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## THE CONSTITUTION AND THE RECOVERY LEGISLATION: THE RÔLES OF DOCUMENT, DOCTRINE, AND JUDGES\*

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WHEN Franklin D. Roosevelt became President in March, 1933, there was an insistent demand for action to end or at least to alleviate the depression. It was a demand for action opposed to American customs and traditions, for action which would work fundamental alterations in basic American institutions. Faith in "natural economic forces" had waned. Governmental action interfering in economic affairs was sought. Action by the federal government, for local and state governments were obviously impotent. Prompt action. Roosevelt called for, and Congress enacted, the statutes known as the recovery legislation.<sup>1</sup> These statutes did effect a fundamental re-distribution of legislative, governmental, and economic power. Congress delegated vast legislative power to the President, to his appointees, and (in effect) to associations of

\* This article will appear in *Studies in Honor of Orrin Kip McMurray*.

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- <sup>1</sup> Chief among the statutes known as the recovery legislation, all enacted in 1933, are:  
National Industrial Recovery Act, 48 Stat. 195, 15 U.S.C.A. Supp. §§ 701-712.  
Public Works Act (N.I.R.A., Title II), 48 Stat. 200, 40 U.S.C.A. Supp. §§ 401-414.  
Agricultural Adjustment Act, 48 Stat. 31, 7 U.S.C.A. Supp. §§ 601-619.  
Emergency Relief Act, 48 Stat. 55, 15 U.S.C.A. Supp. §§ 721-728.  
Unemployment Relief Act, 48 Stat. 22, 16 U.S.C.A. Supp. §§ 585-590.  
Employment Service Act, 48 Stat. 113, 29 U.S.C.A. Supp. §§ 49-49L.  
Home Owners' Loan Act, 48 Stat. 128, 12 U.S.C.A. Supp. §§ 1461-1468.  
Farm Credit Act, 48 Stat. 257, 12 U.S.C.A. Supp. §§ 1131-1138f.  
Emergency Banking Acts, 48 Stat. 1, 3, 5, 20, 72, 12 U.S.C.A. Supp. §§ 95a, b, 204-211, 347d.  
Banking Act, 48 Stat. 162, 12 U.S.C.A. Supp. §§ 221a-221b.  
Securities Act, 48 Stat. 74, 15 U.S.C.A. Supp. §§ 77a-77mm.  
Act Amendatory to Reconstruction Finance Corporation Act (47 Stat. 5, 15 U.S.C.A. Supp. § 601 ff.) 48 Stat. 141, 15 U.S.C.A. Supp. §§ 605.  
Emergency Railroad Transportation Act, 48 Stat. 211, 49 U.S.C.A. Supp. §§ 250-267.  
Tennessee Valley Authority Act, 48 Stat. 58, 16 U.S.C.A. Supp. §§ 831-831cc.  
Credit and Currency Expansion Act, 48 Stat. 51, 31 U.S.C.A. Supp. §§ 821-823.  
Gold Clause Annulment Resolution, 48 Stat. 113, 31 U.S.C.A. Supp. §§ 462-463.

business men. The federal government invaded fields hitherto controlled exclusively by the states. Many of the powers of the managers of business enterprises were transferred to associations of those managers and to public officials. Whether the recovery legislation has been or will be efficacious in ending or even in alleviating the depression are questions with which this paper is not concerned. It is concerned with assertions which have been made as to its constitutionality.

That the Supreme Court of the United States will uphold all of the recovery legislation and most of the official action thereunder is the conclusion reached by those commentators whose writings reveal what I consider to be the view generally accepted by informed persons as to the relative importance, in the decision of constitutional cases, of the written Constitution, the doctrines of constitutional law, and the statesmanship of the judges. The relative importance of those three factors is, it seems to me, misconceived by other commentators who conclude that much of the recovery legislation is clearly unconstitutional or that the Supreme Court can uphold important parts of it only by distinguishing or overruling and repudiating past decisions and doctrines in such a way as to subject its members to accusations of intellectual dishonesty and to ridicule and contempt. That which this group misconceives is not explicitly dealt with by the other group. There seems, then, to be a need for an explicit discussion of the relative importance of judge, doctrine, and document in constitutional law cases. This paper is an attempt to meet that need and to indicate what will be the relative importance of those factors in the decision of the constitutional questions raised by the recovery legislation.

#### THE CONSTITUTION—DOCTRINE—THE JUDGES

##### I

Undoubtedly most of the recovery legislation is "unconstitutional," if that word be given the meaning it has in England. There is, in England, no written constitution; there are no legal limitations upon the power of Parliament; no statute enacted by Parliament is ever treated as void by the courts on the ground that it is inconsistent with the British Constitution. Yet there is a British "Constitution" and it is not unusual for a member of Parliament to urge in opposition to a proposed statute that it is "unconstitutional." He means that, in his opinion, the proposed statute is opposed to British customs and traditions, that its enactment would effect a fundamental alteration in basic British institutions, that it would change something which he and, he thinks, most other Englishmen had regarded as permanent. Such a *proposed* statute is "unconstitutional," in

the English sense. But if and when it is enacted, the statute is no longer unconstitutional. Its enactment has altered the British "Constitution."

According to American usage, to say that a statute is unconstitutional is to predict that the judges will treat it as void. There is an American "Constitution" in the English sense—the aggregate of American institutions, customs, traditions; it is the primary interest of the student of political economy and of the lawyer *qua* student of political economy. But our judges do not treat as void statutes which are inconsistent with that "Constitution." The Constitution upon the basis of which they do treat statutes as void consists of a written document and the doctrines of constitutional law. Large segments of American institutions, customs, and traditions are not rendered immune from legislative change by that document and those doctrines. Nevertheless, it is, I believe, in large part due to an unconscious confusing of the two senses of the word "unconstitutional," that many conservatives, distrustful of anything new, are now attaching that epithet to much of the recovery legislation.<sup>2</sup>

## II

The constitutional validity of *some* statutes can be predicted with assurance from the words of the written Constitution—the document—alone. It contains some clauses so worded that practically no construction or interpretation is needed. Any intelligent reader with some knowledge of history prior to 1789, when the Constitution was adopted, can predict accurately what applications the Supreme Court will make of those clauses.<sup>3</sup>

Most of the clauses in the document, however, are not so worded. Congress, for example, is empowered "to regulate Commerce with foreign Nations, and among the several States."<sup>4</sup> What laws are "regulations"?

<sup>2</sup> There is nothing novel in their conduct. A generation ago, conservatives reacted similarly to workmen's compensation acts and other unprecedented legislation. Speaking for a majority of the Supreme Court, Mr. Justice McKenna protested against this attitude in *German Alliance Insurance Co. v. Kansas*, 233 U.S. 389, 409, 58 L.Ed. 1011, 34 Sup. Ct. 612 (1914): "Against that conservatism of the mind, which puts to question every new act of regulating legislation and regards the legislation invalid or dangerous until it has become familiar, government—state and National—has pressed on in the general welfare; and our reports are full of cases where in instance after instance the exercise of regulation was resisted and yet sustained against attacks asserted to be justified by the Constitution of the United States. The dread of the moment having passed, no one is now heard to say that rights were restrained or their constitutional guaranties impaired."

<sup>3</sup> This is probably true, e.g., of Article I, Section 9, Clause 4, which provides, *inter alia*, that "No Capitation . . . Tax shall be laid, unless in proportion to the Census or Enumeration herein before directed to be taken," and of Article I, Section 9, Clause 5, which provides that "No Tax or Duty shall be laid on Articles exported from any State."

<sup>4</sup> Article I, Section 8, Clause 3.

What activities are "Commerce"? What commerce is "Commerce with foreign Nations, and among the several States"? Here the inquirer may not rest content with the document. He must turn to the Supreme Court reports. They will reveal what doctrines the Court has derived by construction and interpretation from the commerce clause.

The Constitution, then, comprises the document and also the doctrines which the Supreme Court justices derive from it by construction or interpretation. These two parts of the Constitution are partially independent, since construction and interpretation are not processes which yield the same results to all persons. The doctrines derive, not from the document alone, but also from the judges' social, economic, and political philosophies. Within limits set by the extensibility and contractibility of the words used in the light of the known relevant historical data, the construer or interpreter of a clause in the Constitution (or a statute, or will, or other document) is free to pronounce and should pronounce a construction or interpretation which will lead to results he believes to be desirable. Within the specified limits, the judge creates constitutional law not found in the document. And he does this with intellectual honesty and without usurping the authority conceded to the written Constitution. The limits vary for each clause; they are usually, because most of the clauses are phrased in general terms, extremely wide. Within those limits, the judge is called upon to be a statesman creating wise constitutional law, making wise decisions.<sup>5</sup>

The judge may exceed these limits. He may err in determining them. More important, he may intentionally usurp the authority generally conceded to the document. Regard for the public welfare under the conditions of today—conditions vastly different from those of 1789—may prompt him to do so. He may believe that had the framers of the document foreseen the conditions of today, they would have laid down rules other than those they did lay down. Realizing the extreme difficulty of securing an amendment to the document by the method it prescribes, these considerations may well prove irresistible temptations to surreptitious judicial amendment.<sup>6</sup>

<sup>5</sup> Cf. Radin, *Statutory Interpretation*, 43 *Harv. L. Rev.* 863 (1930).

<sup>6</sup> The present justices of the Supreme Court of the United States disagree as to what constitutes construction and interpretation, what judicial amendment, of the words of the written Constitution. Cf. the majority and minority opinions in *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398, 54 *Sup. Ct.* 231 (1934). For the majority, Hughes, C. J., said: "If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation." 290 U.S. 442-443.

Nor is this all. I have distinguished two parts of the Constitution—the document and the doctrines which the Supreme Court justices derive from it by construction or interpretation. In the creation of the second part, the words of the written Constitution—the document—have played and do play an important rôle. *There is a third part of the Constitution the content of which derives not at all from the document.* The judges have held since the latter part of the nineteenth century that certain clauses of the document authorize them to pronounce doctrines not deducible by construction or interpretation from the document.<sup>7</sup> The due process clauses of the Fifth and Fourteenth Amendments, they hold, authorize them to declare invalid as unconstitutional any statute, not specifically authorized by other clauses of the document, which they deem arbitrary, capricious, or unreasonable. Under them, the judges pronounce doctrines as to the reasonableness of statutes relating to procedure, to jurisdiction to tax, to the regulation of public utility rates, to any and every subject—doctrines constituting in no sense of the word construction or interpretation of language found in the written document.<sup>8</sup> In pronouncing these doctrines, which constitute the third and last part of the Constitution, the judges act wholly as statesmen.<sup>9</sup>

To summarize to this point, the Constitution upon the basis of which the Supreme Court will treat a statute as void consists of the written document and of the doctrines of constitutional law which the judges will apply. These doctrines are of two kinds: doctrines which the judges of the past have derived or the judges of today will derive by construction or interpretation from the document; and doctrines, whose content derives not at all from the document, announced under the authority held by the judges to be conferred upon them by the due process clauses. In creating these doctrines, the judges are called upon to be statesmen; with respect to doctrines of the first kind, their statesmanship is limited by the words of each clause and the known relevant historical data, but with respect to

<sup>7</sup> A brief review of relevant constitutional history is attempted, *infra*, 674 ff.

<sup>8</sup> It is the possession by American judges of this power to invalidate statutes upon the basis of wholly non-documental constitutional law which differentiates the American institution of judicial review from that of Australia or of Canada.

<sup>9</sup> The limits upon judicial statesmanship held by the judges to be created by the words of the impairment clause in Article I, Section 10, Clause 1, the equal protection clause in Amendment XIV, and the privileges and immunities clause in Article IV, Section 2, Clause 1 are so slight that the power of the judges in the construction, interpretation, and application of these clauses approaches very nearly their power under the due process clauses. As to the privileges and immunities clause of Article IV, see note, 18 Cal. L. Rev. 159 (1930); as to the impairment clause, see the opinion of Hughes, C. J., in *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398, 54 Sup. Ct. 231 (1934).

doctrines of the second kind their statesmanship is wholly unlimited. Moreover, doctrines purporting to be derived by construction or interpretation from the document may be, on the contrary, the result of usurpation by the judges, perhaps impelled by motives of statesmanship, of the authority conceded by all to the document. As against the words of the document, the part played by the statesmanship of the judges bulks large.

### III

There are other considerations which make the rôle of the judges as statesmen even more important.

In the first place, the existence of doctrines announced and decisions rendered by their predecessors, even when the judges of today adhere to them, does not narrow as much as is sometimes assumed their freedom to reach results they believe to be desirable. There is considerable room for statesmanship in the development and application of accepted doctrines and decisions;<sup>10</sup> the doctrines and decisions do not destroy, but merely limit, the freedom of the judge to decide as he thinks he ought.<sup>11</sup> Moreover, examination of the Supreme Court reports reveals that as to many matters the Court has laid down conflicting doctrines and rendered conflicting decisions without admitting the existence of the conflict. As to many subjects both doctrine and decision are confused. This confusion, this multiplicity and heterogeneity of precedent, permits the judges of today to select that one of existing doctrines, those past decisions, which will indicate in the case before them the decision which they think wise.

Secondly, many of today's doctrines of constitutional law embody tests of such a nature that the doctrine does little, if anything, more than direct the judges to decide the case before them as they think best. As will appear later, this is true in the case of most of the doctrines pronounced under the due process clauses, which do little more than ring the changes on the word "unreasonable"; it is true of the doctrine which has to do with the delegation of power by Congress to the President and others; it is frequently true of doctrines allocating power between the federal government and the states. Where doctrines embody such tests not only do they restrict judicial statesmanship hardly at all, decisions applying them are authoritative only for the narrow points decided and later cases can be easily distinguished from them.

Finally, the rôle of the judges as statesmen is tremendously increased by the fact that the Supreme Court's tradition permits and modern

<sup>10</sup> See Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 *Univ. Pa. L. Rev.* 833 (1931). Cf., for an extreme "realist" view, Frank, *Law and the Modern Mind* (1930).

<sup>11</sup> Here, too, the judge, consciously or unconsciously, may usurp the authority which he professes to concede to doctrine and past decisions.

practice makes not unusual the repudiation of doctrine and the overruling of past decisions.<sup>12</sup> Changes in the judges' approach which have occurred in the past twenty years or so make this of especial significance today. The opinions of Mr. Justice Holmes and Mr. Justice Brandeis and the writings of commentators such as Thomas Reed Powell have brought it about that the judges of today are more fully conscious than were their predecessors that what doctrines shall be created, what decisions rendered, has depended and does depend more upon the wisdom of the judges than upon the wording of the document. This realization, coupled with the contagious effect of Mr. Justice Holmes's scepticism as to the power of any human being to achieve ultimate wisdom,<sup>13</sup> has made some of the judges less willing than were their predecessors to veto changes in our institutions deemed by Congress to be necessary. Coupled with Mr. Justice Brandeis's insistence that the judges' decisions will be wise ones only if they inform themselves fully as to the facts, as to the needs the questioned legislation was enacted to meet,<sup>14</sup> the judges' realization that their task is that of statesmen has made some of them more willing than were their predecessors to re-examine their initial uninformed disapproval of questioned legislation. Realizing that they are statesmen attempting to reach wise decisions, some of the judges are today influenced less by traditionally accepted ideas as to the respective spheres of government and business, of state and federal governments, of Congress and the President, more by the growth and general acceptance of new ideas as to the proper allocation of those spheres. For all these reasons, the judges' deference to the decisions and doctrines of their predecessors has been lessened. For if those decisions and doctrines were not deductions from the written Constitution, but merely the wisdom of the judges of yesterday, they should not be binding upon the legislatures or judges of today—surely not if they were pronounced by judges who had not fully informed themselves as to the facts, or if since their pronouncement the factual situation has changed, or if they were the result of views of policy which have become outmoded. And to the extent that the deference of the judges to precedent has been lessened, the freedom of the judges of today to act as statesmen is increased.

<sup>12</sup> The dissenting opinion of Brandeis, J., in *Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 405, 768 L.Ed. 815, 52 Sup. Ct. 443 (1932), states the Court's tradition and practice and lists the cases which have been overruled.

<sup>13</sup> This scepticism is perhaps most explicitly stated in Mr. Justice Holmes's dissent in *Abrams v. United States*, 250 U.S. 616, 630, 63 L.Ed. 1173, 40 Sup. Ct. 17 (1919).

<sup>14</sup> Mr. Justice Brandeis's dissenting opinion in *Burns Baking Co. v. Bryan*, 264 U.S. 504, 517, 68 L.Ed. 813, 44 Sup. Ct. 412 (1924) well illustrates his method. Cf. Mr. Justice Stone's dissenting opinion in *Ribnik v. McBride*, 277 U.S. 350, 359, 72 L.Ed. 913, 48 Sup. Ct. 545 (1928).

## IV

All that I have written sums up to this: the freedom of the judges of today to decide cases as they think best (resulting from the part their own wisdom plays in construing and interpreting clauses in the written Constitution, in pronouncing doctrines under the due process clauses, in the development and application of doctrines and past decisions, in determining whether or not to repudiate old doctrines and overrule past decisions) is so great that their statesmanship plays a far greater part in the determination of what statutes are constitutional than do either the words of the document or the pronouncements of their predecessors.

The judges, like other statesmen, have been influenced by prevailing sentiment with respect to "the historical rights of Englishmen," "Anglo-Saxon" traditions of individual liberty, American traditions, customs, and institutions.<sup>15</sup> But, again like other statesmen, they have felt the needs of a society which has become more and more unlike the America of pre-Revolutionary or pre-Civil War days.<sup>16</sup> Their statesmanship has reflected that sentiment and those needs, as it has reflected the rest of their social, economic, and political philosophies. Consequently, although the Supreme Court justices could veto practically any statute, the area within which they are likely to veto statutes which may be enacted by legislators who are products of the same general environment as the judges, is fairly narrow. Moreover the area is further restricted by a consideration not yet mentioned—the fact that past decisions upholding Congressional legislation are less likely to be overruled than are past decisions invalidating it.

As a single economic and social unit has been fashioned out of a congeries of quasi-independent states, the federal government has ex-

<sup>15</sup> This is illustrated by holdings that the due process clause of Amendment XIV is violated by state action infringing certain of the rights guaranteed by the first eight Amendments against federal infringement only. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 77 L.Ed. 158, 53 Sup. Ct. 55 (1932). But see *Hurtado v. California*, 110 U.S. 516, 28 L.Ed. 232, 4 Sup. Ct. 111, 292 (1884) and *Twining v. New Jersey*, 211 U.S. 78, 53 L.Ed. 97, 29 Sup. Ct. 14 (1908).

<sup>16</sup> Cf. the following statement by Hughes, C. J., in *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398, 442, 54 Sup. Ct. 231 (1934): "It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected. . . ."



tended its control further and further over matters once within the exclusive control of the states. With few and minor exceptions the Supreme Court has been able to hold these extensions of federal control valid. It has permitted extension after extension, each going further than the preceding ones. And *once the Court has upheld an extension of federal control it has never retraced its steps and overruled that holding*. Similarly, as a simple agricultural society has become a complex, interdependent, industrial one, government (federal and state) has gradually limited the liberty and the property rights of individuals and corporations. There have been notable exceptions, but more than ninety-nine per cent of this regulation has been upheld. Decisions invalidating particular regulations have been overruled from time to time, but *once the Court has upheld an extension of governmental regulation of personal and property rights it has never overruled that holding*. In short, decisions limiting governmental power, decisions denying Federal power, are likely to be overruled; decisions upholding governmental power, in general, or federal power, are not. Moreover, no delegation of power by Congress has ever been invalidated; successive delegations, each greater than the preceding, have been upheld.<sup>17</sup>

What statutes the Supreme Court justices are likely to veto depends primarily, then, on what statutes have been upheld in the past. Secondary in importance, because likely to be overruled, are the past decisions invalidating statutes and the doctrines announced in those decisions. In some few cases, the words of the document play an important part. Prevalent attitudes, in which the judges share, toward existing institutions bulk large. Within the limits which these considerations tend to fix, what statutes are constitutional depends upon what nine men happen to be justices of the Supreme Court of the United States, upon what their social, economic, and political philosophies are, upon the extent to which they believe judges should go in vetoing legislation.<sup>18</sup>

The judges' growing realization of the nature of their rôle and of the necessity of their being informed if their decisions are to be wise, their growing scepticism as to the finality of their own wisdom and even more as to the finality of the wisdom of their predecessors, their tendency more and more to adopt a policy of *laissez-faire* toward legislatures and especially toward Congress—these are the most significant developments in constitutional law today.

<sup>17</sup> These generalizations will be supported, in part at least, in subsequent portions of this paper.

<sup>18</sup> That the minimum wage decision, *Adkins v. Children's Hospital*, 261 U.S. 525, 67 L.Ed. 785, 43 Sup. Ct. 394 (1923), is a striking example of this fact is conclusively shown in Powell, *The Judiciary of Minimum Wage Legislation*, 37 Harv. L. Rev. 545 (1924).

Three types of attack are made upon the constitutionality of the recovery legislation. It is contended that it unconstitutionally interferes with personal and property rights and with the freedom of business enterprisers to operate their businesses as they want to operate them, that it unconstitutionally delegates Congressional power to the President and to others, that it involves invasions by the federal government of fields reserved by the Constitution to state control. Learned articles have appeared in several legal periodicals discussing in detail constitutional questions raised by these contentions. It is not the purpose of this paper to deal with them in detail. But I shall discuss each of the three types of questions separately, attempting to show, in the light of the foregoing exposition of the judicial process in constitutional cases, what will be, as to each, the rôle of the document, of doctrine, of the judges.

Attacks of the first type—contentions that the Constitution guarantees a minimum of individualism, that its mandate with respect to governmental control of business is *laissez-faire*, and that the recovery legislation violates that guaranty and that mandate—are based wholly upon the doctrines (and decisions applying them) announced by the judges in the exercise of the authority which they have claimed, during the past half century, is conferred upon them by the due process clauses. These attacks invoke neither the words of the document nor doctrines deducible by construction or interpretation (in any true sense of those words) from it; they invoke solely the doctrines which I have called the third part of the Constitution. To substantiate the position I have taken that these doctrines are wholly the result of the judges' statesmanship and not at all the result of construction or interpretation of the document in any true sense, I shall, before discussing the due process attacks upon the recovery legislation, attempt a review of so much of constitutional history as is necessary for a full understanding of the power claimed by the judges under the due process clauses.

## THE HISTORY OF THE JUDGES' POWER UNDER THE DUE PROCESS CLAUSES

### I

The initial assumption by the judges of power to declare statutes unconstitutional is not adequately accounted for, as Mr. Chief Justice Marshall asserted it to be, by the mere fact that there was a written Constitution.<sup>19</sup> In France a written constitution did not lead to judicial

<sup>19</sup> *Marbury v. Madison*, 1 Cranch (U.S.) 137, 2 L.Ed. 60 (1803). For a critical consideration of the reasoning of Marshall, C. J., see Gibson, J., in *Eakin v. Raub*, 12 S.& R. (Pa.) 330, 345 ff. (1825). Cf. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*,

review of the constitutional validity of statutes. When the Constitution was adopted it was not generally accepted that law is a command of a political superior to a political inferior; the notion that law is that which commands the right, that law is discoverable, not made by human beings, was widely accepted. This identification of "ought" with "is" has a long history. Natural law, natural rights, deriving from Greek and Roman thought, persisting throughout and beyond the middle ages, have often meant more than "ought-to-be-law" or "ought-to-be-rights"; at many times throughout antiquity and the middle ages it was asserted that any human enactment violating natural law was not binding.<sup>20</sup> The colonists had cited Coke's claim of power for the courts to nullify Acts of Parliament contrary to "right reason" in support of their refusal to recognize English statutes hurtful to their pocket books. It is in the light of these ideas and of the then prevalent social compact theory, of Cicero, Grotius, Puffendorf, and Locke, that the Declaration of Independence with its inalienable rights is to be interpreted.<sup>21</sup> Impressed as they were with Montesquieu's notion that the judiciary was a branch of government coördinate with the legislature, it is easy to understand why the judges seized upon the written Constitution as empowering them to nullify statutes which they thought infringed the rights to secure which government was instituted.<sup>22</sup>

In the period immediately following the adoption of the Federal Constitution, the really doubtful question was whether, in addition to invalidating statutes which they thought violative of constitutional pro-

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7 Harv. L. Rev. 129 (1893), Thayer, *Legal Essays* (1908), 1. That the written Constitution expressly authorizes the judges to declare statutes unconstitutional, see McGovney, *Review of Haines: American Doctrine of Judicial Supremacy*, 21 Cal. L. Rev. 637, 639-41 (1933).

<sup>20</sup> On natural law and natural rights, see Ritchie, *Natural Rights*, (1894), Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 Harv. L. Rev. 149, 365 (1928-9), and Haines, *The Revival of Natural Law Concepts* (1930).

<sup>21</sup> See, in general, Becker, *The Declaration of Independence* (1922).

<sup>22</sup> The historical basis of the power of American judges to declare statutes unconstitutional is indicated accurately by the opinion of Mr. Justice Patterson, on circuit, in *Vanhorne's Lessee v. Dorrance*, 2 Dallas (U.S.) 304, 1 L.Ed. 391 (1795) holding void a Pennsylvania statute. After expounding the theory that the judiciary was coördinate with, not subordinate to, the legislature and referring to a vague clause in the State Constitution, he said: "The preservation of property, then, is a primary object of the social compact and, by the . . . constitution of Pennsylvania, was made a fundamental law. . . . [An] act divesting one citizen of his freehold, and vesting it in another, without a just compensation . . . is inconsistent with the principles of reason, justice, and moral rectitude; it is incompatible with the comfort, peace, and happiness of mankind; it is contrary to the principles of social alliance in every free government; and, lastly, it is contrary both to the letter and spirit of the constitution. In short, it is what every one would think unreasonable and unjust in his own case." 2 Dallas, 310.

visions, the judges would nullify statutes which were inconsistent with their conceptions of natural law and natural rights. In 1798, in delivering the opinion of the Supreme Court in *Calder v. Bull*,<sup>23</sup> Mr. Justice Chase, by dictum, unequivocally claimed for the judges power to do this; Mr. Justice Iredell delivered a separate opinion protesting against the assumption of such power.<sup>24</sup> Iredell's rebuke did not silence the adherents of natural law. In 1810, in *Fletcher v. Peck*,<sup>25</sup> the Supreme Court held invalid a Georgia statute revoking a land grant, which had been procured by fraud, after the land had been bought by an innocent purchaser. Mr. Chief Justice Marshall stretched the impairment clause to cover the case.<sup>26</sup> But he did not place the decision upon the written Constitution

<sup>23</sup> 3 Dallas (U.S.) 386, 1 L.Ed. 648 (1798).

<sup>24</sup> Mr. Justice Chase said: "I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the constitution or fundamental law of the state. The people of the United States erected their constitutions or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it. The nature and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit. There are acts which the federal, or state legislature cannot do, without exceeding their authority. There are certain vital principles in our free republican governments, which will determine and overrule apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the legislature (for I cannot call it a law), contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law, in governments established on express compact, and on republican principles, must be determined by the nature of the power of which it is founded." 3 Dallas (U.S.) 387-8.

To which Mr. Justice Iredell answered: "It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that any court of justice would possess a power to declare it so. . . . If any act of congress, or of the legislature of a state, violates constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the legislature of the Union, or the legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and the purest men have differed upon the subject; and all the court could properly say, in such an event, would be, that the legislature (possessed of an equal right of opinion) had passed an act which in the opinion of the judges was inconsistent with the abstract principles of natural justice." 3 Dallas (U.S.) 398-9.

<sup>25</sup> 6 Cranch (U.S.) 87, 3 L.Ed. 162 (1810).

<sup>26</sup> He held that a grant was a contract and that the clause (Article I, Section 10, Clause 1: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts") covered not only contracts between individuals but also contracts between a state and an individual. Why the clause forbade the state to exercise against an innocent purchaser with whom it had

alone; he expressed doubt whether the Georgia Constitution's grant of "legislative power" to the state legislature authorized the revoking statute—whether power to enact such a statute could be said to be in the nature of "legislative power"—and he definitely held, as an alternative ground of decision, that the revoking statute was void under "general principles which are common to our free institutions."<sup>27</sup> Mr. Justice Johnson, unwilling to stretch the impairment clause as his brethren had done, placed his concurrence in the decision solely on this ground—in his own words, "on a general principle, on the reason and nature of things; a principle which will impose laws even on the Deity."<sup>28</sup> *Fletcher v. Peck*, nevertheless, really marks the end of the judges' open avowal of power to nullify statutes not violative of the written Constitution because inconsistent with their conceptions of natural law. For it showed the availability, so far as state statutes were concerned, of the impairment clause as a peg for the views of Marshall and his federalist associates as to the sanctity of property rights.<sup>29</sup> That clause was extended still further; it became the basis for the doctrine that state legislatures may not impair vested rights.<sup>30</sup> This doctrine did not forbid all impairments of vested rights; in effect, it forbade only unreasonable impairments of them<sup>31</sup>—in other words it forbade impairments worked by statutes inconsistent with the judges' conceptions of natural law.

The necessity of finding for invaded rights an origin which could be called "contractual," even in the broad sense that Marshall gave to that term, restricted the availability of the impairment clause as a peg for the invalidation of statutes upon the basis of natural law. As Jacksonian Democrats were appointed, Marshall gradually lost control of the Court and the veto power exercised by the judges under the impairment clause at first ceased to expand and finally began to contract. In 1827, the Chief Justice and his never-failing adherent, Mr. Justice Story, were able to muster but one other of the Court's seven members to vote in favor of Webster's contention that the impairment clause should be extended so

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not contracted a right to rescind which it surely did not prevent the state from exercising against the fraudulent grantee, the opinion does not make clear.

<sup>27</sup> 6 Cranch (U.S.) 135-6, 139 (1810).

<sup>28</sup> 6 Cranch (U.S.) 143 (1810).

<sup>29</sup> The impairment clause was the only possible peg for such views. The ex post facto clause (Article I, Section 10, Clause 1) had been held to apply only to statutes relating to criminal offenses. *Calder v. Bull*, *supra* note 23. Until the adoption of the Fourteenth Amendment in 1868, the Constitution contained no due process clause applicable to the States.

<sup>30</sup> See Corwin, A Basic Doctrine of American Constitutional Law, 12 Mich. L. Rev. 247 (1914).

<sup>31</sup> *Wilkinson v. Leland*, 2 Pet. (U.S.) 627, 7 L.Ed. 542 (1829).

as to serve as a peg for natural law objections to state bankruptcy laws applicable to debts contracted after their enactment.<sup>32</sup> In 1833, Marshall conceded that nothing in the Federal Constitution prevented a state from taking private property for public use without compensation.<sup>33</sup> After Marshall's death, in 1837, the Supreme Court, under Taney's leadership, cut down the availability of the impairment clause by the adoption of the rule that public grants must be construed strictly against the grantee.<sup>34</sup> Until several decades after the Civil War, state legislation was not subject to invalidation by the Supreme Court upon the ground that it was inconsistent with natural law or invaded natural rights, i.e., that it was unreasonable.<sup>35</sup>

## II

Today, the due process clauses of the Fifth and Fourteenth Amendments<sup>36</sup> are held to render invalid all statutes, whether relating to procedure or substantive law, which the judges deem to be violative of natural law or natural rights. The words "life," "liberty," and "property" in those clauses have been given such extended meanings that every statute adversely affecting an individual is held to deprive him of one or the other of them. Whether or not a statute is valid depends, therefore, wholly upon whether it is "law," within the meaning of that word as it is used in the due process clauses. And it is "law" only if the judges deem it to be not arbitrary, capricious, or unreasonable—i.e., *not inconsistent with their conceptions of natural law, not violative of what they deem to be fundamental, or natural, rights*. The subsidiary doctrines which have been laid down under the due process clauses are nothing more or less than the judges' versions of natural law, of natural rights. The Taney court's limitation of Marshall's impairment clause doctrines was of no avail. The Su-

<sup>32</sup> *Ogden v. Saunders*, 12 Wheat. (U.S.) 212, 6 L.Ed. 605 (1827). The Court had held before this, in *Sturges v. Crowninshield*, 4 Wheat (U.S.) 122, 4 L.Ed. 529 (1819), that the impairment clause did forbid the application of state bankruptcy laws to debts contracted before their enactment.

<sup>33</sup> *Barron v. Baltimore*, 7 Pet. (U.S.) 243, 8 L.Ed. 672 (1833). This is the leading case on the proposition that the first eight Amendments limit the federal government only, not the states. The Fifth Amendment does forbid such a taking.

<sup>34</sup> *Charles River Bridge v. Warren Bridge*, 11 Pet. (U.S.) 420, 9 L.Ed. 773 (1837).

<sup>35</sup> Mr. Justice Story's chagrin and determination to resign because "the doctrines and opinions of the 'old Court' were daily losing ground, . . . especially those on great constitutional questions . . . so vital to the country" are expressed by him in a letter to Ezekiel Bacon on April 12, 1845, printed in *Story, Life and Letters of Joseph Story* (1851), 527.

<sup>36</sup> The Fifth Amendment, adopted in 1791, applicable to the federal government only, provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law." The Fourteenth Amendment, adopted in 1868, provides that "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

preme Court's final position gives it more power than even Marshall claimed for it; in all but theory, Mr. Justice Chase's claim of power for the judges to invalidate statutes not violative of the provisions of the written Constitution but inconsistent with the judges' conceptions of natural law and natural rights<sup>37</sup> has won out. How did this occur?

Most of the original state constitutions contained clauses forbidding deprivations of life, liberty, or property otherwise than by the law of the land. These clauses, copied after chapter 39 of Magna Charta, sometimes substituted "without due process of law" for "otherwise than by the law of the land." With one or two exceptions,<sup>38</sup> these clauses were held by the state courts at first to be, not restrictions upon the legislature, but merely directions that executive and judicial action must be in accordance with law, i.e., either the common law or the law enacted by the legislature. Later they came to be regarded as limitations upon legislative power to alter and prescribe modes of procedure.<sup>39</sup> Finally, there was a revival in some state courts of the practice, already abandoned by the Supreme Court of the United States, of overthrowing statutes on natural law grounds. The state constitutions' grants of "legislative power" to state legislatures were said to embrace only the power to tax, the power of eminent domain, and the "police power." As a New York judge put it in 1843, the power delegated to the legislature by the clause granting it legislative power does not "reach the life, liberty, or property of a citizen . . . when the sacrifice is not demanded by a just regard for the public welfare"<sup>40</sup>—i.e., by what the judges deem to be a just regard for the public welfare. The next step, an assertion that the law of the land and the due process clauses were a mandate to the judges to protect persons and property against unreasonable laws, was a short one.<sup>41</sup> This construction of the state constitutions' due process and law of the land clauses was far from universal and was not unchallenged,<sup>42</sup> but it was stated as settled

<sup>37</sup> Note 24, *supra*. Neither Chase, J., nor the later justices have invoked the Ninth Amendment (which reads "The Enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people") although a plausible argument in favor of judicial protection of natural rights might be constructed from it.

<sup>38</sup> E.g., *Trustees of the University of North Carolina v. Foy*, 1 Murphey (N.C.) 58 (1805).

<sup>39</sup> See Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 *Harv. L. Rev.* 366, 460 (1911).

<sup>40</sup> *Bronson, J., in Taylor v. Porter*, 4 Hill (N.Y.) 140, 144 (1843).

<sup>41</sup> In *Taylor v. Porter*, *supra* note 40, the due process clause was invoked as an alternative ground of decision. In *Westervelt v. Gregg*, 12 N.Y. 202 (1854) the restrictive interpretation of the state constitution's grant of legislative power was abandoned, the due process clause relied upon as the sole ground of decision.

<sup>42</sup> See Corwin, *supra* note 39.

law, elaborated, and whole-heartedly approved by Judge Cooley in his *Constitutional Limitations*. This work, published in 1868, the year of the adoption of the Fourteenth Amendment, was for forty years at least the standard lawyer's and law student's text on constitutional law and was constantly cited and relied upon by the courts.

The due process clause of the Fifth Amendment, applicable to the federal government, had received no such construction when it was copied by the Joint Committee on Reconstruction and inserted in what became, in 1868, the Fourteenth Amendment. It was thought by Mr. Justice Story in 1833 to relate to modes of procedure only.<sup>43</sup> It had been invoked in but two cases, one in 1855 and another in 1857, and these cases had done nothing to clarify its meaning.<sup>44</sup> What, if any, limitation on the power of state legislatures, its framers, the Congress which proposed it, and the state legislatures which ratified it, intended the due process clause of the Fourteenth Amendment to have has never been and probably never can be ascertained.<sup>45</sup>

It was twenty years after the adoption of the Fourteenth Amendment before the view that its due process clause authorized the judges to invalidate all statutes they thought to be arbitrary and unreasonable finally prevailed. In the end that view was asserted not only with respect to the due process clause in the Fourteenth Amendment but also with

<sup>43</sup> Story on the Constitution (1847 ed.), 233. His language is: ". . . this clause, in effect, affirms the right of trial, according to the process and proceedings of the common law." In all, he devotes ten lines of a 350 page volume to the due process clause.

<sup>44</sup> The two cases are *Den dem. Murray v. The Hoboken Land, etc., Co.*, 18 How. (U.S.) 272, 15 L.Ed. 372 (1855) and *Dred Scott v. Sandford*, 19 How. (U.S.) 393, 15 L.Ed. 691 (1857). The former held that the Fifth Amendment due process clause did not prevent seizure of property of a federal tax collector and sale thereof to pay a sum found by the United States auditor to be due the United States, without a judicial proceeding or hearing of any kind, on the ground that there was historical warrant for such a summary procedure in such a case. In the *Dred Scott* Case, Taney, C. J., voting to hold void the Missouri Compromise, briefly referred to the due process clause as a ground of decision in addition to those he developed at length (19 How. 450). Only two justices concurred in the opinion of Taney, C. J. Curtis, J., dissenting, insisted that such a construction of the due process clause would not "bear examination" (19 How. 626). The other justices did not mention the due process clause. No federal statute was invalidated by the Court on the basis of the Fifth Amendment due process clause until, in 1908, *Adair v. United States*, 208 U.S. 161, 52 L.Ed. 436, 28 Sup. Ct. 277, was decided. Cf., however, *Dred Scott v. Sanford*, *supra*, and the first *Legal Tender* Case, *infra*, text and note 48, in both of which the clause was cited as a makeweight.

<sup>45</sup> See Flack, *The Adoption of the Fourteenth Amendment* (1908); Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* (1914). Kendrick relies upon assertions made by a member of the committee (Conklin) in 1882 as counsel in the argument of *San Mateo County v. Southern Pacific Co.*, 116 U.S. 138, 29 L.Ed. 589, 6 Sup. Ct. 317 (1885), that the due process clause was intended to protect individuals and corporations against oppressive state legislation.



respect to that in the Fifth Amendment. Widespread acceptance of the views of state court judges in the forties and fifties given currency by Judge Cooley's universally read treatise, the rapid industrialization of the country and the never-ending advocacy of able counsel employed by corporations and individuals of great wealth and economic power to combat statutes regulating industry,<sup>46</sup> the convictions and dominating personality of Mr. Justice Field,<sup>47</sup> the judges' fright at the Granger and Populist movements and other rumblings of discontent—these are some of the influences which contributed to the result.

The development was marked by aberrations. It began with the first *Legal Tender Case*,<sup>48</sup> decided in 1870, which held invalid, by a vote of four to three, the federal Legal Tender Act. Among other grounds of invalidity, the majority cited, as a makeweight, the due process clause of the Fifth Amendment. The invocation of this clause because of the alleged injustice of the law was denounced by Mr. Justice Miller as substituting "our ideas of policy for judicial construction, an undefined code of ethics for the Constitution, and a court of justice for the national legislature."<sup>49</sup> Two years later, the decision was overruled; Mr. Justice Field, now in dissent, not only disagreed with Miller's interpretation of the due process clause but went further and, quoting the language of Mr. Justice Chase in *Calder v. Bull* in 1798, reiterated the latter's claim for the judges of power to invalidate unjust laws even though they violated no provision of the written Constitution.<sup>50</sup> In 1874, in *Loan Association v. Topeka*,<sup>51</sup> with only one justice protesting, the Supreme Court did invalidate, on natural law grounds, without reference to the Fourteenth Amendment or any other provision of the written Constitution, a Kansas statute authorizing a city to donate money to a manufacturing concern to encourage it

<sup>46</sup> See Lerner, *The Supreme Court and American Capitalism*, 42 *Yale L. Jour.* 668 (1933).

<sup>47</sup> See Nelles, *Review of Swisher: Stephen J. Field—Craftsman of the Law* (1930), 40 *Yale L. Jour.* 998 (1931). In general, see Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 *Mich. L. Rev.* 643 (1909); Corwin, *Social Planning under the Constitution—A Study in Perspectives*, 26 *American Political Science Review* 1 (1932).

<sup>48</sup> *Hepburn v. Griswold*, 8 *Wall. (U.S.)* 603, 19 *L.Ed.* 513 (1870).

<sup>49</sup> 8 *Wall. (U.S.)* 637-8 (1870).

<sup>50</sup> *Legal Tender Cases*, 12 *Wall. (U.S.)* 457, 20 *L.Ed.* 287 (1870). Mr. Justice Field's claim of power in the judges to invalidate laws upon extra-constitutional bases occurs at p. 670.

Allegations that the overruling of the first *Legal Tender Case* was the result of a "packing" of the Court are discussed and doubted in Hughes, *The Supreme Court of the United States* (1928), 51 ff.

<sup>51</sup> 20 *Wall. (U.S.)* 655, 22 *L.Ed.* 455 (1874). Clifford, J., dissenting, protested that "Errors of indiscretion which the legislature may commit in the exercise of the power it possesses cannot be corrected by the courts, for the reason that the courts cannot adjudge an act of the legislature void unless it is in violation of the Federal or State constitution." 20 *Wall.* 668.

to establish its works in the city. The opinion (written not by Field but by Miller!) invokes limitations upon the powers of legislatures "which grow out of the essential nature of all free governments," "implied reservations of individual rights, without which the social compact could not exist"; from them it deduces a rule that taxation must be for purposes deemed by the judges to be "public."<sup>52</sup> But in most of the cases before 1885, Field's views were expressed in dissenting opinions. The Fourteenth Amendment was first invoked in 1873 in the *Slaughter House Cases*.<sup>53</sup> The majority, over the dissent of Field and three other justices, who relied more upon the privileges and immunities clause of the Fourteenth Amendment<sup>54</sup> than upon its due process clause, held that the grant of a monopoly to certain butchers in New Orleans did not infringe the constitutional rights of other butchers; they insisted that the Fourteenth Amendment was not intended to make the United States Supreme Court "a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment."<sup>55</sup> Again, in *Munn v. Illinois*<sup>56</sup> and several companion cases,<sup>57</sup> decided in 1877, it was held, over Field's vehement dissents, that the Fourteenth Amendment did not prevent a state from fixing the rates to

<sup>52</sup> 20 Wall. (U.S.) 662-3. In *Davidson v. New Orleans*, 96 U.S. 97, 24 L.Ed. 616 (1877), Mr. Justice Miller perhaps accounts for the seeming inconsistency of his *Hepburn v. Griswold* opinion (*supra* text and note 49) and his *Loan Association v. Topeka* opinion. In refusing, on writ of error to the Supreme Court of Louisiana, to invalidate a drainage assessment which he finds not prohibited by the federal Constitution, he says: "It may possibly violate some of those principles of general constitutional law, of which we could take jurisdiction were we sitting in review of a Circuit Court of the United States, as we were in *Loan Association v. Topeka*." 96 U.S. 105.

The doctrine of *Loan Association v. Topeka* has long been subsumed under the due process clause of the Fourteenth Amendment. See McAllister, *Public Purpose in Taxation*, 18 Cal. L. Rev. 137, 241 (1930).

<sup>53</sup> 16 Wall. (U.S.) 36, 21 L.Ed. 394 (1873).

<sup>54</sup> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The majority, in rendering this clause nugatory by holding it to guarantee only rights already guaranteed by other clauses of the Constitution, probably indulged in judicial nullification. The clause, it is fairly certain, was intended (in connection with the enforcement power granted to Congress by the Fourteenth Amendment) to increase federal legislative power. See Kendrick, note 45 *supra*, *passim*, and McGovney, *Privileges or Immunities Clause—Fourteenth Amendment*, 4 Iowa L. Bull. 219 (1918).

<sup>55</sup> 16 Wall. (U.S.) 78. Again it is Miller, J., who speaks thus.

<sup>56</sup> 94 U.S. 113, 24 L.Ed. 77 (1877).

<sup>57</sup> *Chicago, etc., R. R. Co. v. Iowa*, 94 U.S. 155, 24 L.Ed. 94 (1877); *Peik v. Chicago, etc., Ry. Co.*, 94 U.S. 164, 24 L.Ed. 97 (1877); *Chicago, etc., R. R. Co. v. Ackley*, 94 U.S. 179, 24 L.Ed. 99 (1877); *Winona, etc., R. R. Co. v. Blake*, 94 U.S. 180, 24 L.Ed. 99 (1877); *Stone v. Wisconsin*, 94 U.S. 181, 24 L.Ed. 102 (1877).

be charged not only by railroads but also by grain elevator operators and that when the state had fixed such rates, the Court had no power to review their reasonableness and to invalidate them if the judges thought them too low to yield a fair return on the property of the owner. But Field's dissents persisted. Majority opinions, although upholding questioned statutes, began to meet him on his own ground, began to attempt to demonstrate the reasonableness of the statutes. In 1898, in *Smyth v. Ames*,<sup>58</sup> the railroad attorneys finally persuaded the Court to overrule the decision in *Munn v. Illinois* that the reasonableness of legislatively fixed rates was not subject to judicial review. Field's view of the power of the Supreme Court under the due process clauses had finally become unquestioned law.<sup>59</sup>

### III

In the past decade, constitutional theory as to the power claimed by the judges under the due process clause has been simplified. Until then, there was much talk of the "police power." State statutes interfering with life, liberty, or property were said to be valid under the due process clause of the Fourteenth Amendment only if they were exercises of the power to tax, the power of eminent domain, or the "police power."<sup>60</sup> Countless attempts were made to define, or rather describe, the "police power." For a time there was controversy as to whether it extended only to the protection of the peace, good order, morals, and health of the community, or also to the promotion of the general welfare. There were disputes as to whether or not the federal government possessed "police power." By a

<sup>58</sup> 169 U.S. 466, 42 L.Ed. 819, 18 Sup. Ct. 418 (1898).

<sup>59</sup> Occasional questionings do occur in the opinions of Mr. Justice Holmes and Mr. Justice Brandeis. In *Whitney v. California*, 274 U.S. 357, 71 L.Ed. 1095, 47 Sup. Ct. 641, 373 (1927) the latter said: "Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure." Cf. the view of Mr. Justice Story, note 43, *supra*. In *Baldwin v. Missouri*, 281 U.S. 586, 595, 74 L.Ed. 1056, 50 Sup. Ct. 436 (1930). Mr. Justice Holmes, dissenting, said: "As the decisions now stand I can see hardly any limit but the sky to the invalidation of [the constitutional rights of the States] if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the [Fourteenth] Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions. Yet I can think of no narrower reason that seems to me to justify the present and the earlier decisions to which I have referred. Of course the words 'due process of law,' if taken in their literal meaning, have no application to this case; and while it is too late to deny that they have been given a more extended and artificial signification, still we ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide the Court's own discretion, the validity of whatever laws the States may pass."

<sup>60</sup> See Field, J., dissenting, in *Munn v. Illinois*, 94 U.S. 113, 145, 24 L.Ed. 77 (1877).

curious confusion of ideas, it was suggested that Congress's power to tax was not subject to the limitation of reasonableness held to be created by the Fifth Amendment due process clause.<sup>61</sup> Now the term "police power" is obsolescent. The considerations formerly held to determine whether or not a statute was "within the police power" are now held to go to "reasonableness" and the due process clauses are held to require that every exercise of any governmental power, whether the general governmental powers retained by the states or the special powers delegated to the federal government, be reasonable. The extra term is being dropped.<sup>62</sup> Distinct bodies of doctrine have been developed concerned with what statutes dealing with particular subjects—e.g., procedure, taxation, regulation of business—are reasonable and therefore "law" within the due process clauses.

To say, as I have said, that in creating these doctrines, in determining their content, the judges have been wholly free to act as statesmen does not disclose the influences which have induced the judges to pronounce the particular doctrines which they have pronounced. Negatively, it does assert that those doctrines have not been derived from the words of the document. It implies the part played by the accidental presence upon the Court of men with definite views as to what institutions the country should have, as to what existing institutions must be left unaltered if the country is to persist. On the other hand, the prevailing American emotional attachments to the "historical rights of Englishmen," to "Anglo-Saxon" traditions of individual liberty and individual rights, to American customs and institutions, would have been reflected in doctrine and decision whatever men had been upon the Court.<sup>63</sup>

Here, as elsewhere in constitutional law today, it is of the utmost significance that some of the judges, at least, are becoming increasingly unwilling to veto Congressional legislation upon the basis of their own or their predecessors' wisdom. This fact is peculiarly important here because so much of existing due process doctrine embodies tests which do little more than direct the judge to decide cases as he thinks they ought to be decided.

<sup>61</sup> White, C. J., in *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1, 24, 60 L.Ed. 493, 36 Sup. Ct. 236 (1916). Federal tax statutes have since been held invalid because in violation of the due process clause of the Fifth Amendment in *Heiner v. Donnan*, 285 U.S. 312, 76 L.Ed. 772, 52 Sup. Ct. 358 (1932), and other cases. Cf. however, the language of Sutherland, J., in *Magnano Co. v. Hamilton*, 54 Sup. Ct. 599 (1934).

<sup>62</sup> It is used but once by Roberts, J., in *Nebbia v. New York*, 54 Sup. Ct. 505 (1934).

<sup>63</sup> See *supra* note 15. This, of course, is also true as to doctrine pronounced by the judges in interpreting the words of the written Constitution.

## THE RECOVERY LEGISLATION AND DUE PROCESS OF LAW

Unprecedentedly drastic limitations upon the liberty of business enterprisers to operate their businesses as they want to operate them are imposed by the National Industrial Recovery Act and the Agricultural Adjustment Act and the subordinate legislation (the codes, etc.) authorized by them. The Securities Act and the banking and railroad legislation also constitute far-reaching extensions of governmental control over business. The calling in of gold coin, the reduction of the gold content of the dollar, and the annulment of the gold clauses in private and public contracts are striking interferences with the liberty and property of individuals. The expenditure of public funds for relief of banks, of industry, of farmers, of homeowners, of the unemployed entails the exaction of money from taxpayers for unwonted uses.

One thing is certain. No clause of the written Constitution and no doctrine deducible by construction or interpretation therefrom prevents government from thus regulating business, from thus interfering with the liberty or property of individuals or corporations. The document and doctrines thus deducible therefrom furnish no basis for claims that the mandate of the Constitution with respect to governmental control of business is *laissez-faire*. So far as they are concerned, the Constitution permits the adoption of any form of relationship between government and business. The document does guarantee certain fairly clearly defined individual rights,<sup>64</sup> but it is clear that the recovery legislation does not infringe the rights thus guaranteed.<sup>65</sup> Its constitutionality (apart from questions of the delegation of legislative power and of federal government interference in fields reserved to the states, which are considered later) depends wholly upon the "third part" of the Constitution—the due process doctrines which derive not at all from the document. I shall attempt to state the principal questions which are likely to be raised and to indicate the extent to which their decision will depend upon the statesmanship of the Supreme Court justices.

## I

That a statute expending funds derived from taxation is invalid unless the purpose of the expenditure is deemed by the judges to be a "public purpose" was first announced as a limitation upon government growing

<sup>64</sup> E.g., the right to jury trial in the federal courts and the other rights guaranteed by the first eight amendments. See also Article I, Section 9.

<sup>65</sup> A possible contention that the calling in of gold violates the provision of Amendment V that "private property [shall not] be taken for public use, without just compensation" is considered *infra* note 71.

out of "the essential nature of all free governments";<sup>66</sup> later the doctrine was subsumed under the due process clause. Phrased as it is, this is one of the doctrines which involve a test that does little more than direct the judges to decide as statesmen would. Past decisions have upheld most questioned expenditures.<sup>67</sup>

So far as most of the statutes comprising the recovery legislation which authorize the expenditure of public funds are concerned, there is no way in which the constitutional question whether the expenditure is for a public purpose can be brought before the Court. The statutes under which the federal government has lent or given money to banks, industry, farmers, homeowners, the unemployed do not compel action or penalize non-action by anyone other than the taxpayers from whom the money distributed is exacted. Except for the proceeds of the processing taxes, the funds expended are funds raised by general taxes. And the Supreme Court has held that a taxpayer has too remote and slight an interest in funds raised by general taxation to be entitled to question the validity of statutes authorizing their expenditure.<sup>68</sup> Nor can a state, as *parens patriae* of its citizen taxpayers, question such statutes.<sup>69</sup>

The money turned over to farmers under the Agricultural Adjustment Act is raised by a special tax—the processing tax. Persons from whom it is exacted, therefore, do have a sufficient interest to question whether it is being expended for what the judges deem to be a "public purpose." The answer to that question, it is obvious, will depend wholly upon the statesmanship of the judges.<sup>70</sup>

## II

The calling in of gold coin and payment therefor of a smaller number of paper dollars than could be procured for the gold were there a free market, the reduction in the gold content of the dollar, the annulment of the gold clause in private and public contracts raise questions so unlike any question upon which the Supreme Court has ruled in the past, that no relevant due process doctrines or decisions exist. Consequently, the test of validity is the fundamental due process test—are the statutes, in view of needs to meet which they were enacted, arbitrary, capricious, and unreasonable

<sup>66</sup> *Loan Association v. Topeka*, 20 Wall. (U.S.) 655, 22 L.Ed. 455 (1874).

<sup>67</sup> They are collected in *McAllister, Public Purpose in Taxation*, 18 Cal. L. Rev. 137, 241 (1930).

<sup>68</sup> *Frothingham v. Mellon*, 262 U.S. 447, 486, 67 L.Ed. 1078, 43 Sup. Ct. 597 (1923).

<sup>69</sup> *Massachusetts v. Mellon*, 262 U.S. 447, 67 L.Ed. 1078, 43 Sup. Ct. 597 (1923).

<sup>70</sup> For analysis of the question and discussion of the cases, see Brewster, *Is the Processing Tax Unconstitutional*, 19 American Bar Association Journal, 419 (1933).

or does their tendency to advance the public welfare outweigh the burdens they impose upon individuals. In the invalidation of statutes by reason of this test the judges must determine how far it is wise for them to go in preferring their own views of policy if they differ from those of Congress; in the application of such a test, statesmanship alone is called for.<sup>71</sup>

### III

Some of the extensions of government control over industry are, it is clear in view of existing doctrine and past decisions, unlikely to be held invalid under the due process clause of the Fifth Amendment. The Securities Act, the Act providing for the insurance of bank deposits, and the Emergency Banking Act (which provides for limitations on banking and foreign exchange transactions) are similar to and are little if any more drastic interferences in the field of private enterprise than statutes which the Court has upheld in the past.<sup>72</sup>

There remain for consideration the attacks which will be made upon the National Industrial Recovery Act and the Agricultural Adjustment Act and the subordinate legislation thereunder. These Acts and the codes and licenses which to date have been promulgated under them contain provisions, binding upon some or all industries, which can be grouped under four heads: labor provisions, price-fixing provisions, production-limitation provisions, miscellaneous trade practice provisions.

Hours of work are limited, minimum wages are fixed, child labor is forbidden, employers are prohibited from interfering with their workmen's freedom of organization, a variety of regulations of working conditions are imposed. Past decisions, based upon the fundamental due process tests of reasonableness, of balancing the social gain against the restrictions

<sup>71</sup> The impairment clause (Article 1, Section 10, Clause 1), of course, has no application to federal governmental action. If it did apply, existing doctrine would make validity depend upon the statesmanship of the judges. Hughes, C. J., said in *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398, 437, 54 Sup. Ct. 231 (1934) that "The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts."

It will perhaps be contended that the gold coin called in is being "taken for public use" within the Fifth Amendment and that "just compensation" is not being made. There is no relevant past decision or doctrine. Decision either way is within the limits upon judicial statesmanship fixed by the words of the clause in the document. See, in general, note, 47 *Harv. L. Rev.* 479 (1934); *United States v. Campbell*, 5 *F. Supp.* 156 (1933) and note thereon, 34 *Col. L. Rev.* 166 (1934); Nebolsine, *The Gold Clause in Private Contracts*, 42 *Yale L. Jour.* 1051 (1933); Post and Willard, *The Power of Congress to Nullify Gold Clauses*, 46 *Harv. L. Rev.* 1225 (1933); Eder, *A Forgotten Section of the Fourteenth Amendment*, 19 *Corn. L. Quar.* 1 (1933).

<sup>72</sup> See the collection of cases upholding regulatory statutes in *Nebbia v. New York*, 54 *Sup. Ct.* 505, 511 ff. (1934).

upon liberty and property rights, make it practically certain that all of the regulations of working conditions, the prohibition of child labor, and the limitation of hours of work will be upheld.<sup>73</sup> Past decisions invalidating the outlawry of yellow dog contracts<sup>74</sup> have recently been overruled in effect by a decision<sup>75</sup> which renders practically certain the upholding of the prohibition against interference by employers with the freedom of organization of employees. The fixing of minimum wages is the only labor regulation the upholding of which is at all doubtful. A 1923 decision by a narrowly divided Court held invalid the fixing of minimum wages for women.<sup>76</sup> Criticism of the holding has been almost entirely adverse.<sup>77</sup> The N.I.R.A. codes will not raise the question whether the 1923 decision should be overruled. Not only have conditions changed, but the social gains sought to be achieved are very different from those sought by the statute invalidated in 1923. Then the tendency, if any, of a local minimum wage to protect and promote the health and morals of women was held by five of the justices not to outweigh the interference with freedom involved. Whether a nation-wide minimum wage for men as well as women, intended not only to benefit the workers but also to benefit industry as a whole by creating, through increased purchasing power of the workers, a better market for the products of industry, is reasonable is a very different question—a question the answering of which involves statesmanship alone.

Prices for petroleum and for milk are now fixed directly; indirectly, the prices for certain agricultural products are sought to be raised by the processing tax; sales below cost or below a fair market value or below published price lists are forbidden in certain industries.<sup>78</sup> When this regula-

<sup>73</sup> As to working conditions, citation of authority seems unnecessary in view of the multitude of statutes of unquestioned validity relating to the safety, health, and comfort of workers. Cf. *Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 46 L.Ed. 55, 22 Sup. Ct. 1 (1901), upholding statute regulating the issuance of store orders for wages.

As to child labor, see *Sturges & Burn v. Beauchamp*, 231 U.S. 320, 58 L.Ed. 245, 34 Sup. Ct. 60 (1913).

As to hours of work, see *Bunting v. Oregon*, 243 U.S. 426, 61 L.Ed. 830, 37 Sup. Ct. 435 (1917). *Radice v. New York*, 264 U.S. 292, 68 L.Ed. 690, 44 Sup. Ct. 325 (1924), upheld the prohibition of night work by women.

<sup>74</sup> *Adair v. United States*, 208 U.S. 161, 52 L.Ed. 436, 28 Sup. Ct. 277 (1908); *Coppage v. Kansas*, 236 U.S. 1, 59 L.Ed. 441, 35 Sup. Ct. 240 (1915).

<sup>75</sup> *Texas & New Orleans R. Co. v. Brotherhood*, 281 U.S. 548, 74 L.Ed. 1034, 50 Sup. Ct. 427 (1930).

<sup>76</sup> *Adkins v. Children's Hospital*, 261 U.S. 525, 67 L.Ed. 785, 43 Sup. Ct. 394 (1923).

<sup>77</sup> See, *The Supreme Court and Minimum Wage Legislation: Comment by the Legal Profession on the District of Columbia Case* (1925).

<sup>78</sup> On the last mentioned prohibition, see *Terborgh, Price Control Devices in N.R.A. Codes* (1934).



tion was undertaken, doctrine invalidated governmental price fixing except in businesses "affected with a public interest" or "clothed with a public use." No satisfactory definition of these phrases had been formulated; in reality they were labels used after the judges, as statesmen, had decided to permit price fixing in a particular business.<sup>79</sup> Now this doctrine has been repudiated. Over the dissent of Justices McReynolds, Van Devanter, Sutherland, and Butler, the fixing of prices for milk by the State of New York was upheld on March 5, 1934, by Chief Justice Hughes and Justices Brandeis, Stone, Roberts, and Cardozo.<sup>80</sup> Writing the majority opinion, Mr. Justice Roberts said: "The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good."<sup>81</sup> The sub-doctrine repudiated, the fundamental due process test of reasonableness is all that is left. Constitutionality depends upon the judges.

In the petroleum and lumber industries maximum production figures are set for each industry as a whole and quotas are allocated to individual producers; in the cotton and wool textile industries the number of hours of plant activity is limited; before the capacity of existing plants in the cotton textile, lace, ice, and some other industries may be increased, the equivalent of a certificate of public convenience and advantage must be procured. The only past decision relevant to the validity of these regulations is *New State Ice Co. v. Liebmann*.<sup>82</sup> There it was held by six of the justices (the Chief Justice and Mr. Justice Roberts voting with the four who constituted the minority in the New York milk case) that the requirement of a certificate of public convenience and advantage as a prerequisite to entrance into a business was permissible only in the case of businesses "affected with a public interest" and that the ice business in Oklahoma was not so affected. The Milk Case undermines this decision. Much of Mr. Justice Roberts's language in the latter case is reminiscent of Mr. Justice Brandeis's already classic dissent in the Ice Case.<sup>83</sup> It seems cer-

<sup>79</sup> In dissenting opinions, Mr. Justice Stone had pointed this out and had suggested a meaningful test. *Tyson v. Banton*, 273 U.S. 418, 447, 71 L.Ed. 718, 47 Sup. Ct. 426 (1927); *Ribnik v. McBride*, 277 U.S. 350, 359, 72 L.Ed. 913, 48 Sup. Ct. 545 (1928). See McAllister, *Lord Hale and Business Affected with a Public Interest*, 43 Harv. L. Rev. 759 (1930); Hamilton, *Affection with Public Interest*, 39 Yale L. Jour. 1089 (1930).

<sup>80</sup> *Nebbia v. New York*, 54 Sup. Ct. 505 (1934).

<sup>81</sup> 54 Sup. Ct. 515-516. Such a holding was called for in *Carpenter, The Constitutionality of the National Industrial Recovery Act*, 7 So. Cal. L. Rev. 125, 141 (1934).

<sup>82</sup> 285 U.S. 262, 76 L.Ed. 747, 52 Sup. Ct. 371 (1932).

<sup>83</sup> Because its bearing is so wide, a long quotation from Mr. Justice Roberts's opinion seems justified. I omit his citation of cases.

" . . . there can be no doubt that upon proper occasion and by appropriate measures the

tain that the Court as at present constituted will regard all regulations as to limitation of production and entry into business as subject only to the fundamental due process test of reasonableness. Again constitutionality depends upon the statesmanship of the judges; upon the extent to which they will prefer their own views of policy if they differ from those of Congress and the agencies to which Congress has delegated power to make these regulations.

The trade practices outlawed by the codes are practices some of which are regarded as injurious to consumers, some as injurious to competitors. No past decisions lay down doctrines particularizing the general due process test.

Due process decisions in the past, and the doctrines announced in them, gave some basis for claims that the Constitution's mandate with respect to governmental control of business was *laissez-faire*. But so many regu-

state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells.

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislative arm, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*. 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.' Northern Securities Co. v. United States, 193 U.S. 197, 337-8. And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. . . .

"The law-making bodies have in the past endeavored to promote free competition by laws aimed at trusts and monopolies. The consequent interference with private property and freedom of contract has not availed with the courts to set these enactments aside as denying due process. Where the public interest was deemed to require the fixing of minimum prices, that expedient has been sustained. If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty. . . ." 54 Sup. Ct. 516-517.

latory statutes have been upheld, so many invalidating decisions overruled and doctrines repudiated, that there is today no basis for such claims. Moreover, doctrine at all times has been so phrased that any regulatory statute would be upheld if the judges thought the public interest involved was great enough to outweigh the interference with liberty and property involved. The rôle of the judges far overshadows the rôle of doctrine; the words of the document have never, in this field, played any part.<sup>84</sup>

#### THE RECOVERY LEGISLATION AND THE DELEGATION OF LEGISLATIVE POWER

Many of the statutes which comprise the recovery legislation delegate legislative power to the President or to others. The N.I.R.A. codes are the most conspicuous example of the subordinate legislation which Congress has authorized.

The document does not expressly forbid the delegation of legislative power by Congress. Article I, Section 1, provides that "All legislative Powers herein granted shall be vested in a Congress of the United States." The judges have derived from these words, by construction and interpretation, a doctrine that legislative power is non-delegable. *But*, Congress has delegated important legislative powers to the President and to others many times. A number of these delegations have been questioned; none has ever been invalidated.<sup>85</sup> The delegations upheld have been labeled delegations of "quasi-legislative power" only.

The truth is that the complexity of the problems with which legislatures must deal today, the need for the particularization of general policies and for the formulation and frequent readjustment of subordinate policies and specific rules by informed experts, has made subordinate

<sup>84</sup> Questions as to sufficiency of notice and hearing before administrative action is taken and as to the extent of judicial review of administrative determinations involve doctrines referable to Article III as well as to the due process clause. Here, as elsewhere, neither document nor existing doctrines or past decisions limit greatly the statesmanship of the judges. See Fuchs, *The Constitutionality of the Recovery Program*, 19 *St. Louis L. Rev.* 1, 18 ff. (1933); note, 43 *Yale L. Jour.* 599 (1934).

<sup>85</sup> The President empowered to lower tariff rates, *Field v. Clark*, 143 U.S. 649, 36 L.Ed. 294, 12 Sup. Ct. 495 (1892). Secretary of Treasury, to define and exclude impure tea, *Buttfield v. Stranahan*, 192 U.S. 470, 48 L.Ed. 525, 24 Sup. Ct. 349 (1904). Secretary of War, to order removal of obstructing bridges, *Union Bridge Co. v. United States*, 204 U.S. 364, 51 L.Ed. 523, 27 Sup. Ct. 367 (1907). Secretary of Agriculture, to prescribe regulations (violations of which to be criminal offenses) for use of national forests, *United States v. Grimaund*, 220 U.S. 506, 55 L.Ed. 563, 31 Sup. Ct. 480 (1911). Interstate Commerce Commission, to specify accounting methods required to be followed by carriers, *I.C.C. v. Goodrich Transit Co.*, 224 U.S. 194, 56 L.Ed. 729, 32 Sup. Ct. 436 (1912). President, to change tariff rates, *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 72 L.Ed. 624, 48 Sup. Ct. 348 (1928). There are other cases. See comment, 31 *M.ch. L. Rev.* 786 (1933).

legislation an essential part of the machinery of government.<sup>86</sup> As Elihu Root has said, "the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight."<sup>87</sup>

Doubtless a Congressional enactment empowering the President to promulgate what laws he pleased upon any subject would be held invalid by the judges. Somewhere short of such a statute the judges will draw the line. The recovery legislation does leave to the President and the other delegates wider discretion than did any of the statutes upheld in the past. Whether, notwithstanding the exigency which led to their passage, they will be held to go too far, will depend upon the judges's statesmanship, not upon the document, existing doctrines, or past decisions.

#### THE RECOVERY LEGISLATION AND THE INVASION BY THE FEDERAL GOVERNMENT OF FIELDS RESERVED TO THE STATES

The federal government possesses only those powers delegated to it by the Constitution. An Act of Congress, or subordinate legislation or official action thereunder, will be held invalid unless it can be referred to powers conferred on Congress by the document. But by interpretation and construction of the document, the Supreme Court has discovered many powers not evident to one reading it. As the United States has become economically and socially more and more a single unit, the federal government has gradually extended its control and the Court has felt able to justify practically all of these extensions.

#### I

Most of the statutes which comprise the recovery legislation are clearly within powers of Congress long recognized by the Court. To the currency and fiscal powers, held to result from the power to coin money, from the taxing power and from other powers, can be referred all of the legislation and official action relating to currency and inflation, the invalidation of the gold clauses, the regulation of banks and of dealings in foreign exchange, the calling in of gold. For most of this regulation, the commerce clause is also a possible peg. To a spending power expressly or impliedly conferred by the clause granting Congress the power to tax, can be referred the Farm Credit Act, the Home Owners' Loan Act, the Public Works Act, the Tennessee Valley Authority Act, the Civilian Conservation Corps Act, the Emergency Relief Act, the National Employment Service Act. The contention once made that the federal spending power may be exerted

<sup>86</sup> See, reviewing several recent studies, Carr, *Delegated Legislation in England as Seen from Abroad*, 16 *Journal Comparative Legislation and International Law* 96 (1934).

<sup>87</sup> *Addresses on Citizenship and Government* (1916). Quoted by Frankfurter and Davison, *Cases on Administrative Law* (1932), 15.

only in fields directly related to other powers possessed by the federal government has long been abandoned;<sup>88</sup> moreover, since these statutes authorize the expenditure of funds raised by general taxation only, no one will have sufficient interest to attack them.<sup>89</sup> To the commerce clause can be referred the Emergency Railroad Transportation Act; to that clause and to the power over the mails can be referred the Securities Act.

## II

The National Industrial Recovery Act and the Agricultural Adjustment Act (with the possible exception of the processing tax levied under the authority of the latter) are, I believe, referable only to the commerce clause.<sup>90</sup> Applications of the subordinate legislation promulgated under these statutes may be attacked as federal interference in fields reserved by the Constitution to state control, but the statutory provisions authorizing the codes and licenses are not themselves subject to such attack. The N.I.R.A. provides that violation of a code shall be a criminal offense only if it occurs "in any transaction in or affecting interstate commerce." The A.A.A. authorizes licenses (imposing as conditions provisions comparable to those in the N.I.R.A. codes) for the handling of agricultural products "in the current of interstate or foreign commerce" only. Congress has expressed its intention that codes and licenses shall have the widest application it has power to give them. If a code or license cannot constitutionally be applied to a particular transaction, the statutes do not authorize its application thereto. Codes and licenses have been applied and are now being applied to transactions formerly controlled by state law. Are these applications violative of the Constitution and therefore of the statutes?

The document, doctrine, and past decisions leave it uncertain to what transactions the power of Congress extends. The document makes no attempt to define what activities are interstate (or foreign) commerce activities. Doctrine and past decisions make it clear that transportation of persons, things, or ideas across state lines falls within but does not exhaust the category. What other activities fall within it is far from clear. Moreover, doctrine makes it certain that Congress may regulate, under the commerce clause, some activities which do not themselves constitute interstate commerce, because of the effect those activities have upon

<sup>88</sup> Corwin, *The Spending Power of Congress*, 36 *Harv. L. Rev.* 548 (1923).

<sup>89</sup> See *supra* notes 68 and 69.

<sup>90</sup> There is, of course, no clause conferring upon Congress power to legislate to promote the general welfare. Congress may levy taxes and spend the funds thus raised to promote the general welfare. Article I, Section 8, Clause 1. See Corwin, *supra* note 88. The preamble, which states that the general welfare is one of the objects to promote which the Constitution was established, is not a grant of power. See *infra*, 696.

interstate commerce activities; but doctrine does not make clear what non-interstate commerce activities Congress may thus regulate nor what effect they must have upon interstate commerce activities to render Congressional regulation of them permissible.

Decisions either upholding or invalidating state regulation of a particular activity are sometimes thought to indicate the field of Congressional competence under the commerce clause. But since Congress may sometimes regulate intrastate commerce activities, it is clear that they do not. Moreover decisions upholding or denying state competence as to a particular activity do not necessarily indicate even whether that activity is interstate or intrastate commerce. Interstate activities are affected by intrastate activities and by regulations of the latter; the converse is also true. Doctrine asserts that state statutes are invalid if they "unduly" burden, obstruct, or interfere with interstate commerce activities. A state statute may be held invalid either because the activity it directly affects is interstate commerce (and its effect thereupon constitutes an "undue" interference therewith) or because, although the activity is intrastate commerce, this particular regulation of it indirectly affects and unduly interferes with other, interstate commerce, activity. Similarly, a state statute may be held valid either because the activity it directly affects is intrastate commerce (and it involves no indirect "undue" interference with other, interstate commerce, activity) or because although the activity is interstate commerce this particular regulation of it does not constitute an "undue" interference therewith. Even when the Court has placed a decision explicitly upon one rather than the other of these alternatives and definitely characterized a particular activity as interstate (or as intrastate) commerce, it may later treat the case as resting upon the other alternative.<sup>91</sup>

Decisions that state statutes regulating particular activities do or do not constitute "undue" interferences with interstate commerce are not, therefore, relevant authority upon the question whether Congressional power under the commerce clause extends to those activities. The validity of a Congressional statute founded on the commerce clause depends upon whether the activities it regulates either constitute interstate commerce or so affect interstate commerce that the particular Congressional regulations imposed are valid.<sup>92</sup> The document does not furnish a test.

<sup>91</sup> See, e.g., *East Ohio Gas Co. v. Tax Commission of Ohio*, 283 U.S. 465, 471 ff., 75 L.Ed. 1171, 51 Sup. Ct. 499 (1931), where *Pennsylvania Gas Co. v. Public Service Commission*, 252 U.S. 23, 64 L.Ed. 434, 40 Sup. Ct. 279 (1920) is thus treated.

<sup>92</sup> The Court frequently upholds an application of a federal statute without deciding which alternative basis of Congressional power is present. See, e.g., *Local 167, International Brotherhood of Teamsters v. United States*, 54 Sup. Ct. 396 (1934).

The only relevant doctrines and decisions are those which relate specifically to the validity of Congressional statutes.

Doctrine permits Congress to regulate intrastate commerce activities to the extent necessary to preserve, protect, and foster interstate commerce. Upon the basis of this doctrine, past decisions have permitted further and further extensions of Congressional power.<sup>93</sup> The concept of a "stream of interstate commerce," including many intrastate commerce activities, has been employed.<sup>94</sup> It has been asserted that where intrastate activities are so intermingled with interstate commerce activities that the latter can be regulated effectively only if the former are subjected to the same regulation, Congress may regulate both.<sup>95</sup> It is probably true that all intrastate activities have some remote effect upon interstate commerce and that conceivable Congressional legislation could so regulate them as to foster interstate commerce. Somewhere short of that, the Supreme Court will probably draw a line limiting Congressional power under the commerce clause. Neither the document, existing doctrines, or past decisions furnish any basis for prediction where that line will be drawn. They do indicate that codes and licenses can be validly applied far outside the field of interstate commerce itself. But whether, for example, a minimum wage provision in an N.I.R.A. code can be validly applied to a Chicago barber shop depends wholly upon the judges' statesmanship.

### III

The N.I.R.A., the A.A.A., and perhaps the Securities Act raise questions of another type. It is sometimes contended that these statutes, or parts of them, though they constitute an exertion by Congress of powers granted to it by the Constitution, were enacted for the purpose of achieving results in fields control over which is reserved by the Constitution to the states and that they are therefore invalid. The Child Labor Cases<sup>96</sup>

<sup>93</sup> The Safety Appliance Act validly applies to intrastate trains on tracks over which interstate trains run. *Southern Railway v. United States*, 222 U.S. 20, 56 L.Ed. 72, 32 Sup. Ct. 2 (1911). Intrastate rates may be ordered raised if so low that interstate commerce is burdened or discriminated against. *Railroad Commission v. Chicago, B. & Q. Ry.*, 257 U.S. 563, 66 L.Ed. 371, 42 Sup. Ct. 232 (1922). Cf. such an application of the Sherman Act (26 Stat. 209, 1890) as that in *Swift & Co. v. United States*, 196 U.S. 375, 49 L.Ed. 518, 25 Sup. Ct. 276 (1905) with that held invalid in *The Sugar Trust Case*, 156 U.S. 1, 39 L.Ed. 325, 15 Sup. Ct. 249 (1895).

<sup>94</sup> See, e.g., *Stafford v. Wallace*, 258 U.S. 495, 66 L.Ed. 735, 42 Sup. Ct. 397 (1922). See Ribble, *The "Current of Commerce,"* 18 Minn. L. Rev. 296, 312 ff. (1934).

<sup>95</sup> See, e.g., *United States v. New York Central Railroad Co.*, 272 U.S. 457, 464, 71 L.Ed. 350, 47 Sup. Ct. 130 (1926).

<sup>96</sup> *Hammer v. Dagenhart*, 247 U.S. 251, 62 L.Ed. 1101, 38 Sup. Ct. 529 (1918); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 66 L.Ed. 817, 42 Sup. Ct. 449 (1922).

See also, *Hill v. Wallace*, 259 U.S. 44, 66 L.Ed. 822, 42 Sup. Ct. 453 (1922) invalidating regulation under the taxing power of sales of grain for future delivery. Similar regulation, under

are cited in support of these contentions. The first case, decided in 1918, invalidated a Congressional prohibition of the shipment in interstate commerce of the products of child labor. The second, in 1922, invalidated a Congressional tax upon mines and factories in which child labor was employed. Both statutes were regarded by a majority of the Court as unconstitutional invasions by Congress of powers reserved to the states by the Tenth Amendment. It is now urged that the exclusion of oil produced in violation of the N.I.R.A. Code from interstate commerce, the exclusion of prospectuses forbidden by the Securities Act from interstate commerce and from the mails, and the levying of the processing tax under the A.A.A. are unconstitutional for the same reason.

There are two alternatives open to the court. The first derives from the fact that the written Constitution's grant of authority to Congress is phrased in terms of powers, not fields of control. The preamble states that the promotion of the general welfare is one of the objects to secure which the Constitution was ordained. It is possible for the Court to take the position that Congress is authorized to exert any power delegated to it for the purpose of promoting the general welfare in any field. The second alternative derives from the Tenth Amendment, which provides that powers not delegated to the federal government are reserved to the states. The Court has held that certain of the powers of Congress are exclusive, that the states may not regulate matters falling within the scope of these exclusive powers. It is possible for the Court to take the position that similarly certain of the powers reserved to the states by the Tenth Amendment are exclusive, that Congress may not exert its powers so as to regulate (or at least not for the purpose of regulating) matters falling within these exclusive state powers.

Until the Child Labor Cases were decided, doctrine and decisions indicated that the Court had taken the first of these alternative positions.<sup>97</sup> These earlier decisions were not overruled, nor were they satisfactorily

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the commerce clause, was later upheld. *Board of Trade v. Olsen*, 262 U.S. 1, 67 L.Ed. 839, 43 Sup. Ct. 470 (1923).

<sup>97</sup> As to the taxing power, see *McCray v. United States*, 195 U.S. 27, 49 L.Ed. 78, 24 Sup. Ct. 769 (1904), upholding prohibitory tax on yellow oleomargarine, and *United States v. Doremus*, 249 U.S. 86, 63 L.Ed. 493, 39 Sup. Ct. 214 (1919), upholding tax intended to eliminate the general sale of narcotic drugs.

As to power under the commerce clause, see *The Lottery Case*, 188 U.S. 321, 47 L.Ed. 492, 23 Sup. Ct. 321 (1903), upholding the barring of lottery tickets from interstate commerce; *Hipolite Egg Co. v. United States*, 220 U.S. 45, 55 L.Ed. 364, 31 Sup. Ct. 364 (1911) upholding the barring of impure foods and drugs; and other cases discussed in *Corwin, Congress's Power to Prohibit Commerce*, 18 *Corn. L. Quar.* 477 (1933).

See, in general, Powell, *Child Labor, Congress, and the Constitution*, 1 *N. Car. L. Rev.* 61 (1922).



distinguished, in the Child Labor Cases. Doctrine is now confused.<sup>98</sup> It is probable, though not certain, that the Court will eventually draw a line somewhere, preserving for the states exclusive control of some matters. But with the document silent, with doctrine confused and past decisions contradictory, where that line will be drawn depends wholly upon where the judges believe it should be drawn.

#### CONCLUSION

There is a written Constitution in France. The French judges do not claim power to treat as invalid statutes they think inconsistent with it. But it does not follow that French legislators do not feel restrained, because of the existence of the written Constitution, from enacting laws forbidden by it.

In Australia there is also a written Constitution. The judges there do treat as invalid statutes they think inconsistent with its provisions. Doctrines construing and interpreting those provisions do derive in part from the statesmanship of the judges. But the Australian judges do not claim power to pronounce doctrines of constitutional law which derive not at all from their written Constitution.

This power to invalidate statutes upon the basis of wholly extra-documental constitutional law was not exercised by the Supreme Court of the United States during the first century of its existence. During most of our history, the Court confined itself to functions similar to those exercised by the Australian courts—the American constitutional system then resembled closely the Australian. Between such systems and our present system, there is a gap as large as that which separates such systems from the French system.

The rôle of the judges under our present system—with the due process clauses held to authorize them to treat as invalid all statutes they deem to be unwise or unjust—renders relatively insignificant the rôle of the written Constitution. It is possible that a majority of the nine justices of the Supreme Court may vote against the constitutionality of minor parts of the recovery program. If they do, it will not be because of the words of the document, or because of doctrine or past decisions. It will be because they believe those parts of the recovery program to be so unwise that they think the Court should invalidate them.<sup>99</sup>

<sup>98</sup> See articles by Powell and Corwin *supra* note 97.

<sup>99</sup> The considerations upon which depends the wisdom of the recovery legislation's expansion of federal authority, its delegations of legislative power, and its extensions of governmental regulation—the non-documentary, non-doctrinal, non-decisional considerations upon which, therefore, the judges should base their decisions as to its constitutionality—are admirably stated and developed by John Dickinson in his paper, *Political Aspects of the New Deal*, 28 *Am. Pol. Sci. Rev.* 197 (1934).