of the law hinged solely on that fact, as all three opinions in *Lochner* bear out. Rights such as free speech today may be abridged only by the showing of an *overriding* public purpose.

abridgment is unnecessary to the accomplishment of the public purpose, or that it is unjustifiably severe in light of the magnitude of the public purpose to be served, would become quite relevant. In such cases, it would not be enough to show that there was a reasonable basis for the legislative belief in the propriety of the law; it would have to be shown that there was an adequate basis for the belief that the law, both as enacted and as applied, was sufficiently *necessary* in the public interest to warrant the degree of abridgment of constitutional rights that it would bring about. And degree of necessity, if not reasonableness of belief, is open to rebuttal by counterdemonstrations of fact in a Brandeis brief or by testimony at a trial.

There is one area of law in which the presumption of constitutionality is generally conceded to be offset by competing considerations, so that legislative facts may be weighed on the judicial scales. This is the area of state regulation of interstate commerce, where, at least since *Cooley v. Board of Wardens*[100] in 1852, the applicable, although enigmatic, constitutional rule regarding the extent of state power has been that states cannot establish regulations governing those aspects of interstate commerce that "are in their nature national, or admit only of one uniform system, or plan of regulation," but can establish regulations to govern any aspect that "is local and not national," that "is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable."[101] The patent reasonableness of this rule tends to disguise the fact that it leaves open the very large questions of just which aspects of interstate commerce require a uniform system of regulation and which do not, and just how much regulation the states can impose in the areas where some state regulation is permissible.[102] Although Congress has the undoubted power to provide the authoritative answers to these questions, it has not chosen to attempt the impossible task of drawing the boundary lines in all their necessary detail. Thus, if interstate commerce is not to be left to the mercy of state legislatures, it is for the courts to decide whether state or national concerns are paramount, and this frankly legislative question should be answered, as it can only be answered, by thoughtful reference to legislative facts.

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[100] 53 U.S. (12 How.) 299 (1852).

[101] *Id.* at 319.

[102] It is not clear, from the opinions of the Court in cases in this area, whether the magnitude of the burden placed on commerce, the degree of the need for uniformity, or the importance of the local interest is the controlling factor in determining the validity of the state law. The three concepts are normally intermingled. See Stern, *The Problems of Yesteryear—Commerce and Due Process*, 4 VAND. L. REV. 446, 451-57 (1951).

Not all the Justices of the Supreme Court have accepted this task willingly, however. Mr. Justice Black, in the 1945 case of *Southern Pacific Co. v. Arizona*,[103] insisted that this was an area in which judicial self-restraint must prevail, and he heatedly objected both to the practice of holding a trial of legislative facts and to the Court's reliance on the facts found in such a trial to rule that an Arizona law limiting the lengths of interstate trains did not have sufficient advantages as a safety measure to warrant the interference with interstate commerce that it caused. Trials of legislative facts, he argued, were entirely improper, for these facts had no relevance to the judicial process and could be used only to permit the courts to review the wisdom of the policy embodied in challenged laws, and thus to act as a "super legislature."[104] Only Congress, he maintained, should be able to void nondiscriminatory state laws as improper regulations of interstate commerce, for, of the branches of the federal government, only Congress could consider legislative facts.[105] But despite the vigor of Mr. Justice Black's arguments, such stringent limitations on the judiciary would hardly seem justified, for consideration of legislative facts has other purposes than a mere review of the wisdom of legislative policy. When courts try such questions in commerce cases, the crucial evidentiary facts concern the urgency of the state policy not its wisdom and, in addition, a factor not necessarily considered at all by the state legislature, the impact of that policy on national commerce. That is, the legislative question to be determined by the courts is not whether the law is a good idea, but whether the urgency of the public need it was enacted to meet is sufficiently great to warrant the degree of the obstruction it imposes on interstate commerce.[106] This is altogether a different question, requiring an altogether different presumption of constitutionality than would be presented by a claim that the law is unreasonable, and it demands judicial concentration on legislative facts.

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[103] 325 U.S. 761 (1945).

[104] *Id.* at 788 (dissenting opinion).

[105] This was not the first expression by Mr. Justice Black of his belief that courts could not void legislative acts for legislative considerations. In J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 316 (1938) and Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 442 (1939), he dissented alone from the invalidation of state taxes as burdens on interstate commerce in the absence of any act of Congress barring their imposition. In McCarroll v. Dixie Greyhound Lines, Inc., 309 U.S. 176, 183 (1940), he had been joined in a dissent on the same issue by newly appointed Justices Frankfurter and Douglas. By the time of *Southern Pacific*, however, he again stood alone on this question. While Mr. Justice Douglas also dissented, he expressly conceded that the question of the validity of the challenged law "calls for a close appraisal of the facts." Southern Pac. Co. v. Arizona, 325 U.S. 761, 795-96 (1945) (dissenting opinion).

[106] *Cf.* Mr. Justice Black's concurring opinion in Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 273 (1964), where he stated: "The choice of policy is of course within the exclusive power of Congress; but whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question,

Some such considerations as these might have prompted Mr. Justice Black to modify the rigidity of his position. Just twelve months after *Southern Pacific,* in *Morgan v. Virginia,*[107] when the question before the Court was whether a state law requiring the racial segregation of passengers on interstate busses constituted an undue burden on interstate commerce, he concurred in the Court's opinion invalidating the law, explaining that "so long as the Court remains committed to the 'undue burden on commerce formula,' I must make decisions under it." [108] Thereafter, he grudgingly gave up his most vocal objections to the principle of judicial review in this type of case.[109]

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and can be settled finally only by this Court." Substitute "the legislature" for "Congress" in this statement, and "the constitutional prohibition against state regulation" for "the constitutional power of Congress to regulate them," and the statement not only becomes perfectly applicable to cases of state regulation of interstate commerce, but represents an answer to Mr. Justice Black's own objections to the Court's approach to *Southern Pacific* and to other cases in this area.

[107] 328 U.S. 373 (1946).

[108] *Id.* at 387. Interestingly, Mr. Justice Burton dissented alone in the *Morgan* case, on the ground that there was a "lack of facts and findings essential to demonstrate the existence of such a serious and major burden upon the national interest in interstate commerce as to outweigh whatever state or local benefits are attributable to the statute and which would be lost by its invalidation." *Id.* at 391. His point is, of course, well taken, in that if the Court is going to make decisions on the basis of legislative fact, it must insist that all available factual data are put before it, either in briefs or on the record, and it is remiss in its duties if it does not do so. See Karst, *supra* note 60, at 97-98. However, as Professor Karst has noted, "it does seem that most of the justices feel more confident of their own unaided evaluations of the legislative facts when they are dealing with civil liberties than when the issues are economic in nature." *Id.* at 96. Where the members of the Court have decided, as they evidently had in *Morgan,* that the local interest to be protected by the statute is not constitutionally defensible, and that the commerce clause is a convenient tool with which to strike it down, it matters little whether the burden on interstate commerce is great or small; as long as a reasonable case can be made out that some burden exists, that showing will suffice. *Cf.* Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948), in which the Court upheld a state anti-segregation statute as applied to passengers on boats from Detroit to a local amusement park in Canada, declaring that *Morgan* had not "involved so completely and locally insulated a segment of foreign or interstate commerce," and that no "national interest or policy . . . could reasonably be found to be adversely affected by applying Michigan's statute to these facts or to outweigh her interest in doing so." *Id.* at 39-40. Despite the fact that Hall v. DeCuir, 95 U.S. 485 (1878), striking down as a burden on interstate commerce a Reconstruction period statute of Louisiana barring racial segregation of passengers by interstate carriers, was suddenly endowed with renewed vitality as a precedent at this time, one can surmise that the Court would have required considerably greater evidence of a burden on commerce before invalidating a state anti-segregation statute than a segregation statute. More recent decisions supporting this surmise include Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 327 U.S. 714 (1963), in which the Court distinguished both *Morgan* and Hall v. DeCuir, *supra,* and declared that a state law forbidding racial discrimination by employers was not an unconstitutional burden on interstate commerce when applied to the hiring of pilots by an interstate airline, and Lassiter v. United States, 371 U.S. 10 (1962), in which the Court, without opinion, affirmed a district court judgment invalidating a Louisiana law requiring racial segregation in the terminal facilities maintained by interstate carriers, because, among other reasons, the law served to "impose an undue burden upon interstate commerce." United States v. Lassiter, 203 F. Supp. 20, 25 (W.D. La. 1962).

[109] In the first cases following *Morgan* invalidating state tax laws on the basis of the commerce clause, Mr. Justice Black dissented without opinion. Freeman v. Hewitt, 329 U.S. 249, 259 (1946); Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422, 434 (1947). He also pursued a similar course in the first case following

Yet despite Mr. Justice Black's diffidence, the Court has remained "committed to the 'undue burden on commerce formula,' " at least in cases dealing with state regulatory legislation enacted under the police power,[110] and its members have, since *Morgan*, continued to "make decisions under it," [111] striking down state or local laws or particular applications of laws in four principal cases decided with full opinion. In three of these four, the Court examined whatever legislative facts were presented in support of and in opposition to the challenged laws and based its decisions properly on the preponderance of this factual evidence. Its rulings in these three cases seem entirely sound. In the fourth, it paid little attention to facts, and its decision glaringly reflected this inadequacy. Brief consideration of these four cases may be illustrative.

In *Toomer v. Witsell*,[112] the invalidated laws were so flagrantly and undeniably discriminatory that detailed scrutiny of legislative facts was not genuinely warranted. These laws were part of a local commerce war, in which each of the southeastern coastal states had enacted legislation intended to limit the amount of profit from shrimp fishing in its ocean waters that could be drawn off to its neighbors. South Carolina had passed a licensing statute for shrimp boats establishing a fee of twenty-five dollars for each boat owned by a resident and, with certain exceptions, a fee of 2,500 dollars for each boat owned by a nonresident. The state had also imposed the requirement that all boats fishing in state waters dock at a South Carolina port to unload and pack their shrimp and obtain a tax stamp before proceeding elsewhere. The reasons halfheartedly advanced by the state as justification

Morgan in which a state regulatory law was held to contravene the commerce clause, concurring in the judgment of the Court, but declining, without opinion, to associate himself with that part of the Court's opinion relying on the commerce clause. Toomer v. Witsell, 334 U.S. 385, 407 (1948). More recently, Mr. Justice Black's usual course has been to dissent on the merits when a state law is struck down on commerce clause grounds—in cases involving the invalidation of a state tax law on these grounds, he will almost invariably join in a dissent written by Mr. Justice Clark. See Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 78 (1963); Railway Express Agency v. Virginia, 347 U.S. 359, 369 (1954); Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602, 610 (1951); Norton Co. v. Illinois, 340 U.S. 534, 541 (1951). In only one tax and one regulatory case since *Morgan* has Mr. Justice Black concurred in a majority opinion invalidating a state law on commerce clause grounds where no question of conflict with federal regulations or laws was involved. The tax case was Michigan-Wisconsin Pipeline Co. v. Calvert, 347 U.S. 157 (1954) (per Clark, J.). The regulation case was Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959). Both decisions were without dissent.

[110] See Barrett, *"Substance" vs. "Form" in the Application of the Commerce Clause to State Taxation*, 101 U. PA. L. REV. 740 (1953), where it is observed that the Court apparently felt incapable of extending the technique of the *Southern Pacific* case to the area of state taxation of interstate commerce, and reverted, unhappily and unnecessarily in Professor Barrett's view, to formal tests which did not take into account the actual local or national interests involved or the extent of their involvement.

[111] See generally Dunham, *Congress, the States and Commerce*, 8 J. PUB. L. 47 (1959); Stern, *supra* note 102.

[112] 334 U.S. 385 (1948).

for its statutes were manifestly devoid of merit,[113] and the state placed its greatest reliance on the argument that it had paramount rights of ownership over its fish and wild game and could thus exercise discretionary power to limit or prohibit shrimp fishing or the shipment of shrimp out of the state.[114] The Court, noting that a state had no discretionary power to impose discriminatory restrictions on commercial activity by nonresidents for the sole advantage of its own citizens, struck down the docking and unloading statute on the basis of the commerce clause.[115] While the Court might have invalidated the license fee statute on the same ground, a course that Justices Frankfurter and Jackson urged,[116] it relied for this purpose[117] on the "privileges and immunities" clause of article IV, a judgment which required consideration of the identical legislative facts in an identical manner as a ruling under the commerce clause.

In *Dean Milk Co. v. Madison*,[118] a Madison, Wisconsin, ordinance was challenged which prohibited the sale of milk in that city as pasteurized milk unless the pasteurization had taken place within five miles of the center of town. Although the ordinance had the effect of excluding from the Madison market the milk pasteurized by the Dean Milk Company in its plants in northern Illinois, it was justified as a health measure intended to protect the citizens of Madison from impure or unsanitary milk pasteurized outside the normal travelling range of the city's health inspectors. The Court is understandably loath to employ the commerce clause to strike down any law, even one imposing a considerable restriction on interstate commerce, that could reasonably be said to be necessary or useful for the protection of vital state interests, such as safeguarding public health. However, this ordinance was immediately suspect because it so effectively shielded the pasteurizing plants around Madison from all outside competition. Unless the Court was prepared to hold that any law plausibly justifiable as a health measure was entirely immune from invalidation under the

[113] The extraordinary differential in license fees, it was argued, was justified by a desire to conserve the shrimp by reducing the number of licenses granted, but this argument was contradicted by the expressed policy of the state more fully to capitalize on the economic potential of the shrimp industry, and by a marked and uncontrolled increase in the number of resident owned boats licensed in the preceding years. 334 U.S. at 397 n.28. It was also suggested that the differential might have been justified by differences in the size of the boats or the methods of fishing employed by nonresidents, or by the cost of enforcing the laws against them. *Id.* at 398-99. No evidence could be presented, however, to show that any such differences existed or that the cost of law enforcement was materially greater in the case of nonresidents than residents.

[114] *Id.* at 399-402, 404-06, relying primarily on McCready v. Virginia, 94 U.S. 391 (1876), and Geer v. Connecticut, 161 U.S. 519 (1896).

[115] 334 U.S. at 404-06.

[116] *Id.* at 407-09 (concurring opinion).

[117] *Id.* at 395-403.

[118] 340 U.S. 349 (1951).

commerce clause,[119] it had no alternative except to compare the degree of the burden imposed on commerce with the danger to public health that might have been anticipated in the absence of the law. After studying the factual evidence, the Court found that the complete exclusion of Illinois milk from Madison served no valid purpose because of the ready availability of equally satisfactory and workable alternatives that would adequately guarantee the purity of the milk without this exclusion.[120] Therefore, it held the ordinance to be unconstitutional as an unnecessary restriction on interstate commerce.

Mr. Justice Black, joined by Justices Douglas and Minton, dissented, arguing that the Court should not elevate "the right to traffic in commerce for profit above the power of the people to guard the purity of their daily diet of milk," and noting that the company could have sold its milk in Madison simply by sending it to an approved plant for pasteurization.[121] The company's task was not that easy, however, inasmuch as another ordinance, not directly involved in this decision, effectively prohibited the sale in Madison of all milk produced more than twenty-five miles from the city. The pasteurization ordinance, of course, could not be rendered unconstitutional because of the effect of the other law, but the existence of the second law provided evidence that the real purpose of the city's milk laws was less a concern for health than a desire to preserve a monopoly for local farmers and distributors.

The 1959 case of *Bibb v. Navajo Freight Lines, Inc.*[122] tested the validity of an Illinois requirement that all trucks operating on the highways of the state be equipped with specially designed contour mudguards to prevent splattering that might obscure the vision of the drivers of passing or following vehicles. Interference with interstate commerce resulted because almost all other states permitted the use of conventional mudflaps for this purpose, and the state of Arkansas, to complicate matters, apparently required use of the conventional equipment. Since the constitutional issue turned on highly technical questions of safety engineering, the trial court (a three judge federal district

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[119] Mr. Justice Clark, speaking for the Court, noted that the contention "that the ordinance is valid simply because it professes to be a health measure, would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." *Id.* at 354.

[120] Madison could charge the cost of sending its inspectors to outlying areas to the inspected companies, or it could accept the reports of inspection prepared by officials in other areas so long as the inspection standards were as rigorous as those employed by Madison and the quality of the inspection was reviewed by spot checks conducted by the United States Public Health Service. *Id.* at 354-56.

[121] *Id.* at 357-59 (dissenting opinion).

[122] 359 U.S. 520 (1959).

court) appropriately held an extensive trial of the facts before reaching its conclusion that the law represented an unnecessary and therefore unconstitutional burden on commerce.[123] It was found that mudflaps were just as effective as the contour guards in preventing splattering, that the contour guards tended to cause the wheels to become overheated thus creating new safety hazards not present when flaps were used, that the contour equipment had to be welded on, which was a time-consuming process often leading to serious delays in shipments, that welding was hazardous when trucks were loaded with explosives or inflammable material, and that the statute potentially affected even truck companies that did not use Illinois roads because of the common practice of "interline" transfers whereby truck trailers would be transferred from one line to another without unloading. On the basis of this record of factual evidence, the Supreme Court unanimously affirmed the district court's judgment.[124]

The fourth post-*Morgan* decision in which a state regulatory law was invalidated on the basis of the commerce clause, *H. P. Hood & Sons v. Du Mond*,[125] was, however, far less satisfactory. The ruling was altogether unrelated to the prevailing realities, for the Court attempted to decide the constitutional questions presented in that case without reference to the facts. The circumstances of the case were these: The Commissioner of Agriculture and Markets of New York State had denied a license to H. P. Hood and Sons to open a new plant in eastern New York for receiving milk from local farmers for shipment to the Boston area. The Commissioner denied the license, under the authority of applicable state law, on the ground that the opening of a new plant by Hood, which was already operating two in the immediate vicinity, would "tend to a destructive competition," and would also tend to deprive certain markets (such as Troy, New York, where a milk shortage had recently occurred) of their needed supply.[126]

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[123] Navajo Freight Lines, Inc. v. Bibb, 159 F. Supp. 385 (S.D. Ill. 1958).

[124] Mr. Justice Douglas, writing the opinion of the Court, denied that the Court's judgment was based on a resolution of "the much discussed issues of safety presented in this case," 359 U.S. at 526, and stressed, instead, the conflict between the Illinois and Arkansas requirements and the inconvenience that this conflict could cause to interstate truckers, analogizing this to the inconvenience caused by the need to rearrange seating to conform to potentially conflicting state laws on racial segregation of passengers that was said to be the basis of the ruling in *Morgan v. Virginia*. 359 U.S. at 526-27. Nevertheless, the convincing evidence that the Illinois law offered no significant safety advantages and some additional safety hazards must inevitably have had much to do with the unanimity of the Court's ruling, and Mr. Justice Harlan, joined by Mr. Justice Stewart, concurred specifically on the ground that: "In view of the finding of the District Court . . . this heavy burden cannot be justified on the theory that the Illinois statute is a necessary, appropriate, or helpful local safety measure." *Id.* at 530.

[125] 336 U.S. 525 (1949).

[126] *Id.* at 529. The second reason raises the unanswered question of whether a state can, for the benefit of its own citizens, restrict the exportation of a resource

By a vote of five to four, the Court declared the action to be an unconstitutional interference with interstate commerce. The majority opinion, although written by Mr. Justice Jackson, who, ironically, was noted in other areas for his insistence upon due cognizance of factual reality as the basis for judicial decision,[127] exuded constitutional absolutism from every paragraph and was marked by a disdainful unconcern for whatever factual justification may have existed for the denial of the license. As an added irony, the two exceptionally vigorous dissents filed in this case to criticize the Court for its failure to examine the facts were written by Justices Black and Frankfurter, the leading judicial exponents of the two constitutional doctrines which, when applied, allow no room for the consideration of legislative facts.

For the majority, the case was exceedingly easy. New York, in order to preserve milk for its own marketing areas and to promote the economic advantage of distributors operating within the state, had denied to a distributor shipping milk to Boston the right to do additional business with local farmers. Since this was a barrier to interstate commerce imposed by an individual state for its own advantage, the very kind the commerce clause was designed to prevent, it was unconstitutional. The opinion was replete with references to the dangers to be apprehended from the adoption by states of laws having the effect of a protective tariff, and of consequent retaliatory measures, the wisdom of the framers in confiding power over interstate commerce to the national government and the advantages of free and unrestricted trade among the states.[128] At no point, however, did it give any consideration to whether the New York regulation had a discriminatory or protective effect, except to note that it was here being applied to the disadvantage of an interstate distributor.

Even the most superficial analysis suffices to demonstrate the weakness of this reasoning. The constitutionality of stringent regu-

that may be in short supply. It has been held to have this power with regard to wild game, Geer v. Connecticut, 161 U.S. 519 (1896), but not with regard to natural gas, Pennsylvania v. West Virginia, 262 U.S. 553 (1923); West v. Kansas Natural Gas Co., 221 U.S. 229 (1911).

[127] Mr. Justice Jackson's emphasis on facts was particularly noteworthy in the area of freedom of expression. See, *e.g.*, Kunz v. New York, 340 U.S. 290, 295 (1951) (dissenting opinion); Terminiello v. Chicago, 337 U.S. 1, 13 (1949) (dissenting opinion); Douglas v. City of Jeannette, 319 U.S. 157, 166 (1943) (concurring opinion). See also note 40 *supra*.

[128] *E.g.*:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

336 U.S. at 539.

lation of the New York dairy industry for the purpose of preventing destructive competition was convincingly upheld in one of the great decisions of the New Deal era, *Nebbia v. New York*,[129] and, if regulation for such purpose is clearly constitutional, the state must have power to control the number of plants offering to buy milk from farmers. It therefore could clearly have prevented Hood or any other distributor from opening a receiving plant to obtain milk for a market within the state. Since this is the case, why should it be totally barred from preventing similar destructive competition simply because the distributor in question intended to ship his milk to a neighboring state? Such a doctrine serves only to nullify essential regulatory power. In the absence of any evidence that would show that New York was treating Hood differently from intrastate distributors, or that the need to control destructive competition did not genuinely exist, or that the denial of the license would have had a particularly burdensome effect on interstate commerce, the decision of the Court was unsupportable.[130] Mr. Justice Black sarcastically noted that the state law "should not be condemned on the basis of abstract rhetoric about the 'fathers' and the commerce clause," adding, in reference to the Court's avoidance of the facts, that "a state is still entitled to present its side of a constitutional controversy." [131] Mr. Justice Frankfurter in his opinion argued cogently for remand of the case to the state court for full airing of the relevant facts, listing no less than eleven pertinent questions that needed to be answered by reference to these facts before an informed constitutional judgment could be handed down.[132]

It is not necessary to denigrate the principle of free trade among the states or to deny that the commerce clause was intended to be the embodiment of that principle in order to argue that its mere assertion

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[129] 291 U.S. 502 (1934).

[130] The precedent the Court placed particular reliance on was Baldwin v. Seelig, 294 U.S. 511 (1935), in which the Supreme Court unanimously declared invalid New York regulations which prohibited the sale of milk imported from neighboring states unless the price paid by the distributor was at least equal to the minimum price established by the state for purchases from local farmers. However, these regulations were obviously akin to a protective tariff, and did have the effect of discriminating against out of state farmers whose own state laws might require or permit sales at lower prices than those authorized by New York. The regulations in *Hood* were not comparable.

[131] 336 U.S. at 560 (dissenting opinion). Although he has not infrequently been guilty of similar abuses of rhetoric, he was most intolerant of that technique here, objecting strenuously to the fact that "appeals can be made to the 'fundamental principles of liberty and justice' which our 'fathers' wished to preserve," or that "reference can appropriately be made to the far-seeing wisdom of the 'fathers,'" and concluded: "Such arguments have strong emotional appeals and when skillfully utilized they sometimes obscure the vision." *Id.* at 563. One wonders whether stirring language regarding the "fathers" and the first amendment should prevent the government from presenting its side of the controversy in a free speech case.

[132] *Id.* at 573-74.

is not enough to decide a commerce clause case. The police power of a state, validly exercised to protect the welfare of its citizens, may impose serious restrictions on the free flow of trade without necessarily running afoul of the commerce clause, and the Court must have evidence before it can rule whether a particular exercise of this power is constitutionally impermissible. The most recent cases in which the Supreme Court has invalidated state laws on the basis of the commerce clause demonstrate rather clearly that when the legislative facts are subjected to judicial scrutiny, an entirely defensible judgment can be made as to whether the challenged law should be upheld as a proper police regulation or whether it must yield to the principle that states may not erect barriers to interstate commerce. However, when legislative facts are not considered—either for the reasons of judicial self-restraint urged by Mr. Justice Black in *Southern Pacific* or for the reasons of constitutional absolutism underlying Mr. Justice Jackson's majority opinion in *Hood*—the soundness of the ultimate decision becomes little more than a matter of luck, and, depending on which set of reasons the Court accepts, either freedom of interstate trade or state police power stands in danger of being needlessly undermined.

Conclusion

Despite the insistence of those who would deny the inescapable political responsibility of the Supreme Court, it is not only manifestly feasible for the Court to examine legislative facts, but such an examination is often altogether indispensable to sound constitutional adjudication. The legitimacy of the practice has been recognized in one area—state regulation of commerce—because the attenuation of the presumption of constitutionality is conceded, a factor which removes these cases from the category of challenges to legislation based merely on claims of want of legislative power or the absence of a valid public purpose. But it is difficult to see why the same reasoning which requires the counterbalancing of the presumption of constitutionality where freedom from unnecessary state restrictions on commerce is at stake should not also require the counterbalancing of the presumption in all other areas in which constitutionally protected rights may justifiably be said to suffer meaningful abridgment (and this would include those areas of substantive due process in which the Court is willing to elevate the threatened liberty—travel, privacy, etc.—to the level of a protected right).

Once it is conceded that the presumption of constitutionality may be weakened to the extent that it cannot, of itself, resolve constitutional issues, the rationale supporting judicial self-restraint, which is

dependent upon the existence of the presumption, collapses. However, if the doctrine of self-restraint is to be replaced by that of constitutional absolutism, no material improvement could be anticipated. There is no greater advantage in sacrificing necessary governmental power to act in the public interest in order to obey the literal words of a constitutional provision read as an absolute, than there is in sacrificing the guarantees of the Constitution in order to extend judicial deference to legislative authority. The great task of the Constitution is to grant government the power necessary to carry out its essential functions without permitting it to abridge guaranteed rights. The great task of the interpreters of the Constitution is to construe its provisions so as to preserve, as fully as possible, both public power and private rights. Judges cannot perform this task if they uncritically yield either to legislative assertions of need regardless of the private rights affected, or to claims of constitutional protection regardless of the public need involved. Attention to facts alone can permit them to accomplish their function, and the appealingly misleading slogans of both self-restraint and absolutism serve only to stand in the way.