**1925-1932: America in Isolation**

Pierce v. Society of Sisters, 268 U.S. 510 (1925)

Children Cannot Be Compelled to Receive Public School Education

Gitlow v. People, 268 U.S. 652 (1923)

Freedom of speech and of the press is not an absolute right to speak or publish without responsibility whatever one may choose or an immunity for every possible use of language.

Democratic Party Platform, 1924

The Party of the recently deceased Woodrow Wilson seeks to regain a place in the White House. The presidential candidate was John W. Davis.

Republican Party Platform, 1924

When Harding died in office in 1923, the Republican Party sought to return Coolidge, his constitutional successor, to office.

LaFollette's Platform, 1924

LaFollette's Progressive Party platform resulted in Federal Legislation for farm aid, protection of labor rights, and regulation of railroads.

Conference for Progressive Political Action Platform, 1924

"Government is deemed best which offers to the many the highest level of average happiness and well being."

Prohibition Platform, 1924

Although the repeal of the Eighteenth Amendment was still nine years away, widespread corruption and crime induced some to pay full attention to the enforcement of Prohibition. Presidential candidate for the party was Herman P. Faris.

Socialist Labor Platform, 1924

Sixteenth national convention summary of the Socialist Labor Party of America under presidential candidate Frank T. Johns.

Worker's Party Platform, 1924

The platform for the Communist Party of the United States under presidential candidate William Z. Foster.

Myers v. United States, 272 U.S. 52 (1925)

The President's power to dismiss a person from the Executive Branch is not subject to the "advice and consent of the Senate" rule which applies to appointments.

Tyson & Bro. v. Banton, 273 U.S. 418 (1927)

The right of an owner to set the price for sale or use of property is an inherent attribute of the property itself, and, as such, within the protection of the Due Process of Law clauses of the Fifth and Fourteenth Amendments.

Nixon v. Herndon, 273 U.S. 536 (1927)

A Texas state statute barring African-Americans from participation in Democratic party primary elections for the nomination of candidates for Congress, state and other offices, violates the Fourteenth Amendment.

Buck v. Bell, 274 U.S. 200 (1927)

A Virginia statute that provided for the sexual sterilization of inmates of institutions supported by the State found to be afflicted with an hereditary form of insanity or imbecility, is held to be within the power of the State under the Fourteenth Amendment.

Whitney v. California, 274 U.S. 357 (1927)

Under the California Criminal Syndicalism Act, the conviction of a founder of the Communist Labor Party could be reviewed for its federal implications. The constitutionality of the statute was affirmed.

Fiske v. Kansas, 274 U.S. 380 (1927)

Application of a "criminal syndication" act to a particular instance where a person's membership in an organization was used as evidence to convict him. The Court held that conviction on mere membership violated "due process" and, therefore, the rights of an individual.

Marron v. United States, 275 U.S. 192 (1927)

Allows an officer executing a warrant to use reasonable discretion to seize materials not specifically described in the warrant but related to the investigation.

Republican Party Platform (1928)

Herbert Hoover endorsed this in his successful bid for the presidency.

Democratic Party Platform (1928)

The platform pledged enforcement of the eighteenth amendment despite presidential candidate Alfred E. Smith's personal opposition to prohibition and the Volstead Act.

Olmstead v. United States, 277 U.S. 438 (1928)

Legally obtained evidence through telephone wiretapping does not constitute a violation of the Fifth Amendment protection against self-incrimination.

Herbert Hoover Inaugural Address (1929)

Calls for expansion of the criminal justice system to handle increased demands placed upon it by enforcement of the eighteenth amendment. Hoover predicts a profitable future for the country.

Hoover's Message to the National Federation of Men's Bible Classes, May 5, 1929

This includes Hoover's statement affirming that, "As a nation we are indebted to the Book of Books for our national ideals and representative institutions. Their preservation rests in adhering to its principles."

Ex parte Bakelite Corp., 279 U.S. 438 (1929)

The decision set distinctions between Constitutional and Legislative Courts and explained the authority of each.

Pocket Veto Case, 279 U.S. 655 (1929)

The Court established the importance of the presidential veto and also struck the limitations imposed upon the President by Congress regarding time limits to exercise a veto

Patton v. United States, 281 U.S. 276 (1930)

The right to trial by jury as guaranteed in the Sixth Amendment may be waived by an accused person if they choose.

Hoover's Veto of the Muscle Shoals Resolution

The veto of the 1931 Muscle Shoals Act set the stage for the 1933 Act creating the Tennessee Valley Authority with widely extended powers far beyond that conceived in the original bill.

Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931)

Despite the presence of a valid arrest warrant the Fourteenth Amendment can still be liberally applied to protect unreasonable searches and seizures.

Stromberg v. California, 283 U.S. 359 (1931)

Reversed a lower Court decision which prohibited the display of a red flag as a sign or symbol against organized government, finding the conception of "liberty" under the due process clause of the Fourteenth Amendment embraces the right of free speech.

Phillips v. Commissioner, 283 U.S. 589 (1931)

The Court holds that stockholders of a dissolved corporation, whose assets were distributed, can be held liable for unpaid federal taxes the corporation owed prior to the dissolution.

Near v. Minnesota, 283 U.S. 697 (1931)

The Court upheld the right to publish material that is objectionable and libelous without censorship or prior restraint, however established and secured the right to prosecute for publication of such material.

Hoover's Statement about the Bonus Marchers, July 29, 1932

Statement against the "Bonus Army" and the violence from attempting to expel them from their camps in Washington, D.C.

Blockburger v. United States, 284 U.S. 299 (1932)

The Court held that sales of illegal narcotics to the same person a short time apart, can be treated as two separate offenses.

Crowell v. Benson, 285 U.S. 22 (1932)

The decision clarified maritime law and the ability of Congress to establish rules to govern those laws through a case involving claims against the Longshoremen's and Harbor Workers' Compensation Act.

New State Ice Co. v. Liebmann, 285 U.S. 262 (1932)

The Court upheld the right of private business to conduct enterprise without having to prove the necessity of the business to the government. Any infringement by the government is "repugnant to the due process clause of the Fourteenth Amendment."

Pierce v. Society of Sisters, 1925

Title: Pierce v. Society of Sisters

Author: U.S. Supreme Court

Date: June 1, 1925

Source: 268 U.S. 510

This case, nos. 583 and 584, was argued March 16th and 17th, 1925, and was decided June 1st, 1925.

1925, Pierce v. Society of Sisters, 268 U.S. 510

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES

1925, Pierce v. Society of Sisters, 268 U.S. 510

FOR THE DISTRICT OF OREGON

Syllabus

1925, Pierce v. Society of Sisters, 268 U.S. 510

1. The fundamental theory of liberty upon which all governments of this Union rest excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. P. 535.

1925, Pierce v. Society of Sisters, 268 U.S. 510

2. The Oregon Compulsory Education Act (Oreg. Ls., § 5259) which, with certain exemptions, requires every parent, guardian or other person having control of a child between the ages of eight and sixteen years to send him to the public school in the district where he resides, for the period during which the school is held for the current year, is an unreasonable interference with the liberty of the parents and guardians to direct the upbringing of the children, and in that respect violates the Fourteenth Amendment. P. 534.

1925, Pierce v. Society of Sisters, 268 U.S. 510

3. In a proper sense, it is true that corporations cannot claim for themselves the liberty guaranteed by the Fourteenth Amendment, and, in general, no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power by the State upon the ground that he will be deprived of patronage;

1925, Pierce v. Society of Sisters, 268 U.S. 510

4. But where corporations owning and conducting schools are threatened with destruction of their business and property through the improper and unconstitutional compulsion exercised by this statute upon parents and guardians, their interest is direct and immediate, and entitles them to protection by injunction. Truax v. Raich, 239 U.S. 33. P. 535.

1925, Pierce v. Society of Sisters, 268 U.S. 510

5. The Act, being intended to have general application, cannot be construed in its application to such corporations as an exercise of power to amend their charters. Berea College v. Kentucky, 211 U.S. 45. P. 535.

1925, Pierce v. Society of Sisters, 268 U.S. 510

6. Where the injury threatened by an unconstitutional statute is present and real before the statute is to be effective, and will [268 U.S. 511] become irreparable if relief be postponed to that time, a suit to restrain future enforcement of the statute is not premature. P. 536.

1925, Pierce v. Society of Sisters, 268 U.S. 511

296 Fed. 928, affirmed.

1925, Pierce v. Society of Sisters, 268 U.S. 511

APPEALS from decrees of the District Court granting preliminary injunctions restraining the Governor, and other officials, of the State of Oregon from threatening or attempting to enforce an amendment to the school law—an initiative measure adopted by the people November 7, 1922, to become effective in 1926—requiring parents and others having control of young children to send them to the primary schools of the State. The plaintiffs were two Oregon corporations owning and conducting schools. [268 U.S. 529]

MCREYNOLDS, J., lead opinion

1925, Pierce v. Society of Sisters, 268 U.S. 529

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

1925, Pierce v. Society of Sisters, 268 U.S. 529

These appeals are from decrees, based upon undenied allegations, which granted preliminary orders restraining [268 U.S. 530] appellants from threatening or attempting to enforce the Compulsory Education Act\* adopted November 7, 1922, under the initiative provision of her Constitution by the voters of Oregon. Jud.Code, § 266. They present the same points of law; there are no controverted questions of fact. Rights said to be guaranteed by the federal Constitution were specially set up, and appropriate prayers asked for their protection.

1925, Pierce v. Society of Sisters, 268 U.S. 530

The challenged Act, effective September 1, 1926, requires every parent, guardian or other person having control or charge or custody of a child between eight and sixteen years to send him "to a public school for the period of time a public school shall be held during the current year" in the district where the child resides, and failure so to do is declared a misdemeanor. There are [268 U.S. 531] exemptions not specially important here—for children who are not normal, or who have completed he eighth grade, or who reside at considerable distances from any public school, or whose parents or guardians hold special permits from the County Superintendent. The manifest purpose is to compel general attendance at public schools by normal children, between eight and sixteen, who have not completed the eighth grade. And without doubt enforcement of the statute would seriously impair, perhaps destroy, the profitable features of appellees' business and greatly diminish the value of their property.

1925, Pierce v. Society of Sisters, 268 U.S. 531

Appellee, the Society of Sisters, is an Oregon corporation, organized in 1880, with power to care for orphans, educate and instruct the youth, establish and maintain academies or schools, and acquire necessary real and personal [268 U.S. 532] property. It has long devoted its property and effort to the secular and religious education and care of children, and has acquired the valuable good will of many parents and guardians. It conducts interdependent primary and high schools and junior colleges, and maintains orphanages for the custody and control of children between eight and sixteen. In its primary schools, many children between those ages are taught the subjects usually pursued in Oregon public schools during the first eight years. Systematic religious instruction and moral training according to the tenets of the Roman Catholic Church are also regularly provided. All courses of study, both temporal and religious, contemplate continuity of training under appellee's charge; the primary schools are essential to the system and the most profitable. It owns valuable buildings, especially constructed and equipped for school purposes. The business is remunerative—the annual income from primary schools exceeds thirty thousand dollars—and the successful conduct of this requires long-time contracts with teachers and parents. The Compulsory Education Act of 1922 has already caused the withdrawal from its schools of children who would otherwise continue, and their income has steadily declined. The appellants, public officers, have proclaimed their purpose strictly to enforce the statute.

1925, Pierce v. Society of Sisters, 268 U.S. 532

After setting out the above facts, the Society's bill alleges that the enactment conflicts with the right of parents to choose schools where their children will receive appropriate mental and religious training, the right of the child to influence the parents' choice of a school, the right of schools and teachers therein to engage in a useful business or profession, and is accordingly repugnant to the Constitution and void. And, further, that, unless enforcement of the measure is enjoined the corporation's business and property will suffer irreparable injury.

1925, Pierce v. Society of Sisters, 268 U.S. 532

Appellee, Hill Military Academy, is a private corporation organized in 1908 under the laws of Oregon, engaged [268 U.S. 533] in owning, operating and conducting for profit an elementary, college preparatory and military training school for boys between the ages of five and twenty-one years. The average attendance is one hundred, and the annual fees received for each student amount to some eight hundred dollars. The elementary department is divided into eight grades, as in the public schools; the college preparatory department has four grades, similar to those of the public high schools; the courses of study conform to the requirements of the State Board of Education. Military instruction and training are also given, under the supervision of an Army officer. It owns considerable real and personal property, some useful only for school purposes. The business and incident good will are very valuable. In order to conduct its affairs, long time contracts must be made for supplies, equipment, teachers and pupils. Appellants, law officers of the State and County, have publicly announced that the Act of November 7, 1922, is valid, and have declared their intention to enforce it. By reason of the statute and threat of enforcement, appellee's business is being destroyed and its property depreciated; parents and guardians are refusing to make contracts for the future instruction of their sons, and some are being withdrawn.

1925, Pierce v. Society of Sisters, 268 U.S. 533

The Academy's bill states the foregoing facts and then alleges that the challenged Act contravenes the corporation's rights guaranteed by the Fourteenth Amendment and that, unless appellants are restrained from proclaiming its validity and threatening to enforce it, irreparable injury will result. The prayer is for an appropriate injunction.

1925, Pierce v. Society of Sisters, 268 U.S. 533

No answer was interposed in either cause, and, after proper notices, they were heard by three judges (Jud.Code § 266) on motions for preliminary injunctions upon the specifically alleged facts. The court ruled that the Fourteenth Amendment guaranteed appellees against the [268 U.S. 534] deprivation of their property without due process of law consequent upon the unlawful interference by appellants with the free choice of patrons, present and prospective. It declared the right to conduct schools was property, and that parents and guardians, as a part of their liberty, might direct the education of children by selecting reputable teachers and places. Also, that these schools were not unfit or harmful to the public, and that enforcement of the challenged statute would unlawfully deprive them of patronage, and thereby destroy their owners' business and property. Finally, that the threats to enforce the Act would continue to cause irreparable injury, and the suits were not premature.

1925, Pierce v. Society of Sisters, 268 U.S. 534

No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

1925, Pierce v. Society of Sisters, 268 U.S. 534

The inevitable practical result of enforcing the Act under consideration would be destruction of appellees' primary schools, and perhaps all other private primary schools for normal children within the State of Oregon. These parties are engaged in a kind of undertaking not inherently harmful, but long regarded as useful and meritorious. Certainly there is nothing in the present records to indicate that they have failed to discharge their obligations to patrons, students or the State. And there are no peculiar circumstances or present emergencies which demand extraordinary measures relative to primary education.

1925, Pierce v. Society of Sisters, 268 U.S. 534

Under the doctrine of Meyer v. Nebraska, 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children [268 U.S. 535] under their control: as often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

1925, Pierce v. Society of Sisters, 268 U.S. 535

Appellees are corporations, and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. Northwestern Life Ins. Co. v. Riggs, 203 U.S. 243, 255; Western Turf Association v. Greenberg, 204 U.S. 359, 363. But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action. Truax v. Raich, 239 U.S. 33; Truax v. Corrigan, 257 U.S. 312; Terrace v. Thompson, 263 U.S. 197.

1925, Pierce v. Society of Sisters, 268 U.S. 535

The courts of the State have not construed the Act, and we must determine its meaning for ourselves. Evidently it was expected to have general application, and cannot be construed as though merely intended to amend the charters of certain private corporations, as in Berea College v. Kentucky, 211 U.S. 45. No argument in favor of such view has been advanced.

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Generally it is entirely true, as urged by counsel, that no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power of the State upon the ground that he will be deprived [268 U.S. 536] of patronage. But the injunctions here sought are not against the exercise of any proper power. Plaintiffs asked protection against arbitrary, unreasonable and unlawful interference with their patrons and the consequent destruction of their business and property. Their interest is clear and immediate, within the rule approved in Truax v. Raich, Truax v. Corrigan and Terrace v. Thompson, supra, and many other cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers. Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229; Duplex Printing Press Co. v. Deering, 254 U.S. 443; American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184; Nebraska District v. McKelvie, 262 U.S. 404; Truax v. Corrigan, supra, and cases there cited.

1925, Pierce v. Society of Sisters, 268 U.S. 536

The suits were not premature. The injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the Act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well recognized function of courts of equity. The decrees below are

1925, Pierce v. Society of Sisters, 268 U.S. 536

Affirmed.

Footnotes

MCREYNOLDS, J., lead opinion (Footnotes)

1925, Pierce v. Society of Sisters, 268 U.S. 536

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1925, Pierce v. Society of Sisters, 268 U.S. 536

Be it Enacted by the People of the State of Oregon:

1925, Pierce v. Society of Sisters, 268 U.S. 536

Section 1. That Section 5259, Oregon Laws, be and the same is hereby amended so as to read as follows:

1925, Pierce v. Society of Sisters, 268 U.S. 536

Sec. 5259. Children Between the Ages of Eight and Sixteen Years—Any parent, guardian or other person in the State of Oregon, having control or charge or custody of a child under the age of sixteen years and of the age of eight years or over at the commencement of a term of public school of the district in which said child resides, who shall fail or neglect or refuse to send such child to a public school for the period of time a public school shall be held during the current year in said district, shall be guilty of a misdemeanor and each day's failure to send such child to a public school shall constitute a separate offense; provided, that, in the following cases, children shall not be required to attend public schools:

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(a) Children Physically Unable—Any child who is abnormal, subnormal or physically unable to attend school.

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(b) Children Who Have Completed the Eighth Grade—Any child who has completed the eighth grade, in accordance with the provisions of the state course of study.

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(c) Distance from school—Children between the ages of eight and ten years, inclusive, whose place of residence is more than one and one-half miles, and children over ten years of age whose place of residence is more than three miles, by the nearest traveled road, from public school; provided, however, that, if transportation to and from school is furnished by the school district, this exemption shall not apply.

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(d) Private Instruction—Any child who is being taught for a like period of time by the parent or private teacher such subjects as are usually taught in the first eight years in the public school; but before such child can be taught by a parent or a private teacher, such parent or private teacher must receive written permission from the county superintendent, and such permission shall not extend longer than the end of the current school year. Such child must report to the county school superintendent or some person designated by him at least once every three months and take an examination in the work covered. If, after such examination, the county superintendent shall determine that such child is not being properly taught, then the county superintendent shall order the parent, guardian or other person, to send such child to the public school the remainder of the school year.

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If any parent, guardian or other person having control or charge or custody of any child between the ages of eight and sixteen years shall fail to comply with any provision of this section, he shall be guilty of a misdemeanor, and shall, on conviction thereof, be subject to a fine of not less than $5, nor more than $100, or to imprisonment in the county jail not less than two nor more than thirty days, or by both such fine and imprisonment in the discretion of the court.

1925, Pierce v. Society of Sisters, 268 U.S. 536

This Act shall take effect and be and remain in force from and after the first day of September, 1926.

Gitlow v. People, 1925

Title: Gitlow v. People

Author: U.S. Supreme Court

Date: June 8, 1925

Source: 268 U.S. 652

This case was argued April 12, 1923, and was reargued November 23, 1923. The case was decided June 8, 1925.

1925, Gitlow v. People, 268 U.S. 652

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

Syllabus

1925, Gitlow v. People, 268 U.S. 652

1. Assumed, for the purposes of the case, that freedom of speech and of the press are among the personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the States. P. 666.

1925, Gitlow v. People, 268 U.S. 652

2. Freedom of speech and of the press, as secured by the Constitution, is not an absolute right to speak or publish without responsibility whatever one may choose or an immunity for every possible use of language. P. 666.

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3. That a State, in the exercise of its police power, may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime or disturb the public peace, is not open to question. P. 667.

1925, Gitlow v. People, 268 U.S. 652

4. For yet more imperative reasons, a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. P. 667.

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5. A statute punishing utterances advocating the overthrow of organized government by force, violence and unlawful means, imports a legislative determination that such utterances are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized under the police power, and this determination must be given great weight, and every presumption be indulged in favor of the validity of the statute. P. 668.

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6. Such utterances present sufficient danger to the public peace and security of the State to bring their punishment clearly within the range of legislative discretion, even if the effect of a given utterance cannot accurately be foreseen. P. 669.

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7. A State cannot reasonably be required to defer taking measures against these revolutionary utterances until they lead to actual disturbances of the peace or imminent danger of the State's destruction. P. 669.

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8. The New York statute punishing those who advocate, advise or teach the duty; necessity or propriety of overthrowing or overturning organized government by force, violence, or any unlawful means, or who print, publish, or knowingly circulate any book, [268 U.S. 653] paper, etc., advocating, advising or teaching the doctrine that organized government should be so overthrown, does not penalize the utterance or publication of abstract doctrine or academic discussion having no quality of incitement to any concrete action, but denounces the advocacy of action for accomplishing the overthrow of organized government by unlawful means, and is constitutional as applied to a printed "Manifesto" advocating and urging mass action which shall progressively foment industrial disturbances and, through political mass strikes and revolutionary mass action, overthrow and destroy organized parliamentary government; even though the advocacy was in general terms, and not addressed to particular immediate acts or to particular person. Pp. 654, 672.

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9. The statute being constitutional, it may constitutionally be applied to every utterance not too trivial to be beneath the notice of the law—which is of such a character and used with such intent and purpose as to bring it within the prohibition of the statute, and the question whether the specific utterance in question was likely to bring about the substantive evil aimed at by the statute is not open to consideration. Schenck v. United States, 249 U.S. 47, explained. P. 670.

1925, Gitlow v. People, 268 U.S. 653

195 App.Div. 77; 234 N.Y. 132, 539, affirmed.

1925, Gitlow v. People, 268 U.S. 653

ERROR to a judgment of the Supreme Court of New York, affirmed by the Appellate Division thereof and by the Court of Appeals, sentencing the plaintiff in error for the crime of criminal anarchy, (New York Laws, 1909, c. 88), of which he had been convicted by a jury. [268 U.S. 654]

SANFORD, J., lead opinion

1925, Gitlow v. People, 268 U.S. 654

MR. JUSTICE SANFORD delivered the opinion of the Court.

1925, Gitlow v. People, 268 U.S. 654

Benjamin Gitlow was indicted in the Supreme Court of New York, with three others, for the statutory crime of criminal anarchy. New York Penal Laws, §§ 160, 161. 1 He was separately tried, convicted, and sentenced to imprisonment. The judgment was affirmed by the Appellate Division and by the Court of Appeals. 195 App.Div. 773; 234 N.Y. 132 and 539. The case is here on writ of error to the Supreme Court, to which the record was remitted. 260 U.S. 703.

1925, Gitlow v. People, 268 U.S. 654

The contention here is that the statute, by its terms and as applied in this case, is repugnant to the due process clause of the Fourteenth Amendment. Its material provisions are:

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§ 160. Criminal anarchy defined. Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

1925, Gitlow v. People, 268 U.S. 654

§ 161. Advocacy of criminal anarchy. Any person who:

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1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,

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2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any [268 U.S. 655] form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means

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Is guilty of a felony and punishable

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by imprisonment or fine, or both.

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The indictment was in two counts. The first charged that the defendant had advocated, advised and taught the duty, necessity and propriety of overthrowing and overturning organized government by force, violence and unlawful means, by certain writings therein set forth entitled "The Left Wing Manifesto"; the second, that he had printed, published and knowingly circulated and distributed a certain paper called "The Revolutionary Age," containing the writings set forth in the first count advocating, advising and teaching the doctrine that organized government should be overthrown by force, violence and unlawful means.

1925, Gitlow v. People, 268 U.S. 655

The following facts were established on the trial by undisputed evidence and admissions: the defendant is a member of the Left Wing Section of the Socialist Party, a dissenting branch or faction of that party formed in opposition to its dominant policy of "moderate Socialism." Membership in both is open to aliens as well as citizens. The Left Wing Section was organized nationally at a conference in New York City in June, 1919, attended by ninety delegates from twenty different States. The conference elected a National Council, of which the defendant was a member, and left to it the adoption of a "Manifesto." This was published in The Revolutionary Age, the official organ of the Left Wing. The defendant was on the board of managers of the paper, and was its business manager. He arranged for the printing of the paper, and took to the printer the manuscript of the first issue which contained the Left Wing Manifesto, and also a Communist Program and a Program of the Left Wing that had been adopted by the conference. Sixteen thousand [268 U.S. 656] copies were printed, which were delivered at the premises in New York City used as the office of the Revolutionary Age and the headquarters of the Left Wing, and occupied by the defendant and other officials. These copies were paid for by the defendant, as business manager of the paper. Employees at this office wrapped and mailed out copies of the paper under the defendant's direction, and copies were sold from this office. It was admitted that the defendant signed a card subscribing to the Manifesto and Program of the Left Wing, which all applicants were required to sign before being admitted to membership; that he went to different parts of the State to speak to branches of the Socialist Party about the principles of the Left Wing and advocated their adoption, and that he was responsible for the Manifesto as it appeared, that "he knew of the publication, in a general way, and he knew of its publication afterwards, and is responsible for its circulation."

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There was no evidence of any effect resulting from the publication and circulation of the Manifesto.

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No witnesses were offered in behalf of the defendant.

1925, Gitlow v. People, 268 U.S. 656

Extracts from the Manifesto are set forth in the margin. 2 Coupled with a review of the rise of Socialism, it [268 U.S. 657] condemned the dominant "moderate Socialism" for its recognition of the necessity of the democratic parliamentary state; repudiated its policy of introducing Socialism by legislative measures, and advocated, in plain and unequivocal language, the necessity of accomplishing the "Communist Revolution" by a militant and "revolutionary Socialism", based on "the class struggle" and mobilizing [268 U.S. 658] the "power of the proletariat in action," through mass industrial revolts developing into mass political strikes and "revolutionary mass action", for the purpose of conquering and destroying the parliamentary state and establishing in its place, through a "revolutionary dictatorship of the proletariat", the system of Communist Socialism. The then recent strikes in Seattle and Winnipeg 3 were cited as instances of a development already verging on revolutionary action and suggestive of proletarian [268 U.S. 659] dictatorship, in which the strike-workers were "trying to usurp the functions of municipal government", and revolutionary Socialism, it was urged, must use these mass industrial revolts to broaden the strike, make it general and militant, and develop it into mass political strikes and revolutionary mass action for the annihilation of the parliamentary state.

1925, Gitlow v. People, 268 U.S. 659

At the outset of the trial, the defendant's counsel objected to the introduction of any evidence under the [268 U.S. 660] indictment on the grounds that, as a matter of law, the Manifesto "is not in contravention of the statute," and that "the statute is in contravention of" the due process clause of the Fourteenth Amendment. This objection was denied. They also moved, at the close of the evidence, to dismiss the indictment and direct an acquittal "on the grounds stated in the first objection to evidence", [268 U.S. 661] and again on the grounds that "the indictment does not charge an offense" and the evidence "does not show an offense." These motions were also denied.

1925, Gitlow v. People, 268 U.S. 661

The court, among other things, charged the jury, in substance, that they must determine what was the intent, purpose and fair meaning of the Manifesto; that its words must be taken in their ordinary meaning, as they would be understood by people whom it might reach; that a mere statement or analysis of social and economic facts and historical incidents, in the nature of an essay, accompanied by prophecy as to the future course of events, but with no teaching, advice or advocacy of action, would not constitute the advocacy, advice or teaching of a doctrine for the overthrow of government within the meaning of the statute; that a mere statement that unlawful acts might accomplish such a purpose would be insufficient, unless there was a teaching, advising and advocacy of employing such unlawful acts for the purpose of overthrowing government, and that, if the jury had a reasonable doubt that the Manifesto did teach, advocate or advise the duty, necessity or propriety of using unlawful means for the overthrowing of organized government, the defendant was entitled to an acquittal.

1925, Gitlow v. People, 268 U.S. 661

The defendant's counsel submitted two requests to charge which embodied in substance the statement that to constitute criminal anarchy within the meaning of the statute it was necessary that the language used or published should advocate, teach or advise the duty, necessity or propriety of doing "some definite or immediate act or acts" of force, violence or unlawfulness directed toward the overthrowing of organized government. These were denied further than had been charged. Two other requests to charge embodied in substance the statement that, to constitute guilt, the language used or published must be "reasonably and ordinarily calculated to incite certain persons" to acts of force, violence or unlawfulness, [268 U.S. 662] with the object of overthrowing organized government. These were also denied.

1925, Gitlow v. People, 268 U.S. 662

The Appellate Division, after setting forth extracts from the Manifesto and referring to the Left Wing and Communist Programs published in the same issue of the Revolutionary Age, said: 4

1925, Gitlow v. People, 268 U.S. 662

It is perfectly plain that the plan and purpose advocated . . . contemplate the overthrow and destruction of the governments of the United States and of all the States, not by the free action of the majority of the people through the ballot box in electing representatives to authorize a change of government by amending or changing the Constitution, but by immediately organizing the industrial proletariat into militant Socialist unions and at the earliest opportunity through mass strike and force and violence, if necessary, compelling the government to cease to function, and then through a proletarian dictatorship, taking charge of and appropriating all property and administering it and governing through such dictatorship until such time as the proletariat is permitted to administer and govern it. . . . The articles in question are not a discussion of ideas and theories. They advocate a doctrine deliberately determined upon and planned for militantly disseminating a propaganda advocating that it is the duty and necessity of the proletariat engaged in industrial pursuits to organize to such an extent that, by massed strike, the wheels of government may ultimately be stopped and the government overthrown. . . .

1925, Gitlow v. People, 268 U.S. 662

The Court of Appeals held that the Manifesto "advocated the overthrow of this government by violence, or by unlawful means." 5 In one of the opinions representing [268 U.S. 663] the views of a majority of the court, 6 it was said:

1925, Gitlow v. People, 268 U.S. 663

It will be seen . . . that this defendant through the manifesto . . . advocated the destruction of the state and the establishment of the dictatorship of the proletariat. . . . To advocate . . . the commission of this conspiracy or action by mass strike whereby government is crippled, the administration of justice paralyzed, and the health, morals and welfare of a community endangered, and this for the purpose of bringing about a revolution in the state, is to advocate the overthrow of organized government by unlawful means.

1925, Gitlow v. People, 268 U.S. 663

In the other, 7 it was said:

1925, Gitlow v. People, 268 U.S. 663

As we read this manifesto, we feel entirely clear that the jury were justified in rejecting the view that it was a mere academic and harmless discussion of the advantages of communism and advanced socialism

and

in regarding it as a justification and advocacy of action by one class which would destroy the rights of all other classes and overthrow the state itself by use of revolutionary mass strikes. It is true that there is no advocacy in specific terms of the use of . . . force or violence. There was no need to be. Some things are so commonly incident to others that they do not need to be mentioned when the underlying purpose is described.

1925, Gitlow v. People, 268 U.S. 663

And both the Appellate Division and the Court of Appeals held the statute constitutional.

1925, Gitlow v. People, 268 U.S. 663

The specification of the errors relied on relates solely to the specific rulings of the trial court in the matters hereinbefore set out. 8 The correctness of the verdict is not [268 U.S. 664] questioned, as the case was submitted to the jury. The sole contention here is, essentially, that as there was no evidence of any concrete result flowing from the publication of the Manifesto or of circumstances showing the likelihood of such result, the statute as construed and applied by the trial court penalizes the mere utterance, as such, of "doctrine" having no quality of incitement, without regard either to the circumstances of its utterance or to the likelihood of unlawful sequences, and that, as the exercise of the right of free expression with relation to government is only punishable "in circumstances involving likelihood of substantive evil," the statute contravenes the due process clause of the Fourteenth Amendment. The argument in support of this contention rests primarily upon the following propositions: 1st, that the "liberty" protected by the Fourteenth Amendment includes the liberty of speech and of the press, and 2nd, that while liberty of expression "is not absolute," it may be restrained "only in circumstances where its exercise bears a causal relation with some substantive evil, consummated, attempted or likely," and as the statute "takes no account of circumstances," it unduly restrains this liberty and is therefore unconstitutional.

1925, Gitlow v. People, 268 U.S. 664

The precise question presented, and the only question which we can consider under this writ of error, then is whether the statute, as construed and applied in this case by the state courts, deprived the defendant of his liberty of expression in violation of the due process clause of the Fourteenth Amendment.

1925, Gitlow v. People, 268 U.S. 664

The statute does not penalize the utterance or publication of abstract "doctrine" or academic discussion having no quality of incitement to any concrete action. It is not aimed against mere historical or philosophical essays. It does not restrain the advocacy of changes in the form of government by constitutional and lawful means. What it prohibits is language advocating, advising or teaching [268 U.S. 665] the overthrow of organized government by unlawful means. These words imply urging to action. Advocacy is defined in the Century Dictionary as: "1. The act of pleading for, supporting, or recommending; active espousal." It is not the abstract "doctrine" of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of action for the accomplishment of that purpose. It was so construed and applied by the trial judge, who specifically charged the jury that:

1925, Gitlow v. People, 268 U.S. 665

A mere grouping of historical events and a prophetic deduction from them would neither constitute advocacy, advice or teaching of a doctrine for the overthrow of government by force, violence or unlawful means. [And] if it were a mere essay on the subject, as suggested by counsel, based upon deductions from alleged historical events, with no teaching, advice or advocacy of action, it would not constitute a violation of the statute. . . .

1925, Gitlow v. People, 268 U.S. 665

The Manifesto, plainly, is neither the statement of abstract doctrine nor, as suggested by counsel, mere prediction that industrial disturbances and revolutionary mass strikes will result spontaneously in an inevitable process of evolution in the economic system. It advocates and urges in fervent language mass action which shall progressively foment industrial disturbances and, through political mass strikes and revolutionary mass action, overthrow and destroy organized parliamentary government. It concludes with a call to action in these words:

1925, Gitlow v. People, 268 U.S. 665

The proletariat revolution and the Communist reconstruction of society—the struggle for these—is now indispensable. . . . The Communist International calls the proletariat of the world to the final struggle!

1925, Gitlow v. People, 268 U.S. 665

This is not the expression of philosophical abstraction, the mere prediction of future events; it is the language of direct incitement.

1925, Gitlow v. People, 268 U.S. 665

The means advocated for bringing about the destruction of organized parliamentary government, namely, mass industrial [268 U.S. 666] revolts usurping the functions of municipal government, political mass strikes directed against the parliamentary state, and revolutionary mass action for its final destruction, necessarily imply the use of force and violence, and, in their essential nature, are inherently unlawful in a constitutional government of law and order. That the jury were warranted in finding that the Manifesto advocated not merely the abstract doctrine of overthrowing organized government by force, violence and unlawful means, but action to that end, is clear.

1925, Gitlow v. People, 268 U.S. 666

For present purposes, we may and do assume that freedom of speech and of the press which are protected by the First Amendment from abridgment by Congress are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States. We do not regard the incidental statement in Prudential Ins. Co. v. Cheek, 259 U.S. 530, 543, that the Fourteenth Amendment imposes no restrictions on the States concerning freedom of speech, as determinative of this question. 9

1925, Gitlow v. People, 268 U.S. 666

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. 2 Story on the Constitution, 5th ed., § 1580, p. 634; Robertson v. Baldwin, 165 U.S. 275, 281; Patterson v. Colorado, 205 U.S. 454, 462; Fox v. Washington, 236 [268 U.S. 667] U.S. 273, 276; Schenck v. United States, 249 U.S. 47, 52; Frohwerk v. United States, 249 U.S. 204, 206; Debs v. United States, 249 U.S. 211, 213; Schaefer v. United States, 251 U.S. 466, 474; Gilbert v. Minnesota, 254 U.S. 325, 332; Warren v. United States, (C.C.A.) 183 Fed. 718, 721. Reasonably limited, it was said by Story in the passage cited, this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.

1925, Gitlow v. People, 268 U.S. 667

That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. Robertson v. Baldwin, supra, p. 281; Patterson v. Colorado, supra, p. 462; Fox v. Washington, supra, p. 277; Gilbert v. Minnesota, supra, p. 339; People v. Most, 171 N.Y. 423, 431; State v. Holm, 139 Minn. 267, 275; State v. Hennessy, 114 Wash. 351, 359; State v. Boyd, 86 N.J.L. 75, 79; State v. McKee, 73 Conn. 18, 27. Thus, it was held by this Court in the Fox Case that a State may punish publications advocating and encouraging a breach of its criminal laws; and, in the Gilbert Case, that a State may punish utterances teaching or advocating that its citizens should not assist the United States in prosecuting or carrying on war with its public enemies.

1925, Gitlow v. People, 268 U.S. 667

And, for yet more imperative reasons, a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State. Freedom of speech and press, said Story (supra) does not protect disturbances to the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties. State v. [268 U.S. 668] Holm, supra, p. 275. It does not protect publications prompting the overthrow of government by force; the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the State. People v. Most, supra, pp. 431, 432. And a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means. People v. Lloyd, 304 Ill. 23, 34. See also State v. Tachin, 92 N.J.L. 269, 274, and People v. Steelik, 187 Cal. 361, 375. In short, this freedom does not deprive a State of the primary and essential right of self-preservation, which, so long as human governments endure, they cannot be denied. Turner v. Williams, 194 U.S. 279, 294. In Toledo Newspaper Co. v. United States, 247 U.S. 402, 419, it was said:

1925, Gitlow v. People, 268 U.S. 668

The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions.

1925, Gitlow v. People, 268 U.S. 668

By enacting the present statute, the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute. Mugler v. Kansas, 123 U.S. 623, 661. And the case is to be considered "in the light of the principle that the State is primarily the judge of regulations required in the interest of public safety and welfare;" and that its police

1925, Gitlow v. People, 268 U.S. 668

statutes may only be declared unconstitutional where they are arbitrary or unreasonable [268 U.S. 669] attempts to exercise authority vested in the State in the public interest.

1925, Gitlow v. People, 268 U.S. 669

Great Northern Ry. v. Clara City, 246 U.S. 434, 439. That utterances inciting to the overthrow of organized government by unlawful means present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace, and ultimate revolution. And the immediate danger is none the less real and substantial because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when, in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency. In People v. Lloyd, supra, p. 35, it was aptly said:

1925, Gitlow v. People, 268 U.S. 669

Manifestly, the legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government without waiting until there is a present and imminent danger of the success of the plan advocated. If the State were compelled to wait until the apprehended danger became certain, then its right to protect itself would come into being simultaneously with the overthrow of the government, when there [268 U.S. 670] would be neither prosecuting officers nor courts for the enforcement of the law.

1925, Gitlow v. People, 268 U.S. 670

We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the State unwarrantably infringing the freedom of speech or press, and we must and do sustain its constitutionality.

1925, Gitlow v. People, 268 U.S. 670

This being so, it may be applied to every utterance—not too trivial to be beneath the notice of the law—which is of such a character and used with such intent and purpose as to bring it within the prohibition of the statute. This principle is illustrated in Fox v. Washington, supra, p. 277; Abrams v. United States, 250 U.S. 616, 624; Schaefer v. United States, supra., pp. 479, 480; Pierce v. United States, 252 U.S. 239, 250, 251; 10 and Gilbert v. Minnesota, supra, p. 333. In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition.

1925, Gitlow v. People, 268 U.S. 670

It is clear that the question in such cases is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language [268 U.S. 671] used by the defendant for the purpose of bringing about the prohibited results. There, if it be contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech or press, it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection. In such cases, it has been held that the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if its natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent. Schenck v. United States, supra, p. 51; Debs v. United States, supra., pp. 215, 216. And the general statement in the Schenck Case (p. 52) that the

1925, Gitlow v. People, 268 U.S. 671

question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils

1925, Gitlow v. People, 268 U.S. 671

—upon which great reliance is placed in the defendant's argument—was manifestly intended, as shown by the context, to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character.

1925, Gitlow v. People, 268 U.S. 671

The defendant's brief does not separately discuss any of the rulings of the trial court. It is only necessary to say that, applying the general rules already stated, we find that none of them involved any invasion of the constitutional rights of the defendant. It was not necessary, within the meaning of the statute, that the defendant should have advocated "some definite or immediate act or acts" of force, violence or unlawfulness. It was sufficient if such acts were advocated in general terms, and it was not essential that their immediate execution should [268 U.S. 672] have been advocated. Nor was it necessary that the language should have been "reasonably and ordinarily calculated to incite certain persons" to acts of force, violence or unlawfulness. The advocacy need not be addressed to specific persons. Thus, the publication and circulation of a newspaper article may be an encouragement or endeavor to persuade to murder, although not addressed to any person in particular. Queen v. Most, L.R., 7 Q.B.D. 244.

1925, Gitlow v. People, 268 U.S. 672

We need not enter upon a consideration of the English common law rule of seditious libel or the Federal Sedition Act of 1798, to which reference is made in the defendant's brief. These are so unlike the present statute that we think the decisions under them cast no helpful light upon the questions here.

1925, Gitlow v. People, 268 U.S. 672

And finding, for the reasons stated, that the statute is not, in itself, unconstitutional, and that it has not been applied in the present case in derogation of any constitutional right, the judgment of the Court of Appeals is

1925, Gitlow v. People, 268 U.S. 672

Affirmed.

HOLMES, J., dissenting

1925, Gitlow v. People, 268 U.S. 672

MR. JUSTICE HOLMES, dissenting.

1925, Gitlow v. People, 268 U.S. 672

MR. JUSTICE BRANDEIS and I are of opinion that this judgment should be reversed. The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word "liberty" as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States. If I am right, then I think that the criterion sanctioned by the full Court in Schenck v. United States, 249 U.S. 47, 52, applies.

1925, Gitlow v. People, 268 U.S. 672

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive [268 U.S. 673] evils that [the State] has a right to prevent.

1925, Gitlow v. People, 268 U.S. 673

It is true that, in my opinion, this criterion was departed from in Abrams v. United States, 250 U.S. 616, but the convictions that I expressed in that case are too deep for it to be possible for me as yet to believe that it and Schaefer v. United States, 251 U.S. 466, have settled the law. If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief, and, if believed, it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration. If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

1925, Gitlow v. People, 268 U.S. 673

If the publication of this document had been laid as an attempt to induce an uprising against government at once, and not at some indefinite time in the future, it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences. But the indictment alleges the publication, and nothing more.

Footnotes

SANFORD, J., lead opinion (Footnotes)

1925, Gitlow v. People, 268 U.S. 673

1. Laws of 1909, ch. 88; Consol.Laws, 1909, ch. 40. This statute was originally enacted in 1902. Laws of 1902, ch. 371.

1925, Gitlow v. People, 268 U.S. 673

2. Italics are given as in the original, but the paragraphing is omitted.

1925, Gitlow v. People, 268 U.S. 673

The Left Wing Manifesto

1925, Gitlow v. People, 268 U.S. 673

Issued on Authority of the Conference by the

1925, Gitlow v. People, 268 U.S. 673

National Council of the Left Wing

1925, Gitlow v. People, 268 U.S. 673

The world is in crisis. Capitalism, the prevailing system of society, is in process of disintegration and collapse. . . . Humanity can be saved from its last excesses only by the Communist Revolution. There can now be only the Socialism which is one in temper and purpose with the proletarian revolutionary struggle. . . . The class struggle is the heart of Socialism. Without strict conformity to the class struggle, in its revolutionary implications, Socialism becomes either sheer Utopianism, or a method of reaction. . . . The dominant Socialism united with the capitalist governments to prevent a revolution. The Russian Revolution was the first act of the proletariat against the war and Imperialism. . . . [The] proletariat, urging on the poorer peasantry, conquered power. It accomplished a proletarian revolution by means of the Bolshevik policy of "all power to the Soviets,"—organizing the new transitional state of proletarian dictatorship. . . . Moderate Socialism affirms that the bourgeois, democratic parliamentary state is the necessary basis for the introduction of Socialism. . . . Revolutionary Socialism, on the contrary, insists that the democratic parliamentary state can never be the basis for the introduction of Socialism; that it is necessary to destroy the parliamentary state, and construct a new state of the organized producers, which will deprive the bourgeoisie of political power, and function as a revolutionary dictatorship of the proletariat. . . . Revolutionary Socialism alone is capable of mobilizing the proletariat for Socialism, for the conquest of the power of the state, by means of revolutionary mass action and proletarian dictatorship. . . . Imperialism is dominant in the United States, which is now a world power. . . . The war has aggrandized American Capitalism, instead of weakening it as in Europe. . . . These conditions modify our immediate task, but do not alter its general character; this is not the moment of revolution, but it is the moment of revolutionary struggle. . . . Strikes are developing which verge on revolutionary action, and in which the suggestion of proletarian dictatorship is apparent, the striker-workers trying to usurp functions of municipal government, as in Seattle and Winnipeg. The mass struggle of the proletariat is coming into being. . . . These strikes will constitute the determining feature of proletarian action in the days to come. Revolutionary Socialism must use these mass industrial revolts to broaden the strike, to make it general and militant; use the strike for political objectives, and, finally, develop the mass political strike against Capitalism and the state. Revolutionary Socialism must base itself on the mass struggles of the proletariat, engage directly in these struggles while emphasizing the revolutionary purposes of Socialism and the proletarian movement. The mass strikes of the American proletariat provide the material basis out of which to develop the concepts and action of revolutionary Socialism. . . . Our task . . . is to articulate and organize the mass of the unorganized industrial proletariat, which constitutes the basis for a militant Socialism. The struggle for the revolutionary industrial unionism of the proletariat becomes an indispensable phase of revolutionary Socialism, on the basis of which to broaden and deepen the action of the militant proletariat, developing reserves for the ultimate conquest of power. . . . Revolutionary Socialism adheres to the class struggle because through the class struggle alone—the mass struggle—can the industrial proletariat secure immediate concessions and finally conquer power by organizing the industrial government of the working class. The class struggle is a political struggle . . . in the sense that its objective is political—the overthrow of the political organization upon which capitalistic exploitation depends, and the introduction of a new social system. The direct objective is the conquest by the proletariat of the power of the state. Revolutionary Socialism does not propose to "capture" the bourgeois parliamentary state, but to conquer and destroy it. Revolutionary Socialism, accordingly, repudiates the policy of introducing Socialism by means of legislative measures on the basis of the bourgeois state. . . . It proposes to conquer by means of political action . . . in the revolutionary Marxian sense, which does not simply mean parliamentarism, but the class action of the proletariat in any form having as its objective the conquest of the power of the state. . . . Parliamentary action which emphasizes the implacable character of the class struggle is an indispensable means of agitation. . . . But parliamentarism cannot conquer the power of the state for the proletariat. . . . It is accomplished not by the legislative representatives of the proletariat, but by the mass power of the proletariat in action. The supreme power of the proletariat inheres in the political mass strike, in using the industrial mass power of the proletariat for political objectives. Revolutionary Socialism, accordingly, recognizes that the supreme form of proletarian political action is the political mass strike. . . . The power of the proletariat lies fundamentally in its control of the industrial process. The mobilization of this control in action against the bourgeois state and Capitalism means the end of Capitalism, the initial form of the revolutionary mass action that will conquer the power of the state. . . . The revolution starts with strikes of protest, developing into mass political strikes and then into revolutionary mass action for the conquest of the power of the state. Mass action becomes political in purpose while extra-parliamentary in form; it is equally a process of revolution and the revolution itself in operation. The final objective of mass action is the conquest of the power of the state, the annihilation of the bourgeois parliamentary state and the introduction of the transition proletarian state, functioning as a revolutionary dictatorship of the proletariat. . . . The bourgeois parliamentary state is the organ of the bourgeoisie for the coercion of the proletariat. The revolutionary proletariat must, accordingly, destroy this state. . . . It is therefore necessary that the proletariat organize its own state for the coercion and suppression of the bourgeoisie. . . . Proletarian dictatorship is a recognition of the necessity for a revolutionary state to coerce and suppress the bourgeoisie; it is equally a recognition of the fact that, in the Communist reconstruction of society, the proletariat as a class alone counts. . . . The old machinery of the state cannot be used by the revolutionary proletariat. It must be destroyed. The proletariat creates a new state, based directly upon the industrially organized producers, upon the industrial unions or Soviets, or a combination of both. It is this state alone, functioning as a dictatorship of the proletariat, that can realize Socialism. . . . While the dictatorship of the proletariat performs its negative task of crushing the old order, it performs the positive task of constructing the new. Together with the government of the proletarian dictatorship, there is developed a new "government," which is no longer government in the old sense, since it concerns itself with the management of production, and not with the government of persons. Out of workers' control of industry, introduced by the proletarian dictatorship, there develops the complete structure of Communist Socialism—industrial self-government of the communistically organized producers. When this structure is completed, which implies the complete expropriation of the bourgeoisie economically and politically, the dictatorship of the proletariat ends, in its place coming the full and free social and individual autonomy of the Communist order. . . . It is not a problem of immediate revolution. It is a problem of the immediate revolutionary struggle. The revolutionary epoch of the final struggle against Capitalism may last for years and tens of years; but the Communist International offers a policy and program immediate and ultimate in scope, that provides for the immediate class struggle against Capitalism, in its revolutionary implications, and for the final act of the conquest of power. The old order is in decay. Civilization is in collapse. The proletarian revolution and the Communist reconstruction of society—the struggle for these—is now indispensable. This is the message of the Communist International to the workers of the world. The Communist International calls the proletariat of the world to the final struggle!

1925, Gitlow v. People, 268 U.S. 673

3. There was testimony at the trial that

1925, Gitlow v. People, 268 U.S. 673

there was an extended strike at Winnipeg commencing May 15, 1919, during which the production and supply of necessities, transportation, postal and telegraphic communication and fire and sanitary protection were suspended or seriously curtailed.

1925, Gitlow v. People, 268 U.S. 673

4. 195 App.Div. 773, 782, 790.

1925, Gitlow v. People, 268 U.S. 673

5. Five judges, constituting the majority of the court, agreed in this view. 234 N.Y. 132, 138. And the two judges, constituting the minority—who dissented solely on a question as to the construction of the statute which is not here involved—said in reference to the Manifesto:

1925, Gitlow v. People, 268 U.S. 673

Revolution for the purpose of overthrowing the present form and the established political system of the United States government by direct means.rather than by constitutional means is therein clearly advocated and defended. . . .

1925, Gitlow v. People, 268 U.S. 673

P. 154.

1925, Gitlow v. People, 268 U.S. 673

6. Pages 141, 142.

1925, Gitlow v. People, 268 U.S. 673

7. Pages 149, 150.

1925, Gitlow v. People, 268 U.S. 673

8. Exceptions to all of these rulings had been duly taken.

1925, Gitlow v. People, 268 U.S. 673

9. Compare Patterson v. Colorado, 205 U.S. 454, 462; Twining v. New Jersey, 211 U.S. 78, 108; Coppage v. Kansas, 236 U.S. 1, 17; Fox v. Washington, 236 U.S. 273, 276; Schaefer v. United States, 251 U.S. 466, 474; Gilbert v. Minnesota, 254 U.S. 325, 338; Meyer v. Nebraska, 262 U.S. 390, 399; 2 Story On the Constitution, 5th Ed., § 1950, p. 698.

1925, Gitlow v. People, 268 U.S. 673

10. This reference is to so much of the decision as relates to the conviction under the third count. In considering the effect of the decisions under the Espionage Act of 1917 and the amendment of 1918, the distinction must be kept in mind between indictments under those provisions which specifically punish certain utterances, and those which merely punish specified acts in general terms, without specific reference to the use of language.

Democratic Platform of 1924

Title: Democratic Platform of 1924

Author: Democratic Party

Date: 1924

Source: National Party Platforms, pp.243-252

National Party Platforms, Democratic Platform of 1924, p.243

We, the representatives of the democratic party, in national convention assembled, pay our profound homage to the memory of Woodrow Wilson. Our hearts are filled with gratitude that American democracy should have produced this man, whose spirit and influence will live on through the ages; and that it was our privilege to have co-operated with him in the advancement of ideals of government which will serve as an example and inspiration for this and future generations. We affirm our abiding faith in those ideals and pledge ourselves to take up the standard which he bore and to strive for the full triumph of the principles of democracy to which he dedicated his life.

Democratic Principles

National Party Platforms, Democratic Platform of 1924, p.243

The democratic party believes in equal rights to all and special privilege to none. The republican party holds that special privileges are essential to national prosperity. It believes that national prosperity must originate with the special interests and seep down through the channels of trade to the less favored industries to the wage earners and small salaried employes. It has accordingly enthroned privilege and nurtured selfishness.

National Party Platforms, Democratic Platform of 1924, p.243

The republican party is concerned chiefly with material things; the democratic party is concerned chiefly with human rights. The masses, burdened by discriminating laws and unjust administration, are demanding relief. The favored special interests, represented by the republican party, contented with their unjust privileges, are demanding that no change be made. The democratic party stands for remedial legislation and progress. The republican party stands still.

Comparison of Parties

National Party Platforms, Democratic Platform of 1924, p.244

We urge the American people to compare the record of eight unsullied years of democratic administration with that of the republican administration. In the former there was no corruption. The party pledges were faithfully fulfilled and a democratic congress enacted an extraordinary number of constructive and remedial laws. The economic life of the nation was quickened.

National Party Platforms, Democratic Platform of 1924, p.244

Tariff taxes were reduced. A federal trade commission was created. A federal farm loan system was established. Child labor legislation was enacted. A good roads bill was passed. Eight hour laws were adopted. A secretary of labor was given a seat in the cabinet of the president. The Clayton amendment to the Sherman anti-trust act was passed, freeing American labor and taking it from the category of commodities. By the Smith-Lever bill improvement of agricultural conditions was effected. A corrupt practice act was adopted. A well-considered warehouse act was passed. Federal employment bureaus were created, farm loan banks were organized and the federal reserve system was established. Privilege was uprooted. A corrupt lobby was driven from the national capital. A higher sense of individual and national duty was aroused. America enjoyed an unprecedented period of social and material progress.

National Party Platforms, Democratic Platform of 1924, p.244

During the time which intervened between the inauguration of a democratic administration on March 4, 1913, and our entrance into the world war, we placed upon the statute-books of our country more effective constructive and remedial legislation than the republican party had placed there in a generation.

National Party Platforms, Democratic Platform of 1924, p.244

During the great struggle which followed we had a leadership that carried America to greater heights of honor and power and glory than she had ever known before in her entire history.

National Party Platforms, Democratic Platform of 1924, p.244

Transition from this period of exalted democratic leadership to the sordid record of the last three and a half years makes the nation ashamed. It marks the contrast between a high conception of public service and an avid purpose to distribute spoils.

G. O. P. Corruption

National Party Platforms, Democratic Platform of 1924, p.244

Never before in our history has the government been so tainted by corruption and never has an administration so utterly failed. The nation has been appalled by the revelations of political de-pravity which have characterized the conduct of public affairs. We arraign the republican party for attempting to limit inquiry into official delinquencies and to impede if not to frustrate the investigations to which in the beginning the republican party leaders assented, but which later they regarded with dismay.

National Party Platforms, Democratic Platform of 1924, p.244

These investigations sent the former secretary of the interior to Three Rivers in disgrace and dishonor. These investigations revealed the incapacity and indifference to public obligation of the secretary of the navy, compelling him by force of public opinion to quit the cabinet. These investigations confirmed the general impression as to the unfitness of the attorney general by exposing an official situation and personal contacts which shocked the conscience of the nation and compelled his dismissal from the cabinet.

National Party Platforms, Democratic Platform of 1924, p.244

These investigations disclosed the appalling conditions of the veterans bureau with its fraud upon the government and its cruel neglect of the sick and disabled soldiers of the world war. These investigations revealed the criminal and fraudulent nature of the oil leases which caused the congress, despite the indifference of the executive, to direct recovery of the public domain and the prosecution of the criminal.

National Party Platforms, Democratic Platform of 1924, p.244

Such are the exigencies of partisan politics that republican leaders are teaching the strange doctrine that public censure should be directed against those who expose crime rather than against criminals who have committed the offenses. If only three cabinet officers out of ten are disgraced, the country is asked to marvel at how many are free from taint. Long boastful that it was the only party "fit to govern," the republican party has proven its inability to govern even itself. It is at war with itself. As an agency of government it has ceased to function.

National Party Platforms, Democratic Platform of 1924, p.244

This nation cannot afford to entrust its welfare to a political organization that cannot master itself, or to an executive whose policies have been rejected by his own party. To retain in power an administration of this character would inevitably result in four years more of continued disorder, internal dissension and governmental inefficiency. A vote for Coolidge is a vote for chaos.

Issues

National Party Platforms, Democratic Platform of 1924, p.244

The dominant issues of the campaign are created by existing conditions. Dishonesty, discrimination, extravagances and inefficiency exist in government. The burdens of taxation have become unbearable. Distress and bankruptcy in agriculture, the basic industry of our country, is affecting the happiness and prosperity of the whole people. The cost of living is causing hardship and unrest.

National Party Platforms, Democratic Platform of 1924, p.245

The slowing down of industry is adding to the general distress. The tariff, the destruction of our foreign markets and the high cost of transportation are taking the profit out of agriculture, mining and other raw material industries. Large standing armies and the cost of preparing for war still cast their burdens upon humanity. These conditions the existing republican administration has proven itself unwilling or unable to redress.

National Party Platforms, Democratic Platform of 1924, p.245

The democratic party pledges itself to the following program:

National Party Platforms, Democratic Platform of 1924, p.245

Honest government.

National Party Platforms, Democratic Platform of 1924, p.245

We pledge the democratic party to drive from public places all which make barter of our national power, its resources or the administration of its laws; to punish those guilty of these offenses.

National Party Platforms, Democratic Platform of 1924, p.245

To put none but the honest in public office; to practice economy in the expenditure of public money; to reverence and respect the rights of all under the constitution.

National Party Platforms, Democratic Platform of 1924, p.245

To condemn and destroy government by the spy and blackmailer which was by this republican administration both encouraged and practiced.

Tariff and Taxation

National Party Platforms, Democratic Platform of 1924, p.245

The Fordney-McCumber tariff act is the most unjust, unscientific and dishonest tariff tax measure ever enacted in our history. It is class legislation which defrauds the people for the benefit of a few, it heavily increases the cost of living, penalizes agriculture, corrupts the government, fosters paternalism and, in the long run, does not benefit the very interests for which it was intended.

National Party Platforms, Democratic Platform of 1924, p.245

We denounce the republican tariff laws which are written, in great part, in aid of monopolies and thus prevent that reasonable exchange of commodities which would enable foreign countries to buy our surplus agricultural and manufactured products with resultant profit to the toilers and producers of America.

National Party Platforms, Democratic Platform of 1924, p.245

Trade interchange, on the basis of reciprocal advantages to the countries participating is a time-honored doctrine of democratic faith. We declare our party's position to be in favor of a tax on commodities entering the customs house that will promote effective competition, protect against monopoly and at the same time produce a fair revenue to support the government.

National Party Platforms, Democratic Platform of 1924, p.245

The greatest contributing factor in the increase and unbalancing of prices is unscientific taxation. After having increased taxation and the cost of living by $2,000,000,000 under the Fordney-Mc-Cumber tariff, all that the republican party could suggest in the way of relief was a cut of $300,000,000 in direct taxes; and that was to be given principally to those with the largest incomes.

National Party Platforms, Democratic Platform of 1924, p.245

Although there was no evidence of a lack of capital for investment to meet the present requirements of all legitimate industrial enterprises and although the farmers and general consumers were bearing the brunt of tariff favors already granted to special interests, the administration was unable to devise any plan except one to grant further aid to the few. Fortunately this plan of the administration failed and under democratic leadership, aided by progressive republicans, a more equitable one was adopted, which reduces direct taxes by about $450,000,000.

National Party Platforms, Democratic Platform of 1924, p.245

The issue between the president and the democratic party is not one of tax reduction or of the conservation of capital. It is an issue of relative burden of taxation and of the distribution of capital as affected by the taxation of income. The president still stands on the so-called Mellon plan, which his party has just refused to indorse or mention in its platform.

National Party Platforms, Democratic Platform of 1924, p.245

The income tax was intended as a tax upon wealth. It was not intended to take from the poor any part of the necessities of life. We hold that the fairest tax with which to raise revenue for the federal government is the income tax. We favor a graduated tax upon incomes, so adjusted as to lay the burdens of government upon the taxpayers in proportion to the benefits they enjoy and their ability to pay.

National Party Platforms, Democratic Platform of 1924, p.245

We oppose the so-called nuisance taxes, sales taxes and all other forms of taxation that unfairly shift to the consumer the burdens of taxation. We refer to the democratic revenue measure passed by the last congress as distinguished from the Mellon tax plan as an illustration of the policy of the democratic party. We first made a flat reduction of 25 per cent upon the tax of all incomes payable this year and then we so changed the proposed Mellon plan as to eliminate taxes upon the poor, reducing them upon moderate incomes and, in a lesser degree, upon the incomes of multi-millionaires. We hold that all taxes are unnecessarily high and pledge ourselves to further reductions.

National Party Platforms, Democratic Platform of 1924, p.246

We denounce the Mellon plan as a device to relieve multi-millionaires at the expense of other taxpayers, and we accept the issue of taxation tendered by President Coolidge.

Agriculture

National Party Platforms, Democratic Platform of 1924, p.246

During the four years of republican government the economic condition of the American farmer has changed from comfort to bankruptcy, with all its attendant miseries. The chief causes for this are:

National Party Platforms, Democratic Platform of 1924, p.246

(a) The republican party policy of isolation in international affairs has prevented Europe from getting back to its normal balance, and, by leaving unsolved the economic problems abroad, has driven the European city population from industrial activities to the soil in large numbers in order to earn the mere necessaries of life. This has deprived the American farmer of his normal export trade.

National Party Platforms, Democratic Platform of 1924, p.246

(b) The republican policy of a prohibitive tariff, exemplified in the Fordney-McCumber law, which has forced the American farmer, with his export market debilitated, to buy manufactured goods at sustained high domestic levels, thereby making him the victim of the profiteer.

National Party Platforms, Democratic Platform of 1924, p.246

(c) The republican policy of high transportation rates, both rail and water, which has made it impossible for the farmer to ship his produce to market at even a living profit.

National Party Platforms, Democratic Platform of 1924, p.246

To offset these policies and their disastrous results, and to restore the farmer again to economic equality with other industrialists, we pledge

National Party Platforms, Democratic Platform of 1924, p.246

ourselves:

National Party Platforms, Democratic Platform of 1924, p.246

(a) To adopt an international policy of such co-operation by direct official, instead of indirect and evasive unofficial means, as will re-establish the farmers' export market by restoring the industrial balance in Europe and the normal flow of international trade with the settlement of Europe's economic problems.

National Party Platforms, Democratic Platform of 1924, p.246

(b) To adjust the tariff so that the farmer and all other classes can buy again in a competitive manufacturers' market.

National Party Platforms, Democratic Platform of 1924, p.246

(c) To readjust and lower rail and water rates which will make our markets, both for the buyer and the seller, national and international instead of regional and local.

National Party Platforms, Democratic Platform of 1924, p.246

(d) To bring about the early completion of international waterway systems for transportation and to develop our water powers for cheaper fertilizer and use on our farms.

National Party Platforms, Democratic Platform of 1924, p.246

(e) To stimulate by every proper governmental activity the progress of the co-operative marketing movement and the establishment of an export marketing corporation or commission in order that the exportable surplus may not establish the price of the whole crop.

National Party Platforms, Democratic Platform of 1924, p.246

(f) To secure for the farmer credits suitable for his needs.

National Party Platforms, Democratic Platform of 1924, p.246

(g) By the establishment of these policies and others naturally supplementary thereto, to reduce the margin between what the producer receives for his products and the consumer has to pay for his supplies, to the end that we secure an equality for agriculture.

Railroads

National Party Platforms, Democratic Platform of 1924, p.246

The sponsors for the Esch-Cummins transportation act of 1920, at the time of its presentation to congress, stated that it had for its purposes the reduction of the cost of transportation, the improvement of service, the bettering of labor conditions, the promotion of peaceful co-operation between employer and employe, and at the same time the assurance of a fair and just return to the railroads upon their investment.

National Party Platforms, Democratic Platform of 1924, p.246

We are in accord with these announced purposes, but contend that the act has failed to accomplish them. It has failed to reduce the cost of transportation. The promised improvement in service has not been realized. The labor provisions of the act have proven unsatisfactory in settling differences between employer and employes. The so-called recapture clause has worked out to the advantage of the strong and has been of no benefit to the weak. The pronouncement in the act for the development of both rail and water transportation has proved futile. Water transportation upon our inland waterways has not been encouraged, the limitation of our coastwise trade is threatened by the administration of the act. It has unnecessarily interfered with the power of the states to regulate purely intrastate transportation. It must therefore be so rewritten that the high purpose which the public welfare demands may be accomplished.

National Party Platforms, Democratic Platform of 1924, p.246

Railroad freight rates should be so readjusted as to give the bulky basic, low-priced raw commodities, such as agricultural products, coal and ores the lowest rates, placing the higher rates upon more valuable and less bulky manufactured products.

Muscle Shoals

National Party Platforms, Democratic Platform of 1924, p.247

We reaffirm and pledge the fulfillment of the policy, with reference to Muscle Shoals, as declared and passed by the democratic majority of the sixty-fourth congress in the national defense act of 1916, "for the production of nitrates or other products needed for munitions of war and useful in the manufacture of fertilizers."

National Party Platforms, Democratic Platform of 1924, p.247

We hold that the production of cheaper and high grade fertilizers is essential to agricultural prosperity. We demand prompt action by congress for the operation of the Muscle Shoals plants to maximum capacity in the production, distribution and sale of commercial fertilizers to the farmers of the country and we oppose any legislation that limits the production of fertilizers at Muscle Shoals by limiting the amount of power to be used in their manufacture.

Credit and Currency

National Party Platforms, Democratic Platform of 1924, p.247

We denounce the recent cruel and unjust contraction of legitimate and necessary credit and currency, which was directly due to the so-called deflation policy of the republican party, as declared in its national platform of June, 1920, and in the speech of acceptance of its candidate for the presidency. Within eighteen months after the election of 1920 this policy resulted in withdrawing bank loans by over $5,000,000,000 and in contracting our currency by over $1,500,000,000.

National Party Platforms, Democratic Platform of 1924, p.247

The contraction bankrupted hundreds of thousands of farmers and stock growers in America and resulted in widespread industrial depression and unemployment. We demand that the federal reserve system be so administered as to give stability to industry, commerce and finance, as was intended by the democratic party, which gave the federal reserve system to the nation.

Reclamation

National Party Platforms, Democratic Platform of 1924, p.247

The democratic party was foremost in urging reclamation for the immediate arid and semiarid lands of the west. The lands are located in the public land states, and, therefore, it is due to the government to utilize their resources by reclamation. Homestead entrymen under reclamation projects have suffered from the extravagant inefficiencies and mistakes of the federal government.

National Party Platforms, Democratic Platform of 1924, p.247

The reclamation act of 1924, recommended by the fact finding commission and added as an amendment to the second deficiency appropriation bill at the last session of congress, was eliminated from that bill by the republican conferees in the report they presented to congress one hour before adjournment. The democratic party pledges itself actively, efficiently and economically to carry on the reclamation projects, and to make equitable adjustment for the mistakes the government has made.

Conservation

National Party Platforms, Democratic Platform of 1924, p.247

We pledge recovery of the navy's oil reserves, and all other parts of the public domain which have been fraudulently or illegally leased or otherwise wrongfully transferred to the control of private interests; vigorous prosecution of all public officials, private citizens and corporations that participated in these transactions; revision of the water power act, the general leasing act and all other legislation relating to public domain, that may be essential to its conservation and honest and efficient use on behalf of the people of the country.

National Party Platforms, Democratic Platform of 1924, p.247

We believe that the nation should retain title to its water power and we favor the expeditious creation and development of our water power. We favor strict public control and conservation of all the nation's natural resources, such as coal, iron, oil and timber, and their use in such manner as may be to the best interest of our citizens.

National Party Platforms, Democratic Platform of 1924, p.247

The conservation of migratory birds, the establishment of game preserves, and the protection and conservation of wild life is of importance to agriculturists as well as sportsmen. Our disappearing national natural resources of timber calls for a national policy of reforestation.

Improved Highways

National Party Platforms, Democratic Platform of 1924, p.247

Improved roads are of vital importance, not only to commerce and industry, but also to agriculture and natural life. We call attention to the record of the democratic party in this matter and favor continuance of federal aid under existing federal and state agencies.

Mining

National Party Platforms, Democratic Platform of 1924, p.247

Mining is one of the basic industries of this country. We produce more coal, iron, copper and silver than any other country. The value of our mineral production is second only to agriculture.

National Party Platforms, Democratic Platform of 1924, p.248

Mining has suffered like agriculture and from the same causes. It is the duty of our government to foster this industry and to remove the restrictions that destroy its prosperity.

Merchant Marine

National Party Platforms, Democratic Platform of 1924, p.248

The democratic party condemns the vacillating policy of the republican administration in the failure to develop an American flag shipping policy. There has been a marked decrease in the volume of American commerce carried in American vessels as compared to the record under a democratic administration.

National Party Platforms, Democratic Platform of 1924, p.248

We oppose as illogical and unsound all efforts to overcome by subsidy the handicap to American shipping and commerce imposed by republican policies.

National Party Platforms, Democratic Platform of 1924, p.248

We condemn the practice of certain American railroads in favoring foreign ships, and pledge ourselves to correct such discriminations. We declare for an American owned merchant marine, American built and manned by American crews, which is essential for naval security in war and is a protection to the American farmer and manufacturer against excessive ocean freight charges on products of farm and factory.

National Party Platforms, Democratic Platform of 1924, p.248

We declare that the government should own and operate such merchant ships as will insure the accomplishment of these purposes and to continue such operation so long as it may be necessary without obstructing the development and growth of a privately owned American flag shipping.

Necessities of Life

National Party Platforms, Democratic Platform of 1924, p.248

We pledge the democratic party to regulate by governmental agencies the anthracite coal industry and all other corporations controlling the necessaries of life where public welfare has been subordinated to private interests.

Education

National Party Platforms, Democratic Platform of 1924, p.248

We believe with Thomas Jefferson and founders of the republic that ignorance is the enemy of freedom and that each state, being responsible for the intellectual and moral qualifications of its citizens and for the expenditure of the moneys collected by taxation for the support of its schools, shall use its sovereign fight in all matters pertaining to education. The federal government should offer to the states such counsel, advice and aid as may be made available through the federal agencies for the general improvement of our schools in view of our national needs.

Civil Service

National Party Platforms, Democratic Platform of 1924, p.248

We denounce the action of the republican administration in its violations of the principles of civil service by its partisan removals and manipulation of the eligible lists in the postoffice department and other governmental departments; by its packing the civil service commission so that commission became the servile instrument of the administration in its wish to deny to the former service men their preferential rights under the law and the evasion of the requirements of the law with reference to appointments in the department.

National Party Platforms, Democratic Platform of 1924, p.248

We pledge the democratic party faithfully to comply with the spirit as well as the regulation of civil service; to extend its provisions to internal revenue officers and to other employes of the government not in executive positions, and to secure to former service men preference in such appointments.

Postal Employes

National Party Platforms, Democratic Platform of 1924, p.248

We declare in favor of adequate salaries to provide decent living conditions for postal employes.

Popular Elections

National Party Platforms, Democratic Platform of 1924, p.248

We pledge the democratic party to a policy which will prevent members of either house who fail of re-election from participating in the subsequent sessions of congress. This can be accomplished by fixing the days for convening the congress immediately after the biennial national election; and to this end we favor granting the right to the people of the several states to vote on proposed constitutional amendments on this subject.

Probation

National Party Platforms, Democratic Platform of 1924, p.248

We favor the extension of the probation principle to the courts of the United States.

Activities of Women

National Party Platforms, Democratic Platform of 1924, p.248

We welcome the women of the nation to their rightful place by the side of men in the control of the government whose burdens they have always shared.

National Party Platforms, Democratic Platform of 1924, p.249

The democratic party congratulates them upon the essential part which they have taken in the progress of our country, and the zeal with which they are using their political power to aid the enactment of beneficial laws and the exaction of fidelity in the public service.

Veterans of Wars

National Party Platforms, Democratic Platform of 1924, p.249

We favor generous appropriations, honest management and sympathetic care and assistance in the hospitalization, rehabilitation and compensation of the veterans of all wars and their dependents. The humanizing of the veterans' bureau is imperatively required.

Contributions

National Party Platforms, Democratic Platform of 1924, p.249

The nation now knows that the predatory interests have, by supplying republican campaign funds, systematically purchased legislative favors and administrative immunity. The practice must stop; our nation must return to honesty and decency in politics.

National Party Platforms, Democratic Platform of 1924, p.249

Elections are public affairs conducted for the sole purpose of ascertaining the will of the sovereign voters. Therefore, we demand that national elections shall hereafter be kept free from the poison of excessive private contributions. To this end, we favor reasonable means of publicity, at public expense, so that candidates, properly before the people for federal offices, may present their claims at a minimum of cost. Such publicity should precede the primary and the election.

National Party Platforms, Democratic Platform of 1924, p.249

We favor the prohibition of individual contributions, direct and indirect, to the campaign funds of congressmen, senators or presidential candidates, beyond a reasonable sum to be fixed in the law, for both individual contributions and total expenditures, with requirements for full publicity. We advocate a complete revision of the corrupt practice act to prevent Newberryism and the election evils disclosed by recent investigations.

Narcotics

National Party Platforms, Democratic Platform of 1924, p.249

Recognizing in narcotic addiction, especially the spreading of heroin addiction among the youth, a grave peril to America and to the human race, we pledge ourselves vigorously to take against it all legitimate and proper measures for education, for control and for suppression at home and abroad.

Prohibition Law

National Party Platforms, Democratic Platform of 1924, p.249

The republican administration has failed to enforce the prohibition law; is guilty of trafficking in liquor permits, and has become the protector of violators of this law.

National Party Platforms, Democratic Platform of 1924, p.249

The democratic party pledges itself to respect and enforce the constitution and all laws.

Bights of States

National Party Platforms, Democratic Platform of 1924, p.249

We demand that the states of the union shall be preserved in all their vigor and power. They constitute a bulwark against the centralizing and destructive tendencies of the republican party.

National Party Platforms, Democratic Platform of 1924, p.249

We condemn the efforts of the republican party to nationalize the functions and duties of the states.

National Party Platforms, Democratic Platform of 1924, p.249

We oppose the extension of bureaucracy, the creation of unnecessary bureaus and federal agencies and the multiplication of offices and office-holders.

National Party Platforms, Democratic Platform of 1924, p.249

We demand a revival of the spirit of local self-government essential to the preservation of the free institutions of our republic.

Asiatic Immigration

National Party Platforms, Democratic Platform of 1924, p.249

We pledge ourselves to maintain our established position in favor of the exclusion of Asiatic immigration.

Philippines

National Party Platforms, Democratic Platform of 1924, p.249

The Filipino peoples have succeeded in maintaining a stable government and have thus fulfilled the only condition laid down by congress as a prerequisite to the granting of independence. We declare that it is now our liberty and our duty to keep our promise to these people by granting them immediately the independence which they so honorably covet.

Alaska

National Party Platforms, Democratic Platform of 1924, p.249

The maladministration of affairs in Alaska is a matter of concern to all our people. Under the republican administration, development has ceased and the fishing industry has been seriously impaired. We pledge ourselves to correct the evils which have grown up in the administration of that rich domain.

National Party Platforms, Democratic Platform of 1924, p.250

An adequate form of local self-government for Alaska must be provided and to that end we favor the establishment of a full territorial form of government for that territory similar to that enjoyed by all the territories except Alaska during the last century of American history.

Hawaii

National Party Platforms, Democratic Platform of 1924, p.250

We believe in a policy for continuing the improvements of the national parks, the harbors and breakwaters, and the federal roads of the territory of Hawaii.

Virgin Islands

National Party Platforms, Democratic Platform of 1924, p.250

We recommend legislation for the welfare of the inhabitants of the Virgin islands.

Lausanne Treaty

National Party Platforms, Democratic Platform of 1924, p.250

We condemn the Lausanne treaty. It barters legitimate American rights and betrays Armenia, for the Chester oil concessions.

National Party Platforms, Democratic Platform of 1924, p.250

We favor the protection of American rights in Turkey and the fulfillment of President Wilson's arbitral award respecting Armenia.

Disarmament

National Party Platforms, Democratic Platform of 1924, p.250

We demand a strict and sweeping reduction of armaments by land and sea, so that there shall be no competitive military program or naval building. Until international agreements to this end have been made we advocate an army and navy adequate for our national safety.

National Party Platforms, Democratic Platform of 1924, p.250

Our government should secure a joint agreement with all nations for world disarmament and also for a referendum of war, except in case of actual or threatened attack.

National Party Platforms, Democratic Platform of 1924, p.250

Those who must furnish the blood and bear the burdens imposed by war should, whenever possible, be consulted before this supreme sacrifice is required of them.

Greece

National Party Platforms, Democratic Platform of 1924, p.250

We welcome to the sisterhood of republics the ancient land of Greece which gave to our party its priceless name. We extend to her government and people our cordial good wishes.

National Party Platforms, Democratic Platform of 1924, p.250

War is a relic of barbarism and it is justifiable only as a measure of defense.

National Party Platforms, Democratic Platform of 1924, p.250

In the event of war in which the man power of the nation is drafted, all other resources should likewise be drafted. This will tend to discourage war by depriving it of its profits.

Personal Freedom

National Party Platforms, Democratic Platform of 1924, p.250

The democratic party reaffirms its adherence and devotion to those cardinal principles contained in the constitution and the precepts upon which our government is founded, that congress shall make no laws respecting the establishment of religion, or prohibiting the free exercises thereof, or abridging the freedom of speech or of the press or of the right of the people peaceably to assemble and to petition the government for a redress of grievances, that the church and the state shall be and remain separate, and that no religious test shall ever be required as a qualification to any office of public trust under the United States. These principles, we pledge ourselves ever to defend and maintain. We insist at all times upon obedience to the orderly processes of the law and deplore and condemn any effort to arouse religious or racial dissension.

League of Nations

National Party Platforms, Democratic Platform of 1924, p.250

The democratic party pledges all its energies to the outlawing of the whole war system. We refuse to believe that the wholesale slaughter of human beings on the battlefield is any more necessary to man's highest development than is killing by individuals.

National Party Platforms, Democratic Platform of 1924, p.250

The only hope for world peace and for economic recovery lies in the organized efforts of sovereign nations co-operating to remove the causes of war and to substitute law and order for violence.

National Party Platforms, Democratic Platform of 1924, p.250

Under democratic leadership a practical plan was devised under which fifty-four nations are now operating, and which has for its fundamental purpose the free co-operation of all nations in the work of peace.

National Party Platforms, Democratic Platform of 1924, p.250

The government of the United States for the last four years has had no foreign policy, and consequently it has delayed the restoration of the political and economic agencies of the world. It has impaired our self-respect at home and injured our prestige abroad. It has curtailed our foreign markets and ruined our agricultural prices.

National Party Platforms, Democratic Platform of 1924, p.250

It is of supreme importance to civilization and to mankind that America be placed and kept on the right side of the greatest moral question of all time, and therefore the democratic party renews its declarations of confidence in the idea of world peace, the league of nations and the world court of justice as together constituting the supreme effort of the statesmanship and religious conviction of our time to organize the world for peace.

National Party Platforms, Democratic Platform of 1924, p.251

Further, the democratic party declared that it will be the purpose of the next administration to do all in its power to secure for our country that moral leadership in the family of nations which, in the providence of God, has been so clearly marked out for it. There is no substitute for the league of nations as an agency working for peace, therefore, we believe, that, in the interest of permanent peace, and in the lifting of the great burdens of war from the backs of the people, and in order to establish a permanent foreign policy on these supreme questions, not subject to change with change of party administration, it is desirable, wise and necessary to lift this question out of party politics and to that end to take the sense of the American people at a referendum election, advisory to the government, to be held officially, under act of congress, free from all other questions and candidacies, after ample time for full consideration and discussion throughout the country, upon the question, in substance, as follows:

National Party Platforms, Democratic Platform of 1924, p.251

"Shall the United States become a member of the league of nations upon such reservations or amendments to the covenant of the league as the president and the senate of the United States may agree upon."

National Party Platforms, Democratic Platform of 1924, p.251

Immediately upon an affirmative vote we will carry out such mandate.

Waterways

National Party Platforms, Democratic Platform of 1924, p.251

We favor and will promote deep waterways from the great lakes to the gulf and to the Atlantic ocean.

Flood Control

National Party Platforms, Democratic Platform of 1924, p.251

We favor a policy for the fostering and building of inland waterways and the removal of discrimination against water transportation. Flood control and the lowering of flood levels is essential to the safety of life and property, the productivity of our lands, the navigability of our streams and the reclaiming of our wet and overflowed lands and the creation of hydro-electric power. We favor the expeditious construction of flood relief works on the Mississippi and Colorado rivers and also such reclamation and irrigation projects upon the Colorado river as may be found to be feasible and practical.

National Party Platforms, Democratic Platform of 1924, p.251

We favor liberal appropriations for prompt coordinated surveys by the United States to determine the possibilities of general navigation improvements and water power development on navigable streams and their tributaries, to secure reliable information as to the most economical navigation improvement, in combination with the most efficient and complete development of water power.

National Party Platforms, Democratic Platform of 1924, p.251

We favor suspension of the granting of federal water power licenses by the federal water power committee until congress has received reports from the water power commission with regard to applications for such licenses.

Private Monopolies

National Party Platforms, Democratic Platform of 1924, p.251

The federal trade commission has submitted to the republican administration numerous reports showing the existence of monopolies and combinations in restraint of trade, and has recommended proceedings against these violators of the law. The few prosecutions which have resulted from this abundant evidence furnished by this agency created by the democratic party, while proving the indifference of the administration to the violations of law by trusts and monopolies and its friendship for them, nevertheless demonstrate the value of the federal trade commission.

National Party Platforms, Democratic Platform of 1924, p.251

We declare that a private monopoly is indefensible and intolerable, and pledge the democratic party to vigorous enforcement of existing laws against monopoly and illegal combinations, and to the enactment of such further measures as may be necessary.

Fraudulent Stock Sale

National Party Platforms, Democratic Platform of 1924, p.251

We favor the immediate passage of such legislation as may be necessary to enable the states efficiently to enforce their laws relating to the gradual financial strangling of innocent investors, workers and consumers, caused by the indiscriminate promotion, refinancing and reorganizing of corporations on an inflated and over-capitalized basis, resulting already in the undermining and collapse of many railroads, public service and industrial corporations, manifesting itself in unemployment, irreparable loss and waste and which constitute a serious menace to the stability of our economic system.

Aviation

National Party Platforms, Democratic Platform of 1924, p.252

We favor a sustained development of aviation by both the government and commercially.

Labor, Child Welfare

National Party Platforms, Democratic Platform of 1924, p.252

Labor is not a commodity. It is human. We favor collective bargaining and laws regulating hours of labor and conditions under which labor is performed. We favor the enactment of legislation providing that the product of convict labor shipped from one state to another shall be subject to the laws of the latter state exactly as though they had been produced therein. In order to mitigate unemployment attending business depression, we urge the enactment of legislation authorizing the construction and repair of public works be initiated in periods of acute unemployment.

National Party Platforms, Democratic Platform of 1924, p.252

We pledge the party to co-operate with the state governments for the welfare, education and protection of child life and all necessary safeguards against exhaustive debilitating employment conditions for women.

National Party Platforms, Democratic Platform of 1924, p.252

Without the votes of democratic members of congress the child labor amendment would not have been submitted for ratification.

Latin-America

National Party Platforms, Democratic Platform of 1924, p.252

From the day of their birth, friendly relations have existed between the Latin-American republics and the United States. That friendship grows stronger as our relations become more intimate. The democratic party sends to these republics its cordial greeting; God has made us neighbors—justice shall keep us friends.

Republican Platform of 1924

Title: Republican Platform of 1924

Author: Republican Party

Date: 1924

Source: National Party Platforms, pp.258-265

National Party Platforms, Republican Platform of 1924, p.258

We the delegates of the republican party in national convention assembled, bow our heads in reverent memory of Warren G. Harding.

National Party Platforms, Republican Platform of 1924, p.258

We nominated him four years ago to be our candidate; the people of the nation elected him their president. His human qualities gripped the affections of the American people. He was a public servant unswerving in his devotion to duty.

National Party Platforms, Republican Platform of 1924, p.258

A staunch republican, he was first of all a true patriot, who gave unstintingly of himself during a trying and critical period of our national life.

National Party Platforms, Republican Platform of 1924, p.258

His conception and successful direction of the limitation of armaments conference in Washington was an accomplishment which advanced the world along the path toward peace.

National Party Platforms, Republican Platform of 1924, p.258

As delegates of the republican party, we share in the national thanksgiving that in the great emergency created by the death of our great leader there stood forth fully equipped to be his successor one whom we had nominated as vice-president—Calvin Coolidge, who as vice-president and president by his every act has justified the faith and confidence which he has won from the nation.

National Party Platforms, Republican Platform of 1924, p.258

He has put the public welfare above personal considerations. He has given to the people practical idealism in office. In his every act, he has won without seeking the applause of the people of the country. The constantly accumulating evidence of his integrity, vision and single minded devotion to the needs of the people of this nation strengthens and inspires our confident faith in his continued leadership.

Situation in 1921

National Party Platforms, Republican Platform of 1924, p.258

When the republican administration took control of the government in 1921, there were four and a half million unemployed; industry and commerce were stagnant; agriculture was prostrate; business was depressed; securities of the government were selling below their par values.

National Party Platforms, Republican Platform of 1924, p.258

Peace was delayed; misunderstanding and friction characterized our relations abroad. There was a lack of faith in the administration of government resulting in a growing feeling of distrust in the very principles upon which our institutions are rounded.

National Party Platforms, Republican Platform of 1924, p.258

To-day industry and commerce are active; public and private credits are sound; we have made peace; we have taken the first step toward disarmament and strengthened our friendship with the world powers, our relations with the rest of the world are on a firmer basis, our position was never better understood, our foreign policy never more definite and consistent. The tasks to which we have put our hands are completed. Time has been too short for the correction of all the ills we received as a heritage from the last democratic administration, and the notable accomplishments under republican rule warrant us in appealing to the country with entire confidence.

Public Economy

National Party Platforms, Republican Platform of 1924, p.258

We demand and the people of the United States have a right to demand rigid economy in government. A policy of strict economy enforced by the republican administration since 1921 has made possible a reduction in taxation and has enabled the government to reduce the public debt by $2,500,000,000. This policy vigorously enforced has resulted in a progressive reduction of public expenditures until they arc now two billions dollars per annum less than in 1921. The tax burdens of the people have been relieved to the extent of $1,250,000,000 per annum. Government securities have been increased in value more than $3,000,000,000. Deficits have been converted in surpluses. The budget system has been firmly established and the number of federal employes has been reduced more than one hundred thousand. We commend the firm insistence of President Coolidge upon rigid government economy and pledge him our earnest support to this end.

Finance and Taxation

National Party Platforms, Republican Platform of 1924, p.259

We believe that the achievement of the republican administration in reducing taxation by $1,250,000,000 per annum; reducing of the public debt by $2,432,000,000; installing a budget system; reducing the public expenditures from $5,500,000,000 per annum to approximately $3,400,000,000 per annum, thus reducing the ordinary expenditures of the government to substantially a pre-war basis, and the complete restoration of public credit; the payment or refunding of $7,500,000,000 of public obligations without disturbance of credit or industry—all during the short period of three years—presents a record unsurpassed in the history of public finance.

National Party Platforms, Republican Platform of 1924, p.259

The assessment of taxes wisely and scientifically collected and the efficient and economical expenditure of the money received by the government are essential to the prosperity of our nation.

National Party Platforms, Republican Platform of 1924, p.259

Carelessness in levying taxes inevitably breeds extravagance in expenditures. The wisest of taxation rests most rightly on the individual and economic life of the country. The public demand for a sound tax policy is insistent.

National Party Platforms, Republican Platform of 1924, p.259

Progressive tax reduction should be accomplished through tax reorganization. It should not be confined to less than 4,000,000 of our citizens who pay direct taxes, but is the right of more than 100,000,000 who are daily paying their taxes through their living expenses. Congress has in the main confined its work to tax reduction. The matter of tax reform is still unsettled and is equally essential.

National Party Platforms, Republican Platform of 1924, p.259

We pledge ourselves to the progressive reduction of taxes of all the people as rapidly as may be done with due regard for the essential expenditures for the government administered with rigid economy and to place our tax system on a sound peace time basis.

National Party Platforms, Republican Platform of 1924, p.259

We endorse the plan of President Coolidge to call in November a national conference of federal and state officials for the development of the effective methods of lightening the tax burden of our citizens and adjusting questions of taxation as between national and state governments.

National Party Platforms, Republican Platform of 1924, p.259

We favor the creation by appropriate legislation of a non-partisan federal commission to make a comprehensive study and report upon the tax system of the states and federal government with a view to an intelligent reformation of our systems of taxation to a more equitable basis and a proper adjustment of the subjects of taxation as between the national and state governments with justice to the taxpayer and in conformity with the sound economic principles.

Reorganization

National Party Platforms, Republican Platform of 1924, p.259

We favor a comprehensive reorganization of the executive departments and bureaus along the line of the plan recently submitted by a joint committee of the congress which has the unqualified support of President Coolidge.

Civil Service

National Party Platforms, Republican Platform of 1924, p.259

Improvement in the enforcement of the merit system both by legislative enactment and executive action since March 4, 1921, has been marked and effective. By executive order the appointment of presidential postmasters has been placed on the merit basis similar to that applying to the classified service.

National Party Platforms, Republican Platform of 1924, p.259

We favor the classification of postmasters in first, second and third class postoffices and the placing of the prohibition enforcement field forces within the classified civil service without necessarily incorporating the present personnel.

Foreign Debts

National Party Platforms, Republican Platform of 1924, p.259

In fulfillment of our solemn pledge in the national platform of 1920 we have steadfastly refused to consider the cancellation of foreign debts. Our attitude has not been that of an oppressive creditor seeking immediate return and ignoring existing financial conditions, but has been based on the conviction that a moral obligation such as was incurred should not be disregarded.

National Party Platforms, Republican Platform of 1924, p.259

We stand for settlements with all debtor countries, similar in character to our debt agreement with Great Britain. That settlement achieved under a republican administration, was the greatest international financial transaction in the history of the world. Under the terms of the agreement the United States now receives an annual return upon four billion six hundred million dollars owing to us by Great Britain with a definite obligation of ultimate payment in full.

National Party Platforms, Republican Platform of 1924, p.260

The justness of the basis employed has been formally recognized by other debtor nations.

National Party Platforms, Republican Platform of 1924, p.260

Great nations cannot recognize or admit the principle of repudiation. To do so would undermine the integrity essential for international trade, commerce and credit. Thirty-five per cent of the total foreign debt is now in process of liquidation.

The Tariff

National Party Platforms, Republican Platform of 1924, p.260

We reaffirm our belief in the protective tariff to extend needed protection to our productive industries. We believe in protection as a national policy, with due and equal regard to all sections and to all classes. It is only by adherence to such a policy that the well being of the consumers can be safeguarded that there can be assured to American agriculture, to American labor and to American manufacturers a return to perpetrate American standards of life. A protective tariff is designed to support the high American economic level of life for the average family and to prevent a lowering to the levels of economic life prevailing in other lands.

National Party Platforms, Republican Platform of 1924, p.260

In the history of the nation the protective tariff system has ever justified itself by restoring confidence, promoting industrial activity and employment, enormously increasing our purchasing power and bringing increased prosperity to all our people.

National Party Platforms, Republican Platform of 1924, p.260

The tariff protection to our industry works for increased consumption of domestic agricultural products by an employed population instead of one unable to purchase the necessities of life. Without the strict maintenance of the tariff principle our farmers will need always to compete with cheap lands and cheap labor abroad and with lower standards of living.

National Party Platforms, Republican Platform of 1924, p.260

The enormous value of the protective principle has once more been demonstrated by the emergency tariff act of 1921 and the tariff act of 1922.

National Party Platforms, Republican Platform of 1924, p.260

We assert our belief in the elastic provision adopted by congress in the tariff act of 1922 providing for a method of readjusting the tariff rates and the classifications in order to meet changing economic conditions when such changed conditions are brought to the attention of the president by complaint or application.

National Party Platforms, Republican Platform of 1924, p.260

We believe that the power to increase or decrease any rate of duty provided in the tariff furnishes a safeguard on the one hand against excessive taxes and on the other hand against too high customs charges.

National Party Platforms, Republican Platform of 1924, p.260

The wise provisions of this section of the tariff act afford ample opportunity for tariff duties to be adjusted after a hearing in order that they may cover the actual differences in the cost of production in the United States and the principal competing countries of the world.

National Party Platforms, Republican Platform of 1924, p.260

We also believe that the application of this provision of the tariff act will contribute to business stability by making unnecessary general disturbances which are usually incident to general tariff revisions.

Foreign Relations

National Party Platforms, Republican Platform of 1924, p.260

The republican party reaffirmed its stand for agreement among the nations to prevent war and preserve peace. As an immediate step in this direction we endorse the permanent court of international justice and favor the adherence of the United States to this tribunal as recommended by President Coolidge. This government has definitely refused membership in the league of nations or to assume any obligations under the covenant of the league. On this we stand.

National Party Platforms, Republican Platform of 1924, p.260

While we are unwilling to enter into political commitments which would involve us in the conflict of European politics, it should be the purpose and high privilege of the United States to continue to co-operate with other nations in humanitarian efforts in accordance with our cherished traditions. The basic principles of our foreign policy must be independence without indifference to the rights and necessities of others and cooperation without entangling alliances. The policy overwhelmingly approved by the people has been vindicated since the end of the great war.

National Party Platforms, Republican Platform of 1924, p.260

America's participation in world affairs under the administration of President Harding and President Coolidge has demonstrated the wisdom and prudence of the national judgment. A most impressive example of the capacity of the United States to serve the cause of the world peace without political affiliations was shown in the effective and beneficent work of the Dawes commission toward the solution of the perplexing question of German reparations.

National Party Platforms, Republican Platform of 1924, p.260

The first conference of great powers in Washington called by President Harding accomplished the limitation of armaments and the readjustment of the relations of the powers interested in the far east. The conference resulted in an agreement to reduce armaments, relieved the competitive nations involved from the great burdens of taxation arising from the construction and maintenance of capital battleships; assured a new, broader and better understanding in the far east; brought the assurance of peace in the region of the Pacific and formally adopted the policy of the open door for trade and commerce in the great markets of the far east.

National Party Platforms, Republican Platform of 1924, p.261

This historic conference paved the way to avert the danger of renewed hostilities in Europe, and to restore the necessary economic stability. While the military forces of America have been restored to a peace footing, there has been an increase in the land and air forces abroad which constitutes a continual menace to the peace of the world and a bar to the return of prosperity.

National Party Platforms, Republican Platform of 1924, p.261

We firmly advocate the calling of a conference on the limitation of land forces, the use of submarines and poison gas, as proposed by President Coolidge, when, through the adoption of a permanent reparations plan the conditions in Europe will make negotiations and co-operation opportune and possible.

National Party Platforms, Republican Platform of 1924, p.261

By treaties of peace, safeguarding our rights and without derogating those of our former associates in arms, the republican administration ended the war between this country and Germany and Austria. We have concluded and signed with other nations during the past three years more than fifty treaties and international agreements in the furtherance of peace and good will.

National Party Platforms, Republican Platform of 1924, p.261

New sanctions and new proofs of permanent accord have marked our relations with all Latin-America. The long standing controversy between Chile and Peru has been advanced toward settlement by its submission to the president of the United States as arbitrator and with the helpful co-operation of this country a treaty has been signed by the representatives of sixteen American republics which will stabilize conditions on the American continent and minimize the opportunities for war.

National Party Platforms, Republican Platform of 1924, p.261

Our difficulties with Mexico have happily yielded to a most friendly adjustment. Mutual confidence has been restored and a pathway for that friendliness and helpfulness which should exist between this government and the government of our neighboring republic has been marked. Agreements have been entered into for the determination by judicial commissions of the claims of the citizens of each country against the respective governments. We can confidently look forward to more permanent and more stable re lations with this republic that joins for so many miles our southern border.

National Party Platforms, Republican Platform of 1924, p.261

Our policy, now well defined, of giving practical aid to other peoples without assuming political obligations has been conspicuously demonstrated. The ready and generous response of America to the needs of the starving in Russia and the suddenly stricken people of Japan gave evidence of our helpful interest in the welfare of the distressed in other lands.

National Party Platforms, Republican Platform of 1924, p.261

The work of our representatives in dealing with subjects of such universal concern as the traffic in women and children, the production and distribution of narcotic drugs, the sale of arms and in matters affecting public health and morals, demonstrates that we can effectively do our part for humanity and civilization without forfeiting, limiting or restricting our national freedom of action.

National Party Platforms, Republican Platform of 1924, p.261

The American people do cherish their independence, but their sense of duty to all mankind will ever prompt them to give their support, service and leadership to every cause which makes for peace and amity among the nations of the world.

Agriculture

National Party Platforms, Republican Platform of 1924, p.261

In dealing with agriculture the republican party recognizes that we are faced with a fundamental national problem, and that the prosperity and welfare of the nation as a whole is dependent upon the prosperity and welfare of our agricultural population.

National Party Platforms, Republican Platform of 1924, p.261

We recognize our agricultural activities are still struggling with adverse conditions that have brought about distress. We pledge the party to take whatever steps are necessary to bring back a balanced condition between agriculture, industry and labor, which was destroyed by the democratic party through an unfortunate administration of legislation passed as war-time measures.

National Party Platforms, Republican Platform of 1924, p.261

We affirm that under the republican administration the problems of the farm have received more serious consideration than ever before both by definite executive action and by congressional action not only in the field of general legislation but also in the enactment of laws to meet emergency situations.

National Party Platforms, Republican Platform of 1924, p.261

The restoration of general prosperity and the purchasing power of our people through tariff protection has resulted in an increased domestic consumption of food products while the price of many agricultural commodities are above the war price level by reason of direct tariff protection.

National Party Platforms, Republican Platform of 1924, p.262

Under the leadership of the president at the most critical time, a corporation was organized by private capital making available $100,000,000 to assist the farmers of the northwest.

National Party Platforms, Republican Platform of 1924, p.262

In realization of the disturbance in the agricultural export market, the result of the financial depression in Europe. and appreciating that the export field would be enormously improved by economic rehabilitation and the resulting increased consuming power, a sympathetic support and direction was given to the work of the American representatives on the European reparations commission.

National Party Platforms, Republican Platform of 1924, p.262

The revival in 1921 of the war finance corporation with loans of over $300,000,000 averted in 1921 a complete collapse in the agricultural industry.

National Party Platforms, Republican Platform of 1924, p.262

We have established new intermediate credit banks for agriculture and increased the capital of the federal farm loan system. Emergency loans have been granted to drought stricken areas. We have enacted into law the co-operative marketing act, the grain futures and packer control acts; given to agriculture direct representation on the federal reserve board and on the federal aid commission. We have greatly strengthened our foreign marketing service for the disposal of our agricultural products.

National Party Platforms, Republican Platform of 1924, p.262

The crux of the problem from the standpoint of the farmer is the net profit he receives after his outlay. The process of bringing the average prices of what he buys and what he sells closer together can be promptly expedited by reduction in taxes, steady employment in industry and stability in business.

National Party Platforms, Republican Platform of 1924, p.262

This process can be expedited directly by lower freight rates, by better marketing through cooperative efforts and a more scientific organization of the physical human machinery of distribution and by a greater diversification of farm products.

National Party Platforms, Republican Platform of 1924, p.262

We promise every assistance in the reorganization of the market system on sounder and more economical lines and where diversification is needed government assistance during the period of transition. Vigorous efforts of this administration toward broadening our exports market will be continued. The republican party pledges itself to the development and enactment of measures which will place the agricultural interests of

National Party Platforms, Republican Platform of 1924, p.262

America on a basis of economic equality with other industries to assure its prosperity and success. We favor adequate tariff protection to such of our agriculture products as are threatened by competition. We favor, without putting the government into business, the establishment of a federal system of organization for co-operative marketing of farm products.

Highways

National Party Platforms, Republican Platform of 1924, p.262

The federal aid road act, adopted by the republican congress in 1921 has been of inestimable value to the development of the highway systems of the several states and of the nation. We pledge a continuation of this policy of federal co-opera-tion with the states in highway building.

National Party Platforms, Republican Platform of 1924, p.262

We favor the construction of roads and trails in our national forests necessary to their protection and utilization. In appropriations, therefore, the taxes which these lands would pay if taxable, should be considered as a controlling factor.

Labor

National Party Platforms, Republican Platform of 1924, p.262

The increasing stress of industrial life, the constant and necessary efforts because of world competition to increase production and decrease costs has made it specially incumbent on those in authority to protect labor from undue exactions.

National Party Platforms, Republican Platform of 1924, p.262

We commend congress for having recognized this possibility in its prompt adoption of the recommendation of President Coolidge for a constitutional amendment authorizing congress to legislate on the subject of child labor, and we urge the prompt consideration of that amendment by the legislatures of the various states.

National Party Platforms, Republican Platform of 1924, p.262

There is no success great enough to justify the employment of women in labor under conditions which will impair their natural functions.

National Party Platforms, Republican Platform of 1924, p.262

We favor high standards for wage, working and living conditions among the women employed in industry. We pledge a continuance of the successful efforts of the republican administration to eliminate the seven-day, twelve-hour day industry.

National Party Platforms, Republican Platform of 1924, p.262

We regard with satisfaction the elimination of the twelve-hour day in the steel industry and the agreement eliminating the seven-day work week of alternate thirteen and eleven hours accomplished through the efforts of Presidents Harding and Coolidge.

National Party Platforms, Republican Platform of 1924, p.262

We declare our faith in the principle of the eight-hour day.

National Party Platforms, Republican Platform of 1924, p.263

We pledge a continuation of the work of rehabilitating workers in industry as conducted by the federal board for vocational education, and favor adequate appropriations for this purpose.

National Party Platforms, Republican Platform of 1924, p.263

We favor a broader and better system of vocational education, a more adequate system of federal free employment agencies with facilities for assisting the movements of seasonal and migratory labor, including farm labor, with ample organization for bringing the man and his job together.

Railroads

National Party Platforms, Republican Platform of 1924, p.263

We believe that the demand of the American people for improved railroad service at cheaper rates is justified and that it can be fulfilled by the consolidation of the railroads into a lesser number of connecting systems with the resultant operating economy. The labor board provision should be amended to meet the requirements made evident by experience gained from its actual creation.

National Party Platforms, Republican Platform of 1924, p.263

Collective bargaining, voluntary mediation and arbitration are the most important steps in maintaining peaceful labor relations. We do not believe in compulsory action at any time. Public opinion must be the final arbiter in any crisis which so vitally affects public welfare as the suspension of transportation. Therefore, the interests of the public require the maintenance of an impartial tribunal which can in any emergency make an investigation of the fact and publish its conclusions. This is accepted as a basis of popular judgment.

Government Control

National Party Platforms, Republican Platform of 1924, p.263

The prosperity of the American nation rests on the vigor of private initiative which has bred a spirit of independence and self-reliance. The republican party stands now, as always, against all attempts to put the government into business.

National Party Platforms, Republican Platform of 1924, p.263

American industry should not be compelled to struggle against government competition. The right of the government to regulate, supervise and control public utilities and public interests, we believe, should be strengthened, but we are firmly opposed to the nationalization or government ownership of public utilities.

Coal

National Party Platforms, Republican Platform of 1924, p.263

The price and a constant supply of this essential commodity are of vital interest to the public. The government has no constitutional power to regulate prices, but can bring its influence to bear by the powerful instrument afforded by full publicity. When through industrial conflict, its supply is threatened, the president should have authority to appoint a commission to act as mediators and as a medium for voluntary arbitration. In the event of a strike, the control of distribution must be invoked to prevent profiteering.

Merchant Marine

National Party Platforms, Republican Platform of 1924, p.263

The republican party stands for a strong and permanent merchant marine built by Americans, owned by Americans and manned by Americans to secure the necessary contact with world markets for our surplus agricultural products and manufactures; to protect our shippers and importers from exorbitant ocean freight rates, and to become a powerful arm of our national defense.

National Party Platforms, Republican Platform of 1924, p.263

That part of the merchant marine now owned by the government should continue to be improved in its economic and efficient management, with reduction of the losses now paid by the government through taxation until it is finally placed on so sound a basis that, with ocean freight rates becoming normal, due to improvement in international affairs, it can be sold to American citizens.

Waterways

National Party Platforms, Republican Platform of 1924, p.263

Fully realizing the vital importance of transportation in both cost and service to all of our people, we favor the construction of the most feasible waterways from the Great Lakes to the Atlantic seaboard and the Gulf of Mexico, and the improvement and development of rivers, harbors and waterways, inland and coastwise, to the full-est extent justified by the present and potential tonnage available.

National Party Platforms, Republican Platform of 1924, p.263

We favor a comprehensive survey of the conditions under which the flood waters of the Colorado river may be controlled and utilized for the benefit of the people of the states which border thereon.

National Party Platforms, Republican Platform of 1924, p.263

The federal water power act establishes a national water power policy and the way has thereby been opened for the greatest water power development in history under conditions which preserve initiative of our people, yet protect the public interest.

World War Veterans

National Party Platforms, Republican Platform of 1924, p.264

The republican party pledges a continual and increasing solicitude for all those suffering any disability as a result of service to the United States in time of war. No country and no administration has ever shown a more generous disposition in the care of its disabled, or more thoughtful consideration in providing a sound administration for the solution of the many problems involved in making intended benefits fully, directly and promptly available to the veterans.

National Party Platforms, Republican Platform of 1924, p.264

The confusion, inefficiency and maladministration existing heretofore since the establishment of this government agency has been cured, and plans are being actively made looking to a further improvement in the operation of the bureau by the passage of new legislation. The basic statute has been so liberalized as to bring within its terms 100,000 additional beneficiaries. The privilege of hospitalization in government hospitals, as recommended by President Coolidge, has been granted to all veterans irrespective of the origin of disability, and over $50,000,000 has been appropriated for hospital construction which will provide sufficient beds to care for all. Appropriations totalling over $1,100,000,000, made by the republican congress for the care of the disabled, evidence the unmistakable purpose of the government not to consider costs when the welfare of these men is at stake. No legislation for the benefit of the disabled soldiers proposed during the last four years by veterans' organizations has failed to receive consideration.

National Party Platforms, Republican Platform of 1924, p.264

We pledge ourselves to meet the problems of the future affecting the care of our wounded and disabled in a spirit of liberality, and with that thoughtful consideration which will enable the government to give to the individual veteran that full measure of care guaranteed by an effective administrative machinery.

Conservation

National Party Platforms, Republican Platform of 1924, p.264

We believe in the development, effective and efficient, whether of oil, timber, coal or water power resources of this government only as needed and only after the public needs have become a matter of public record, controlled with a scrupulous regard and ever-vigilant safeguards against waste, speculation and monopoly.

National Party Platforms, Republican Platform of 1924, p.264

The natural resources of the country belong to all the people and are a part of an estate belonging to generations yet unborn. The government policy should be to safeguard, develop and utilize these possessions. The conservation policy of the nation originated with the republican party under the inspiration of Theodore Roosevelt.

National Party Platforms, Republican Platform of 1924, p.264

We hold it a privilege of the republican party to build as a memorial to him on the foundation which he laid.

Education and Belief

National Party Platforms, Republican Platform of 1924, p.264

The conservation of human resources is one of the most solemn responsibilities of government. This is an obligation which cannot be ignored and which demands that the federal government shall, as far as lies in its power, give to the people and the states the benefit of its counsel.

National Party Platforms, Republican Platform of 1924, p.264

The welfare activities of the government connected with the various departments are already uumerous and important, but lack the co-ordina-tion which is essential to effective action. To meet these needs we approve the suggestion for the creation of a cabinet post of education and relief.

War-Time Mobilization

National Party Platforms, Republican Platform of 1924, p.264

We believe that in time of war the nation should draft for its defense not only its citizens but also every resource which may contribute to success. The country demands that should the United States ever again be called upon to defend itself by arms the president be empowered to draft such material resources and such service as may be required, and to stabilize the prices of services and essential commodities, whether used in actual warfare or private activities.

Commercial Aviation

National Party Platforms, Republican Platform of 1924, p.264

We advocate the early enactment of such legislation and the taking of such steps by the government as will tend to promote commercial aviation.

Army and Navy

National Party Platforms, Republican Platform of 1924, p.264

There must be no further weakening of our regular army and we advocate appropriations sufficient to provide for the training of all members of the national guard, the citizens' military training camps, the reserve officers' training camps and the reserves who may offer themselves for service. We pledge ourselves for service. We pledge ourselves to round out and maintain the navy to the full strength provided the United States by the letter and spirit of the limitation of armament conference.

The Negro

National Party Platforms, Republican Platform of 1924, p.265

We urge the congress to enact at the earliest possible date a federal anti-lynching law so that the full influence of the federal government may be wielded to exterminate this hideous crime. We believe that much of the misunderstanding which now exists can be eliminated by humane and sympathetic study of its causes. The president has recommended the creation of a commission for the investigation of social and economic conditions and the promotion of mutual understanding and confidence.

Orderly Government

National Party Platforms, Republican Platform of 1924, p.265

The republican party reaffirms its devotion to orderly government under the guarantees embodied in the constitution of the United States. We recognize the duty of constant vigilance to preserve at all times a clean and honest government and to bring to the bar of justice every defiler of the public service in or out of office.

National Party Platforms, Republican Platform of 1924, p.265

Dishonesty and corruption are not political attributes. The recent congressional investigations have exposed instances in both parties of men in public office who are willing to sell official favors and men out of office who are willing to buy them in some cases with money and others with influence.

National Party Platforms, Republican Platform of 1924, p.265

The sale of influence resulting from the holding of public position or from association while in public office or the use of such influence for private gain or advantage is a perversion of public trust and prejudicial to good government. It should be condemned by public opinion and forbidden by law.

National Party Platforms, Republican Platform of 1924, p.265

We demand the speedy, fearless and impartial prosecution of all wrong doers, without regard for political affiliations; but we declare no greater wrong can be committed against the people than the attempt to destroy their trust in the great body of their public servants. Admitting the deep humiliation which all good citizens share that our public life should have harbored some dishonest men, we assert that these undesirables do not represent the standard of our national integrity.

National Party Platforms, Republican Platform of 1924, p.265

The government at Washington is served to-day by thousands of earnest, conscientious and faithful officials and employés in every department.

National Party Platforms, Republican Platform of 1924, p.265

It is a grave wrong against these patriotic men and women to strive indiscriminately to besmirch the names of the innocent and undermine the confidence of the people in the government under which they live. It is even a greater wrong when this is done for partisan purposes or for selfish exploitation.

Immigration

National Party Platforms, Republican Platform of 1924, p.265

The unprecedented living conditions in Europe following the world war created a condition by which we were threatened with mass immigration that would have seriously disturbed our economic life. The law recently enacted is designed to protect the inhabitants of our country, not only the American citizen, but also the alien already with us who is seeking to secure an economic foothold for himself and family from the competition that would come from unrestricted immigration. The administrative features of the law represent a great constructive advance, and eliminate the hardships suffered by immigrants under emergency statute.

National Party Platforms, Republican Platform of 1924, p.265

We favor the adoption of methods which will exercise a helpful influence among the foreign born population and provide for the education of the alien in our language, customs, ideals and standards of life. We favor the improvement of naturalization laws.

La Follette's Platform of 1924

Title: La Follette's Platform of 1924

Author: Robert M. La Follette

Date: 1924

Source: National Party Platforms, pp.252-255

National Party Platforms, La Follette's Platform of 1924, p.252

The great issue before the American people today is the control of government and industry by private monopoly.

National Party Platforms, La Follette's Platform of 1924, p.252

For a generation the people have struggled patiently, in the face of repeated betrayals by successive administrations, to free themselves from this intolerable power which has been undermining representative government.

National Party Platforms, La Follette's Platform of 1924, p.252

Through control of government, monopoly has steadily extended its absolute dominion to every basic industry.

National Party Platforms, La Follette's Platform of 1924, p.252

In violation of law, monopoly has crushed competition, stifled private initiative and independent enterprise, and without fear of punishment now exacts extortionate profits upon every necessity of life consumed by the public.

National Party Platforms, La Follette's Platform of 1924, p.252

The equality of opportunity proclaimed by the Declaration of Independence and asserted and defended by Jefferson and Lincoln as the heritage of every American citizen has been displaced by special privilege for the few, wrested from the government of the many.

Fundamental Rights in Danger

National Party Platforms, La Follette's Platform of 1924, p.252

That tyrannical power which the American people denied to a king, they will no longer endure from the monopoly system. The people know they cannot yield to any group the control of the economic life of the nation and preserve their political liberties. They know monopoly has its representatives in the hails of Congress, on the Federal bench, and in the executive departments; that these servile agents barter away tile nation's natural resources, nullify acts of Congress by judicial veto and administrative favor, invade the people's rights by unlawful arrests and unconstitutional searches and seizures, direct our foreign policy in the interests of predatory wealth, and make wars and conscript the sons of the common people to fight them.

National Party Platforms, La Follette's Platform of 1924, p.252

The usurpation in recent years by the federal courts of the power to nullify laws duly enacted by the legislative branch of the government is a plain violation of the Constitution. Abraham Lincoln, in his first inaugural address, said: "The candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal." The Constitution specifically vests all legislative power in the Congress, giving that body power and authority to override the veto of the president. The federal courts are given no authority under the Constitution to veto acts of Congress. Since the federal courts have assumed to exercise such veto power, it is essential that the Constitution shall give the Congress the right to override such judicial veto, otherwise the Court will make itself master over the other coordinate branches of the government. The people themselves must approve or disapprove the present exercise of legislative power by the federal courts.

Distress of American Farmers

National Party Platforms, La Follette's Platform of 1924, p.253

The present condition of American agriculture constitutes an emergency of the gravest character. The Department of Commerce report shows that during 1923 there was a steady and marked increase in dividends paid by the great industrial corporations. The same is true of the steam and electric railways and practically all other large corporations. On the other hand, the Secretary of Agriculture reports that in the fifteen principal wheat growing states more than 108,000 farmers since 1920 have lost their farms through foreclosure or bankruptcy; that more than 122,000 have surrendered their property without legal proceedings, and that nearly 375,000 have retained possession of their property only through the leniency of their creditors, making a total of more than 600,000 or 26 per cent of all farmers who have virtually been bankrupted since 1920 in these fifteen states alone.

National Party Platforms, La Follette's Platform of 1924, p.253

Almost unlimited prosperity for the great corporations and ruin and bankruptcy for agriculture is the direct and logical result of the policies and legislation which deflated the farmer while extending almost unlimited credit to the great corporations; which protected with exorbitant tariffs the industrial magnates, but depressed the prices of the farmers' products by financial juggling while greatly increasing the cost of what he must buy; which guaranteed excessive freight rates to the railroads and put a premium on wasteful management while saddling an unwarranted burden on to the backs of the American farmer; which permitted gambling in the products of the farm by grain speculators to the great detriment of the farmer and to the great profit of the grain gambler.

A Covenant With the People

National Party Platforms, La Follette's Platform of 1924, p.253

Awakened by the dangers which menace their freedom and prosperity the American people still retain the right and courage to exercise their sovereign control over their government. In order to destroy the economic and political power ofmonopoly, which has come between the people and their government, we pledge ourselves to the following principles and policies:

The House Cleaning

National Party Platforms, La Follette's Platform of 1924, p.253

1. We pledge a complete housecleaning in the Department of Justice, the Department of the Interior, and the other executive departments. We demand that the power of the Federal Government be used to crush private monopoly, not to foster it.

Natural Resources

National Party Platforms, La Follette's Platform of 1924, p.253

2. We pledge recovery of the navy's oil reserves and all other parts of the public domain which have been fraudulently or illegally leased, or otherwise wrongfully transferred, to the control of private interests; vigorous prosecution of all public officials, private citizens and corporations that participated in these transactions; complete revision of the water-power act, the general leasing act, and all other legislation relating to the public domain. We favor public ownership of the nation's water power and the creation and development of a national super-water-power system, including Muscle Shoals, to supply at actual cost light and power for the people and nitrate for the farmers, and strict public control and permanent conservation of all the nation's resources, including coal, iron and other ores, oil and timber lands, in the interest of the people.

Railroads

National Party Platforms, La Follette's Platform of 1924, p.253

3. We favor repeal of the Esch-Cummins railroad law and the fixing of railroad rates upon the basis of actual, prudent investment and cost of service. We pledge speedy enactment of the Howell-Barkley Bill for the adjustment of controversies between railroads and their employees, which was held up in the last Congress by joint action of reactionary leaders of the Democratic and Republican parties. We declare for public ownership of railroads with definite safeguards against bureaucratic control, as the only final solution of the transportation problem.

Tax Reduction

National Party Platforms, La Follette's Platform of 1924, p.253

4. We favor reduction of Federal taxes upon individual incomes and legitimate business, limiting tax exactions strictly to the requirements of the government administered with rigid economy, particularly by curtailment of the eight hundred million dollars now annually expended for the army and navy in preparation for future wars; by the recovery of the hundreds of millions of dollars stolen from the Treasury through fraudulent war contracts and the corrupt leasing of the public resources; and by diligent action to collect the accumulated interest upon the eleven billion dollars owing us by foreign governments.

National Party Platforms, La Follette's Platform of 1924, p.254

We denounce the Mellon tax plan as a device to relieve multi-millionaires at the expense of other tax payers, and favor a taxation policy providing for immediate reductions upon moderate incomes, large increases in the inheritance tax rates upon large estates to prevent the indefinite accumulation by inheritance of great fortunes in a few hands; taxes upon excess profits to penalize profiteering, and complete publicity, under proper safeguards, of all Federal tax returns.

The Counts

National Party Platforms, La Follette's Platform of 1924, p.254

5. We favor submitting to the people, for their considerate judgment, a constitutional amendment providing that Congress may by enacting a statute make it effective over a judicial veto.

National Party Platforms, La Follette's Platform of 1924, p.254

We favor such amendment to the constitution as may be necessary to provide for the election of all Federal Judges, without party designation, for fixed terms not exceeding ten years, by direct vote of the people.

The Farmers

National Party Platforms, La Follette's Platform of 1924, p.254

6. We favor drastic reduction of the exhorbi-tant duties on manufactures provided in the Ford-ney-McCumber tariff legislation, the prohibiting of gambling by speculators and profiteers in agricultural products; the reconstruction of the Federal Reserve and Federal Farm Loan Systems, so as to eliminate control by usurers, speculators and international financiers, and to make the credit of the nation available upon fair terms to all and without discrimination to business men, farmers and home-builders. We advocate the calling of a special session of Congress to pass legislation for the relief of American agriculture. We favor such further legislation as may be needful or helpful in promoting and protecting cooperative enterprises. We demand that the Interstate Commerce Commission proceed forthwith to reduce by an approximation to pre-war levels the present freight rates on agricultural products, including live stock, and upon the materials required upon American farms for agricultural purposes.

Labor

National Party Platforms, La Follette's Platform of 1924, p.254

7. We favor abolition of the use of injunctions in labor disputes and dec]arc for complete protection of the right of farmers and industrial workers to organize, bargain collectively through representatives of their own choosing, and conduct without hindrance cooperative enterprises.

National Party Platforms, La Follette's Platform of 1924, p.254

We favor prompt ratification of the Child Labor amendment, and subsequent enactment of a Federal law to protect children in industry.

Postal Service

National Party Platforms, La Follette's Platform of 1924, p.254

8. We believe that a prompt and dependable postal service is essential to the social and economic welfare of the nation; and that as one of the most important steps toward establishing and maintaining such a service, it is necessary to fix wage standards that will secure and retain employees of character, energy and ability.

National Party Platforms, La Follette's Platform of 1924, p.254

We favor the enactment of the postal salary adjustment measure (S. 1898) for the employees of the postal service, passed by the first session of the 68th Congress, vetoed by the President and now awaiting further consideration by the next session of Congress.

National Party Platforms, La Follette's Platform of 1924, p.254

We endorse liberalizing the Civil Service Retirement Law along the lines of S. 3011 now pending in Congress.

War Veterans

National Party Platforms, La Follette's Platform of 1924, p.254

9. We favor adjusted compensation for the veterans of the late war, not as charity, but as a matter of right, and we demand that the money necessary to meet this obligation of the government be raised by taxes laid upon wealth in proportion to the ability to pay, and declare our opposition to the sales tax or any other device to shift this obligation onto the backs of the poor in higher prices and increased cost of living. We do not regard the payment at the end of a long period of a small insurance as provided by the law recently passed as in any just sense a discharge of the nation's obligations to the veterans of the late war.

Great Lakes to Sea

National Party Platforms, La Follette's Platform of 1924, p.254

10. We favor a deep waterway from the Great Lakes to the sea. The government should, in conjunction with Canada, take immediate action to give the northwestern states an outlet to the ocean for cargoes, without change in bulk, thus making the primary markets on the Great Lakes equal to those of New York.

Popular Sovereignty

National Party Platforms, La Follette's Platform of 1924, p.255

11. Over and above constitutions and statutes and greater than all, is the supreme sovereignty of the people, and with them should rest the final decision of all great questions of national policy. We favor such amendments to the Federal Constitution as may be necessary to provide for the direct nomination and election of the President, to extend the initiative and referendum to the federal government, and to insure a popular referendum for or against war except in cases of actual invasion.

Peace on Earth

National Party Platforms, La Follette's Platform of 1924, p.255

12. We denounce the mercenary system of foreign policy under recent administrations in the interests of financial imperialists, oil monopolists and international bankers, which has at times degraded our State Department from its high service as a strong and kindly intermediary of defenseless governments to a trading outpost for those interests and concession-seekers engaged in the exploitations of weaker nations, as contrary to the will of the American people, destructive of domestic development and provocative of war. We favor an active foreign policy to bring about a revision of the Versailles treaty in accordance with the terms of the armistice, and to promote firm treaty agreements with all nations to outlaw wars, abolish conscription, drastically reduce land, air and naval armaments, and guarantee public referendum on peace and war.

Conference for Progressive Political Action Platform of 1924

Title: Conference for Progressive Political Action Platform

Date: 1924

Source: National Party Platforms, pp.255-256

National Party Platforms, Conference for Progressive Political Action Platform of 1924, p.255

For 148 years the American people have been seeking to establish a government for the service of all and to prevent the establishment of a government for the mastery of the few. Free men of every generation must combat renewed efforts of organized force and greed to destroy liberty. Every generation must wage a new war for freedom against new forces that seek through new devices to enslave mankind.

National Party Platforms, Conference for Progressive Political Action Platform of 1924, p.255

Under our representative democracy the people protect their liberties through their public agents.

National Party Platforms, Conference for Progressive Political Action Platform of 1924, p.255

The test of public officials and public politics alike must be: Will they serve or will they exploit the common need?

National Party Platforms, Conference for Progressive Political Action Platform of 1924, p.255

The reactionary continues to put his faith in mastery for the solution of all problems. He seeks to have what he calls the strong men and best minds rule and impose their decisions upon the masses of their weaker brethren.

National Party Platforms, Conference for Progressive Political Action Platform of 1924, p.255

The progressive, on the contrary, contends for less autocracy and more democracy in government, for less power of privilege and greater obligations of service.

National Party Platforms, Conference for Progressive Political Action Platform of 1924, p.255

Under the principle of ruthless individualism and competition, that government is deemed best which offers to the few the greatest chance of individual gain.

National Party Platforms, Conference for Progressive Political Action Platform of 1924, p.255

Under the progressive principle of cooperation, that government is deemed best which offers to the many the highest level of average happiness and well being.

National Party Platforms, Conference for Progressive Political Action Platform of 1924, p.255

It is our faith that we all go up or down together—that class gains are temporary delusions and that eternal laws of compensation make every man his brother's keeper.

Program of Public Service

National Party Platforms, Conference for Progressive Political Action Platform of 1924, p.255

In that faith we present our program of public service:

National Party Platforms, Conference for Progressive Political Action Platform of 1924, p.255

(1) The use of the power of the federal government to crush private monopoly, not to foster it.

National Party Platforms, Conference for Progressive Political Action Platform of 1924, p.255

(2) Unqualified enforcement of the constitutional guarantees of freedom of speech, press, and assemblage.

National Party Platforms, Conference for Progressive Political Action Platform of 1924, p.255

(3) Public ownership of the nation's water power and creation of a public super-power system. Strict public control and permanent conservation of all natural resources, including coal, iron, and other ores, oil, and timber lands in the interest of the people. Promotion of public works in times of business depression.

National Party Platforms, Conference for Progressive Political Action Platform of 1924, p.255

(4) Retention of surtax on swollen incomes, restoration of the tax on excess profits, taxation of stock dividends, profits undistributed to evade taxes, rapidly progressive taxes on large estates and inheritances, and repeal of excessive tariff duties, especially on trust-controlled necessities of life and of nuisance taxes on consumption, to relieve the people of the present unjust burden of taxation and compel those who profited by the war to pay their share of the war's cost, and to provide the funds for adjusted compensation solemnly pledged to the veterans of the World War.

National Party Platforms, Conference for Progressive Political Action Platform of 1924, p.256

(5) Reconstruction of the federal reserve and federal farm loan systems to provide for direct public control of the nation's money and credit to make it available on fair terms to all, and national and state legislation to permit and promote cooperative banking.

National Party Platforms, Conference for Progressive Political Action Platform of 1924, p.256

(6) Adequate laws to guarantee to farmers and industrial workers the right to organize and bargain collectively through representatives of their own choosing for the maintenance or improvement of their standard of life.

National Party Platforms, Conference for Progressive Political Action Platform of 1924, p.256

(7) Creation of a government marketing corporation to provide a direct route between farm producer and city consumer and to assure farmers fair prices for their products, and protect consumers from the profiteers in foodstuffs and other necessaries of life. Legislation to control the meat-packing industry.

National Party Platforms, Conference for Progressive Political Action Platform of 1924, p.256

(8) Protection and aid of cooperative enterprises by national and state legislation.

National Party Platforms, Conference for Progressive Political Action Platform of 1924, p.256

(9) Common international action to effect the economic recovery of the world from the effects of the World War.

National Party Platforms, Conference for Progressive Political Action Platform of 1924, p.256

(10) Repeal of the Cummins-Esch law. Public ownership of railroads, with democratic operation, and with definite safeguards against bureaucratic control.

National Party Platforms, Conference for Progressive Political Action Platform of 1924, p.256

(11) Abolition of the tyranny and usurpation of the courts, including the practice of nullifying legislation in conflict with the political, social or economic theories of the judges. Abolition of injunctions in labor disputes and of the power to punish for contempt without trial by jury. Election of all federal judges without party designation for limited terms.

National Party Platforms, Conference for Progressive Political Action Platform of 1924, p.256

(12) Prompt ratification of the child labor amendment and subsequent enactment of a federal law to protect children in industry. Removal of legal discriminations against women by measures not prejudicial to legislation necessary for the protection of women and for the advancement of social welfare.

National Party Platforms, Conference for Progressive Political Action Platform of 1924, p.256

(13) A deep waterway from the great lakes to the sea.

National Party Platforms, Conference for Progressive Political Action Platform of 1924, p.256

(14) We denounce the mercenary system of degraded foreign policy under recent administrations in the interests of financial imperialists, oil monopolists, and international bankers, which has at times degraded our State Department fromits high service as a strong and kindly intermediary of defenseless governments to a trading outpost for those interests and concession seekers engaged in the exploitation of weaker nations, as contrary to the will of the American people, destructive of domestic development and provocative of war. We favor an active foreign policy to bring about a revision of the Versailles treaty in accordance with the terms of the armistice, and to promote finn treaty agreements with all nations to outlaw wars, abolish conscription, drastically reduce land, air and naval armaments and guarantee public referendum on peace and war.

National Party Platforms, Conference for Progressive Political Action Platform of 1924, p.256

In supporting this program we are applying to the needs of today the fundamental principles of American democracy, opposing equally the dictatorship of plutocracy and the dictatorship of the proletariat.

National Party Platforms, Conference for Progressive Political Action Platform of 1924, p.256

We appeal to all Americans without regard to partisan affiliation and we raise the standards of our faith so that all of like purpose may rally and march in this campaign under the banners of progressive union.

National Party Platforms, Conference for Progressive Political Action Platform of 1924, p.256

The nation may grow rich in the vision of greed. The nation will grow great in the vision of service.

Prohibition Platform of 1924

Title: Prohibition Platform of 1924

Author: Prohibition Party

Date: 1924

Source: National Party Platforms, pp.256-258

National Party Platforms, Prohibition Platform of 1924, p.256

The Prohibition Party in National Convention at Columbus, Ohio, this sixth day of June, 1924, recognizing Almighty God as the source of all governmental authority and that the principles enunciated by His Son, Jesus Christ, should guide in all matters pertaining to government, makes the following declaration of principles:

Our Party and Its Philosophy

National Party Platforms, Prohibition Platform of 1924, p.256

Four years of nullification of the Eighteenth Amendment by the Democratic and Republican officials have demonstrated the soundness of the philosophy of the Prohibition party that a law conferring a right will enforce itself, but a law prohibiting a wrong, financially and politically entrenched, requires a party thoroughly committed to its maintenance and enforcement. Little or no improvement can be expected so long as the friends of the prohibitory law divide themselves among political parties seeking the votes of the law violators and the nullificationists, which votes are regarded to be as necessary to the success of those political parties as are the votes of the law-abiders.

National Party Platforms, Prohibition Platform of 1924, p.257

The astounding revelations of corruption and maladministration in government, extending to the Cabinet itself, are but the inevitable consequences of the moral bankruptcy of a political party which, perpetuating the old liquor régime, is dependent upon the wet vote for its margin of plurality.

International Relations

National Party Platforms, Prohibition Platform of 1924, p.257

The time is past when the United States can hold aloof from the affairs of the World. We support the proposal for the entry of this Country into the Court of International Justice, as an important step for substituting law for force in the settlement of international disputes.

Labor, Capital and the General Public

National Party Platforms, Prohibition Platform of 1924, p.257

While adhering to our time honored position of demanding justice for both Labor and Capital, we declare that the interests of the general public are paramount to both. Therefore, we favor the speedy enactment by Congress and the several state Legislatures, each in its respective jurisdiction, of such legislation as shall impartially protect all three of these classes.

Agriculture

National Party Platforms, Prohibition Platform of 1924, p.257

In the constantly increasing trend of population from the country into the towns and cities, with the constant abandonment of the farms, this country faces a grave peril. It is self-evident that the farmer, with his investment in his lands, buildings, live-stock, machinery, tools, and labor, ought to receive more than one-half of the dollar paid by the consumer for the products of the farm, where no process of manufacture intervenes. If given power, we will by appropriate legislation endeavor to secure to the farmer his just share of the proceeds of his toil.

Conservation

National Party Platforms, Prohibition Platform of 1924, p.257

All natural resources, including mineral, oil, and timber lands, water powers and other wealth still remaining to the United States after the wasteful and profligate administration of corrupt old party officials, should be held perpetually and operated to produce revenue for the use of the Government. They must not be ruthlessly squandered by men or corporations for their own enrichment, normust they become the collateral of political parties for promissory notes issued for value received.

Unjust Ballot Laws

National Party Platforms, Prohibition Platform of 1924, p.257

We denounce the enactment by the Republican and Democratic parties in many states of unjust and discriminatory election laws, that make it almost, and in some states entirely impossible for minor parties to retain their place on the official ballot, or for new parties to be formed, and we demand their repeal.

The Bible in the Schools

National Party Platforms, Prohibition Platform of 1924, p.257

The Bible is the Magna Charta of human liberty and national safety and is of highest educational value. Therefore it should have a large place in our public schools.

Americanization of Aliens

National Party Platforms, Prohibition Platform of 1924, p.257

Recognizing the fact that there are large numbers of unassimilated aliens now in this country who, in their present condition and environment, are incapable of assimilation, and are therefore a menace to our institutions, we declare for an immediate, scientific investigation, looking forward to a constructive program for Americanizing these aliens.

Separation of Departments of Government

National Party Platforms, Prohibition Platform of 1924, p.257

We deplore the prevailing disregard of the parties in power of the Constitutional division of governmental powers into Legislative, Executive, and Judicial branches, and when placed in authority we pledge strict observance of such division.

Woman and the Home

National Party Platforms, Prohibition Platform of 1924, p.257

We approve and adopt the program of the National League of Women Voters for public welfare in government in so far as a strict regard for the division of powers under our dual form of government will permit.

Civil Service

National Party Platforms, Prohibition Platform of 1924, p.257

We favor the extension of the merit system to all the agencies of the Executive branch of our government.

Free Institutions

National Party Platforms, Prohibition Platform of 1924, p.257

We favor freedom of speech, a free press, our free public school system, and compulsory attendance in our public schools. We are unalterably opposed to public monies being used for sectarian purposes. We favor keeping open to public inspection all places where public wards are cared for.

Conclusion

National Party Platforms, Prohibition Platform of 1924, p.258

On this record of principles, and on its record of long-time faithfulness and vision, proved by the many reforms which it was the first to advocate, the National Prohibition Party summons all those who favor suppression of the liquor traffic, the enforcement of law, the maintenance of constitutional government, the purification of our politics, honesty and efficiency in administration, and the building of a better citizenship, to join with us in a new alignment in a political party to achieve these transcendent objectives.

Socialist Labor Platform of 1924

Title: Socialist Labor Platform of 1924

Author: Socialist Labor Party of America

Date: 1924

Source: National Party Platforms, pp.265-266

National Party Platforms, Socialist Labor Platform of 1924, p.265

The world stands upon the threshold of a new social order. The capitalist system of production and distribution is doomed; capitalist appropriation of labor's product forces the bulk of mankind into wage slavery, throws society into the convulsions of the class struggle, and momentarily threatens to engulf humanity in chaos and disaster. At this crucial period in history the Socialist Labor Party of America, in 16th National Convention assembled, reaffirming its former platform declarations, calls upon the workers to rally around the banner of the Socialist Labor Party, the only party in this country that blazes the trail to the Worker's Industrial Republic.

National Party Platforms, Socialist Labor Platform of 1924, p.265

Since the advent of civilization human society has been divided into classes. Each new form of society has come into being with a definite purpose to fulfill in the progress of the human race. Each has been born, has grown, developed, prospered, become old, outworn, and has finally been overthrown. Each society has developed within itself the germs of its own destruction as well as the germs which went to make up the society of the future.

National Party Platforms, Socialist Labor Platform of 1924, p.266

The capitalist system rose during the seventeenth, eighteenth, and nineteenth centuries by the overthrow of feudalism. Its great and all-im-portant mission in the development of man was to improve, develop, and concentrate the means of production and distribution, thus creating a system of co-operative production. This work was completed in advanced capitalist countries about the beginning of the 20th century. That moment capitalism had fulfilled its historic mission, and from that moment the capitalist class became a class of parasites.

National Party Platforms, Socialist Labor Platform of 1924, p.266

In the course of human progress mankind has passed, through class rule, private property, and individualism in production and exchange, from the enforced and inevitable want, misery, poverty, and ignorance of savagery and barbarism to the affluence and high productive capacity of civilization. For all practical purposes, co-operative production has now superseded individual production.

National Party Platforms, Socialist Labor Platform of 1924, p.266

Capitalism no longer promotes the greatest good of the greatest number. It no longer spells progress, but reaction. Private production carries with it private ownership of the products. Production is carried on, not to supply the needs of humanity, but for the profit of the individual owner, the company, or the trust. The worker, not receiving the full product of his labor, cannot buy back all he produces. The capitalist wastes part in riotous living; the rest must find a foreign market. By the opening of the twentieth century the capitalist world—England, America, Germany, France, Japan, China, etc.—was producing at a mad rate for the world market. A capitalist deadlock of markets brought on in 1914 the capitalist collapse popularly known as the World War. The capitalist world Can not extricate itself out of the débris. America to-day is choking under the weight of her own gold and products.

National Party Platforms, Socialist Labor Platform of 1924, p.266

This situation has brought on the present stage of human misery—starvation, want, cold, disease, pestilence, and war. This state is brought about in the midst of plenty, when the earth can be made to yield hundred-fold, when the machinery of production is made to multiply human energy and ingenuity by the hundred. The present state of misery exists solely because the mode of production rebels against the mode of exchange. Private property in the means of life has become a social crime. The land was made by no man; the modern machines are the result of the combined ingenuity of the human race from time immemorial; the land can be made to yield and the machines can be set in motion only by the collective effort of the workers. Progress demands the collective ownership of the land on and the tools with which to produce the necessities of life. The owner of the means of life to-day partakes of the nature of a highwayman; he stands with his gun before society's temple; it depends upon him whether the million mass may work, earn, eat, and live. The capitalist system of production and exchange must be supplanted if progress is to continue.

National Party Platforms, Socialist Labor Platform of 1924, p.266

In place of the capitalist system the Socialist Labor Party aims to substitute a system of social ownership of the means of production, industrially administered by the workers, who assume control and direction as well as operation of their industrial affairs.

National Party Platforms, Socialist Labor Platform of 1924, p.266

We therefore call upon the wage workers to organize themselves into a revolutionary political organization under the banner of the Socialist Labor Party; and to organize themselves likewise upon the industrial field into a Socialist industrial union, in order to consolidate the material power necessary for the establishment of the Socialist Industrial Republic.

National Party Platforms, Socialist Labor Platform of 1924, p.266

We also call upon all intelligent citizens to place themselves squarely upon the ground of working class interest, and join us in this mighty and noble work of human emancipation, so that we may put summary end to the existing barbarous class conflict by placing the land and all the means of production, transportation, and distribution into the hands of the people as a collective body, and substituting Industrial Self-Government for the present state of planless production, industrial war and social disorder—a government in which every worker shall have the free exercise and full benefit of his faculties, multiplied by all the modern factors of civilization.

Workers' Party Platform of 1924

Title: Workers' Party Platform of 1924

Author: Workers' Party

Date: 1924

Source: National Party Platforms, pp.267-269

National Party Platforms, Workers' Party Platform of 1924, p.267

The workers and exploited farmers of the United States face the question of how to organize and use their political power in the coming election. Before deciding this question every industrial worker, agricultural worker and exploited farmer should give fundamental consideration to the situation which exists in this country.

In the Grip of the Exploiters

National Party Platforms, Workers' Party Platform of 1924, p.267

The United States is the wealthiest country in the world. We have natural resources which supply us with raw materials and a great industrial organization which can turn these raw materials into the finished products which satisfy human needs. With the raw materials available and the tremendous machinery of production we have the means of giving a high standard of life—good food, good clothing, good homes, the opportunity for education and recreation—to every person in this country. This high standard of life is denied the workers and exploited farmers of the United States. Millions of these producers of wealth are able to secure for their labor only the means for a bare existence. Millions of workers must work long hours, under bad working conditions, for low wages. Millions are periodically unemployed, as at present, with all the consequent misery and suffering for themselves and their families. In order to keep these conditions from growing worse, millions of industrial workers are periodically compelled to go on strike to fight back the greedy employers. Millions of farmers have been driven into bankruptcy and from the land because of inability to earn enough for a living.

National Party Platforms, Workers' Party Platform of 1924, p.267

These conditions prevail in a country in which we have the means of supplying a high standard of life to every person because a relatively small class has fastened its grip upon the raw materials and industries and uses these to enrich itself at the expense of the producers. Through theft, fraud, corruption, bribery, and the capitalist system of profit taking, this capitalist class has become the owner of the land, raw material and machinery of production upon which the workers and farmers are dependent for a livelihood.

National Party Platforms, Workers' Party Platform of 1924, p.267

The raw materials and industries of the United States are owned by the Garys, Morgans, Rockefellers, Fords, McCormicks, and other great capitalists. The workers and farmers alike pay tribute to these capitalists. They are compelled to accept a low standard of living in order that the capitalists may amass even greater fortunes for themselves.

National Party Platforms, Workers' Party Platform of 1924, p.267

It is this system of capitalist ownership of industry which gives the wealth produced to the few, that denies the millions of industrial workers, agricultural workers and exploited farmers the enjoyment of that high standard of life which their labor and the wealth they produce make possible in this country.

National Party Platforms, Workers' Party Platform of 1924, p.267

It is this system of capitalist ownership of industry which is the basis of the class struggle between the workers, fighting for more of what they produce, and the capitalists, ever bent on securing greater and greater profits for themselves.

How the Capitalists Use the Government

National Party Platforms, Workers' Party Platform of 1924, p.267

The government of the United States is and has been a government of, by, and for the capitalists. It is through the government and use of the governmental power that the capitalists maintain their grip on the industries and their power to rob the industrial workers, agricultural workers, and farmers.

National Party Platforms, Workers' Party Platform of 1924, p.267

During the war, with the connivance of government officials, the capitalists looted the country of billions of wealth. Since the war the shipping board deals, the war veterans' board corruption, the Teapot Dome exposures, have shown how the capitalists fill their pockets at the expense of the working and farming masses.

National Party Platforms, Workers' Party Platform of 1924, p.267

Governmental legislation is framed so as to yield the capitalists more and more profits. Tariff laws, taxation laws, agrarian bank laws, are all framed so as to enable the bankers and industrial magnates to take more and more of what the workers produce.

National Party Platforms, Workers' Party Platform of 1924, p.267

To prevent the workers from securing better wages and working conditions through strikes, the capitalists use the government to destroy these strikes. The disgraceful Daugherty injunction against the railway shopmen, the use of troops against miners in their strike in 1922, the use of the Railway Labor Board against the railroad workers, are only outstanding examples of the continual use of the governmental power by the capitalists to protect themselves in taking greater and greater profits out of the labor of the workers.

National Party Platforms, Workers' Party Platform of 1924, p.268

The government is a dictatorship of the capitalists and their instrument for the oppression and exploitation of the workers. Although the workers are permitted to vote, the capitalists are able, through their control of the means of information and through their economic power, to completely dominate the government, national, state and local.

The Election This Year

National Party Platforms, Workers' Party Platform of 1924, p.268

It is these conditions which the workers and exploited farmers must consider in using their political power in the election this year.

National Party Platforms, Workers' Party Platform of 1924, p.268

The capitalist dictatorship has named two candidates, the Republican, strikebreaker Coolidge, and the Morgan-Rockefeller lawyer Davis. Both are agents of the capitalist class. They, and the other candidates of the two old parties, will loyally serve the capitalists if returned to power—as they have done in the past.

National Party Platforms, Workers' Party Platform of 1924, p.268

La Follette, who is running as an independent, progressive Republican, is equally a supporter of the capitalist system of exploitation. The only difference between La Follette and Coolidge and Davis is that La Follette represents the independent manufacturers, bankers and merchants, who are seeking greater power and profit for themselves and are trying to use the workers and farmers to attain that end.

National Party Platforms, Workers' Party Platform of 1924, p.268

La Follette is the representative of little business against big business, but not the representative of the workers and exploited farmers in their struggle against the capitalists. La Follette's platform is not a workers' and farmers' platform, but a little business men's platform with some bait thrown in for sections of the skilled workers.

National Party Platforms, Workers' Party Platform of 1924, p.268

Against these three candidates of the capitalist system of exploitation, big and little, the Workers' (Communist) Party presents working class candi-dates—Foster and Gitlow—and a working class platform.

The Workers Must Rule

National Party Platforms, Workers' Party Platform of 1924, p.268

There is only one way in which the exploitation of the workers and farmers of this country can be ended. That is through the workers organizing their mass power, ending the capitalist dictatorship and establishing the Workers' and Farmers' Government.

National Party Platforms, Workers' Party Platform of 1924, p.268

In place of the capitalist dictatorship there must be established the rule of the workers. The governmental power must be used in the interest of the workers and farmers as it is now used by the capitalist dictatorship in the interest of the capitalist class.

National Party Platforms, Workers' Party Platform of 1924, p.268

The Russian workers and peasants have established their rule in the form of the Soviet government and are using their power against the capitalists and for themselves—to build a Communist social system which will give the workers and farmers the fruits of their toil.

National Party Platforms, Workers' Party Platform of 1924, p.268

The Workers' party is fighting for the rule of the 30,000,000 workers and their families in the United States. This rule will be established through a proletarian revolution which will create a Soviet government and the dictatorship of the proletariat.

National Party Platforms, Workers' Party Platform of 1924, p.268

This Workers' and Farmers' Government will wrest out of the hands of the capitalists the raw material and great industries and operate them for the happiness and well-being of the producers. It will build in place of the capitalist system of production a Communist system of production.

National Party Platforms, Workers' Party Platform of 1924, p.268

The Workers' Party calls upon workers and exploited farmers to join it in the struggle to establish the Workers' and Farmers' Government in the United States. It urges them to demonstrate their support of the program of the Workers' Party by voting against the three capitalist candidates and for the Communist candidates—Foster and Gitlow.

Immediate Program

National Party Platforms, Workers' Party Platform of 1924, p.268

1. For a Mass Farmer-Labor Party

National Party Platforms, Workers' Party Platform of 1924, p.268

The Workers' Party has for two years carried on a consistent campaign for the formation of a mass Farmer-Labor Party to unite the industrial workers and exploited farmers for independent political action. The betrayal of the Conference for Progressive Political Action in accepting the independent candidacy of La Follette, the betrayal of the Farmer-Labor Party by the Socialist Party and the La Follette supporters among the workers and farmers, the attack upon the Farmer-Labor Party by La Follette, who does not want a party of workers and farmers, made the achievement of this goal impossible in this election campaign. The Workers' party declares its purpose to continue the struggle to mobilize the workers and exploited farmers for independent political action through a mass Farmer-Labor Party.

National Party Platforms, Workers' Party Platform of 1924, p.269

2. Nationalization of Industry and Workers' Control

National Party Platforms, Workers' Party Platform of 1924, p.269

The Workers' Party declares itself in favor of the immediate nationalization of all large-scale industries, such as railroads, mines, super-power plants, and means of communication and transportation, and for the organization of the workers in these industries for participation in the management and direction of the industries nationalized, thus developing industrial democracy, until industry comes under the control of those who produce the wealth of the nation, subject only to such general control as will protect the interest of the producers as a whole.

National Party Platforms, Workers' Party Platform of 1924, p.269

3. Compel Industry and the Government to Pay Wages to the Unemployed

National Party Platforms, Workers' Party Platform of 1924, p.269

Industry in the United States is slowing down and the workers face another period of industrial crisis with millions of unemployed unable to earn a living. The Workers' Party declares that industry must support the unemployed to whom it cannot give work. The government must take the accumulated profits of industry. It must levy excess profit and inheritance taxes to create an unemployment fund, to be administered by the workers, for payment of union wages to workers without jobs. The Workers' Party will initiate the organization of unemployment councils to fight for these demands.

National Party Platforms, Workers' Party Platform of 1924, p.269

4. Down with Injunctions and the Use of Police and Soldiers Against Workers

National Party Platforms, Workers' Party Platform of 1924, p.269

The Workers' Party calls upon the workers and exploited farmers to fight with it against the use of injunctions in labor disputes, intimidation of strikers through police and soldiers, and the use of criminal syndicalist laws to suppress the demands of the revolutionary workers, as well as other infringements of the rights of the workers.

National Party Platforms, Workers' Party Platform of 1924, p.269

5. Release All Political and Class War Prisoners

National Party Platforms, Workers' Party Platform of 1924, p.269

The Workers' Party will fight for the immediate and unconditional release of all workers imprisoned because of their political or economic views and for participation in the class struggle.

National Party Platforms, Workers' Party Platform of 1924, p.269

6. Land for the Users—Nationalize the Farmers' Marketing Industries

National Party Platforms, Workers' Party Platform of 1924, p.269

Land was created for all the people and we demand a system of land tenure which will eliminate landlordism and tenantry and will secure the land to the users thereof. We demand the nationalization of all means of transportation and industries engaged in the preparation and distribution of farm products, with participation of the farmers in the management of these industries.

National Party Platforms, Workers' Party Platform of 1924, p.269

7. Down with Militarism and Imperialist Wars

National Party Platforms, Workers' Party Platform of 1924, p.269

The World War and its slaughter of millions and destruction of billions of wealth was the product of capitalist imperialism. The capitalist government of the United States is already preparing for a new war. It is using its power to oppress weaker nations in the interest of the capitalists, as in Haiti, Santo Domingo, and Central America. It is holding the Philippine Islands in subjection. It is aiding to force the Dawes plan upon Germany in order to enslave the workers of that country. The Workers' Party will fight against militarism and imperialist wars and the use of the governmental power for the exploitation of weaker nations. It demands freedom for the Philippines and the right of self-determination for all colonies and territories of the United States.

National Party Platforms, Workers' Party Platform of 1924, p.269

8. Recognize the Workers' and Peasants' Government of Russia

National Party Platforms, Workers' Party Platform of 1924, p.269

The Union of Soviet Socialist Republics is the only workers' and farmers' government in the world. The capitalist government of the United States refuses it recognition and the restoration of full trade relations. The Workers' Party will rally the workers for immediate, unconditional recognition of the Union of Soviet Socialist Republics.

National Party Platforms, Workers' Party Platform of 1924, p.269

The measures outlined here are measures for immediate struggle and mobilization of the workers against the capitalist class and the capitalist dictatorship in the United States. The end of the glaring evils of capitalist society can only come with the victory of the workers and the establishment of the Workers' and Peasants' government through which capitalism will be abolished and the Communist society created. The Workers' Party will carry on the struggle until this goal is achieved.

Myers v. United States, 1926

Title: Myers v. United States

Author: U.S. Supreme Court

Date: October 25, 1926

Source: 272 U.S. 52

This case was argued December 5, 1923, and was reargued April 13 and 14, 1925. The case was decided October 25, 1926.

1926, Myers v. United States, 272 U.S. 52

APPEAL FROM THE COURT OF CLAIMS

Syllabus

1926, Myers v. United States, 272 U.S. 52

1. A postmaster who was removed from office petitioned the President and the Senate committee on Post Offices for a hearing on any charges filed; protested to the Post Office Department; and, [272 U.S. 53] three months before his four-year term expired, having pursued no other occupation and derived no compensation for other service in the interval, began suit in the Court of Claims for salary since removal. No notice of the removal, nor any nomination of a successor, had been sent in the meantime to the Senate whereby his case could have been brought before that body, and the commencement of suit was within a month after the ending of its last session preceding the expiration of the four years. Held that the plaintiff was not guilty of laches. P. 107.

1926, Myers v. United States, 272 U.S. 53

2. Section 6 of the Act of July 12, 1876, providing that

1926, Myers v. United States, 272 U.S. 53

Postmasters of the first, second and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate and shall hold their offices for four years unless sooner removed or suspended according to law,

1926, Myers v. United States, 272 U.S. 53

is unconstitutional in its attempt to make the President's power of removal dependent upon consent of the Senate. Pp. 107, 176.

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3. The President is empowered by the Constitution to remove any executive officer appointed by him by and with the advice and consent of the Senate, and this power is not subject in its exercise to the assent of the Senate, nor can it be made so by an act of Congress. Pp. 119, 125.

1926, Myers v. United States, 272 U.S. 53

4. The provision of Art. II, § 1, of the Constitution that "the Executive power shall be vested in a President" is a grant of the power, and not merely a naming of a department of the government. Pp. 151, 163.

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5. The provisions of Art. II, § 2, which blend action by the legislative branch, or by part of it, in the work of the Executive, are limitations upon this general grant of the Executive power which are to be strictly construed, and not to be extended by implication. P. 164.

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6. It is a canon of interpretation that real effect should be given to all the words of the Constitution. P. 151.

1926, Myers v. United States, 272 U.S. 53

7. Removal of executive officials from office is an executive function; the power to remove, like the power to appoint, is part of "the Executive power,"—a conclusion which is confirmed by the obligation "to take care that the laws be faithfully executed." Pp. 161, 164.

1926, Myers v. United States, 272 U.S. 53

8. The power of removal is an incident of the power to appoint; but such incident does not extend the Senate's power of checking appointments, to removals. Pp. 119, 121, 126, 161.

1926, Myers v. United States, 272 U.S. 53

9. The excepting clause in § 2 of Art. II, providing

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but Congress may by law vest the appointment of such inferior officers [272 U.S. 54] as they may think proper in the President alone, in the courts of law or in the heads of departments,

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does not enable Congress to regulate the removal of inferior officers appointed by the President by and with the advice and consent of the Senate. Pp. 158-161.

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10. A contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of the Constitution were actively participating in public affairs, acquiesced in for many years, fixes the meaning of the provisions so construed. P. 175.

1926, Myers v. United States, 272 U.S. 54

11. Upon an historical examination of the subject, the Court finds that the action of the First Congress, in 1789, touching the Bill to establish a Department of Foreign Affairs, was a clean-cut and deliberate construction of the Constitution as vesting in the President alone the power to remove officers, inferior as well as superior, appointed by him with the consent of the Senate; that this construction was acquiesced in by all branches of the Government for 73 years, and that subsequent attempts of Congress, through the Tenure of Office Act of March 2, 1867, and other acts of that period, to reverse the construction of 1789 by subjecting the President's power to remove executive officers appointed by him and confirmed by the Senate to the control of the Senate or lodge such power elsewhere in the Government were not acquiesced in, but their validity was denied by the Executive whenever any real issue over it arose. Pp. 111, 164-176.

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12. The weight of congressional legislation as supporting a particular construction of the Constitution by acquiescence depends not only upon the nature of the question, but also upon the attitude of the executive and judicial branches of the government and the number of instances in the execution of the law in which opportunity for objection in the courts or elsewhere has been afforded. P. 170.

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13. The provisions of the Act of May 15, 1820, for removal of the officers therein named "at pleasure," were not based on the assumption that, without them, the President would not have that power, but were inserted in acquiescence to the legislative decision of 1789. P. 146.

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14. Approval by the President of acts of Congress containing provisions purporting to restrict the President's constitutional power of removing officers held not proof of Executive acquiescence in such curtailment where the approval was explicable by the value of the legislation in other respects—as where the restriction was in a rider imposed on an appropriation act. P. 170. [272 U.S. 55]

1926, Myers v. United States, 272 U.S. 55

15. Marbury v. Madison, 1 Cranch. 137, considered, in connection with Parsons v. United States, 167 U.S. 324, and held not authoritative on the question of removal power here involved. Pp. 139-144, 158.

1926, Myers v. United States, 272 U.S. 55

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1926, Myers v. United States, 272 U.S. 55

The questions (1) whether a judge appointed by the President with the consent of the Senate under an act of Congress, not under authority of Art. III of the Constitution, can be removed by the President alone without the consent of the Senate; (2), whether the legislative decision of 1789 covers such a case, and (3), whether Congress may provide for his removal in some other way, present considerations different from those which apply in the removal of executive officers, and are not herein decided. Pp. 154-158.

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This Court has recognized (United States v. Perkins, 116 U.S. 483) that Congress may prescribe incidental regulations controlling and restricting the heads of departments in the exercise of the power of removal; but it has never held, and could not reasonably hold, that the excepting clause enables Congress to draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of that clause and to infringe the constitutional principle of the separation of govern mental powers. P. 161.

1926, Myers v. United States, 272 U.S. 55

Assuming the power of Congress to regulate removals as incidental to the exercise of its constitutional power to vest appointments of inferior officers in the heads of departments, certainly so long as Congress does not exercise that power, the power of removal must remain where the Constitution places it—with the President, as part of the executive power, in accordance with the legislative decision of 1789. P. 161.

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Whether the action of Congress in removing the necessity for the advice and consent of the Senate, and putting the power of appointment in the President alone, would make his power of removal in such case any more subject to Congressional legislation than before is a question not heretofore decided by this Court and not presented or decided in this case. P. 161.

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Congress is only given power to provide for appointments and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President with the Senate's consent. P. 164.

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58 Ct.Cls. 199, affirmed. [272 U.S. 56]

1926, Myers v. United States, 272 U.S. 56

APPEAL from a judgment of the Court of Claims rejecting a claim for salary. Appellant's intestate, Frank S. Myers, was reappointed by the President, by and with the advice and consent of the Senate, as a postmaster of the first class. The Act of July, 1876, § 6, c. 179, 19 Stat. 80, provides that such postmasters shall hold office for four years, unless sooner removed or suspended according to law, and provides that they may be removed by the President "by and with the advice and consent of the Senate." Myers was removed, before the expiration of his term, by an order of the Postmaster General, sanctioned by the President. The removal was not referred to the Senate, either directly or through nomination of a successor, during the four-year period. Judgment of the Court below that Myers could not claim salary for the part of that period following the removal was based on the view that there had been laches in asserting the claim. The appeal was argued and submitted by counsel for the appellant on December 5, 1924. On January 5, 1925, the Court restored the case for reargument. It invited the Honorable George Wharton Pepper, United States Senator from Pennsylvania, to participate as amicus curiae. The reargument occurred on April 13, 14, 1925. In view of the great importance of the matter, the Reporter has deemed it advisable to print, in part, the oral arguments, in addition to summaries of the briefs. [Oral arguments and briefs omitted.] [272 U.S. 106]

TAFT, J., lead opinion

1926, Myers v. United States, 272 U.S. 106

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

1926, Myers v. United States, 272 U.S. 106

This case presents the question whether, under the Constitution, the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate.

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Myers, appellant's intestate, was, on July 21, 1917, appointed by the President, by and with the advice and consent of the Senate, to be a postmaster of the first class at Portland, Oregon, for a term of four years. On January 20, 1920, Myers' resignation was demanded. He refused the demand. On February 2, 1920, he was removed from office by order of the Postmaster General, acting by direction of the President. February 10th, Myers sent a petition to the President and another to the Senate Committee on Post Offices, asking to be heard if any charges were filed. He protested to the Department against his removal, and continued to do so until the end of his term. He pursued no other occupation, and drew compensation for no other service during the interval. On April 21, 1921, he brought this suit in the Court of Claims for his salary from the date of his removal, which, as claimed by supplemental petition filed after July 21, 1921, the end of his term, amounted to $8,838.71. In August, 1920, the President made a recess appointment of one Jones, who took office September 19, 1920. [272 U.S. 107]

1926, Myers v. United States, 272 U.S. 107

The Court of Claims gave judgment against Myers, and this is an appeal from that judgment. The Court held that he had lost his right of action because of his delay in suing, citing Arant v. Lane, 249 U.S. 367; Nicholas v. United States, 257 U.S. 71, and Norris v. United States, 257 U.S. 77. These cases show that, when a United States officer is dismissed, whether in disregard of the law or from mistake as to the facts of his case, he must promptly take effective action to assert his rights. But we do not find that Myers failed in this regard. He was constant in his efforts at reinstatement. A hearing before the Senate Committee could not be had till the notice of his removal was sent to the Senate or his successor was nominated. From the time of his removal until the end of his term, there were three sessions of the Senate without such notice or nomination. He put off bringing his suit until the expiration of the Sixty-sixth Congress, March 4, 1921. After that, and three months before his term expired, he filed his petition. Under these circumstances, we think his suit was not too late. Indeed, the Solicitor General, while not formally confessing error in this respect, conceded at the bar that no laches had been shown.

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By the 6th section of the Act of Congress of July 12, 1876, 19 Stat. 80, 81, c. 179, under which Myers was appointed with the advice and consent of the Senate as a first-class postmaster, it is provided that

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Postmasters of the first, second and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate and shall hold their offices for four years unless sooner removed or suspended according to law.

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The Senate did not consent to the President's removal of Myers during his term. If this statute, in its requirement that his term should be four years unless sooner removed by the President by and with the consent of the [272 U.S. 108] Senate, is valid, the appellant, Myers' administratrix, is entitled to recover his unpaid salary for his full term, and the judgment of the Court of Claims must be reversed. The Government maintains that the requirement is invalid for the reason that, under Article II of the Constitution the President's power of removal of executive officers appointed by him with the advice and consent of the Senate is full and complete without consent of the Senate. If this view is sound, the removal of Myers by the President without the Senate's consent was legal, and the judgment of the Court of Claims against the appellant was correct, and must be affirmed, though for a different reason from that given by that court. We are therefore confronted by the constitutional question, and cannot avoid it.

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The relevant parts of Article II of the Constitution are as follows:

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Section 1. The executive Power shall be vested in a President of the United States of America.

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Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments upon any subject relating to the duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

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He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur, and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States whose Appointments are not herein otherwise provided for, and which shall be established [272 U.S. 109] by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

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The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate by granting Commissions which shall expire at the End of their next Session.

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Section 3. He shall from time to time give to the Congress information of the State of the Union and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

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Section 4. The President, Vice President and all civil Officers of the United States shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other High Crimes and Misdemeanors.

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Section 1 of Article III, provides:

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The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior. . . .

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The question where the power of removal of executive officers appointed by the President by and with the advice and consent of the Senate was vested was presented early in the first session of the First Congress. There is no express provision respecting removals in the Constitution, except as Section 4 of Article II, above quoted, provides for removal from office by impeachment. The subject [272 U.S. 110] was not discussed in the Constitutional Convention. Under the Articles of Confederation, Congress was given the power of appointing certain executive officers of the Confederation, and, during the Revolution and while the Articles were given effect, Congress exercised the power of removal. May, 1776, 4 Journals of the Continental Congress, Library of Congress Ed., 361; August 1, 1777, 8 Journals, 596; January 7, 1779, 13 Journals, 32-33; June 1779, 14 Journals, 542, 712, 714; November 23, 1780, 18 Journals, 1085; December 1, 1780, 18 Journals, 1115.

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Consideration of the executive power was initiated in the Constitutional Convention by the seventh resolution in the Virginia Plan, introduced by Edmund Randolph. 1 Farrand, Records of the Federal Convention, 21. It gave to the Executive "all the executive powers of the Congress under the Confederation," which would seem therefore to have intended to include the power of removal which had been exercised by that body as incident to the power of appointment. As modified by the Committee of the Whole, this resolution declared for a national executive of one person, to be elected by the legislature, with power to carry into execution the national laws and to appoint to offices in cases not otherwise provided for. It was referred to the Committee on Detail, 1 Farrand, 230, which recommended that the executive power should be vested in a single person, to be styled the President of the United States; that he should take care that the laws of the United States be duly and faithfully executed, and that he should commission all the officers of the United States and appoint officers in all cases not otherwise provided by the Constitution. 2 Farrand, 185. The committee further recommended that the Senate be given power to make treaties, and to appoint ambassadors and judges of the Supreme Court.

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After the great compromises of the Convention—the one giving the States equality of representation in the [272 U.S. 111] Senate, and the other placing the election of the President not in Congress, as once voted, but in an electoral college in which the influence of larger States in the selection would be more nearly in proportion to their population—the smaller States, led by Roger Sherman, fearing that, under the second compromise, the President would constantly be chosen from one of the larger States, secured a change by which the appointment of all officers, which theretofore had been left to the President without restriction, was made subject to the Senate's advice and consent, and the making of treaties and the appointments of ambassadors, public ministers, consuls and judges of the Supreme Court were transferred to the President, but made subject to the advice and consent of the Senate. This third compromise was effected in a special committee in which Gouverneur Morris of Pennsylvania represented the larger States and Roger Sherman the smaller States. Although adopted finally without objection by any State in the last days of the Convention, members from the larger States, like Wilson and others, criticized this limitation of the President's power of appointment of executive officers and the resulting increase of the power of the Senate. 2 Farrand, 537, 538, 539.

1926, Myers v. United States, 272 U.S. 111

In the House of Representatives of the First Congress, on Tuesday, May 18, 1789, Mr. Madison moved in the Committee of the Whole that there should be established three executive departments—one of Foreign Affairs, another of the Treasury, and a third of War—at the head of each of which there should be a Secretary, to be appointed by the President by and with the advice and consent of the Senate, and to be removable by the President. The committee agreed to the establishment of a Department of Foreign Affairs, but a discussion ensued as to making the Secretary removable by the President. 1 Annals of Congress, 370, 371.

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The question was now taken and carried, by a considerable majority, in favor [272 U.S. 112] of declaring the power of removal to be in the President.

1926, Myers v. United States, 272 U.S. 112

1 Annals of Congress, 383.

1926, Myers v. United States, 272 U.S. 112

On June 16, 1789, the House resolved itself into a Committee of the Whole on a bill proposed by Mr. Madison for establishing an executive department to be denominated the Department of Foreign Affairs, in which the first clause, after stating the title of the officer and describing his duties, had these words: "to be removable from office by the President of the United States." 1 Annals of Congress, 455. After a very full discussion, the question was put: shall the words "to be removable by the President " be struck out? It was determined in the negative yeas 20, nays 34. 1 Annals of Congress, 576.

1926, Myers v. United States, 272 U.S. 112

On June 22, in the renewal of the discussion,

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Mr. Benson moved to amend the bill by altering the second clause so as to imply the power of removal to be in the President alone. The clause enacted that there should be a chief clerk, to be appointed by the Secretary of Foreign Affairs, and employed as he thought proper, and who, in case of vacancy, should have the charge and custody of all records, books, and papers appertaining to the department. The amendment proposed that the chief clerk, "whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy," should, during such vacancy, have the charge and custody of all records, books, and papers appertaining to the department.

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1 Annals of Congress, 578.

1926, Myers v. United States, 272 U.S. 112

Mr. Benson stated that his objection to the clause "to be removable by the President" arose from an idea that the power of removal by the President hereafter might appear to be exercised by virtue of a legislative grant only, and consequently be subjected to legislative instability, when he was well satisfied in his own mind that it was fixed by a fair legislative construction of the Constitution.

1926, Myers v. United States, 272 U.S. 112

1 Annals of Congress, 579. [272 U.S. 113]

1926, Myers v. United States, 272 U.S. 113

Mr. Benson declared, if he succeeded in this amendment, he would move to strike out the words in the first clause, "to be removable by the President" which appeared somewhat like a grant. Now, the mode he took would evade that point and establish a legislative construction of the Constitution. He also hoped his amendment would succeed in reconciling both sides of the House to the decision, and quieting the minds of gentlemen.

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1 Annals of Congress, 578.

1926, Myers v. United States, 272 U.S. 113

Mr. Madison admitted the objection made by the gentleman near him (Mr. Benson) to the words in the bill. He said:

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They certainly may be construed to imply a legislative grant of the power. He wished everything like ambiguity expunged, and the sense of the House explicitly declared, and therefore seconded the motion. Gentlemen have all along proceeded on the idea that the Constitution vests the power in the President, and what arguments were brought forward respecting the convenience or inconvenience of such disposition of the power were intended only to throw light upon what was meant by the compilers of the Constitution. Now, as the words proposed by the gentleman from New York expressed to his mind the meaning of the Constitution, he should be in favor of them, and would agree to strike out those agreed to in the committee.

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1 Annals of Congress, 578, 579.

1926, Myers v. United States, 272 U.S. 113

Mr. Benson's first amendment to alter the second clause by the insertion of the italicized words, made that clause to read as follows:

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That there shall be in the State Department an inferior officer to be appointed by the said principal officer, and to be employed therein as he shall deem proper, to be called the Chief Clerk in the Department of Foreign Affairs, and who, whenever the principal officer shall be removed from office by the President of the United States, or in any other case of vacancy, shall, during such vacancy, [272 U.S. 114] have charge and custody of all records, books and papers appertaining to said department.

1926, Myers v. United States, 272 U.S. 114

The first amendment was then approved by a vote of thirty to eighteen. 1 Annals of Congress, 580. Mr. Benson then moved to strike out in the first clause the words "to be removable by the President," in pursuance of the purpose he had already declared, and this second motion of his was carried by a vote of thirty-one to nineteen. 1 Annals of Congress, 585.

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The bill as amended was ordered to be engrossed, and read the third time the next day, June 24, 1789, and was then passed by a vote of twenty-nine to twenty-two, and the Clerk was directed to carry the bill to the Senate and desire their concurrence. 1 Annals of Congress, 591.

1926, Myers v. United States, 272 U.S. 114

It is very clear from this history that the exact question which the House voted upon was whether it should recognize and declare the power of the President under the Constitution to remove the Secretary of Foreign Affairs without the advice and consent of the Senate. That was what the vote was taken for. Some effort has been made to question whether the decision carries the result claimed for it, but there is not the slightest doubt, after an examination of the record, that the vote was, and was intended to be, a legislative declaration that the power to remove officers appointed by the President and the Senate vested in the President alone, and, until the Johnson Impeachment trial in 1868, its meaning was not doubted even by those who questioned its soundness.

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The discussion was a very full one. Fourteen out of the twenty-nine who voted for the passage of the bill, and eleven of the twenty-two who voted against the bill, took part in the discussion. Of the members of the House, eight had been in the Constitutional Convention, and, of these, six voted with the majority, and two, Roger Sherman and Eldridge Gerry, the latter of whom had refused to sign the Constitution, voted in the minority. After [272 U.S. 115] the bill as amended had passed the House, it was sent to the Senate, where it was discussed in secret session, without report. The critical vote there was upon the striking out of the clause recognizing and affirming the unrestricted power of the President to remove. The Senate divided by ten to ten, requiring the deciding vote of the Vice-President, John Adams, who voted against striking out, and in favor of the passage of the bill as it had left the House.\* Ten of the Senators had been in the Constitutional Convention, and, of them, six voted that the power of removal was in the President alone. The bill, having passed as it came from the House, was signed by President Washington and became a law. Act of July 27, 1789, 1 Stat. 28, c. 4.

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The bill was discussed in the House at length and with great ability. The report of it in the Annals of Congress is extended. James Madison was then a leader in the House, as he had been in the Convention. His arguments in support of the President's constitutional power of removal independently of Congressional provision, and without the consent of the Senate, were masterly, and he carried the House.

1926, Myers v. United States, 272 U.S. 115

It is convenient in the course of our discussion of this case to review the reasons advanced by Mr. Madison and his associates for their conclusion, supplementing them, so far as may be, by additional considerations which lead this Court to concur therein.

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First. Mr. Madison insisted that Article II, by vesting the executive power in the President, was intended to grant to him the power of appointment and removal of executive officers except as thereafter expressly provided in that Article. He pointed out that one of the chief [272 U.S. 116] purposes of the Convention was to separate the legislative from the executive functions. He said:

1926, Myers v. United States, 272 U.S. 116

If there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive and Judicial powers. If there is any point in which the separation of the Legislative and Executive powers ought to be maintained with great caution, it is that which relates to officers and offices.

1926, Myers v. United States, 272 U.S. 116

1 Annals of Congress, 581.

1926, Myers v. United States, 272 U.S. 116

Their union under the Confederation had not worked well, as the members of the convention knew. Montesquieu's view that the maintenance of independence as between the legislative, the executive, and the judicial branches was a security for the people had their full approval. Madison in the Convention, 2 Farrand, Records of the Federal Convention, 56. Kendall v. United States, 12 Peters. 524, 610. Accordingly, the Constitution was so framed as to vest in the Congress all legislative powers therein granted, to vest in the President the executive power, and to vest in one Supreme Court and such inferior courts as Congress might establish the judicial power. From this division on principle, the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires. Madison, 1 Annals of Congress, 497. This rule of construction has been confirmed by this Court in Meriwether v. Garrett, 102 U.S. 472, 515; Kilbourn v. Thompson, 103 U.S. 168, 190; Mugler v. Kansas, 123 U.S. 623, 662.

1926, Myers v. United States, 272 U.S. 116

The debates in the Constitutional Convention indicated an intention to create a strong Executive, and, after a controversial discussion, the executive power of the Government was vested in one person and many of his important functions were specified so as to avoid the [272 U.S. 117] humiliating weakness of the Congress during the Revolution and under the Articles of Confederation. 1 Farrand, 66-97.

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Mr. Madison and his associates in the discussion in the House dwelt at length upon the necessity there was for construing Article II to give the President the sole power of removal in his responsibility for the conduct of the executive branch, and enforced this by emphasizing his duty expressly declared in the third section of the Article to "take care that the laws be faithfully executed." Madison, 1 Annals of Congress, 496, 497.

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The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President, alone and unaided, could not execute the laws. He must execute them by the assistance of subordinates. This view has since been repeatedly affirmed by this Court. Wilcox v. Jackson, 13 Peters 498, 513; United States v. Eliason, 16 Peters 291, 302; Williams v. United States, 1 How. 290, 297; Cunningham v. Neagle, 135 U.S. 1, 63; Russell Co. v. United States, 261 U.S. 514, 523. As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that, as part of his executive power, he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that, as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible. Fisher Ames, 1 Annals of Congress, 474. It was urged that the natural meaning of the term "executive power" granted the President included the appointment and removal of executive subordinates. If such appointments and removals were not an exercise of the executive power, what were they? They certainly [272 U.S. 118] were not the exercise of legislative or judicial power in government as usually understood.

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It is quite true that, in state and colonial governments at the time of the Constitutional Convention, power to make appointments and removals had sometimes been lodged in the legislatures or in the courts, but such a disposition of it was really vesting part of the executive power in another branch of the Government. In the British system, the Crown, which was the executive, had the power of appointment and removal of executive officers, and it was natural, therefore, for those who framed our Constitution to regard the words "executive power" as including both. Ex Parte Grossman, 267 U.S. 87, 110. Unlike the power of conquest of the British Crown, considered and rejected as a precedent for us in Fleming v. Page, 9 How. 603, 618, the association of removal with appointment of executive officers is not incompatible with our republican form of Government.

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The requirement of the second section of Article II that the Senate should advise and consent to the Presidential appointments, was to be strictly construed. The words of section 2, following the general grant of executive power under section 1, were either an enumeration and emphasis of specific functions of the Executive, not all-inclusive, or were limitations upon the general grant of the executive power, and, as such, being limitations, should not be enlarged beyond the words used. Madison, 1 Annals, 462, 463, 464. The executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed, and the fact that no express limit was placed on the power of removal by the Executive was convincing indication that none was intended. This is the same construction of Article II as that of Alexander Hamilton quoted infra. [272 U.S. 119]

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Second. The view of Mr. Madison and his associates was that not only did the grant of executive power to the President in the first section of Article II carry with it the power of removal, but the express recognition of the power of appointment in the second section enforced this view on the well approved principle of constitutional and statutory construction that the power of removal of executive officers was incident to the power of appointment. It was agreed by the opponents of the bill, with only one or two exceptions, that, as a constitutional principle, the power of appointment carried with it the power of removal. Roger Sherman, 1 Annals of Congress, 491. This principle, as a rule of constitutional and statutory construction then generally conceded, has been recognized ever since. Ex parte Hennen, 13 Peters 230, 259; Reagan v. United States, 182 U.S. 419; Shurtleff v. United States, 189 U.S. 311, 315. The reason for the principle is that those in charge of and responsible for administering functions of government who select their executive subordinates need, in meeting their responsibility, to have the power to remove those whom they appoint.

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Under section 2 of Article II, however, the power of appointment by the Executive is restricted in its exercise by the provision that the Senate, a part of the legislative branch of the Government, may check the action of the Executive by rejecting the officers he selects. Does this make the Senate part of the removing power? And this, after the whole discussion in the House is read attentively, is the real point which was considered and decided in the negative by the vote already given.

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The history of the clause by which the Senate was given a check upon the President's power of appointment makes it clear that it was not prompted by any desire to limit removals. As already pointed out, the important purpose of those who brought about the restriction was to lodge in the Senate, where the small States had equal [272 U.S. 120] representation with the larger States, power to prevent the President from making too many appointments from the larger States. Roger Sherman and Oliver Ellsworth, delegates from Connecticut, reported to its Governor:

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The equal representation of the States in the Senate and the voice of that branch in the appointment to offices will secure the rights of the lesser as well as of the greater States.

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3 Farrand, 99. The formidable opposition to the Senate's veto on the President's power of appointment indicated that, in construing its effect, it should not be extended beyond its express application to the matter of appointments. This was made apparent by the remarks of Abraham Baldwin, of Georgia, in the debate in the First Congress. He had been a member of the Constitutional Convention. In opposing the construction which would extend the Senate's power to check appointments to removals from office, he said:

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I am well authorized to say that the mingling of the powers of the President and Senate was strongly opposed in the Convention which had the honor to submit to the consideration of the United States and the different States the present system for the government of the Union. Some gentlemen opposed it to the last, and finally it was the principal ground on which they refused to give it their signature and assent. One gentleman called it a monstrous and unnatural connexion, and did not hesitate to affirm it would bring on convulsions in the government. This objection was not confined to the walls of the Convention; it has been subject of newspaper declamation, and perhaps justly so. Ought we not, therefore, to be careful not to extend this unchaste connexion any further?

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1 Annals of Congress, 557.

1926, Myers v. United States, 272 U.S. 120

Madison said:

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Perhaps there was no argument urged with more success or more plausibly grounded against the Constitution under which we are now deliberating than that founded [272 U.S. 121] on the mingling of the executive and legislative branches of the Government in one body. It has been objected that the Senate have too much of the executive power even, by having control over the President in the appointment to office. Now shall we extend this connexion between the legislative and executive departments which will strengthen the objection and diminish the responsibility we have in the head of the Executive?

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1 Annals of Congress, 380.

1926, Myers v. United States, 272 U.S. 121

It was pointed out in this great debate that the power of removal, though equally essential to the executive power, is different in its nature from that of appointment. Madison, 1 Annals of Congress, 497, et seq.; Clymer, 1 Annals, 489; Sedgwick, 1 Annals, 522; Ames, 1 Annals, 541, 542; Hartley, 1 Annals, 481. A veto by the Senate—a part of the legislative branch of the Government—upon removals is a much greater limitation upon the executive branch and a much more serious blending of the legislative with the executive than a rejection of a proposed appointment. It is not to be implied. The rejection of a nominee of the President for a particular office does not greatly embarrass him in the conscientious discharge of his high duties in the selection of those who are to aid him, because the President usually has an ample field from which to select for office, according to his preference, competent and capable men. The Senate has full power to reject newly proposed appointees whenever the President shall remove the incumbents. Such a check enables the Senate to prevent the filling of offices with bad or incompetent men or with those against whom there is tenable objection.

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The power to prevent the removal of an officer who has served under the President is different from the authority to consent to or reject his appointment. When a nomination is made, it may be presumed that the Senate is, or may become, as well advised as to the fitness of the nominee [272 U.S. 122] as the President, but, in the nature of things, the defects in ability or intelligence or loyalty in the administration of the laws of one who has served as an officer under the President are facts as to which the President, or his trusted subordinates, must be better informed than the Senate, and the power to remove him may, therefore, be regarded as confined, for very sound and practical reasons, to the governmental authority which has administrative control. The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.

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Oliver Ellsworth was a member of the Senate of the First Congress, and was active in securing the imposition of the Senate restriction upon appointments by the President. He was the author of the Judiciary Act in that Congress, and subsequently Chief Justice of the United States. His view as to the meaning of this article of the Constitution, upon the point as to whether the advice of the Senate was necessary to removal, like that of Madison, formed and expressed almost in the very atmosphere of the Convention, was entitled to great weight. What he said in the discussion in the Senate was reported by Senator William Patterson, 2 Bancroft, History of the Constitution of the United States, 192, as follows:

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The three distinct powers, legislative, judicial and executive, should be placed in different hands. "He shall take care that the laws be faithfully executed" are sweeping words. The officers should be attentive to the President to whom the Senate is not a council. To turn a man out of office is an exercise neither of legislative nor of judicial power; it is like a tree growing upon land that has been granted. The advice of the Senate does not make the appointment. The President appoints. There [272 U.S. 123] are certain restrictions in certain cases, but the restriction is as to the appointment, and not as to the removal.

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In the discussion in the First Congress, fear was expressed that such a constitutional rule of construction as was involved in the passage of the bill would expose the country to tyranny through the abuse of the exercise of the power of removal by the President. Underlying such fears was the fundamental misconception that the President's attitude in his exercise of power is one of opposition to the people, while the Congress is their only defender in the Government, and such a misconception may be noted in the discussions had before this Court. This view was properly contested by Mr. Madison in the discussion (1 Annals of Congress, 461), by Mr. Hartley (1 Annals, 481), by Mr. Lawrence (1 Annals, 485), and by Mr. Scott (1 Annals, 533). The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature, whose constituencies are local, and not countrywide; and, as the President is elected for four years, with the mandate of the people to exercise his executive power under the Constitution, there would seem to be no reason for construing that instrument in such a way as to limit and hamper that power beyond the limitations of it, expressed or fairly implied.

1926, Myers v. United States, 272 U.S. 123

Another argument advanced in the First Congress against implying the power of removal in the President alone from its necessity in the proper administration of the executive power was that all embarrassment in this respect could be avoided by the President's power of suspension of officers, disloyal or incompetent, until the Senate could act. To this, Mr. Benson, said:

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Gentlemen ask, will not the power of suspending an officer be sufficient to prevent mal-conduct? Here is some [272 U.S. 124] inconsistency in their arguments. They declare that Congress have no right to construe the Constitution in favor of the President with respect to removal; yet they propose to give a construction in favor of the power of suspension being exercised by him. Surely gentlemen do not pretend that the President has the power of suspension granted expressly by the Constitution; if they do, they have been more successful in their researches into that instrument than I have been. If they are willing to allow a power of suspending, it must be because they construe some part of the Constitution in favor of such a grant. The construction in this case must be equally unwarrantable. But admitting it proper to grant this power, what then? When an officer is suspended, does the place become vacant? May the President proceed to fill it up? Or must the public business be likewise suspended? When we say an officer is suspended, it implies that the place is not vacant; but the parties may be heard, and, after the officer is freed from the objections that have been taken to his conduct, he may proceed to execute the duties attached to him. What would be the consequence of this? If the Senate, upon its meeting, were to acquit the officer, and replace him in his station, the President would then have a man forced on him whom he considered as unfaithful, and could not, consistent with his duty, and a proper regard to the general welfare, go so far as to entrust him with full communications relative to the business of his department. Without a confidence in the Executive department, its operations would be subject to perpetual discord, and the administration of the Government become impracticable.

1926, Myers v. United States, 272 U.S. 124

1 Annals of Congress, 506.

1926, Myers v. United States, 272 U.S. 124

Mr. Vining said:

1926, Myers v. United States, 272 U.S. 124

The Departments of Foreign Affairs and War are peculiarly within the powers of the President, and he must be responsible for them; but take away his controlling power, and upon what principle do you require his responsibility? [272 U.S. 125]

1926, Myers v. United States, 272 U.S. 125

The gentlemen say the President may suspend. They were asked if the Constitution gave him this power any more than the other? Do they contend the one to be a more inherent power than the other? If they do not, why shall it be objected to us that we are making a Legislative construction of the Constitution, when they are contending for the same thing?

1926, Myers v. United States, 272 U.S. 125

1 Annals of Congress, 512.

1926, Myers v. United States, 272 U.S. 125

In the case before us, the same suggestion has been made for the same purpose, and we think it is well answered in the foregoing. The implication of removal by the President alone is no more a strained construction of the Constitution than that of suspension by him alone, and the broader power is much more needed and more strongly to be implied.

1926, Myers v. United States, 272 U.S. 125

Third. Another argument urged against the constitutional power of the President alone to remove executive officers appointed by him with the consent of the Senate is that, in the absence of an express power of removal granted to the President, power to make provision for removal of all such officers is vested in the Congress by section 8 of Article I.

1926, Myers v. United States, 272 U.S. 125

Mr. Madison, mistakenly thinking that an argument like this was advanced by Roger Sherman, took it up and answered it as follows:

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He seems to think (if I understand him rightly) that the power of displacing from office is subject to Legislative discretion, because, having a right to create, it may limit or modify as it thinks proper. I shall not say but at first view this doctrine may seem to have some plausibility. But when I consider that the Constitution clearly intended to maintain a marked distinction between the Legislative, Executive, and Judicial powers of Government, and when I consider that, if the Legislature has a power such as is contended for, they may subject and transfer at discretion powers from one department of our Government to another; they may, on that principle, [272 U.S. 126] exclude the President altogether from exercising any authority in the removal of officers; they may give [it] to the Senate alone, or the President and Senate combined; they may vest it in the whole Congress; or they may reserve it to be exercised by this house. When I consider the consequences of this doctrine, and compare them with the true principles of the Constitution, I own that I cannot subscribe to it. . . .

1926, Myers v. United States, 272 U.S. 126

1 Annals of Congress, 495, 496.

1926, Myers v. United States, 272 U.S. 126

Of the eleven members of the House who spoke from amongst the twenty-two opposing the bill, two insisted that there was no power of removing officers after they had been appointed, except by impeachment, and that the failure of the Constitution expressly to provide another method of removal involved this conclusion. Eight of them argued that the power of removal was in the President and the Senate—that the House had nothing to do with it, and most of these were very insistent upon this view in establishing their contention that it was improper for the House to express in legislation any opinion on the constitutional question whether the President could remove without the Senate's consent.

1926, Myers v. United States, 272 U.S. 126

The constitutional construction that excludes Congress from legislative power to provide for the removal of superior officers finds support in the second section of Article II. By it, the appointment of all officers, whether superior or inferior, by the President is declared to be subject to the advice and consent of the Senate. In the absence of any specific provision to the contrary, the power of appointment to executive office carries with it, as a necessary incident, the power of removal. Whether the Senate must concur in the removal is aside from the point we now are considering. That point is that, by the specific constitutional provision for appointment of executive officers, with its necessary incident of removal, the power of appointment and removal is clearly provided for by [272 U.S. 127] the Constitution, and the legislative power of Congress in respect to both is excluded save by the specific exception as to inferior offices in the clause that follows, viz.,

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but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

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These words, it has been held by this Court, give to Congress the power to limit and regulate removal of such inferior officers by heads of departments when it exercises its constitutional power to lodge the power of appointment with them. United States v. Perkins, 116 U.S. 483, 485. Here, then, is an express provision, introduced in words of exception, for the exercise by Congress of legislative power in the matter of appointments and removals in the case of inferior executive officers. The phrase "But Congress may by law vest" is equivalent to "excepting that Congress may by law vest." By the plainest implication, it excludes Congressional dealing with appointments or removals of executive officers not falling within the exception, and leaves unaffected the executive power of the President to appoint and remove them.

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A reference of the whole power of removal to general legislation by Congress is quite out of keeping with the plan of government devised by the framers of the Constitution. It could never have been intended to leave to Congress unlimited discretion to vary fundamentally the operation of the great independent executive branch of government, and thus most seriously to weaken it. It would be a delegation by the Convention to Congress of the function of defining the primary boundaries of another of the three great divisions of government. The inclusion of removals of executive officers in the executive power vested in the President by Article II, according to its usual definition, and the implication of his power of removal of such officers from the provision of section 2 expressly recognizing in him the power of their appointment, [272 U.S. 128] are a much more natural and appropriate source of the removing power.

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It is reasonable to suppose also that, had it been intended to give to Congress power to regulate or control removals in the manner suggested, it would have been included among the specifically enumerated legislative powers in Article I, or in the specified limitations on the executive power in Article II. The difference between the grant of legislative power under Article I to Congress, which is limited to powers therein enumerated, and the more general grant of the executive power to the President under Article II, is significant. The fact that the executive power is given in general terms, strengthened by specific terms where emphasis is appropriate, and limited by direct expressions where limitation is needed, and that no express limit is placed on the power of removal by the executive, is a convincing indication that none was intended.

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It is argued that the denial of the legislative power to regulate removals in some way involves the denial of power to prescribe qualifications for office, or reasonable classification for promotion, and yet that has been often exercised. We see no conflict between the latter power and that of appointment and removal, provided, of course, that the qualifications do not so limit selection and so trench upon executive choice as to be, in effect, legislative designation. As Mr. Madison said in the First Congress:

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The powers relative to offices are partly Legislative and partly Executive. The Legislature creates the office, defines the powers, limits its duration, and annexes a compensation. This done, the Legislative power ceases. They ought to have nothing to do with designating the man to fill the office. That I conceive to be of an Executive nature. Although it be qualified in the Constitution, I would not extend or strain that qualification beyond the limits precisely fixed for it. We ought always to consider [272 U.S. 129] the Constitution with an eye to the principles upon which it was founded. In this point of view, we shall readily conclude that, if the Legislature determines the powers, the honors, and emoluments of an office, we should be insecure if they were to designate the officer also. The nature of things restrains and confines the Legislative and Executive authorities in this respect, and hence it is that the Constitution stipulates for the independence of each branch of the Government.

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1 Annals of Congress, 581, 582.

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The legislative power here referred to by Mr. Madison is the legislative power of Congress under the Constitution, not legislative power independently of it. Article II expressly and by implication withholds from Congress power to determine who shall appoint and who shall remove except as to inferior offices. To Congress under its legislative power is given the establishment of offices, the determination of their functions and jurisdiction, the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees, and the fixing of the term for which they are to be appointed, and their compensation—all except as otherwise provided by the Constitution.

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An argument in favor of full Congressional power to make or withhold provision for removals of all appointed by the President is sought to be found in an asserted analogy between such a power in Congress and its power in the establishment of inferior federal courts. By Article III, the judicial power of the United States is vested in one Supreme Court and in such inferior courts as the Congress may from time to time establish. By section 8 of Article I, also, Congress is given power to constitute tribunals inferior to the Supreme Court. By the second section, the judicial power is extended to all cases in law and equity under this Constitution and to a substantial number of other classes of cases. Under the accepted [272 U.S. 130] construction, the cases mentioned in this section are treated as a description and reservoir of the judicial power of the United States and a boundary of that federal power as between the United States and the States, and the field of jurisdiction within the limits of which Congress may vest particular jurisdiction in anyone inferior federal court which it may constitute. It is clear that the mere establishment of a federal inferior court does not vest that court with all the judicial power of the United States as conferred in the second section of Article III, but only that conferred by Congress specifically on the particular court. It must be limited territorially and in the classes of cases to be heard, and the mere creation of the court does not confer jurisdiction except as it is conferred in the law of its creation or its amendments. It is said that, similarly, in the case of the executive power which is "vested in the President," the power of appointment and removal cannot arise until Congress creates the office and its duties and powers, and must accordingly be exercised and limited only as Congress shall, in the creation of the office, prescribe.

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We think there is little or no analogy between the two legislative functions of Congress in the cases suggested. The judicial power described in the second section of Article III is vested in the courts collectively, but is manifestly to be distributed to different courts and conferred or withheld as Congress shall, in its discretion, provide their respective jurisdictions, and is not all to be vested in one particular court. Any other construction would be impracticable. The duty of Congress, therefore, to make provision for the vesting of the whole federal judicial power in federal courts, were it held to exist, would be one of imperfect obligation, and unenforceable. On the other hand, the moment an office and its powers and duties are created, the power of appointment and removal, as limited by the Constitution, vests in the Executive. [272 U.S. 131] The functions of distributing jurisdiction to courts, and the exercise of it when distributed and vested, are not at all parallel to the creation of an office, and the mere right of appointment to, and of removal from, the office, which at once attaches to the Executive by virtue of the Constitution.

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Fourth. Mr. Madison and his associates pointed out with great force the unreasonable character of the view that the Convention intended, without express provision, to give to Congress or the Senate, in case of political or other differences, the means of thwarting the Executive in the exercise of his great powers and in the bearing of his great responsibility, by fastening upon him, as subordinate executive officers, men who, by their inefficient service under him, by their lack of loyalty to the service, or by their different views of policy, might make his taking care that the laws be faithfully executed most difficult or impossible.

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As Mr. Madison said in the debate in the First Congress:

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Vest this power in the Senate jointly with the President, and you abolish at once that great principle of unity and responsibility in the Executive department which was intended for the security of liberty and the public good. If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved, the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.

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1 Annals of Congress, 499.

1926, Myers v. United States, 272 U.S. 131

Mr. Boudinot of New Jersey said upon the same point:

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The supreme Executive officer against his assistant, and the Senate are to sit as judges to determine whether sufficient cause of removal exists. Does not this set the Senate over the head of the President? But suppose they [272 U.S. 132] shall decide in favor of the officer, what a situation is the President then in, surrounded by officers with whom, by his situation, he is compelled to act, but in whom he can have no confidence, reversing the privilege given him by the Constitution to prevent his having officers imposed upon him who do not meet his approbation?

1926, Myers v. United States, 272 U.S. 132

1 Annals of Congress, 468.

1926, Myers v. United States, 272 U.S. 132

Mr. Sedgwick of Massachusetts asked the question:

1926, Myers v. United States, 272 U.S. 132

Shall a man under these circumstances be saddled upon the President who has been appointed for no other purpose but to aid the President in performing certain duties? Shall he be continued, I ask again, against the will of the President? If he is, where is the responsibility? Are you to look for it in the President, who has no control over the officer, no power to remove him if he acts unfeelingly or unfaithfully? Without you make him responsible, you weaken and destroy the strength and beauty of your system.

1926, Myers v. United States, 272 U.S. 132

1 Annals of Congress, 522.

1926, Myers v. United States, 272 U.S. 132

Made responsible under the Constitution for the effective enforcement of the law, the President needs as an indispensable aid to meet it the disciplinary influence upon those who act under him of a reserve power of removal. But it is contended that executive officers appointed by the President with the consent of the Senate are bound by the statutory law, and are not his servants to do his will, and that his obligation to care for the faithful execution of the laws does not authorize him to treat them as such. The degree of guidance in the discharge of their duties that the President may exercise over executive officers varies with the character of their service as prescribed in the law under which they act. The highest and most important duties which his subordinates perform are those in which they act for him. In such cases, they are exercising not their own, but his, discretion. This field is a very large one. It is sometimes described as political. Kendall v. United States, 12 [272 U.S. 133] Peters 524 at p. 610. Each head of a department is and must be the President's alter ego in the matters of that department where the President is required by law to exercise authority.

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The extent of the political responsibility thrust upon the President is brought out by Mr. Justice Miller, speaking for the Court in Cunningham v. Neagle, 135 U.S. 1 at p. 63:

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The Constitution, section 3, Article 2, declares that the President "shall take care that the laws be faithfully executed," and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and by and with the advice and consent of the Senate to appoint the most important of them and to fill vacancies. He is declared to be commander in chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by Acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the performance of the great duties of his office and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that "he shall take care that the laws be faithfully executed."

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He instances executive dealings with foreign governments, as in the case of Martin Koszta, and he might have added the Jonathan Robbins case as argued by John Marshall in Congress, 5 Wheat. Appendix 1, and approved by this Court in Fong Yue Ting v. United States, 149 U.S. 698, 714. He notes the President's duty as to the protection of the mails, as to which the case of In re Debs, 158 U.S. 564, 582-584 affords an illustration. He [272 U.S. 134] instances executive obligation in protection of the public domain, as in United States v. San Jacinto Tin Co., 125 U.S. 273, and United States v. Hughes, 11 How. 552. The possible extent of the field of the President's political executive power may be judged by the fact that the quasi-civil governments of Cuba, Porto Rico and the Philippines, in the silence of Congress, had to be carried on for several years solely under his direction as commander in chief.

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In all such cases, the discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it. In this field, his cabinet officers must do his will. He must place in each member of his official family, and his chief executive subordinates, implicit faith. The moment that he loses confidence in the intelligence, ability, judgment or loyalty of anyone of them, he must have the power to remove him without delay. To require him to file charges and submit them to the consideration of the Senate might make impossible that unity and coordination in executive administration essential to effective action.

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The duties of the heads of departments and bureaus in which the discretion of the President is exercised and which we have described are the most important in the whole field of executive action of the Government. There is nothing in the Constitution which permits a distinction between the removal of the head of a department or a bureau, when he discharges a political duty of the President or exercises his discretion, and the removal of executive officers engaged in the discharge of their other normal duties. The imperative reasons requiring an unrestricted power to remove the most important of his subordinates in their most important duties must, therefore, control the interpretation of the Constitution as to all appointed by him. [272 U.S. 135]

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But this is not to say that there are not strong reasons why the President should have a like power to remove his appointees charged with other duties than those above described. The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone. Laws are often passed with specific provision for the adoption of regulations by a department or bureau head to make the law workable and effective. The ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President must consider and supervise in his administrative control. Finding such officers to be negligent and inefficient, the President should have the power to remove them. Of course, there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance. Then there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control. But even in such a case, he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been, on the whole, intelligently or wisely exercised. Otherwise, he does not discharge his own constitutional duty of seeing that the laws be faithfully executed. [272 U.S. 136]

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We have devoted much space to this discussion and decision of the question of the Presidential power of removal in the First Congress, not because a Congressional conclusion on a constitutional issue is conclusive, but, first, because of our agreement with the reasons upon which it was avowedly based; second, because this was the decision of the First Congress, on a question of primary importance in the organization of the Government, made within two years after the Constitutional Convention and within a much shorter time after its ratification; and, third, because that Congress numbered among its leaders those who had been members of the Convention. It must necessarily constitute a precedent upon which many future laws supplying the machinery of the new Government would be based, and, if erroneous, it would be likely to evoke dissent and departure in future Congresses. It would come at once before the executive branch of the Government for compliance, and might well be brought before the judicial branch for a test of its validity. As we shall see, it was soon accepted as a final decision of the question by all branches of the Government.

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It was, of course, to be expected that the decision would be received by lawyers and jurists with something of the same division of opinion as that manifested in Congress, and doubts were often expressed as to its correctness. But the acquiescence which was promptly accorded it after a few years was universally recognized.

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A typical case of such acquiescence was that of Alexander Hamilton. In the discussion in the House of Representatives in 1789, Mr. White and others cited the opinion of Mr. Hamilton in respect of the necessity for the consent of the Senate to removals by the President, before they should be effective. (1 Annals, First Congress, 456.) It was expressed in No. 77 of the Federalist as follows: [272 U.S. 137]

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It has been mentioned as one of the advantages to be expected from the cooperation of the Senate in the business of appointments that it would contribute to the stability of the Administration. The consent of that body would be necessary to displace, as well as to appoint. A change of the Chief Magistrate, therefore, would not occasion so violent or so general a revolution in the officers of the Government as might be expected if he were the sole disposer of offices.

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Hamilton changed his view of this matter during his incumbency as Secretary of the Treasury in Washington's Cabinet, as is shown by his view of Washington's first proclamation of neutrality in the war between France and Great Britain. That proclamation was at first criticized as an abuse of executive authority. It has now come to be regarded as one of the greatest and most valuable acts of the first President's Administration, and has been often followed by succeeding Presidents. Hamilton's argument was that the Constitution, by vesting the executive power in the President, gave him the right, as the organ of intercourse between the Nation and foreign nations, to interpret national treaties and to declare neutrality. He deduced this from Article II of the Constitution on the executive power, and followed exactly the reasoning of Madison and his associates as to the executive power upon which the legislative decision of the First Congress as to Presidential removals depends, and he cites it as authority. He said:

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The second article of the Constitution of the United States, section first, establishes this general proposition, that "the Executive Power shall be vested in a President of the United States of America."

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The same article, in a succeeding section, proceeds to delineate particular cases of executive power. It declares, among other things, that the President shall be commander in chief of the army and navy of the United [272 U.S. 138] States, and of the militia of the several states, when called into the actual service of the United States; that he shall have power, by and with the advice and consent of the Senate, to make treaties; that it shall be his duty to receive ambassadors and other public ministers, and to take care that the laws be faithfully executed.

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It would not consist with the rules of sound construction to consider this enumeration of particular authorities as derogating from the more comprehensive grant in the general clause, further than as it may be coupled with express restrictions or limitations; as in regard to the cooperation of the Senate in the appointment of officers and the making of treaties; which are plainly qualifications of the general executive powers of appointing officers and making treaties. The difficulty of a complete enumeration of all the cases of executive authority would naturally dictate the use of general terms, and would render it improbable that a specification of certain particulars was designed as a substitute for those terms, when antecedently used. The different mode of expression employed in the Constitution, in regard to the two powers, the legislative and the executive, serves to confirm this inference. In the article which gives the legislative powers of the government, the expressions are "All legislative powers herein granted shall be vested in a congress of the United States." In that which grants the executive power, the expressions are "The executive power shall be vested in a President of the United States."

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The enumeration ought therefore to be considered as intended merely to specify the principal articles implied in the definition of executive power, leaving the rest to flow from the general grant of that power, interpreted in conformity with other parts of the Constitution, and with the principles of free government.

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The general doctrine of our Constitution, then, is that the executive power of the nation is vested in the President, [272 U.S. 139] subject only to the exceptions and qualifications, which are expressed in the instrument.

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Two of these have already been noticed; the participation of the Senate in the appointment of officers and in the making of treaties. A third remains to be mentioned: the right of the legislature to "declare war and grant letters of marque and reprisal."

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With these exceptions, the executive power of the United States is completely lodged in the President. This mode of construing the Constitution has indeed been recognized by Congress in formal acts upon full consideration and debate, of which the power of removal from office is an important instance. It will follow that, if a proclamation of neutrality is merely an executive act, as it is believed, has been shown, the step which has been taken by the President is liable to no just exception on the score of authority.

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7 J. C. Hamilton's "Works of Hamilton," 80-81.

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The words of a second great constitutional authority, quoted as in conflict with the Congressional decision, are those of Chief Justice Marshall. They were used by him in his opinion in Marbury v. Madison, 1 Cranch. 137 (1803). The judgment in that case is one of the great landmarks in the history of the construction of the Constitution of the United States, and is of supreme authority, first, in respect of the power and duty of the Supreme Court and other courts to consider and pass upon the validity of acts of Congress enacted in violation of the limitations of the Constitution, when properly brought before them in cases in which the rights of the litigating parties require such consideration and decision, and, second, in respect of the lack of power of Congress to vest in the Supreme Court original jurisdiction to grant the remedy of mandamus in cases in which by the Constitution it is given only appellate jurisdiction. But it is not to be regarded as such authority in respect of the [272 U.S. 140] power of the President to remove officials appointed by the advice and consent of the Senate, for that question was not before the Court.

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The case was heard upon a rule served upon James Madison, Secretary of State, to show cause why a writ of mandamus should not issue directing the defendant, Madison, to deliver to William Marbury his commission as a justice of the peace for the County of Washington in the District of Columbia. The rule was discharged by the Supreme Court for the reason that the Court had no jurisdiction in such a case to issue a writ for mandamus.

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The Court had, therefore, nothing before it calling for a judgment upon the merits of the question of issuing the mandamus. Notwithstanding this, the opinion considered preliminarily, first, whether the relator had the right to the delivery of the commission, and second, whether it was the duty of the Secretary of State to deliver it to him, and a duty which could be enforced in a court of competent jurisdiction at common law by a writ of mandamus. The facts disclosed by affidavits filed were that President Adams had nominated Marbury to be a justice of the peace in the District of Columbia, under a law of Congress providing for such appointment, by and with the advice and consent of the Senate, for the term of five years, and that the Senate had consented to such an appointment; that the President had signed the commission as provided by the Constitution, and had transmitted it to the Secretary of State, who, as provided by statute, had impressed the seal of the United States thereon. The opinion of the Chief Justice on these questions was that the commission was only evidence of the appointment; that, upon delivery of the signed commission by the President to the Secretary of State, the office was filled, and the occupant was thereafter entitled to the evidence of his appointment in the form of the commission; that the duty of the Secretary in delivering the commission to the officer entitled [272 U.S. 141] was merely ministerial, and could be enforced by mandamus; that the function of the Secretary in this regard was entirely to be distinguished from his duty as a subordinate to the President in the discharge of the President's political duties, which could not be controlled.

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It would seem that this conclusion applied, under the reasoning of the opinion, whether the officer was removable by the President or not, if in fact the President had not removed him. But the opinion assumed that, in the case of a removable office, the writ would fail, on the presumption that there was in such a case discretion of the appointing power to withhold the commission. And so the Chief Justice proceeded to express an opinion on the question whether the appointee was removable by the President. He said:

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As the law creating the office gave the officer a right to hold it for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights which are protected by the laws of his country.

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There was no answer by Madison to the rule issued in the case. The case went by default. It did not appear, even by avowed opposition to the issue of the writ, that the President had intervened in the matter at all. It would seem to have been quite consistent with the case as shown that this was merely an arbitrary refusal by the Secretary to perform his ministerial function, and, therefore, that the expression of opinion that the officer was not removable by the President was unnecessary, even to the conclusion that a writ in a proper case could issue. However this may be, the whole statement was certainly obiter dictum with reference to the judgment actually reached. The question whether the officer was removable was not argued to the Court by any counsel contending for that view. Counsel for the relator, who made the only argument, contended that the officer was not removable by the President, because he held a judicial office and, [272 U.S. 142] under the Constitution, could not be deprived of his office for the five years of his term by Presidential action. The opinion contains no wider discussion of the question than that quoted above.

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While everything that the great Chief Justice said, whether obiter dictum or not, challenges the highest and most respectful consideration, it is clear that the mere statement of the conclusion made by him, without any examination of the discussion which went on in the First Congress, and without reference to the elaborate arguments there advanced to maintain the decision of 1789, cannot be regarded as authority in considering the weight to be attached to that decision—a decision which, as we shall see, he subsequently recognized as a well established rule of constitutional construction.

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In such a case, we may well recur to the Chief Justice's own language in Cohens v. Virginia, 6 Wheat. 264, 399, in which, in declining to yield to the force of his previous language in Marbury v. Madison, which was unnecessary to the judgment in that case and was obiter dictum, he said:

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It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

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The weight of this dictum of the Chief Justice as to a Presidential removal, in Marbury v. Madison, was considered by this Court in Parsons v. United States, 167 [272 U.S. 143] U.S. 324. It was a suit by Parsons against the United States for the payment of the balance due for his salary and fees as United States District Attorney for Alabama. He had been commissioned as such, under the statute, for the term of four years from the date of the commission, subject to the conditions prescribed by law. There was no express power of removal provided. Before the end of the four years, he was removed by the President. He was denied recovery.

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The language of the Court in Marbury v. Madison, already referred to, was pressed upon this Court to show that Parsons was entitled, against the Presidential action of removal, to continue in office. If it was authoritative and stated the law as to an executive office, it ended the case; but this Court did not recognize it as such, for the reason that the Chief Justice's language relied on was not germane to the point decided in Marbury v. Madison. If his language was more than a dictum, and was a decision, then the Parsons case overrules it.

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Another distinction, suggested by Mr. Justice Peckham in Parsons' case was that the remarks of the Chief Justice were in reference to an office in the District of Columbia over which, by Art. I, sec. 8, subd. 17, Congress had exclusive jurisdiction in all cases, and might not apply to offices outside of the District in respect to which the constant practice and the Congressional decision had been the other way (p. 335). How much weight should be given to this distinction, which might accord to the special exclusive jurisdiction conferred on Congress over the District power to ignore the usual constitutional separation between the executive and legislative branches of the Government, we need not consider.

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If the Chief Justice, in Marbury v. Madison, intended to express an opinion for the Court inconsistent with the legislative decision of 1789, it is enough to observe that he changed his mind; for otherwise it is inconceivable that [272 U.S. 144] he should have written and printed his full account of the discussion and decision in the First Congress and his acquiescence in it, to be found in his Life of Washington (Vol. V, pages 192-200).

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He concluded his account as follows:

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After an ardent discussion which consumed several days, the committee divided, and the amendment [i.e., to strike out from the original bill the words "to be removable by the President"] was negatived by a majority of thirty-four to twenty. The opinion thus expressed by the house of representatives did not explicitly convey their sense of the Constitution. Indeed, the express grant of the power to the president, rather implied a right in the legislature to give or withhold it at their discretion. To obviate any misunderstanding of the principle on which the question had been decided, Mr. Benson [later] moved in the house, when the report of the committee of the whole was taken up, to amend the second clause in the bill so as clearly to imply the power of removal to be solely in the president. He gave notice that, if he should succeed in this, he would move to strike out the words which had been the subject of debate. If those words continued, he said, the power of removal by the president might hereafter appear to be exercised by virtue of a legislative grant only, and consequently be subjected to legislative instability, when he was well satisfied in his own mind that it was by fair construction, fixed in the constitution. The motion was seconded by Mr. Madison, and both amendments were adopted. As the bill passed into a law, it has ever been considered as a full expression of the sense of the legislature on this important part of the American constitution.

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This language was first published in 1807, four years after the judgment in Marbury v. Madison, and the edition was revised by the Chief Justice in 1832. 3 Beveridge, Life of Marshall, 248, 252, 272, 273. [272 U.S. 145]

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Congress, in a number of acts, followed and enforced the legislative decision of 1789 for seventy-for years. In the act of the First Congress which adapted to the Constitution the ordinance of 1787 for the government of the Northwest Territory, which had provided for the appointment and removal of executive territorial officers by the Congress under the Articles of Confederation, it was said

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in all cases where the United States in Congress assembled might, by the said ordinance, revoke any commission or remove from any office, the President is hereby declared to have the same powers of revocation and removal.

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1 Stat. 53, c. 8. This was approved eleven days after the act establishing the Department of Foreign Affairs, and was evidently in form a declaration in accord with the legislative constitutional construction of the latter act. In the provision for the Treasury and War Departments, the same formula was used as occurred in the act creating the Department of Foreign Affairs; but it was omitted from other creative acts only because the decision was thought to be settled constitutional construction. In re Hennen, 13 Peters 230, 259.

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Occasionally we find that Congress thought it wiser to make express what would have been understood. Thus, in the Judiciary Act of 1789, we find it provided in § 27, 1 Stat. 87, c. 20,

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that a marshal shall be appointed in and for each district for the term of four years, but shall be removable at pleasure, whose duty it shall be to attend the District and Circuit Courts.

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That act became a law on September 24th, a month after the Congressional debate on removals. It was formulated by a Senate committee, of which Oliver Ellsworth was chairman, and which presumably was engaged in drafting it during the time of that debate. Section 35 of the same act provided for the appointment of an attorney for the United States to prosecute crimes and conduct civil actions on behalf of [272 U.S. 146] the United States, but nothing was said as to his term of office or as to his removal. The difference in the two cases was evidently to avoid any inference from the fixing of the term that a conflict with the legislative decision of 1789 was intended.

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In the Act of May 15, 1820, 3 Stat. 582, c. 102, Congress provided that thereafter, all district attorneys, collectors of customs, naval officers, surveyors of the customs, navy agents, receivers of public moneys for land, registers of the land office, paymasters in the army, the apothecary general, the assistant apothecaries general, and the commissary general of purchases, to be appointed under the laws of the United States, should be appointed for the term of four years, but should be removable from office at pleasure.

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It is argued that these express provisions for removal at pleasure indicate that, without them, no such power would exist in the President. We cannot accede to this view. Indeed, the conclusion that they were adopted to show conformity to the legislative decision of 1789 is authoritatively settled by a specific decision of this Court.

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In the Parsons case, 167 U.S. 324, already referred to, the exact question which the Court had to decide was whether, under § 769 of the Revised Statutes, providing that district attorneys should be appointed for a term of four years and their commissions should cease and expire at the expiration of four years from their respective dates, the appellant, having been removed by the President from his office as district attorney before the end of his term, could recover his salary for the remainder of the term. If the President had no power of removal, then he could recover. The Court held that, under that section, the President did have the power of removal, because of the derivation of the section from the Act of 1820, above quoted. In § 769, the specific provision of the Act of 1820 that the officers should be removable [272 U.S. 147] from office at pleasure was omitted. This Court held that the section should be construed as having been passed in the light of the acquiescence of Congress in the decision of 1789, and therefore included the power of removal by the President, even though the clause for removal was omitted. This reasoning was essential to the conclusion reached, and makes the construction by this Court of the Act of 1820 authoritative. The Court used, in respect of the Act of 1820, this language (167 U.S. 324, 339):

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The provision for a removal from office at pleasure was not necessary for the exercise of that power by the President, because of the fact that he was then regarded as being clothed with such power in any event. Considering the construction of the Constitution in this regard as given by the Congress. of 1789, and having in mind the constant and uniform practice of the Government in harmony with such construction, we must construe this act as providing absolutely for the expiration of the term of office at the end of four years, and not as giving a term that shall last, at all events, for that time, and we think the provision that the officials were removable from office at pleasure was but a recognition of the construction thus almost universally adhered to and acquiesced in as to the power of the President to remove.

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In the Act of July 17, 1862, 12 Stat. 596, c. 200, Congress actually requested the President to make removals in the following language:

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the President of the United States be, and hereby is, authorized and requested to dismiss and discharge from the military service, either in the army, navy, marine corps, or volunteer force, any officer for any cause which, in his judgment, either renders such officer unsuitable for, or whose dismission would promote, the public service.

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Attorney General Devens (15 Op.A.G. 421) said of this act that, so far as it gave authority to the President, [272 U.S. 148] it was simply declaratory of the long-established law; that the force of the act was to be found in the word "requested," by which it was intended to reenforce strongly this power in the hands of the President at a great crisis of the state—a comment by the Attorney General which was expressly approved by this Court in Blake v. United States, 103 U.S. 227, 234.

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The acquiescence in the legislative decision of 1789 for nearly three-quarters of a century by all branches of the Government has been affirmed by this Court in unmistakable terms. In Parsons v. United States, already cited, in which the matter of the power of removal was reviewed at length in connection with that legislative decision, this Court, speaking by Mr. Justice Peckham, said (page 330):

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Many distinguished lawyers originally had very different opinions in regard to this power from the one arrived at by this Congress, but, when the question was alluded to in after years, they recognized that the decision of Congress in 1789, and the universal practice of the Government under it, had settled the question beyond any power of alteration.

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We find this confirmed by Chancellor Kent's and Mr. Justice Story's comments. Chancellor Kent, in writing to Mr. Webster in January, 1830, concerning the decision of 1789, said:

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I heard the question debated in the summer of 1789, and Madison, Benson, Ames, Lawrence, etc. were in favor of the right of removal by the President, and such has been the opinion ever since, and the practice. I thought they were right because I then thought this side uniformly right.

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Then, expressing subsequent pause and doubt upon this construction as an original question because of Hamilton's original opinion in The Federalist, already referred to, he continued:

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On the other hand, it is too late to call the President's power in question after a declaratory act of Congress and [272 U.S. 149] an acquiescence of half a century. We should hurt the reputation of our government with the world, and we are accused already of the Republican tendency of reducing all executive power into the legislative, and making Congress a national convention. That the President grossly abuses the power of removal is manifest, but it is the evil genius of Democracy to be the sport of factions.

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1 Private Correspondence of Daniel Webster, Fletcher Webster ed., 486; 1903 National ed., Little Brown Co.

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In his Commentaries, referring to this question, the Chancellor said:

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This question has never been made the subject of judicial discussion, and the construction given to the Constitution in 1789 has continued to rest on this loose, incidental, declaratory opinion of Congress, and the sense and practice of government since that time. It may now be considered as firmly and definitely settled, and there is good sense and practical utility in the construction.

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1 Kent Commentaries, Lecture 14, p. 310, Subject, Marshals.

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Mr. Justice Story, after a very full discussion of the decision of 1789 in which he intimates that, as an original question, he would favor the view of the minority, says:

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That the final decision of this question so made was greatly influenced by the exalted character of the President then in office was asserted at the time, and has always been believed. Yet the doctrine was opposed, as well as supported, by the highest talents and patriotism of the country. The public, however, acquiesced in this decision, and it constitutes, perhaps, the most extraordinary case in the history of the government of a power, conferred by implication on the executive by the assent of a bare majority of Congress, which has not been questioned on many other occasions. Even the most jealous advocates of state rights seem to have slumbered over this vast reach of authority, and have left it untouched, as the neutral ground of controversy, in which they desired [272 U.S. 150] to reap no harvest, and from which they retired, without leaving any protestations of title or contest. Nor is this general acquiescence and silence without a satisfactory explanation.

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2 Story, Constitution, § 1543.

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He finds that, until a then very recent period, namely the Administration of President Jackson, the power of unrestricted removal had been exercised by all the Presidents, but that moderation and forbearance had been shown, that, under President Jackson, however, an opposite course had been pursued extensively and brought again the executive power of removal to a severe scrutiny. The learned author then says:

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If there has been any aberration from the true constitutional exposition of the power of removal (which the reader must decide for himself), it will be difficult, and perhaps impracticable, after forty years' experience, to recall the practice to correct theory. But, at all events, it will be a consolation to those who love the Union, and honor a devotion to the patriotic discharge of duty, that, in regard to "inferior officers" (which appellation probably includes ninety-nine out of a hundred of the lucrative offices in the government), the remedy for any permanent abuse is still within the power of Congress, by the simple expedient of requiring the consent of the Senate to removals in such cases.

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2 Story Constitution, § 1544.

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In an article by Mr. Fish contained in the American Historical Association Reports, 1899, p. 67, removals from office, not including Presidential removals in the Army and the Navy, in the administrations from Washington to Johnson, are stated to have been as follows: Washington 17; Adams 19; Jefferson 62; Madison 24; Jackson 180; Van Buren 43; Harrison and Tyler 389; Polk 228; Taylor 491; Fillmore 73; Pierce 771; Buchanan 253; Lincoln 1400; Johnson 726. These, we may infer, were all made in conformity to the legislative decision of 1789.

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Mr. Webster is cited as opposed to the decision of the First Congress. His views were evoked by the controversy [272 U.S. 151] between the Senate and President Jackson. The alleged general use of patronage for political purposes by the President, and his dismissal of Duane, Secretary of the Treasury, without reference to the Senate, upon Duane's refusal to remove government deposits from the United States Bank, awakened bitter criticism in the Senate, and led to an extended discussion of the power of removal by the President. In a speech, May 7, 1834, on the President's protest, Mr. Webster asserted that the power of removal, without the consent of the Senate, was in the President alone, according to the established construction of the Constitution, and that Duane's dismissal could not be justly said to be a usurpation. 4 Webster, Works, 103-105. A year later, in February, 1835, Mr. Webster seems to have changed his views somewhat, and, in support of a bill requiring the President in making his removals from office to send to the Senate his reasons therefor, made an extended argument against the correctness of the decision of 1789. He closed his speech thus:

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But I think the decision of 1789 has been established by practice, and recognized by subsequent laws, as the settled construction of the Constitution, and that it is our duty to act upon the case accordingly for the present, without admitting that Congress may not, hereafter, if necessity shall require it, reverse the decision of 1789.

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4 Webster, 179, 198. Mr. Webster denied that the vesting of the executive power in the President was a grant of power. It amounted, he said, to no more than merely naming the department. Such a construction, although having the support of as great an expounder of the Constitution as Mr. Webster, is not in accord with the usual canon of interpretation of that instrument, which requires that real effect should be given to all the words it uses. Prout v. Starr, 188 U.S. 537, 544; Hurtado v. California, 110 U.S. 516, 534; Prigg v. Pennsylvania, 16 Pet. 539, 612; Holmes v. Jennison, [272 U.S. 152] 14 Pet. 540, 570-571; Cohens v. Virginia, 6 Wheat. 264, 398; Marbury v. Madison, supra, at p. 174. Nor can we concur in Mr. Webster's apparent view that, when Congress, after full consideration and with the acquiescence and long practice of all the branches of the Government, has established the construction of the Constitution, it may, by its mere subsequent legislation, reverse such construction. It is not given power by itself thus to amend the Constitution. It is not unjust to note that Mr. Webster's final conclusion on this head was reached after pronounced political controversy with General Jackson, which he concedes may have affected his judgment and attitude on the subject.

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Mr. Clay and Mr. Calhoun, acting upon a like impulse, also vigorously attacked the decision; but no legislation of any kind was adopted in that period to reverse the established constitutional construction, while its correctness was vigorously asserted and acted on by the Executive. On February 10, 1835, President Jackson declined to comply with the Senate resolution, regarding the charges which caused the removal of officials from office, saying:

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The President, in cases of this nature, possesses the exclusive power of removal from office, and, under the sanctions of his official oath and of his liability to impeachment, he is bound to exercise it whenever the public welfare shall require. If, on the other hand, from corrupt motives he abuses this power, he is exposed to the same responsibilities. On no principle known to our institutions can he be required to account for the manner in which he discharges this portion of his public duties. save only in the mode and under the forms prescribed by the Constitution.

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3 Messages of the Presidents, 1352.

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In Ex parte Hennen, 13 Peters 230, decided by this Court in 1839, the prevailing effect of the legislative decision of 1789 was fully recognized. The question there [272 U.S. 153] was of the legality of the removal from office by a United States District Court of its clerk, appointed by it under § 7 of the Judiciary Act, 1 Stat. 76, c. 20. The case was ably argued and the effect of the legislative decision of the First Congress was much discussed. The Court said (pp. 258-259):

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The Constitution is silent with respect to the power of removal from office, where the tenure is not fixed. It provides that the judges, both of the supreme and inferior courts, shall hold their offices during good behavior. But no tenure is fixed for the office of clerks. . . . It cannot, for a moment, be admitted that it was the intention of the Constitution that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment. This power of removal from office was a subject much disputed, and upon which a great diversity of opinion was entertained in the early history of this government. This related, however, to the power of the President to remove officers appointed with the concurrence of the Senate, and the great question was whether the removal was to be by the President alone, or with the concurrence of the Senate, both constituting the appointing power. No one denied the power of the President and Senate jointly to remove where the tenure of the office was not fixed by the Constitution, which was a full recognition of the principle that the power of removal was incident to the power of appointment. But it was very early adopted as the practical construction of the Constitution that this power was vested in the President alone. And such would appear to have been the legislative construction of the Constitution. For, in the organization of the three great [272 U.S. 154] departments of State, War and Treasury, in the year 1789, provision is made for the appointment of a subordinate officer by the head of the department, who should have the charge and custody of the records, books, and papers appertaining to the office when the head of the department should be removed from the office by the President of the United States. (1 Story, 5, 31, 47.) When the Navy Department was established in the year 1798 (1 Story, 498), provision is made for the charge and custody of the books, records, and documents of the department in case of vacancy in the office of secretary, by removal or otherwise. It is not here said, by removal by the President, as is done with respect to the heads of the other departments, and yet there can be no doubt that he holds his office by the same tenure as the other secretaries, and is removable by the President. The change of phraseology arose, probably, from its having become the settled and well understood construction of the Constitution that the power of removal was vested in the President alone in such cases, although the appointment of the officer was by the President and Senate.

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The legislative decision of 1789 and this Court's recognition of it were followed, in 1842, by Attorney General Legare, in the Administration of President Tyler (4 Op.A.G. 1); in 1847, by Attorney General Clifford, in the

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Administration of President Polk (4 Op.A.G. 603); by Attorney General Crittenden, in the Administration of President Fillmore (5 Op.A.G. 288, 290); by Attorney General Cushing, in the Administration of President Buchanan (6 Op.A.G. 4); all of whom delivered opinions of a similar tenor.

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It has been sought to make an argument, refuting our conclusion as to the President's power of removal of executive officers, by reference to the statutes passed and practice prevailing from 1789 until recent years in respect of the removal of judges whose tenure is not fixed by [272 U.S. 155] Article III of the Constitution, and who are not strictly United States Judges under that article. The argument is that, as there is no express constitutional restriction as to the removal of such judges, they come within the same class as executive officers, and that statutes and practice in respect of them may properly be used to refute the authority of the legislative decision of 1789 and acquiescence therein.

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The fact seems to be that judicial removals were not considered in the discussion in the First Congress, and that the First Congress, August 7, 1789, 1 Stat. 50-53, c. 8, and succeeding Congresses until 1804, assimilated the judges appointed for the territories to those appointed under Article III, and provided life tenure for them, while other officers of those territories were appointed for a term of years unless sooner removed. See, as to such legislation, dissenting opinion of Mr. Justice McLean in United States v. Guthrie, 17 How. 284, 308. In American Insurance Company v. Canter, 1 Peters 511 (1828), it was held that the territorial courts were not constitutional courts in which the judicial power conferred by the Constitution on the general government could be deposited. After some ten or fifteen years, the judges in some territories were appointed for a term of years, and the Governor and other officers were appointed for a term of years unless sooner removed. Inc Missouri and Arkansas only were the judges appointed for four years if not sooner removed.

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After 1804, removals were made by the President of territorial judges appointed for terms of years before the ends of their terms. They were sometimes suspended and sometimes removed. Between 1804 and 1867, there were ten removals of such judges in Minnesota, Utah, Washington, Oregon and Nebraska. The executive department seemed then to consider that territorial judges were subject to removal just as if they had been executive [272 U.S. 156] officers, under the legislative decision of 1789. Such was the opinion of Attorney General Crittenden on the question of the removal of the Chief Justice of Minnesota Territory (5 Op.A.G. 288) in 1851. Since 1867, territorial judges have been removed by the President, seven in Arizona, one in Hawaii, one in Indian Territory, two in Idaho, three in New Mexico, two in Utah, one in Wyoming,

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The question of the President's power to remove such a judge, as viewed by Mr. Crittenden, came before this Court in United States v. Guthrie, 17 How. 284. The relator, Goodrich, who had been removed by the President from his office as a territorial judge, sought by mandamus to compel the Secretary of the Treasury to draw his warrant for the relator's salary for the remainder of his term after removal, and contested the Attorney General's opinion that the President's removal in such a case was valid. This Court did not decide this issue, but held that it had no power to issue a writ of mandamus in such a case. Mr. Justice McLean delivered a dissenting opinion (at page 308). He differed from the Court in its holding that mandamus would not issue. He expressed a doubt as to the correctness of the legislative decision of the First Congress as to the power of removal by the President alone of executive officers appointed by him with the consent of the Senate, but admitted that the decision as to them had been so acquiesced in, and the practice had so conformed to it, that it could not be set aside. But he insisted that the statutes and practice which had governed the appointment and removal of territorial judges did not come within the scope and effect of the legislative decision of 1789. He pointed out that the argument upon which the decision rested was based on the necessity for Presidential removals in the discharge by the President of his executive duties and his taking care that the laws be faithfully executed, and that such an argument could not [272 U.S. 157] apply to the judges over whose judicial duties he could not properly exercise any supervision or control after their appointment and confirmation.

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In the case of McAllister v. United States, 141 U.S. 174, a judge of the District Court of Alaska, it was held, could be deprived of a right to salary as such by his suspension under Revised Statutes 1768. That section gave the President, in his discretion, authority to suspend any civil officer appointed by and with the advice and consent of the Senate, except judges of the courts of the United States, until the end of the next session of the Senate, and to designate some suitable person, subject to be removed in his discretion by the designation of another, to perform the duties of such suspended officer. It was held that the words "except judges of the courts of the United States" applied to judges appointed under Article III, and did not apply to territorial judges, and that the President, under § 1768, had power to suspend a territorial judge during a recess of the Senate, and no recovery could be had for salary during that suspended period. Mr. Justice Field, with Justices Gray and Brown, dissented on the ground that, in England, by the act of 13th William III, it had become established law that judges should hold their offices independent of executive removal, and that our Constitution expressly makes such limitation as to the only judges specifically mentioned in it, and should be construed to carry such limitation as to other judges appointed under its provisions.

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Referring in Parsons v. United States, 167 U.S. 324, at p. 337, to the McAllister case, this Court said:

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The case contains nothing in opposition to the contention as to the practical construction that had been given to the Constitution by Congress in 1789, and by the government generally since that time and up to the Act of 1867.

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The questions, first, whether a judge appointed by the President with the consent of the Senate under an act of [272 U.S. 158] Congress, not under authority of Article III of the Constitution, can be removed by the President alone without the consent of the Senate, second, whether the legislative decision of 1789 covers such a case, and third, whether Congress may provide for his removal in some other way present considerations different from those which apply in the removal of executive officers, and therefore we do not decide them.

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We come now to consider an argument advanced and strongly pressed on behalf of the complainant, that this case concerns only the removal of a postmaster; that a postmaster is an inferior officer; that such an office was not included within the legislative decision of 1789, which related only to superior officers to be appointed by the President by and with the advice and consent of the Senate. This, it is said, is the distinction which Chief Justice Marshall had in mind in Marbury v. Madison in the language already discussed in respect of the President's power to remove a District of Columbia justice of the peace appointed and confirmed for a term of years. We find nothing in Marbury v. Madison to indicate any such distinction. It cannot be certainly affirmed whether the conclusion there stated was based on a dissent from the legislative decision of 1789, or on the fact that the office was created under the special power of Congress exclusively to legislate for the District of Columbia, or on the fact that the office was a judicial one, or on the circumstance that it was an inferior office. In view of the doubt as to what was really the basis of the remarks relied on, and their obiter dictum character, they can certainly not be used to give weight to the argument that the 1789 decision only related to superior officers.

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The very heated discussions during General Jackson's Administration, except as to the removal of Secretary Duane, related to the distribution of offices which were, most of them, inferior offices, and it was the operation of [272 U.S. 159] the legislative decision of 1789 upon the power of removal of incumbents of such offices that led the General to refuse to comply with the request of the Senate that he give his reasons for the removals therefrom. It was to such inferior officers that Chancellor Kent's letter to Mr. Webster, already quoted, was chiefly directed, and the language cited from his Commentaries on the decision of 1789 was used with reference to the removal of United States marshal. It was such inferior offices that Mr. Justice Story conceded to be covered by the legislative decision in his Treatise on the Constitution, already cited, when he suggested a method by which the abuse of patronage in such offices might be avoided. It was with reference to removals from such inferior offices that the already cited opinions of the Attorneys General, in which the legislative decision of 1789 was referred to as controlling authority, were delivered. That of Attorney General Legare (4 Op.A.G. 1) affected the removal of a surgeon in the Navy. The opinion of Attorney General Clifford (4 Op.A.G. 603, 612) involved an officer of the same rank. The opinion of Attorney General Cushing (6 Op.A.G. 4) covered the office of military storekeeper. Finally, Parsons' case, where it was the point in judgment, conclusively establishes for this Court that the legislative decision of 1789 applied to a United States attorney, an inferior officer.

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It is further pressed on us that, even though the legislative decision of 1789 included inferior officers, yet, under the legislative power given Congress with respect to such officers, it might directly legislate as to the method of their removal without changing their method of appointment by the President with the consent of the Senate. We do not think the language of the Constitution justifies such a contention.

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Section 2 of Article II, after providing that the President shall nominate and with the consent of the Senate [272 U.S. 160] appoint ambassadors, other public ministers, consuls, judges of the Supreme Court and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law, contains the proviso:

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but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law or in the heads of departments.

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In United States v. Perkins, 116 U.S. 483, a cadet engineer, a graduate of the Naval Academy, brought suit to recover his salary for the period after his removal by the Secretary of the Navy. It was decided that his right was established by Revised Statutes 1229, providing that no officer in the military or naval service should in time of peace be dismissed from service except in pursuance of a sentence of court-martial. The section was claimed to be an infringement upon the constitutional prerogative of the Executive. The Court of Claims refused to yield to this argument, and said:

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Whether or not Congress can restrict the power of removal incident to the power of appointment to those officers who are appointed by the President by and with the advice and consent of the Senate under the authority of the Constitution, Article 2, Section 2, does not arise in this case, and need not be considered. We have no doubt that, when Congress by law vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers appointed. The head of a department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed not only in making appointments, but in all that is incident thereto. [272 U.S. 161]

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This language of the Court of Claims was approved by this Court and the judgment was affirmed.

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The power to remove inferior executive officers, like that to remove superior executive officers, is an incident of the power to appoint them, and is in its nature an executive power. The authority of Congress given by the excepting clause to vest the appointment of such inferior officers in the heads of departments carries with it authority incidentally to invest the heads of departments with power to remove. It has been the practice of Congress to do so and this Court has recognized that power. The Court also has recognized in the Perkins case that Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal. But the Court never has held, nor reasonably could hold, although it is argued to the contrary on behalf of the appellant, that the excepting clause enables Congress to draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of that clause and to infringe the constitutional principle of the separation of governmental powers.

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Assuming then the power of Congress to regulate removals as incidental to the exercise of its constitutional power to vest appointments of inferior officers in the heads of departments, certainly so long as Congress does not exercise that power, the power of removal must remain where the Constitution places it, with the President, as part of the executive power, in accordance with the legislative decision of 1789 which we have been considering.

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Whether the action of Congress in removing the necessity for the advice and consent of the Senate, and putting the power of appointment in the President alone, would [272 U.S. 162] make his power of removal in such case any more subject to Congressional legislation than before is a question this Court did not decide in the Perkins case. Under the reasoning upon which the legislative decision of 1789 was put, it might be difficult to avoid a negative answer, but it is not before us and we do not decide it.

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The Perkins case is limited to the vesting by Congress of the appointment of an inferior officer in the head of a department. The condition upon which the power of Congress to provide for the removal of inferior officers rests is that it shall vest the appointment in some one other than the President with the consent of the Senate. Congress may not obtain the power and provide for the removal of such officer except on that condition. If it does not choose to entrust the appointment of such inferior officers to less authority than the President with the consent of the Senate, it has no power of providing for their removal. That is the reason why the suggestion of Mr. Justice Story, relied upon in this discussion, cannot be supported if it is to have the construction which is contended for. He says that, in regard to inferior officers under the legislative decision of 1789,

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the remedy for any permanent abuse (i.e., of executive patronage) is still within the power of Congress by the simple expedient of requiring the consent of the Senate to removals in such cases.

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It is true that the remedy for the evil of political executive removals of inferior offices is with Congress by a simple expedient, but it includes a change of the power of appointment from the President with the consent of the Senate. Congress must determine first that the office is inferior, and second that it is willing that the office shall be filled by appointment by some other authority than the President with the consent of the Senate. That the latter may be an important consideration is manifest, and is the subject of comment by this Court in it opinion in the case of Shurtleff v. United States, 189 U.S. 311, 315, where this Court said: [272 U.S. 163]

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To take away this power of removal in relation to an inferior office created by statute, although that statute provided for an appointment thereto by the President and confirmation by the Senate, would require very clear and explicit language. It should not be held to be taken away by mere inference or implication. Congress has regarded the office as of sufficient importance to make it proper to fill it by appointment to be made by the President and confirmed by the Senate. It has thereby classed it as appropriately coming under the direct supervision of the President, and to be administered by officers appointed by him (and confirmed by the Senate) with reference to his constitutional responsibility to see that the laws are faithfully executed. Art. 2, sec. 3.

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It is said that, for forty years or more, postmasters were all by law appointed by the Postmaster General. This was because Congress, under the excepting clause, so provided. But thereafter, Congress required certain classes of them to be, as they now are, appointed by the President with the consent of the Senate. This is an indication that Congress deemed appointment by the President with the consent of the Senate essential to the public welfare, and, until it is willing to vest their appointment in the head of the Department, they will be subject to removal by the President alone, and any legislation to the contrary must fall a in conflict with the Constitution.

1926, Myers v. United States, 272 U.S. 163

Summing up, then, the facts as to acquiescence by all branches of the Government in the legislative decision of 1789, as to executive officers, whether superior or inferior, we find that from 1789 until 1863, a period of 74 years, there was no act of Congress, no executive act, and no decision of this Court at variance with the declaration of the First Congress, but there was, as we have seen, clear, affirmative recognition of it by each branch of the Government.

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Our conclusion on the merits, sustained by the arguments before stated, is that Article II grants to the President [272 U.S. 164] the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed; that Article II excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices; that Congress is only given power to provide for appointments and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President with the Senate's consent; that the provisions of the second section of Article II, which blend action by the legislative branch, or by part of it, in the work of the executive are limitations to be strictly construed, and not to be extended by implication; that the President's power of removal is further established as an incident to his specifically enumerated function of appointment by and with the advice of the Senate, but that such incident does not, by implication, extend to removals the Senate's power of checking appointments, and finally that to hold otherwise would make it impossible for the President, in case of political or other differences with the Senate or Congress, to take care that the laws be faithfully executed.

1926, Myers v. United States, 272 U.S. 164

We come now to a period in the history of the Government when both Houses of Congress attempted to reverse this constitutional construction and to subject the power of removing executive officers appointed by the President and confirmed by the Senate to the control of the Senate—indeed, finally, to the assumed power in Congress to place the removal of such officers anywhere in the Government.

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This reversal grew out of the serious political difference between the two Houses of Congress and President Johnson. [272 U.S. 165] There was a two-thirds majority of the Republican party in control of each House of Congress, which resented what it feared would be Mr. Johnson's obstructive course in the enforcement of the reconstruction measures in respect of the States whose people had lately been at war against the National Government. This led the two Houses to enact legislation to curtail the then acknowledged powers of the President. It is true that, during the latter part of Mr. Lincoln's term, two important voluminous acts were passed, each containing a section which seemed inconsistent with the legislative decision of 1789 (Act of February 25, 1863, 12 Stat. 665, c. 58, § 1, Act of March 3, 1865, 13 Stat. 489, c. 79, § 12); but they were adopted without discussion of the inconsistency, and were not tested by executive or judicial inquiry. The real challenge to the decision of 1789 was begun by the Act of July 13, 1866, 14 Stat. 92, c. 176, forbidding dismissals of Army and Navy officers in time of peace without a sentence by court-martial, which this Court, in Blake v. United States, 103 U.S. 227, at p. 235, attributed to the growing differences between President Johnson and Congress.

1926, Myers v. United States, 272 U.S. 165

Another measure having the same origin and purpose was a rider on an army appropriation act of March 2, 1867, 14 Stat. 487, c. 170, § 2, which fixed the headquarters of the General of the Army of the United States at Washington, directed that all orders relating to military operations by the President or Secretary of War should be issued through the General of the Army, who should not be removed, suspended, or relieved from command, or assigned to duty elsewhere, except at his own request, without the previous approval of the Senate, and that any orders or instructions relating to military operations issued contrary to this should be void, and that any officer of the Army who should issue, knowingly transmit, or obey any orders issued contrary to the provisions of [272 U.S. 166] this section should be liable to imprisonment for years. By the Act of March 27, 1868, 15 Stat. 44, c. 34, § 2, the next Congress repealed a statutory provision as to appeals in habeas corpus cases with the design, as was avowed by Mr. Schenck, chairman of the House Committee on Ways and Means, of preventing this Court from passing on the validity of reconstruction legislation. 81 Congressional Globe, pages 1881, 1883; Ex parte McArdle, 7 Wall. 506.

1926, Myers v. United States, 272 U.S. 166

But the chief legislation in support of the reconstruction policy of Congress was the Tenure of Office Act, of March 2, 1867, 14 Stat. 430, c. 154, providing that all officers appointed by and with the consent of the Senate should hold their offices until their successors should have in like manner been appointed and qualified, and that certain heads of departments, including the Secretary of War, should hold their offices during the term of the President by whom appointed and one month thereafter, subject to removal by consent of the Senate. The Tenure of Office Act was vetoed, but it was passed over the veto. The House of Representatives preferred articles of impeachment against President Johnson for refusal to comply with, and for conspiracy to defeat, the legislation above referred to, but he was acquitted for lack of a two-thirds vote for conviction in the Senate.

1926, Myers v. United States, 272 U.S. 166

In Parsons v. United States, supra, the Court thus refers to the passage of the Tenure of Office Act (p. 340):

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The President, as is well known, vetoed the tenure of office act because he said it was unconstitutional in that it assumed to take away the power of removal constitutionally vested in the President of the United States—a power which had been uniformly exercised by the Executive Department of the Government from its foundation. Upon the return of the bill to Congress, it was passed over the President's veto by both houses, and became a law. The continued and uninterrupted practice of the [272 U.S. 167] Government from 1789 was thus broken in upon and changed by the passage of this act, so that, if constitutional, thereafter all executive officers whose appointments had been made with the advice and consent of the Senate could not be removed by the President without the concurrence of the Senate in such order of removal.

1926, Myers v. United States, 272 U.S. 167

Mr. Blaine, who was in Congress at the time, in afterwards speaking of this bill, said:

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It was an extreme proposition—a new departure from the long-established usage of the Federal Government—and for that reason, if for no other, personally degrading to the incumbent of the Presidential chair. It could only have grown out of abnormal excitement created by dissensions between the two great departments of the Government. . . . The measure was resorted to as one of self-defense against the alleged aggressions and unrestrained power of the executive department.

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Twenty Years of Congress, vol. 2, 273, 274.

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The extreme provisions of all this legislation were a full justification for the considerations so strongly advanced by Mr. Madison and his associates in the First Congress for insisting that the power of removal of executive officers by the President alone was essential in the division of powers between the executive and the legislative bodies. It exhibited in a clear degree the paralysis to which a partisan Senate and Congress could subject the executive arm and destroy the principle of executive responsibility and separation of the powers, sought for by the framers of our Government, if the President had no power of removal save by consent of the Senate. It was an attempt to redistribute the powers, and minimize those of the President.

1926, Myers v. United States, 272 U.S. 167

After President Johnson's term ended, the injury and invalidity of the Tenure of Office Act in its radical innovation were immediately recognized by the Executive, and objected to. General Grant, succeeding Mr. Johnson [272 U.S. 168] in the Presidency, earnestly recommended in his first message the total repeal of the act, saying:

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It may be well to mention here the embarrassment possible to arise from leaving on the statute books the so-called "tenure of office acts," and to earnestly recommend their total repeal. It could not have been the intention of the framers of the Constitution, when providing that appointments made by the President should receive the consent of the Senate, that the latter should have the power to retain in office persons placed there by Federal appointment against the will of the President. The law is inconsistent with a faithful and efficient administration of the Government. What faith can an Executive put in officials forced upon him, and those, too, whom he has suspended for reason? How will such officials be likely to serve an Administration which they know does not trust them?

1926, Myers v. United States, 272 U.S. 168

9 Messages and papers of the Presidents, 3992.

1926, Myers v. United States, 272 U.S. 168

While, in response to this, a bill for repeal of that act passed the House, it failed in the Senate, and, though the law was changed, it still limited the Presidential power of removal. The feeling growing out of the controversy with President Johnson retained the act on the statute book until 1887, when it was repealed. 24 Stat. 500, c. 353. During this interval, on June 8, 1872, Congress passed an act reorganizing and consolidating the Post Office Department, and provided that the Postmaster General and his three assistants should be appointed by the President by and with the advice and consent of the Senate, and might be removed in the same manner. 17 Stat. 284, c. 335, § 2. In 1876 the act here under discussion was passed, making the consent of the Senate necessary both to the appointment and removal of first, second, and third class postmasters. 19 Stat. 80, c. 179, § 6.

1926, Myers v. United States, 272 U.S. 168

In the same interval, in March, 1886, President Cleveland, in discussing the requests which the Senate had [272 U.S. 169] made for his reasons for removing officials, and the assumption that the Senate had the right to pass upon those removals, and thus to limit the power of the President, said:

1926, Myers v. United States, 272 U.S. 169

I believe the power to remove or suspend such officials is vested in the President alone by the Constitution, which, in express terms, provides that "the executive power shall be vested in a President of the United States of America," and that "he shall take care that the laws be faithfully executed."

1926, Myers v. United States, 272 U.S. 169

The Senate belongs to the legislative branch of the Government. When the Constitution, by express provision, superadded to its legislative duties the right to advise and consent to appointments to office and to sit as a court of impeachment, it conferred upon that body all the control and regulation of Executive action supposed to be necessary for the safety of the people, and this express and special grant of such extraordinary powers, not in any way related to or growing out of general Senatorial duties and, in itself, a departure from the general plan of our Government, should be held, under a familiar maxim of construction, to exclude every other right of interference with Executive functions.

1926, Myers v. United States, 272 U.S. 169

11 Messages and Papers of the Presidents, 4964.

1926, Myers v. United States, 272 U.S. 169

The attitude of the Presidents on this subject has been unchanged and uniform to the present day whenever an issue has clearly been raised. In a message withholding his approval of an act which he thought infringed upon the executive power of removal, President Wilson said:

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It has, I think, always been the accepted construction of the Constitution that the power to appoint officers of this kind carries with it, as an incident, the power to remove. I am convinced that the Congress is without constitutional power to limit the appointing power and its incident, the power of removal, derived from the Constitution.

1926, Myers v. United States, 272 U.S. 169

59 Congressional Record (June 4, 1920), 8609. [272 U.S. 170]

1926, Myers v. United States, 272 U.S. 170

And President Coolidge, in a message to Congress in response to a resolution of the Senate that it was the sense of that body that the President should immediately request the resignation of the then Secretary of the Navy, replied:

1926, Myers v. United States, 272 U.S. 170

No official recognition can be given to the passage of the Senate resolution relative to their opinion concerning members of the Cabinet or other officers under executive control.

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. . . The dismissal of an officer of the Government, such as is involved in this case, other than by impeachment, is exclusively an executive function. I regard this as a vital principle of our Government.

1926, Myers v. United States, 272 U.S. 170

65 Congressional Record (Feb. 13, 1924), 2335.

1926, Myers v. United States, 272 U.S. 170

In spite of the foregoing Presidential declarations, it is contended that, since the passage of the Tenure of Office Act, there has been general acquiescence by the Executive in the power of Congress to forbid the President alone to remove executive officers—an acquiescence which has changed any formerly accepted constitutional construction to the contrary. Instances are cited of the signed approval by President Grant and other Presidents of legislation in derogation of such construction. We think these are all to be explained not by acquiescence therein, but by reason of the otherwise valuable effect of the legislation approved. Such is doubtless the explanation of the executive approval of the Act of 1876, which we are considering, for it was an appropriation act on which the section here in question was imposed as a rider.

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In the use of Congressional legislation to support or change a particular construction of the Constitution by acquiescence, its weight for the purpose must depend not only upon the nature of the question, but also upon the attitude of the executive and judicial branches of the Government, as well as upon the number of instances in the execution of the law in which opportunity for objection [272 U.S. 171] in the courts or elsewhere is afforded. When instances which actually involve the question are rare, or have not, in fact, occurred, the weight of the mere presence of acts on the statute book for a considerable time, as showing general acquiescence in the legislative assertion of a questioned power, is minimized. No instance is cited to us where any question has arisen respecting a removal of a Postmaster General or one of his assistants. The President's request for resignations of such officers is generally complied with. The same thing is true of the postmasters. There have been many executive removals of them, and but few protests or objections. Even when there has been a refusal by a postmaster to resign, removal by the President has been followed by a nomination of a successor, and the Senate's confirmation has made unimportant the inquiry as to the necessity for the Senate's consent to the removal.

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Other acts of Congress are referred to which contain provisions said to be inconsistent with the 1789 decision. Since the provision for an Interstate Commerce Commission, in 1887, many administrative boards have been created whose members are appointed by the President, by and with the advice and consent of the Senate, and in the statutes creating them have been provisions for the removal of the members for specified causes. Such provisions are claimed to be inconsistent with the independent power of removal by the President. This, however, is shown to be unfounded by the case of Shurtleff v. United States, 189 U.S. 311 (1903). That concerned an act creating a board of general appraisers, 26 Stat. 131, 136, c. 407, § 12, and providing for their removal for inefficiency, neglect of duty or malfeasance in office. The President removed an appraiser without notice or hearing. It was forcibly contended that the affirmative language of the statute implied the negative of the power to remove except for cause and after a hearing. This would [272 U.S. 172] have been the usual rule of construction, but the Court declined to apply it. Assuming for the purpose of that case only, but without deciding, that Congress might limit the President's power to remove, the Court held that, in the absence of constitutional or statutory provision otherwise, the President could, by virtue of his general power of appointment, remove an officer though appointed by and with the advice and consent of the Senate and notwithstanding specific provisions for his removal for cause, on the ground that the power of removal inhered in the power to appoint. This is an indication that many of the statutes cited are to be reconciled to the unrestricted power of the President to remove if he chooses to exercise his power.

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There are other later acts pointed out in which, doubtless, the inconsistency with the independent power of the President to remove is clearer, but these cannot be said really to have received the acquiescence of the executive branch of the Government. Whenever there has been a real issue in respect of the question of Presidential removals, the attitude of the Executive in Congressional message has been clear and positive against the validity of such legislation. The language of Mr. Cleveland in 1886, twenty years after the Tenure of Office Act, in his controversy with the Senate in respect of his independence of that body in the matter of removing inferior officers appointed by him and confirmed by the Senate, was quite as pronounced as that of General Jackson in a similar controversy in 1835. Mr. Wilson, in 1920, and Mr. Coolidge, in 1924, were quite as all-embracing in their views of the power of removal as General Grant in 1869, and as Mr. Madison and Mr. John Adams in 1789.

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The fact seems to be that all departments of the Government have constantly had in mind, since the passage of the Tenure of Office Act, that the question of power of removal by the President of officers appointed by him [272 U.S. 173] with the Senate's consent, has not been settled adversely to the legislative action of 1789, but, in spite of Congressional action, has remained open until the conflict should be subjected to judicial investigation and decision.

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The action of this Court cannot be said to constitute assent to a departure from the legislative decision of 1789, when the Parsons and Shurtleff cases, one decided in 1897 and the other in 1903, are considered; for they certainly leave the question open. Wallace v. United States, 257 U.S. 541. Those cases indicate no tendency to depart from the view of the First Congress. This Court has, since the Tenure of Office Act, manifested an earnest desire to avoid a final settlement of the question until it should be inevitably presented, as it is here.

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An argument ab inconvenienti has been made against our conclusion in favor of the executive power of removal by the President, without the consent of the Senate—that it will open the door to a reintroduction of the spoils system. The evil of the spoils system aimed at in the civil service law and its amendments is in respect of inferior offices. It has never been attempted to extend that law beyond them. Indeed, Congress forbids its extension to appointments confirmed by the Senate, except with the consent of the Senate. Act of January 16, 1883, 22 Stat. 403, 406, c. 27, sec. 7. Reform in the federal civil service was begun by the Civil Service Act of 1883. It has been developed from that time, so that the classified service now includes a vast majority of all the civil officers. It may still be enlarged by further legislation. The independent power of removal by the President alone, under present condition, works no practical interference with the merit system. Political appointments of inferior officers are still maintained in one important class, that of the first, second and third class postmasters, collectors of internal revenue, marshals, collectors of customs, and other officers of that [272 U.S. 174] kind, distributed through the country. They are appointed by the President with the consent of the Senate. It is the intervention of the Senate in their appointment, and not in their removal, which prevents their classification into the merit system. If such appointments were vested in the heads of departments to which they belong, they could be entirely removed from politics, and that is what a number of Presidents have recommended. President Hayes, whose devotion to the promotion of the merit system and the abolition of the spoils system was unquestioned, said, in his 4th Annual Message, of December 6, 1880, that the first step to improvement in the civil service must be a complete divorce between Congress and the Executive on the matter of appointments, and he recommended the repeal of the Tenure of Office Act of 1867 for this purpose. 10 & 11 Messages and Papers of the Presidents, 4555-4557. The extension of the merit system rests with Congress.

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What, then, are the elements that enter into our decision of this case? We have first a construction of the Constitution made by a Congress which was to provide by legislation for the organization of the Government in accord with the Constitution which had just then been adopted, and in which there were, as representatives and senators, a considerable number of those who had been members of the Convention that framed the Constitution and presented it for ratification. It was the Congress that launched the Government. It was the Congress that rounded out the Constitution itself by the proposing of the first ten amendments, which had, in effect, been promised to the people as a consideration for the ratification. It was the Congress in which Mr. Madison, one of the first in the framing of the Constitution, led also in the organization of the Government under it. It was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest [272 U.S. 175] weight in the interpretation of that fundamental instrument. This construction was followed by the legislative department and the executive department continuously for seventy-three years, and this although the matter, in the heat of political differences between the Executive and the Senate in President Jackson's time, was the subject of bitter controversy, as we have seen. This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long-term of years, fixes the construction to be given its provisions. Stuart v. Laird, 1 Cranch 299, 309; Martin v. Hunter's Lessee, 1 Wheat. 304, 351; Cohens v. Virginia, 6 Wheat. 264, 420; Prigg v. Pennsylvania, 16 Pet. 544, 621; Cooley v. Board of Wardens, etc., 12 How. 299, 315; Burroughs-Giles Lithographing Company v. Sarony, 111 U.S. 53, 57; Ames v. Kansas, 111 U.S. 449, 463-469; The Laura, 114 U.S. 411, 416; Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297; McPherson v. Blacker, 146 U.S. 1, 28, 33, 35; Knowlton v. Moore, 178 U.S. 41, 56; Fairbank v. United States, 181 U.S. 283, 308; Ex parte Grossman, 267 U.S. 87, 118.

1926, Myers v. United States, 272 U.S. 175

We are now asked to set aside this construction, thus buttressed, and adopt an adverse view because the Congress of the United States did so during a heated political difference of opinion between the then President and the majority leaders of Congress over the reconstruction measures adopted as a means of restoring to their proper status the States which attempted to withdraw from the Union at the time of the Civil War. The extremes to which the majority in both Houses carried legislative measures in that matter are now recognized by all who calmly review the history of that episode in our Government, leading to articles of impeachment against President Johnson, and his acquittal. Without animadverting [272 U.S. 176] on the character of the measures taken, we are certainly justified in saying that they should not be given the weight affecting proper constitutional construction to be accorded to that reached by the First Congress of the United States during a political calm and acquiesced in by the whole Government for three-quarters of a century, especially when the new construction contended for has never been acquiesced in by either the executive or the judicial departments. While this Court has studiously avoided deciding the issue until it was presented in such a way that it could not be avoided, in the references it has made to the history of the question, and in the presumptions it has indulged in favor of a statutory construction not inconsistent with the legislative decision of 1789, it has indicated a trend of view that we should not and cannot ignore. When, on the merits, we find our conclusion strongly favoring the view which prevailed in the First Congress, we have no hesitation in holding that conclusion to be correct, and it therefore follows that the Tenure of Office Act of 1867, insofar as it attempted to prevent the President from removing executive officer who had been appointed by him by and with the advice and consent of the Senate, was invalid, and that subsequent legislation of the same effect was equally so.

1926, Myers v. United States, 272 U.S. 176

For the reasons given, we must therefore hold that the provision of the law of 1876, by which the unrestricted power of removal of first class postmasters is denied to the President, is in violation of the Constitution, and invalid. This leads to an affirmance of the judgment of the Court of Claims.

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Before closing this opinion, we wish to express the obligation of the Court to Mr. Pepper for his able brief and argument as a friend of the Court. Undertaken at our request, our obligation is none the less if we find ourselves obliged to take a view adverse to his. The strong presentation of arguments against the conclusion of the Court [272 U.S. 177] is of the utmost value in enabling the Court to satisfy itself that it has fully considered all that can be said.

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Judgment affirmed.

HOLMES, J., dissenting

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MR. JUSTICE HOLMES, dissenting.

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My brothers McREYNOLDS and BRANDEIS have discussed the question before us with exhaustive research, and I say a few words merely to emphasize my agreement with their conclusion.

1926, Myers v. United States, 272 U.S. 177

The arguments drawn from the executive power of the President, and from his duty to appoint officers of the United States (when Congress does not vest the appointment elsewhere), to take care that the laws be faithfully executed, and to commission all officers of the United States, seem to me spider's webs inadequate to control the dominant facts.

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We have to deal with an office that owes its existence to Congress, and that Congress may abolish tomorrow. Its duration and the pay attached to it while it lasts depend on Congress alone. Congress alone confers on the President the power to appoint to it, and at any time may transfer the power to other hands. With such power over its own creation, I have no more trouble in believing that Congress has power to prescribe a term of life for it free from any interference than I have in accepting the undoubted power of Congress to decree its end. I have equally little trouble in accepting its power to prolong the tenure of an incumbent until Congress or the Senate shall have assented to his removal. The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power. [272 U.S. 178]

MCREYNOLDS, J., separate opinion

1926, Myers v. United States, 272 U.S. 178

The separate opinion of MR. JUSTICE McREYNOLDS.

1926, Myers v. United States, 272 U.S. 178

The following provisions of the Act making appropriations for the Post Office Department, approved July 12, 1876, (c. 179, 19 Stat. 78, 80), have not been repealed or superseded.

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Sec. 5. [That the postmasters shall be divided into four classes based on annual compensation]. . . . Sec. 6. Postmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law, and postmasters of the fourth class shall be appointed and may be removed by the Postmaster General, by whom all appointments and removals shall be notified to the Auditor for the Post Office Department.

1926, Myers v. United States, 272 U.S. 178

The President nominated, and, with consent of the Senate, appointed, Frank S. Myers first-class postmaster at Portland, Ore. for four years, commencing July 21, 1917, and undertook to remove him February 3, 1920. The Senate has never approved the removal. Myers protested, asserted illegality of the order, refused to submit, and was ejected. He sued to recover the prescribed salary for the period between February 3, 1920, and July 21, 1921. Judgment must go against the United States unless the President acted within powers conferred by the Constitution.

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II

1926, Myers v. United States, 272 U.S. 178

May the President oust at will all postmasters appointed with the Senate's consent for definite terms under an Act which inhibits removal without consent of that body? May he approve a statute which creates an inferior office and prescribes restrictions on removal, appoint an incumbent, and then remove without regard to the restrictions? Has he power to appoint to an inferior office for a definite term under an Act which prohibits removal except as therein specified, and then arbitrarily [272 U.S. 179] dismiss the incumbent and deprive him of the emoluments? I think there is no such power. Certainly it is not given by any plain words of the Constitution, and the argument advanced to establish it seems to me forced and unsubstantial.

1926, Myers v. United States, 272 U.S. 179

A certain repugnance must attend the suggestion that the President may ignore any provision of an Act of Congress under which he has proceeded. He should promote, and not subvert, orderly government. The serious evils which followed the practice of dismissing civil officers as caprice or interest dictated, long permitted under congressional enactments, are known to all. It brought the public service to a low estate and caused insistent demand for reform.

1926, Myers v. United States, 272 U.S. 179

Indeed, it is utterly impossible not to feel that, if this unlimited power of removal does exist, it may be made, in the hands of a bold and designing man of high ambition and feeble principles, an instrument of the worst oppression and most vindictive vengeance.

1926, Myers v. United States, 272 U.S. 179

Story on the Constitution, 1539.

1926, Myers v. United States, 272 U.S. 179

During the notable Senate debate of 1835 (Debates, 23d Cong., 2d sess.) experienced statesmen pointed out the very real dangers and advocated adequate restraint, through congressional action, upon the power which statutes then permitted the President to exercise.

1926, Myers v. United States, 272 U.S. 179

Mr. Webster declared (p. 469):

1926, Myers v. United States, 272 U.S. 179

I deem this degree of regulation, at least, necessary unless we are willing to submit all these officers to an absolute and perfectly irresponsible removing power, a power which, as recently exercised, tends to turn the whole body of public officers into partisans, dependants, favorites, sycophants, and man-worshippers.

1926, Myers v. United States, 272 U.S. 179

Mr. Clay asserted (id., 515):

1926, Myers v. United States, 272 U.S. 179

The power of removal, as now exercised, is nowhere in the Constitution expressly recognized. The only mode of displacing a public officer for which it does provide is by impeachment. But it has been argued on this occasion that it is a sovereign power, an inherent power, and an executive power, and therefore [272 U.S. 180] that it belongs to the President. Neither the premises nor the conclusion can be sustained. If they could be, the people of the United States have all along totally misconceived the nature of their government, and the character of the office of their supreme magistrate. Sovereign power is supreme power, and in no instance whatever is there any supreme power vested in the President. Whatever sovereign power is, if there be any, conveyed by the Constitution of the United States, is vested in Congress, or in the President and Senate. The power to declare war, to lay taxes, to coin money, is vested in Congress, and the treaty-making power in the president and Senate. The Postmaster General has the power to dismiss his deputies. Is that a sovereign power, or has he any?

1926, Myers v. United States, 272 U.S. 180

Inherent power! That is a new principle to enlarge the powers of the general government. . . . The partisans of the executive have discovered a third and more fruitful source of power. Inherent power! Whence is it derived? The Constitution created the office of President, and made it just what it is. It had no powers prior to its existence. It can have none but those which are conferred upon it by the instrument which created it, or laws passed in pursuance of that instrument. Do gentlemen mean by inherent power such power as is exercised by the monarchs or chief magistrates of other countries? If that be their meaning, they should avow it.

1926, Myers v. United States, 272 U.S. 180

And Mr. Calhoun argued (id., 553):

1926, Myers v. United States, 272 U.S. 180

Hear what that sacred instrument says: "Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers" (those granted to Congress itself) "and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." Mark the fulness of the expression. Congress shall have [272 U.S. 181] power to make all laws, not only to carry into effect the powers expressly delegated to itself, but those delegated to the government or any department or officer thereof, and, of course, comprehends the power to pass laws necessary and proper to carry into effect the powers expressly granted to the executive department. It follows, of course, to whatever express grant of power to the executive the power of dismissal may be supposed to attach, whether to that of seeing the law faithfully executed, or to the still more comprehensive grant, as contended for by some, vesting executive powers in the President, the mere fact that it is a power appurtenant to another power, and necessary to carry it into effect, transfers it, by the provisions of the Constitution cited, from the executive to Congress, and places it under the control of Congress, to be regulated in the manner which it may judge best.

1926, Myers v. United States, 272 U.S. 181

The long struggle for civil service reform and the legislation designed to insure some security of official tenure ought not to be forgotten. Again and again, Congress has enacted statutes prescribing restrictions on removals and, by approving them, many Presidents have affirmed its power therein.

1926, Myers v. United States, 272 U.S. 181

The following are some of the officers who have been or may be appointed with consent of the Senate under such restricting statutes.

1926, Myers v. United States, 272 U.S. 181

Members of the Interstate Commerce Commission, Board of General Appraisers, Federal Reserve Board, Federal Trade Commission, Tariff Commission, Shipping Board, Federal Farm Loan Board, Railroad Labor Board; officers of the Army and Navy; Comptroller General; Postmaster General and his assistants; postmasters of the first, second and third classes; judge of the United States Court for China; judges of the Court of Claims, established in 1855, the judges to serve "during good behavior"; judges of Territorial (statutory) courts; judges of the [272 U.S. 182] Supreme Court and Court of Appeals for the District of Columbia (statutory courts), appointed to serve "during good behavior." Also members of the Board of Tax Appeals provided for by the Act of February 26, 1926, to serve for 12 years, who

1926, Myers v. United States, 272 U.S. 182

shall be appointed by the President by and with the advice and consent of the Senate solely on the grounds of fitness to perform the duties of the office. Members of the Board may be removed by the President after notice and opportunity for public hearing, for inefficiency, neglect of duty or malfeasance in office but for no other cause.

1926, Myers v. United States, 272 U.S. 182

Every one of these officers, we are now told, in effect, holds his place subject to the President's pleasure or caprice. 1 And it is further said, that Congress cannot create any office to be filled through appointment by the President with consent of the Senate—except judges of the Supreme, Circuit and District (constitutional) courts—and exempt the incumbent from arbitrary dismissal. These questions press for answer, and thus the cause becomes of uncommon magnitude.

1926, Myers v. United States, 272 U.S. 182

III

1926, Myers v. United States, 272 U.S. 182

Nothing short of language clear beyond serious disputation should be held to clothe the President with authority wholly beyond congressional control arbitrarily to dismiss every officer whom he appoints except a few judges. There are no such words in the Constitution, and the asserted inference conflicts with the heretofore accepted theory that this government is one of carefully enumerated powers under an intelligible charter. "This instrument contains an enumeration of powers expressly granted." Gibbons v. Ogden, 9 Wheat. 1, 187.

1926, Myers v. United States, 272 U.S. 182

Nor should it ever be lost sight of that the government of [272 U.S. 183] the United States is one of limited and enumerated powers, and that a departure from the true import and sense of its powers is pro tanto the establishment of a new Constitution. It is doing for the people what they have not chosen to do for themselves. It is usurping the functions of a legislator, and deserting those of an expounder of the law. Arguments drawn from impolicy or inconvenience ought here to be of no weight. The only sound principle is to declare, ita lex scripta est, to follow, and to obey. Nor, if a principle so just and conclusive could be overlooked, could there well be found a more unsafe guide in practice than mere policy and convenience.

1926, Myers v. United States, 272 U.S. 183

Story on the Constitution, § 426.

1926, Myers v. United States, 272 U.S. 183

If the phrase "executive power" infolds the one now claimed, many others heretofore totally unsuspected may lie there awaiting future supposed necessity, and no human intelligence can define the field of the President's permissible activities. "A masked battery of constructive powers would complete the destruction of liberty."

1926, Myers v. United States, 272 U.S. 183

IV.

1926, Myers v. United States, 272 U.S. 183

Constitutional provisions should be interpreted with the expectation that Congress will discharge its duties no less faithfully than the Executive will attend to his. The legislature is charged with the duty of making laws for orderly administration obligatory upon all. It possesses supreme power over national affairs, and may wreck as well as speed them. It holds the purse; every branch of the government functions under statutes which embody its will; it may impeach and expel all civil officers. The duty is upon it "to make all laws which shall be necessary and proper for carrying into execution" all powers of the federal government. We have no such thing as three totally distinct and independent departments; the others must look to the legislative for direction and [272 U.S. 184] support. "In republican government, the legislative authority necessarily predominates." The Federalist, XLVI, XVII. Perhaps the chief duty of the President is to carry into effect the will of Congress through such instrumentalities as it has chosen to provide. Arguments, therefore, upon the assumption that Congress may willfully impede executive action are not important.

1926, Myers v. United States, 272 U.S. 184

The Constitution provides—

1926, Myers v. United States, 272 U.S. 184

Art I, Sec. 1. All legislative powers herein granted shall be vested in a Congress of the United States. . . .

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Sec. 2. . . . The House of Representatives . . . shall have the sole power of impeachment.

1926, Myers v. United States, 272 U.S. 184

Sec. 3. . . . The Senate shall have the sole power to try all impeachments. . . .

1926, Myers v. United States, 272 U.S. 184

Sec. 8. The Congress shall have power . . . To establish post offices and post roads; . . . To raise and support armies . . . To provide and maintain a navy; To make rules for the government and regulation of the land and naval forces; . . . To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

1926, Myers v. United States, 272 U.S. 184

Art. II, Sec. 1. The executive power shall be vested in a President of the United States. . . .

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Sec. 2. The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

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He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur, and he shall nominate, [272 U.S. 185] and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

1926, Myers v. United States, 272 U.S. 185

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

1926, Myers v. United States, 272 U.S. 185

Sec. 3. He shall from time to time give to the Congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

1926, Myers v. United States, 272 U.S. 185

Art. III, Sec. 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

1926, Myers v. United States, 272 U.S. 185

Sec. 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority. . . .

1926, Myers v. United States, 272 U.S. 185

V

1926, Myers v. United States, 272 U.S. 185

For the United States, it is asserted—Except certain judges, the President may remove all officers, whether executive [272 U.S. 186] or judicial, appointed by him with the Senate's consent, and therein he cannot be limited or restricted by Congress. The argument runs thus—The Constitution gives the President all executive power of the national government except as this is checked or controlled by some other definite provision; power to remove is executive and unconfined; accordingly, the President may remove at will. Further, the President is required to take care that the laws be faithfully executed; he cannot do this unless he may remove at will all officers whom he appoints; therefore, he has such authority.

1926, Myers v. United States, 272 U.S. 186

The argument assumes far too much. Generally, the actual ouster of an officer is executive action; but to prescribe the conditions under which this may be done is legislative. The act of hanging a criminal is executive; but to say when and where and how he shall be hanged is clearly legislative. Moreover, officers may be removed by direct legislation—the Act of 1820 hereafter referred to did this.

1926, Myers v. United States, 272 U.S. 186

The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society, while the execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate.

1926, Myers v. United States, 272 U.S. 186

The Federalist, No. LXXIV.

1926, Myers v. United States, 272 U.S. 186

The legislature may create post offices and prescribe qualifications, duties, compensation and term. And it may protect the incumbent in the enjoyment of his term unless in some way restrained therefrom. The real question, therefore, comes to this—does any constitutional provision definitely limit the otherwise plenary power of Congress over postmasters, when they are appointed by the President with consent of the Senate? The question is not the much-mooted one whether the Senate is part of the appointing power under the Constitution, and therefore must participate in removals. Here, the restriction [272 U.S. 187] is imposed by statute alone, and thereby made a condition of the tenure. I suppose that beyond doubt Congress could authorize the Postmaster General to appoint all postmasters and restrain him in respect of removals.

1926, Myers v. United States, 272 U.S. 187

Concerning the insistence that power to remove is a necessary incident of the President's duty to enforce the laws, it is enough now to say: the general duty to enforce all laws cannot justify infraction of some of them. Moreover, Congress, in the exercise of its unquestioned power, may deprive the President of the right either to appoint or to remove any inferior officer by vesting the authority to appoint in another. Yet, in that event, his duty touching enforcement of the laws would remain. He must utilize the force which Congress gives. He cannot, without permission, appoint the humblest clerk or expend a dollar of the public funds.

1926, Myers v. United States, 272 U.S. 187

It is well to emphasize that our present concern is with the removal of an " inferior officer," within Art. II, Sec. 2, of the Constitution, which the statute positively prohibits without consent of the Senate. This is no case of mere suspension. The demand is for salary, and not for restoration to the service. We are not dealing with an ambassador, public minister, consul, judge or " superior officer." Nor is the situation the one which arises when the statute creates an office without a specified term, authorizes appointment and says nothing of removal. In the latter event, under long-continued practice and supposed early legislative construction, it is now accepted doctrine that the President may remove at pleasure. This is entirely consistent with implied legislative assent; power to remove is commonly incident to the right to appoint when not forbidden by law. But there has never been any such usage where the statute prescribed restrictions. From its first session down to the last one Congress has consistently asserted its power to prescribe conditions concerning the removal of inferior officers. The executive [272 U.S. 188] has habitually observed them, and this Court has affirmed the power of Congress therein. 2

1926, Myers v. United States, 272 U.S. 188

VI

1926, Myers v. United States, 272 U.S. 188

Some reference to the history of postal affairs will indicate the complete control which Congress has asserted over them with general approval by the executive.

1926, Myers v. United States, 272 U.S. 188

The Continental Congress (1775) established a post office and made Benjamin Franklin Postmaster General, "with power to appoint such and so many deputies, as to him may seem proper and necessary." Under the Articles of Confederation (1781), Congress again provided for a post office and Postmaster General, with "full power and authority to appoint a clerk, or assistant to himself, and such and so many deputy postmasters as he shall think proper." The first Congress under the Constitution (1789) directed:

1926, Myers v. United States, 272 U.S. 188

That there shall be appointed a Postmaster General; his powers and salary, and the compensation to the assistant or clerk and deputies which he may appoint, and the regulations of the post office shall be the same as they last were under the resolutions and ordinances of the late Congress. The Postmaster General to be subject to the direction of the President of the United States in performing the duties of his office, and in forming contracts for the transportation of the mail.

1926, Myers v. United States, 272 U.S. 188

The Act of 1792 (1 Stat. 232, 234) established certain post roads, prescribed regulations for the Department, [272 U.S. 189] and continued in the Postmaster General sole power of appointment; but it omitted the earlier provision that he should "be subject to the direction of the President of the United States in performing the duties of his office."

1926, Myers v. United States, 272 U.S. 189

The Act of March 2, 1799, provided:

1926, Myers v. United States, 272 U.S. 189

That there be established at the seat of Government of the United States, a General Post Office, under the direction of a Postmaster General. The Postmaster General shall appoint an assistant, and such clerks as may be necessary for performing the business of his office; he shall establish post offices, and appoint postmasters, at all such places as shall appear to him expedient, on the post roads that are or may be established by law.

1926, Myers v. United States, 272 U.S. 189

This provision remained until 1836, and, prior to that time, all postmasters were appointed without designated terms and were subject to removal by the Postmaster General alone.

1926, Myers v. United States, 272 U.S. 189

In 1814, Postmaster General Granger appointed Senator Leib postmaster at Philadelphia contrary to the known wishes of President Madison. Granger was removed; but Leib continued to hold his office.

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John Quincy Adams records in his Memoirs (January 5, 1822), that the President

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summoned an immediate meeting of the members of the administration, which was fully attended. It was upon the appointment of the postmaster at Albany.

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A warm discussion arose with much diversity of opinion concerning the propriety of the Postmaster General's request for the President's opinion concerning the proposed appointment. "The President said he thought it very questionable whether he ought to interfere in the case at all." Some members severely censured the Postmaster General for asking the President's opinion after having made up his own mind, holding it an attempt to shift responsibility.

1926, Myers v. United States, 272 U.S. 189

I said I did not see his conduct exactly in the same light. The law gave the appointment of all the postmasters exclusively [272 U.S. 190] to the Postmaster General, but he himself was removable from his own office at the pleasure of the President. Now, Mr. Granger had been removed with disgrace by President Madison for appointing Dr. Leib postmaster at Philadelphia. Mr. Meigs, therefore, in determining to appoint General Van Renesselaer, not only exercised a right but performed a duty of his office; but, with the example of Mr. Granger's dismission before him, it was quite justifiable in him to consult the President's wish, with the declared intention of conforming to it. I thought I should have done the same under similar circumstances.

1926, Myers v. United States, 272 U.S. 190

Act of July 2, 1836 (5 Stat. 80, 87)—

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That there shall be appointed by the President of the United States, by and with the advice and consent of the Senate, a Deputy Postmaster for each post office at which the commissions allowed to the postmaster amounted to one thousand dollars or upwards in the year ending the thirtieth day of June, one thousand eight hundred and thirty-five, or which may, in any subsequent year, terminating on the thirtieth day of June, amount to or exceed that sum, who shall hold his office for the term of four years, unless sooner removed by the President.

1926, Myers v. United States, 272 U.S. 190

This is the first Act which permitted appointment of any postmaster by the President; the first also which fixed terms for them. It was careful to allow removals by the President, which otherwise, under the doctrine of Marbury v. Madison, 1 Cranch. 137, would have been denied him. And, by this legislation, Congress itself terminated the services of postmasters who had been appointed to serve at will.

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The Act of 1863 (12 Stat. 701) empowered the Postmaster General to appoint and commission all postmasters whose salary or compensation "have been ascertained to be less than one thousand dollars." In 1864, five distinct classes were created (13 Stat. 335), and the Act of 1872 (17 Stat. 292) provided—

1926, Myers v. United States, 272 U.S. 190

That postmasters of the fourth and fifth class shall be appointed and may be removed [272 U.S. 191] by the Postmaster General, and all others shall be appointed and may be removed by the President, by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law.

1926, Myers v. United States, 272 U.S. 191

In 1874 (18 Stat. 231, 233) postmasters were divided into four classes according to compensation, and the statute directed that those

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of the first, second, and third classes shall be appointed, and may be removed by the President, by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law, and postmasters of the fourth class shall be appointed and may be removed by the Postmaster General, by whom all appointments and removals shall be notified to the Auditor for the Post Office Department.

1926, Myers v. United States, 272 U.S. 191

This language reappears in § 6, Act July 12, 1876, supra.

1926, Myers v. United States, 272 U.S. 191

On July 1, 1925, there were 50,957 postmasters; 35,758 were of the fourth class.

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For 47 years (1789 to 1836), the President could neither appoint nor remove any postmaster. The Act which first prescribed definite terms for these officers authorized him to do both. Always it has been the duty of the President to take care that the postal laws "be faithfully executed," but there did not spring from this any illimitable power to remove postmasters.

1926, Myers v. United States, 272 U.S. 191

VII

1926, Myers v. United States, 272 U.S. 191

The written argument for the United States by the former Solicitor General avers that it is based on this premise:

1926, Myers v. United States, 272 U.S. 191

The President's supervision of the executive branch of the government, through the necessary power of removal, has always been recognized, and is now recognized, alike by considerations of necessity and the theory of government as an executive power, and is clearly indicated in the text of the Constitution, even though the [272 U.S. 192] power of removal is not expressly granted.

1926, Myers v. United States, 272 U.S. 192

A discourse proceeding from that premise helps only because it indicates the inability of diligent counsel to discover a solid basis for his contention. The words of the Constitution are enough to show that the framers never supposed orderly government required the President either to appoint or to remove postmasters. Congress may vest the power to appoint and remove all of them in the head of a department, and thus exclude them from presidential authority. From 1789 to 1836, the Postmaster General exercised these powers as to all postmasters (Story on the Constitution, § 1536), and the 35,000 in the fourth class are now under his control. For forty years, the President functioned and met his duty to "take care that the laws be faithfully executed" without the semblance of power to remove any postmaster. So I think the supposed necessity and theory of government are only vapors.

1926, Myers v. United States, 272 U.S. 192

VIII

1926, Myers v. United States, 272 U.S. 192

Congress has authority to provide for postmasters and prescribe their compensation, terms and duties. It may leave with the President the right to appoint them with consent of the Senate or direct another to appoint. In the latter event, United States v Perkins, 116 U.S. 483, 485, makes it clear that the right to remove may be restricted. But, so the argument runs, if the President appoints with consent of the Senate, his right to remove cannot be abridged, because Art. II of the Constitution vests in him the "executive power," and this includes an illimitable right to remove. The Constitution empowers the President to appoint Ambassadors, other public ministers, consuls, judges of the Supreme Court and superior officers, and no statute can interfere therein. But Congress may authorize both appointment and removal of all inferior officers without regard to the President's wishes—even in direct opposition to them. This important distinction [272 U.S. 193] must not be overlooked. And consideration of the complete control which Congress may exercise over inferior officers is enough to show the hollowness of the suggestion that a right to remove them may be inferred from the President's duty to "take care that the laws be faithfully executed." He cannot appoint any inferior officer, however humble, without legislative authorization; but such officers are essential to execution of the laws. Congress may provide as many or as few of them as it likes. It may place all of them beyond the President's control; but this would not suspend his duty concerning faithful execution of the laws. Removals, however important, are not so necessary as appointments.

1926, Myers v. United States, 272 U.S. 193

IX

1926, Myers v. United States, 272 U.S. 193

I find no suggestion of the theory that "the executive power" of Art. II, Sec. 1, includes all possible federal authority executive in nature unless definitely excluded by some constitutional provision, prior to the well known House debate of 1789, when Mr. Madison seems to have given it support. A resolution looking to the establishment of an executive department—Department of Foreign Affairs (afterwards State)—provided for a secretary, "who shall be appointed by the President by and with the advice and consent of the Senate and to be removable by the President." Discussion arose upon a motion to strike out, "to be removable by the President." The distinction between superior and inferior officers was clearly recognized; also that the proposed officer was superior, and must be appointed by the President with the Senate's consent. The bill prescribed no definite term—the incumbent would serve until death, resignation or removal. In the circumstances, most of the speakers recognized the rule that, where there is no constitutional or legislative restriction, power to remove is incidental to that of appointment. Accordingly, they thought the [272 U.S. 194] President could remove the proposed officer; but many supposed he must do so with consent of the Senate. They maintained that the power to appoint is joint.

1926, Myers v. United States, 272 U.S. 194

Twenty-four of the fifty-four members spoke and gave their views on the Constitution and sundry matters of expediency. The record fairly indicates that nine, including Mr. Madison, thought the President would have the right to remove an officer serving at will under direct constitutional grant; three thought the Constitution did not, and although Congress might, it ought not to bestow such power; seven thought the Constitution did not, and Congress could, not confer it; five were of opinion that the Constitution did not, but that Congress ought to, confer it. Thus, only nine members said anything which tends to support the present contention, and fifteen emphatically opposed it.

1926, Myers v. United States, 272 U.S. 194

The challenged clause, although twice formally approved, was finally stricken out upon assurance that a new provision (afterwards adopted) would direct disposition of the official records "whenever the said principal officer shall be removed from office by the President of the United States or in any other case of vacancy." This was susceptible of different interpretations, and probably did not mean the same thing to all. The majority said nothing. The result of the discussion and vote was to affirm that the President held the appointing power with a right of negation in the Senate, and that, under the commonly accepted rule, he might remove without concurrence of the Senate when there was no inhibition by Constitution or statute. That the majority did not suppose they had assented to the doctrine under which the President could remove inferior officers contrary to an inhibition prescribed by Congress is shown plainly enough by the passage later in the same session of two Acts containing provisions wholly inconsistent with any such idea. Acts of August 7, 1789, and September 24, 1789, infra. [272 U.S. 195]

1926, Myers v. United States, 272 U.S. 195

Following much discussion of Mr. Madison's motion of May 19, a special committee reported this bill to the House on June 2. Debates upon it commenced June 16 and continued until June 24, when it passed by twenty-nine to twenty-two. The Senate gave it great consideration, commencing June 25, and passed it July 18, with amendments accepted by the House July 20. The Diary of President John Adams (Works 1851 ed. v. 3, p. 412) states that the Senate voted nine to nine, and that the deciding vote was given by the Vice President in favor of the President's power to remove. He also states that Senator Ellsworth strongly supported the bill, and Senator Patterson voted for it. These senators were members of the committee which drafted the Judiciary Bill spoken of below.

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It seems indubitable that, when the debate began, Mr. Madison did not entertain the extreme view concerning illimitable presidential power now urged upon us, and it is not entirely clear that he had any very definite convictions on the subject when the discussion ended. Apparently this notion originated with Mr. Vining, of Delaware, who first advanced it on May 19. Considering Mr. Madison's remarks (largely argumentative) as a whole, they give it small, if any, support. Some of them, indeed, are distinctly to the contrary. He was author of the provision that the Secretary shall "be removable by the President"; he thought it "safe and expedient to adopt the clause," and twice successfully resisted its elimination—May 19 and June 19. He said:

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I think it absolutely necessary that the President should have the power of removing from office. . . . On the constitutionality of the declaration, I have no manner of doubt.

1926, Myers v. United States, 272 U.S. 195

He believed they [his opponents] would not assert that any part of the Constitution declared that the only way to remove should be by impeachment; the contrary might be inferred, because Congress may establish offices by law; [272 U.S. 196] therefore, most certainly, it is in the discretion of the legislature to say upon what terms the office shall be held, either during good behavior or during pleasure.

1926, Myers v. United States, 272 U.S. 196

I have, since the subject was last before the House, examined the Constitution with attention, and I acknowledge that it does not perfectly correspond with the ideas I entertained of it from the first glance. . . . I have my doubts whether we are not absolutely tied down to the construction declared in the bill. . . . If the Constitution is silent, and it is a power the legislature have a right to confer, it will appear to the world, if we strike out the clause, as if we doubted the propriety of vesting it in the President of the United States. I therefore think it best to retain it in the bill. 3 [272 U.S. 197]

1926, Myers v. United States, 272 U.S. 197

Writing to Edmund Randolph, June 17, 1789, Mr. Madison pointed out the precise point of the debate. "A very interesting question is started—By whom officers appointed during pleasure by the President and Senate are to be displaced." And on June 21, 1789, he advised Edmund Pendleton of the discussion, stated the four opinions held by members, and said:

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The last opinion [272 U.S. 198] [the one he held] has prevailed, but is subject to various modifications, by the power of the legislature to limit the duration of laws creating offices, or the duration of the appointments for filling them, and by the power over the salaries and appropriations.

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Defending the Virginia Resolutions (of 1798) after careful preparation aided by long experience with national affairs, Mr. Madison emphasized the doctrine that [272 U.S. 199] the powers of the United States are "particular and limited," that the general phrases of the Constitution must not be so expounded as to destroy the particular enumerations explaining and limiting their meaning, and that latitudinous exposition would necessarily destroy the fundamental purpose of the founders. He continued to hold these general views. In his letters, he clearly exposed the narrow point under consideration by the first Congress, also the modification to which his views were subject, and he supported, during the same session, the Judiciary Act and probably the Northwest Territory Act, which contained provisions contrary to the sentiment now attributed to him. It therefore seems impossible to regard what he once said in support of a contested measure as present authority for attributing to the executive those illimitable and undefinable powers which he thereafter reprobated. Moreover, it is the fixed rule that debates are not relied upon when seeking the meaning or effect of statutes.

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But if it were possible to spell out of the debate and action of the first Congress on the bill to establish the Department of Foreign Affairs some support for the present claim of the United States, this would be of little real consequence, for the same Congress on at least two occasions took the opposite position, and time and time again subsequent congresses have done the same thing. It would be amazing for this Court to base the interpretation of a constitutional provision upon a single doubtful congressional interpretation when there have been dozens of them extending through a hundred and thirty-five years, which are directly to the contrary effect.

1926, Myers v. United States, 272 U.S. 199

Following the debate of 1789, it became the commonly approved view that the Senate is not a part of the appointing power. Also it became accepted practice that the President might remove at pleasure all officers appointed by him when neither Constitution nor statute [272 U.S. 200] prohibited by prescribing a fixed term or otherwise. Prior to 1820, very few officers held for definite terms; generally they were appointed to serve at pleasure, and Mr. Madison seems always to have regarded this as the proper course. He emphatically disapproved the Act of 1820, which prescribed such terms, and even doubted its constitutionality. Madison's Writings, 1865 ed., vol. 3, p. 196. It was said that

1926, Myers v. United States, 272 U.S. 200

He thought the tenure of all subordinate executive officers was necessarily the pleasure of the chief by whom they were commissioned. If they could be limited by Congress to four years, they might to one—to a month—to a day—and the executive power might thus be annihilated.

1926, Myers v. United States, 272 U.S. 200

Diary, John Quincy Adams, 1875 ed., vol. VII, p. 425.

1926, Myers v. United States, 272 U.S. 200

During the early administrations, removals were infrequent and for adequate reasons. President Washington removed ten officers; President John Adams, eight.

1926, Myers v. United States, 272 U.S. 200

Complying with a Resolution of March 2, 1839, President Van Buren sent to the House of Representatives, March 13, 1840,

1926, Myers v. United States, 272 U.S. 200

a list of all [civil] officers of the Government deriving their appointments from the nomination of the President and concurrence of the Senate whose commissions are recorded in the Department of State and who have been removed from office since the 3rd of March, 1789.

1926, Myers v. United States, 272 U.S. 200

Document No. 132, 26th Cong., 1st Sess. Two hundred and eight had been removed; and, after a somewhat careful survey of the statutes, I think it true to say that not one of these removals had been inhibited by Congress. On the contrary, all were made with it.s consent, either implied from authorization of the appointment for service at pleasure or indicated by express words of the applicable statute. The Act of 1789 authorized appointment of marshals for four years, removable at pleasure. The Act of 1820 established definite terms for many officers, but directed that they "shall be removable from office at pleasure." The Act of 1836 prescribed [272 U.S. 201] fixed terms for certain postmasters and expressly provided for removals by the President.

1926, Myers v. United States, 272 U.S. 201

A summary of the reported officers with commissions in the State Department who were removed, with the number in each class, is in the margin. 4 The Secretary of the Treasury reported that twenty-four officers in that Department had been removed "since the burning of the Treasury Building in 1833." The Postmaster General reported that thirteen postmasters appointed by the President had been dismissed (prior to 1836 all postmasters were appointed by the Postmaster General; after that time, the President had express permission to dismiss those whom he appointed). Nine Indian Agents were removed. One hundred and thirty-nine commissioned officers of the army and twenty-two of the navy were removed. I find no restriction by Congress on the President's right to remove any of these officers. See Wallace v. United States, 257 U.S. 541.

1926, Myers v. United States, 272 U.S. 201

Prior to the year 1839, no President engaged in the practice of removing officials contrary to congressional direction. [272 U.S. 202] There is no suggestion of any such practice which originated after that date.

1926, Myers v. United States, 272 U.S. 202

Rightly understood, the debate and Act of 1789 and subsequent practice afford no support to the claim now advanced. In Marbury v. Madison, supra, this court expressly repudiated it, and that decision has never been overruled. On the contrary, Shurtleff v. United States, 189 U.S. 311, clearly recognizes the right of Congress to impose restrictions.

1926, Myers v. United States, 272 U.S. 202

Concerning the legislative and practical construction following this debate, Mr. Justice Story wrote (1833):

1926, Myers v. United States, 272 U.S. 202

It constitutes perhaps the most extraordinary case in the history of the government of a power, conferred by implication on the executive by the assent of a bare majority of Congress, which has not been questioned on many other occasions. . . . Whether the predictions of the original advocates of the executive power, or those of the opposers of it, are likely, in the future progress of the government, to be realized must be left to the sober judgment of the community and to the impartial award of time. If there has been any aberration from the true constitutional exposition of the power of removal (which the reader must decide for himself), it will be difficult, and perhaps impracticable, after forty years' experience to recall the practice to the correct theory. But, at all events, it will be a consolation to those who love the Union and honor a devotion to the patriotic discharge of duty that, in regard to "inferior officers" (which appellation probably includes ninety-nine out of a hundred of the lucrative offices in the government), the remedy for any permanent abuse is still within the power of Congress, by the simple expedient of requiring the consent of the Senate to removals in such cases.

1926, Myers v. United States, 272 U.S. 202

Story on the Constitution, §§ 1543, 1544.

1926, Myers v. United States, 272 U.S. 202

Writing in 1826 (\*309, 310) Chancellor Kent affirmed:

1926, Myers v. United States, 272 U.S. 202

The Act [the Judiciary Act of September 24, 1789, § 27] [272 U.S. 203] says that the marshal shall be removable at pleasure, without saying by whom, and, on the first organization of the government, it was made a question whether the power of removal, in case of officers appointed to hold at pleasure, resided anywhere but in the body which appointed, and, of course, whether the consent of the Senate was not requisite to remove. This was the construction given to the Constitution while it was pending for ratification before the state conventions, by the author of The Federalist. . . . But the construction which was given to the Constitution by Congress, after great consideration and discussion, was different. In the Act for establishing the Treasury Department, the Secretary was contemplated as being removable from office by the President. The words of the Act are,

1926, Myers v. United States, 272 U.S. 203

That whenever the Secretary shall be removed from office by the President of the United States, or in any other case of vacancy in the office, the assistant shall act,

1926, Myers v. United States, 272 U.S. 203

&c. This amounted to a legislative construction of the Constitution, and it has ever since been acquiesced in and acted upon as of decisive authority in the case. It applies equally to every other officer of government appointed by the President and Senate whose term of duration is not specially declared.

1926, Myers v. United States, 272 U.S. 203

These great expounders had no knowledge of any practical construction of the Constitution sufficient to support the theory here advanced. This court knew nothing of it in 1803 when it decided Marbury v. Madison, and we have the assurance of Mr. Justice McLean (United States v. Guthrie, 17 How. 284, 305) that it adhered to the view there expressed so long as Chief Justice Marshall lived. And neither Calhoun nor Clay nor Webster knew of any such thing during the debate of 1835 when they advocated limitation, by further legislation, of powers granted to the President by the Act of 1820.

1926, Myers v. United States, 272 U.S. 203

If the remedy suggested by Mr. Justice Story and long supposed to be efficacious should prove to be valueless, [272 U.S. 204] I suppose Congress may enforce its will by empowering the courts or heads of departments to appoint all officers except representatives abroad, certain judges and a few "superior" officers—members of the cabinet. And, in this event, the duty to "take care that the laws be faithfully executed" would remain notwithstanding the President's lack of control. In view of this possibility, under plain provisions of the Constitution, it seems useless, if not, indeed, presumptuous for courts to discuss matters of supposed convenience or policy when considering the President's power to remove.

1926, Myers v. United States, 272 U.S. 204

X

1926, Myers v. United States, 272 U.S. 204

Congress has long and vigorously asserted its right to restrict removals, and there has been no common executive practice based upon a contrary view. The President has often removed, and it is admitted that he may remove, with either the express or implied assent of Congress; but the present theory is that he may override the declared will of that body. This goes far beyond any practice heretofore approved or followed; it conflicts with the history of the Constitution, with the ordinary rules of interpretation, and with the construction approved by Congress since the beginning and emphatically sanctioned by this court. To adopt it would be revolutionary.

1926, Myers v. United States, 272 U.S. 204

The Articles of Confederation contained no general grant of executive power.

1926, Myers v. United States, 272 U.S. 204

The first constitutions of the States vested in a governor or president, sometimes with and sometimes without a council, "the executive power," "the supreme executive power"; but always in association with carefully defined special grants, as in the federal Constitution itself. They contained no intimation of executive powers except those definitely enumerated or necessarily inferred therefrom or from the duty of the executive to enforce the laws. Speaking in the Convention, July 17, [272 U.S. 205] Mr. Madison said: "The executives of the States are in general little more than cyphers; the legislatures omnipotent."

1926, Myers v. United States, 272 U.S. 205

In the proceedings of the Constitutional Convention, no hint can be found of any executive power except those definitely enumerated or inferable therefrom or from the duty to enforce the laws. In the notes of Rufus King (June 1) upon the Convention, this appears—

1926, Myers v. United States, 272 U.S. 205

Wilson—an extive. ought to possess the powers of secresy, vigour & Dispatch—and to be so constituted as to be responsible—Extive. powers are designed for the execution of Laws, and appointing Officers not otherwise to be appointed—if appointments of Officers are made by a sing. Ex he is responsible for the propriety of the same. Not so where the Executive is numerous.

1926, Myers v. United States, 272 U.S. 205

Mad: agrees wth. Wilson in his definition of executive powers executive powers ex vi termini, do not include the Rights of war & peace &c. but the powers shd. be confined and defined—if large we shall have the Evils of elective Monarchies—probably the best plan will be a single Executive of long duration wth. a Council, with liberty to depart from their Opinion at his peril—.

1926, Myers v. United States, 272 U.S. 205

Farrand, Records Fed. Con. v. I, p. 70.

1926, Myers v. United States, 272 U.S. 205

If the Constitution or its proponents had plainly avowed what is now contended for, there can be little doubt that it would have been rejected.

1926, Myers v. United States, 272 U.S. 205

The Virginia plan, when introduced, provided—

1926, Myers v. United States, 272 U.S. 205

That a national executive be instituted, to be chosen by the national legislature for the term of years, to receive punctually at stated times a fixed compensation for the services rendered, in which no increase or diminution shall be made so as to affect the magistracy existing at the time of increase or diminution, and to be ineligible a second time, and that besides a general authority to execute the national laws, it ought to enjoy the executive rights vested in Congress by the Confederation. [272 U.S. 206]

1926, Myers v. United States, 272 U.S. 206

That the executive and a convenient number of the national judiciary ought to compose a council of revision with authority to examine every act of the national legislature before it shall operate, and every act of a particular legislature before a negative thereon shall be final, and that the dissent of the said council shall amount to a rejection unless the act of the national legislature be again passed, or that of a particular legislature be again negatived by \_\_\_ of the members of each branch.

1926, Myers v. United States, 272 U.S. 206

This provision was discussed and amended. When reported by the Committee of the Whole and referred to the Committee on Detail, June 13, it read thus—

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Resolved, That a national executive be instituted to consist of a single person, to be chosen by the national legislature for the term of seven years, with power to carry into execution the national laws, to appoint to offices in cases not otherwise provided for—to be ineligible a second time, and to be removable on impeachment and conviction of malpractices or neglect of duty—to receive a fixed stipend by which he may be compensated for the devotion of his time to public service to be paid out of the national treasury. That the national executive shall have a right to negative any legislative act which shall not be afterwards passed unless by two-thirds of each branch of the national legislature.

1926, Myers v. United States, 272 U.S. 206

The Committee on Detail reported: "Sec. 1. The executive power of the United States shall be vested in a single person," etc. This was followed by Sec. 2 with the clear enumeration of the President's powers and duties. Among them were these:

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He shall from time to time give information to the Legislature of the state of the Union. . . . He shall take care that the laws of the United States be duly and faithfully executed. . . . He shall receive ambassadors. . . . He shall be commander-in-chief of the Army and Navy.

1926, Myers v. United States, 272 U.S. 206

Many of these [272 U.S. 207] were taken from the New York Constitution. After further discussion, the enumerated powers were somewhat modified and others were added, among them (September 7), the power " to call for the opinions of the heads of departments, in writing."

1926, Myers v. United States, 272 U.S. 207

It is beyond the ordinary imagination to picture forty or fifty capable men, presided over by George Washington, vainly discussing, in the heat of a Philadelphia summer, whether express authority to require opinions in writing should be delegated to a President in whom they had already vested the illimitable executive power here claimed.

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The New Jersey plan—

1926, Myers v. United States, 272 U.S. 207

That the United States in Congress be authorized to elect a federal executive to consist of \_\_\_ persons, to continue in office for the term of \_\_\_ years, to receive punctually at stated times a fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons composing the executive at the time of such increase or diminution, to be paid out of the federal treasury; to be incapable of holding any other office or appointment during their time of service and for \_\_\_ years thereafter; to be ineligible a second time, and removable by Congress on application by a majority of the executives of the several States; that the executives, besides their general authority to execute the federal acts, ought to appoint all federal officers not otherwise provided for, and to direct all military operations; provided that none of the persons composing the federal executive shall on any occasion take command of any troops, so as personally to conduct any enterprise as general or in other capacity.

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The sketch offered by Mr. Hamilton—

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The supreme executive authority of the United States to be vested in a governor to be elected to serve during good behavior—the election to be made by electors chosen by the people in the election districts aforesaid—the authorities [272 U.S. 208] and functions of the executive to be as follows: to have a negative on all laws about to be passed, and the execution of all laws passed; to have the direction of war when authorized or begun; to have with the advice and approbation of the Senate the power of making all treaties; to have the sole appointment of the heads or chief officers of the departments of Finance, War and Foreign Affairs; to have the nomination of all other officers (ambassadors to foreign nations included) subject to the approbation or rejection of the Senate; to have the power of pardoning all offences except treason, which he shall not pardon without the approbation of the Senate.

1926, Myers v. United States, 272 U.S. 208

XI

1926, Myers v. United States, 272 U.S. 208

The Federalist, Article LXXVI by Mr. Hamilton, says:

1926, Myers v. United States, 272 U.S. 208

It has been mentioned as one of the advantages to be expected from the cooperation of the Senate in the business of appointments that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as to appoint. A change of the Chief Magistrate, therefore, would not occasion so violent or so general a revolution in the officers of the government as might be expected if he were the sole disposer of offices. Where a man in any station had given satisfactory evidence of his fitness for it, a new President would be restrained from attempting a change in favor of a person more agreeable to him by the apprehension that a discountenance of the Senate might frustrate the attempt, and bring some degree of discredit upon himself. Those who can best estimate the value of a steady administration will be most disposed to prize a provision which connects the official existence of public men with the approbation or disapprobation of that body which, from the greater permanency of its own composition, will in all probability be less subject to inconstancy than any other member of the government. [272 U.S. 209]

1926, Myers v. United States, 272 U.S. 209

XII

1926, Myers v. United States, 272 U.S. 209

Since the debate of June, 1789, Congress has repeatedly asserted power over removals; this court has affirmed the power, and practices supposed to be impossible have become common.

1926, Myers v. United States, 272 U.S. 209

Mr. Madison was much influenced by supposed expediency, the impossibility of keeping the Senate in constant session, etc.; also the extraordinary personality of the President. He evidently supposed it would become common practice to provide for officers without definite terms, to serve until resignation, death or removal. And this was generally done until 1820. The office under discussion was a superior one, to be filled only by Presidential appointment. He assumed as obviously true things now plainly untrue, and was greatly influenced by them. He said—

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The danger then consists merely in this: the President can displace from office a man whose merits require that he should be continued in it. What will be the motives which the President can feel for such abuse of his power, and the restraints that operate to prevent it? In the first place, he will be impeachable by this House, before the Senate for such an act of maladministration, for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust. But what can be his motives for displacing a worthy man? It must be that he may fill the place with an unworthy creature of his own. . . . Now if this be the case with an hereditary monarch, possessed of those high prerogatives and furnished with so many means of influence, can we suppose a President, elected for four years only, dependent upon the popular voice, impeachable by the legislature, little, if at all, distinguished for wealth, personal talents, or influence from the head of the department himself; I say, will he bid defiance to all these considerations and wantonly dismiss a meritorious and virtuous officer? [272 U.S. 210] Such abuse of power exceeds my conception. If anything takes place in the ordinary course of business of this kind, my imagination cannot extend to it on any rational principle.

1926, Myers v. United States, 272 U.S. 210

We face as an actuality what he thought was beyond imagination, and his argument must now be weighed accordingly. Evidently the sentiments which he then apparently held came to him during the debate, and were not entertained when he left the Constitutional Convention, nor during his later years. It seems fairly certain that he never consciously advocated the extreme view now attributed to him by counsel. His clearly stated exceptions to what he called the prevailing view and his subsequent conduct repel any such idea.

1926, Myers v. United States, 272 U.S. 210

By an Act approved August 7, 1789, (c. 8, 1 Stat. 50, 53) Congress provided for the future government of the Northwest Territory, originally organized by the Continental Congress. This statute directed:

1926, Myers v. United States, 272 U.S. 210

The President shall nominate and by and with the advice and consent of the Senate shall appoint all officers which by the said ordinance were to have been appointed by the United States in Congress assembled, and all officers so appointed shall be commissioned by him, and in all cases where the United States in Congress assembled, might, by the said ordinance, revoke any commission or remove from any office, the President is hereby declared to have the same powers of revocation and removal.

1926, Myers v. United States, 272 U.S. 210

The ordinance of 1787 authorized the appointment by Congress of a Governor "whose commission shall continue in force for the term of three years unless sooner revoked by Congress," a secretary "whose commission shall continue in force for four years unless sooner revoked," and three judges whose "commissions shall continue in force during good behavior." These were not constitutional judges. American Insurance Co. v. Canter, 1 Pet. 511. Thus, Congress, at its first session, inhibited removal of judges [272 U.S. 211] and assented to removal of the first civil offices for whom it prescribed fixed terms. It was wholly unaware of the now-supposed construction of the Constitution which would render these provisions improper. There had been no such construction; the earlier measure and debate related to an officer appointed by legislative consent to serve at will and whatever was said must be limited to that precise point.

1926, Myers v. United States, 272 U.S. 211

On August 18, 1789, the President nominated, and on the twentieth the Senate "did advise and consent" to the appointment of, the following officers for the Territory: Arthur St. Clair, Governor; Winthrop Sargent, Secretary; Samuel Holden Parsons, John Cleves Symmes and William Barton, judges of the court.

1926, Myers v. United States, 272 U.S. 211

The bill for the Northwest Territory was a House measure, framed and presented July 16, 1789, by a special committee of which Mr. Sedgwick of Massachusetts was a member, and passed July 21 without roll call. The Senate adopted it August 4. The debate on the bill to create the Department of Foreign Affairs must have been fresh in the legislative mind, and it should be noted that Mr. Sedgwick had actively supported the power of removal when that measure was up.

1926, Myers v. United States, 272 U.S. 211

The Act of September 24, 1789 (c. 20, § 27, 1 Stat. 73, 87), provided for another civil officer with fixed term.

1926, Myers v. United States, 272 U.S. 211

A marshal shall be appointed in and for each district for the term of four years, but shall be removable from office at pleasure, whose duty it shall be,

1926, Myers v. United States, 272 U.S. 211

etc. This Act also provided for district attorneys and an Attorney General without fixed terms, and said nothing of removal. The legislature must have understood that, if an officer be given a fixed term and nothing is said concerning removal, he acquires a vested right to the office for the full period; also that officers appointed without definite terms were subject to removal by the President at will, assent of Congress being implied. [272 U.S. 212]

1926, Myers v. United States, 272 U.S. 212

This bill was a Senate measure, prepared by a committee of which Senators Ellsworth and Paterson were members and introduced June 12. It was much considered between June 22 and July 17, when it passed the Senate fourteen to six. During this same period, the House bill to create the Department of Foreign Affairs was under consideration by the Senate, and Senators Ellsworth and Paterson both gave it support. The Judiciary bill went to the House July 20, and there passed September 17. Mr. Madison supported it.

1926, Myers v. United States, 272 U.S. 212

If the theory of illimitable executive power now urged is correct, then the Acts of August 7 and September 24 contained language no less objectionable than the original phrase in the bill to establish the Department of Foreign Affairs over which the long debate arose. As nobody objected to the provisions concerning removals and life tenure in the two later Acts, it seems plain enough that the first Congress never entertained the constitutional views now advanced by the United States. As shown by Mr. Madison's letter to Edmund Randolph, supra, the point under discussion was the power to remove officers appointed to serve at will. Whatever effect is attributable to the action taken must be confined to such officers.

1926, Myers v. United States, 272 U.S. 212

Congress first established courts in the District of Columbia by the Act of February 27, 1801, c. 15, 2 Stat. 103. This authorized three judges to be appointed by the President with consent of the Senate "to hold their respective offices during good behavior." The same tenure has been bestowed on all subsequent superior District of Columbia judges. The same Act also provided for a marshal, to serve during four years, subject to removal at pleasure; for a district attorney without definite term, and

1926, Myers v. United States, 272 U.S. 212

such number of discreet persons to be justices of the peace as the President of the United States shall from time to time think expedient, to [272 U.S. 213] continue in office five years.

1926, Myers v. United States, 272 U.S. 213

Here, again, Congress undertook to protect inferior officers in the District from executive interference, and the same policy has continued down to this time. (See Act of February 9, 1893, c. 74, 27 Stat. 434.)

1926, Myers v. United States, 272 U.S. 213

The Acts providing "for the government of the Territory of the United States south of the River Ohio" (1790), and for the organization of the Territories of Indiana (1800), Illinois (1809), and Michigan (1805), all provided that the government should be similar to that established by the ordinance of 1787, for the Northwest Territory. Judges for the Northwest Territory were appointed for life.

1926, Myers v. United States, 272 U.S. 213

The Act establishing the territorial government of Wisconsin (1836) directed:

1926, Myers v. United States, 272 U.S. 213

That the judicial power of the said Territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. The supreme court shall consist of a chief justice and two associate judges, any two of whom shall be a quorum, and who shall hold a term at the seat of government of the said Territory annually, and they shall hold their offices during god behaviour.

1926, Myers v. United States, 272 U.S. 213

The organization Acts for the territories of Louisiana (1804), Iowa (1838), Minnesota (1849), New Mexico (1850), Utah (1850), North Dakota (1861), Nevada (1861), Colorado (1861), and Arizona (1863), provided for judges " to serve for four years." Those for the organization of Oregon (1848), Washington (1853), Kansas (1854), Nebraska (1854), Idaho (1863), Montana (1864), Alaska (1884), Indian Territory (1889), and Oklahoma (1890), provided for judges "to serve for four years, and until their successors shall be appointed and qualified." Those for Missouri (1812), Arkansas (1819), Wyoming (1868), Hawaii (1900), and Florida (1822), provided that judges should be appointed to serve "four years unless sooner removed;" "four years unless sooner removed by [272 U.S. 214] the President;" "four years unless sooner removed by the President with the consent of the Senate of the United States;" "who shall be citizens of the Territory of Hawaii and shall be appointed by the President of the United States, by and with the advice and consent of the Senate of the United States, and may be removed by the President;" "for the term of four years and no longer."

1926, Myers v. United States, 272 U.S. 214

May 15, 1820, President Monroe approved the first general tenure of office Act, c. 102, 3 Stat. 582. If directed—

1926, Myers v. United States, 272 U.S. 214

All district attorneys, collectors of the customs, naval officers and surveyors of the customs, navy agents, receivers of public moneys for lands, registers of the land offices, paymasters in the army, the apothecary general, the assistant apothecaries general, and the commissary general of purchases, to be appointed under laws of the United States, shall be appointed for the term of four years, but shall be removable from office at pleasure. [Prior to this time, these officers were appointed without term to serve at will.]

1926, Myers v. United States, 272 U.S. 214

Sec. 2. . . . The commission of each and every of the officers named in the first section of this Act, now in office, unless vacated by removal from office, or otherwise, shall cease and expire in the manner following: all such commissions, bearing date on or before the thirtieth day of September, one thousand eight hundred and fourteen, shall cease and expire on the day and month of their respective dates, which shall next ensue after the thirtieth day of September next; all such commissions, bearing date after the said thirtieth day of September, in the year one thousand eight hundred and fourteen, and before the first day of October, one thousand eight hundred and sixteen, shall cease and expire on the day and month of their respective dates, which shall next ensue after the thirtieth day of September, one thousand eight hundred and twenty-one. And all other such commissions shall cease [272 U.S. 215] and expire at the expiration of the term of four years from their respective dates.

1926, Myers v. United States, 272 U.S. 215

Thus, Congress not only asserted its power of control by prescribing terms and then giving assent to removals, but it actually removed officers who were serving at will under presidential appointment with consent of the Senate. This seems directly to conflict with the notion that removals are wholly executive in their nature.

1926, Myers v. United States, 272 U.S. 215

XIII

1926, Myers v. United States, 272 U.S. 215

The claim advanced for the United States is supported by no opinion of this court, and conflicts with Marbury v. Madison (1803), supra, concurred in by all, including Mr. Justice Paterson, who was a conspicuous member of the Constitutional Convention and, as Senator from New Jersey, participated in the debate of 1789 concerning the power to remove and supported the bill to establish the Department of Foreign Affairs.

1926, Myers v. United States, 272 U.S. 215

By an original proceeding here, Marbury sought a mandamus requiring Mr. Madison, then Secretary of State, to deliver a commission signed by President Adams which showed his appointment (under the Act of February 27, 1801) as Justice of the Peace for the District of Columbia, "to continue in office five years." The Act contained no provision concerning removal. 5 As required by the circumstances, the court first considered Marbury's right to demand the commission, and affirmed it. Mr. Chief Justice Marshall said—

1926, Myers v. United States, 272 U.S. 215

It is, therefore, decidedly the opinion of the court, that, when a commission has been signed by the President, [272 U.S. 216] the appointment is made, and that the commission is complete when the seal of the United States has been affixed to it by the Secretary of State.

1926, Myers v. United States, 272 U.S. 216

Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable, and the commission may be arrested if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed.

1926, Myers v. United States, 272 U.S. 216

The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where by law the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute, unconditional power of accepting or rejecting it.

1926, Myers v. United States, 272 U.S. 216

Mr. Marbury, then, since his commission was signed by the President and sealed by the Secretary of State, was appointed, and, as the law creating the office gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country. [This freedom from executive interference had been affirmed by Representative Bayard in February, 1802, during the debate on repeal of the Judiciary Act of 1801.]

1926, Myers v. United States, 272 U.S. 216

To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

1926, Myers v. United States, 272 U.S. 216

The office of justice of peace in the District of Columbia is such an office [of trust, honor, or profit]. . . . It has been created by special Act of Congress, and has been secured, so far as the laws can give security, to the person appointed to fill it, for five years. . . . [272 U.S. 217]

1926, Myers v. United States, 272 U.S. 217

It is, then, the opinion of the court—1st. that, by signing the commission of Mr. Marbury, the President of the United States appointed him a justice of peace for the County of Washington, in the District of Columbia, and that the seal of the United States, affixed thereto by the Secretary of State, is conclusive testimony of the verity of the signature, and of the completion of the appointment, and that the appointment conferred on him a legal right to the office for the space of five years.

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It has already been stated that the applicant has, to that commission, a vested legal right of which the executive cannot deprive him. He has been appointed to an office from which he is not removable at the will of the executive, and being so appointed, he has a right to the commission which the Secretary has received from the President for his use.

1926, Myers v. United States, 272 U.S. 217

The point thus decided was directly presented and essential to proper disposition of the cause. If the doctrine now advanced had been approved, there would have been no right to protect, and the famous discussion and decision of the great constitutional question touching the power of the court to declare an Act of Congress without effect would have been wholly out of place. The established rule is that doubtful constitutional problems must not be considered unless necessary to determination of the cause. The sometime suggestion that the Chief Justice indulged an obiter dictum is without foundation. The court must have appreciated that, unless it found Marbury had the legal right to occupy the office irrespective of the President's will, there would be no necessity for passing upon the much-controverted and far-reaching power of the judiciary to declare an Act of Congress without effect. In the circumstances then existing, it would have been peculiarly unwise to consider the second and more important question without first demonstrating the necessity therefor by ruling upon the first. Both points [272 U.S. 218] were clearly presented by the record, and they were decided in logical sequence. Cooley's Constitutional Limitations, 7th ed., 231. 6

1926, Myers v. United States, 272 U.S. 218

But, assuming that it was unnecessary in Marbury v. Madison to determine the right to hold the office, nevertheless this Court deemed it essential and decided it. I cannot think this opinion is less potential than Mr. Madison's argument during a heated debate concerning an office without prescribed tenure.

1926, Myers v. United States, 272 U.S. 218

This opinion shows clearly enough why Congress, when it directed appointment of marshals for definite terms by the Act of 1789, also took pains to authorize their removal. The specification of a term, without more, would have prevented removals at pleasure.

1926, Myers v. United States, 272 U.S. 218

We are asked by the United States to treat the definite holding in Marbury v. Madison that the plaintiff was not subject to removal by the President at will as mere dictum—to disregard it. But a solemn adjudication by this Court may not be so lightly treated. For a hundred and twenty years, that case has been regarded as among the most important ever decided. It lies at the very foundation of our jurisprudence. Every point determined was deemed essential, and the suggestion of dictum, either idle or partisan exhortation, ought not to be tolerated. The point here involved was directly passed upon by the great Chief Justice, and we must accept the result unless prepared to express direct disapproval and exercise the transient power which we possess to overrule our great predecessors—the opinion cannot be shunted.

1926, Myers v. United States, 272 U.S. 218

At the outset, it became necessary to determine whether Marbury had any legal right which could, prima facie at least, create a justiciable or actual case arising under the laws of the United States. Otherwise, there would have [272 U.S. 219] been nothing more than a moot cause; the proceeding would have been upon an hypothesis, and he would have shown no legal right whatever to demand an adjudication on the question of jurisdiction and constitutionality of the statute. The court proceeded upon the view that it would not determine an important and far-reaching constitutional question unless presented in a properly justiciable cause by one asserting a clear legal right susceptible of protection. It emphatically declared, not by way of argument or illustration, but as definite opinion, that the appointment of Marbury "conferred on him a legal right to the office for the space of five years," beyond the President's power to remove; and, plainly on this premise, it thereupon proceeded to consider the grave constitutional question. Indeed, if Marbury had failed to show a legal right to protect or enforce, it could be urged that the decision as to invalidity of the statute lacked force as a precedent because rendered upon a mere abstract question raised by a moot case. The rule has always been cautiously to avoid passing upon important constitutional questions unless some controversy properly presented requires their decision.

1926, Myers v. United States, 272 U.S. 219

The language of Mr. Justice Matthews in Liverpool, etc., Steamship Co. v. Commissioners of Emigration, 113 U.S. 33, 39, is pertinent—

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If, on the other hand, we should assume the plaintiff's case to be within the terms of the statute, we should have to deal with it purely as an hypothesis, and pass upon the constitutionality of an Act of Congress as an abstract question. That is not the mode in which this court is accustomed or willing to consider such questions. It has no jurisdiction to pronounce any statute, either of a State or of the United States, void because irreconcilable with the Constitution except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two [272 U.S. 220] rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. These rules are safe guides to sound judgment. It is the dictate of wisdom to follow them closely and carefully.

1926, Myers v. United States, 272 U.S. 220

Also the words of Mr. Justice Brewer in Union Pacific Co. v. Mason City Co., 199 U.S. 160, 166—

1926, Myers v. United States, 272 U.S. 220

Of course, where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is obiter, but each is the judgment of the court and of equal validity with the other. Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can in no just sense be called mere dictum. Railroad Companies v. Schutte, 103 U.S. 118, in which this court said (p. 143):

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It cannot be said that a case is not authority on the point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here, the precise question was properly presented, fully argued and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended.

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And see Chicago, etc., Railway Co. v. Wellman, 143 U.S. 339, 345; United States v. Chamberlin, 219 U.S. 250, 262; United States. v. Title Insurance Co., 265 U.S. 472, 486; Watson v. St. Louis, etc., Ry. Co., 169 Fed. 942, 944, 945.

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Although he was intensely hostile to Marbury v. Madison, and refused to recognize it as authoritative, I do not find that Mr. Jefferson ever controverted the view [272 U.S. 221] that an officer duly appointed for a definite time, without more, held his place free from arbitrary removal by the President. If there had been any generally accepted opinion or practice under which he could have dismissed such an officer, as now claimed, that cause would have been a rather farcical proceeding with nothing substantial at issue, since the incumbent could have been instantly removed. And, assuming such doctrine, it is hardly possible that Mr. Jefferson would have been ignorant of the practical way to end the controversy—a note of dismissal or removal. Evidently he knew nothing of the congressional interpretation and consequent practice here insisted on. And this notwithstanding Mr. Madison sat at his side.

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Mr. Jefferson's letters to Spencer Roane (1819) and George Hay (1807) give his views.

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In the case of Marbury and Madison, the federal judges declared that commissions, signed and sealed by the President, were valid although not delivered. I deemed delivery essential to complete a deed, which, as long as it remains in the hands of the party, is as yet no deed, it is in posse only, but not in esse, and I withheld delivery of the commissions.

1926, Myers v. United States, 272 U.S. 221

I think it material to stop citing Marbury v. Madison as authority and have it denied to be law.

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1. Because the judges, in the outset, disclaimed all cognizance of the case, although they then went on to say what would have been their opinion, had they had cognizance of it. This, then, was confessedly an extrajudicial opinion. and, as such, of no authority. 2. Because, had it been judicially pronounced, it would have been against law; for to a commission, a deed, a bond, delivery is essential to give validity. Until, therefore, the commission is delivered out of the hands of the executive and his agents, it is not his deed.

1926, Myers v. United States, 272 U.S. 221

The judges did not disclaim all cognizance of the cause they were called upon to determine the question [272 U.S. 222] irrespective of the result reached—and, whether rightly or wrongly, they distinctly held that actual delivery of the commission was not essential. That question does not now arise—here the commission was delivered and the appointee took office.

1926, Myers v. United States, 272 U.S. 222

Ex parte Mennen (1839), 13 Peters 230, 258, involved the power of a United States District Judge to dismiss at will the clerk whom he had appointed. Mr. Justice Thompson said—

1926, Myers v. United States, 272 U.S. 222

The Constitution is silent with respect to the power of removal from office, where the tenure is not fixed. It provides, that the judges, both of the supreme and inferior courts, shall hold their offices during good behaviour. But no tenure is fixed for the office of clerks. Congress has by law limited the tenure of certain officers to the term of four years, 3 Story, 1790; but expressly providing that the officers shall, within that term, be removable at pleasure; which, of course, is without requiring any cause for such removal. The clerks of courts are not included within this law, and there is no express limitation in the Constitution, or laws of Congress, upon the tenure of the office.

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All offices, the tenure of which is not fixed by the Constitution or limited by law, must be held either during good behavior or (which is the same thing in contemplation of law) during the life of the incumbent; or must be held at the will and discretion of some department of the government, and subject to removal at pleasure.

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It cannot for a moment be admitted that it was the intention of the Constitution that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment. This power of [272 U.S. 223] removal from office was a subject much disputed, and upon which a great diversity of opinion was entertained in the early history of this government. This related, however, to the power of the President to remove officers appointed with the concurrence of the Senate, and the great question was whether the removal was to be by the President alone, or with the concurrence of the Senate, both constituting the appointing power. No one denied the power of the President and Senate jointly to remove where the tenure of the office was not fixed by the Constitution, which was a full recognition of the principle that the power of removal was incident to the power of appointment. But it was very early adopted as the practical construction of the Constitution that this power was vested in the President alone. And such would appear to have been the legislative construction of the Constitution. . . .

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It would be a most extraordinary construction of the law that all these offices were to be held during life, which must inevitably follow unless the incumbent was removable at the discretion of the head of the department: the President has certainly no power to remove. These clerks fall under that class of inferior officers the appointment of which the Constitution authorizes Congress to vest in the head of the department. The same rule as to the power of removal must be applied to offices where the appointment is vested in the President alone. The nature of the power, and the control over the officer appointed, does not at all depend on the source from which it emanates. The execution of the power depends upon the authority of law, and not upon the agent who is to administer it. And the Constitution has authorized Congress, in certain cases, to vest this power in the President alone, in the Courts of law, or in the heads of departments, and all inferior officers appointed under each, by authority of law, must hold their office at the discretion [272 U.S. 224] of the appointing power. Such is the settled usage and practical construction of the Constitution and laws under which these offices are held.

1926, Myers v. United States, 272 U.S. 224

United States v. Guthrie (1854), 17 How. 284. Goodrich had been removed from the office of Chief Justice of the Supreme Court, Territory of Minnesota, to which he had been appointed to serve "during the period of four years." He sought to recover salary for the time subsequent to removal through a mandamus to the Secretary of the Treasury. The court held this was not a proper remedy, and did not consider whether the President had power to remove a territorial judge appointed for a fixed term. The reported argument of counsel is enlightening; the dissenting opinion of Mr. Justice McLean is important. He points out that only two territorial judges had been removed—the plaintiff Goodrich, in 1851, and William Trimble, May 20, 1830. The latter was judge of the Superior Court of the Territory of Arkansas, appointed to "continue in office for the term of four years, unless sooner removed by the President."

1926, Myers v. United States, 272 U.S. 224

United States v. Bigler, Fed. Cases, 14481 (1867). This opinion contains a valuable discussion of the general doctrine here involved.

1926, Myers v. United States, 272 U.S. 224

United States v. Perkins (1886), 116 U.S. 483, 485, held that

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when Congress, by law, vests the appointment of inferior officers in the heads of Departments, it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict and regulate the removal by such laws as Congress may enact in relation to the officers so appointed.

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McAllister v. United States (1891), 141 U.S. 174. Plaintiff was appointed District Judge for Alaska

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for the term of four years from the day of the date hereof, and until his successor shall be appointed and qualified, subject [272 U.S. 225] to the conditions prescribed by law.

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He was suspended, and the Senate confirmed his successor. He sought to recover salary for the time between his removal and qualification of his successor. Section 1768, R.S., authorized the President to suspend civil officers "except judges of the courts of the United States." This court reviewed the authorities and pointed out that judges of territorial courts were not judges of courts of the United States within § 1768, and, accordingly, were subject to suspension by the President as therein provided. This argument would have been wholly unnecessary if the theory now advanced, that the President has illimitable power to remove, had been approved.

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In an elaborate dissent, Mr. Justice Field, Mr. Justice Gray, and Mr. Justice Brown expressed the view that it was beyond the President's power to remove the judge of any court during the term for which appointed. They necessarily repudiated the doctrine of illimitable power.

1926, Myers v. United States, 272 U.S. 225

Parsons v. United States (1897), 167 U.S. 324, 343. After a review of the history and cases supposed to be apposite, this court, through Mr. Justice Peckham, held that the President had power to remove Parsons from the office of District Attorney, to which he had been appointed "for the term of four years from the date hereof, subject to the conditions prescribed by law."

1926, Myers v. United States, 272 U.S. 225

We are satisfied that its [Congress'] intention in the repeal of the Tenure of Office sections of the Revised Statutes was again to concede to the President the power of removal if taken from him by the original Tenure of Office Act, and, by reason of the repeal, to thereby enable him to remove an officer when, in his discretion, he regards it for the public good, although the term of office may have been limited by the words of the statute creating the office.

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He referred to the Act of 1820 and suggested that the situation following it had been renewed by repeal of the Tenure of Office Act. [272 U.S. 226]

1926, Myers v. United States, 272 U.S. 226

The opinion does express the view that, by practical construction prior to 1820, the President had power to remove an officer appointed for a fixed term; but this is a clear mistake. In fact, no removals of such duly commissioned officers were made prior to 1820, and Marbury v. Madison expressly affirms that this could not lawfully be done. The whole discussion in Parsons' case was futile if the Constitution conferred upon the President illimitable power to remove. It was pertinent only upon the theory that, by apt words, Congress could prohibit removals, and this view was later affirmed by Mr. Justice Peckham in Shurtleff v. United States. Apparently he regarded the specification of a definite term as not equivalent to positive inhibition of removal by Congress.

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Reagan v. United States (1901), 182 U.S. 419, 425. Reagan, a Commissioner of the United States Court in Indian Territory, was dismissed by the judge, and sued to recover salary. He claimed that the judge's action was invalid because the cause assigned therefor was not one of those prescribed by law. This court, by Mr. Chief Justice Fuller, said:

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The inquiry is, therefore, whether there were any causes of removal prescribed by law, March 1, 1895, or at the time of removal. If there were, then the rule would apply that, where causes of removal are specified by constitution or statute, as also where the the term of office is for a fixed period, notice and hearing are essential. If there were not, the appointing power could remove at pleasure or for such cause as it deemed sufficient. . . . The commissioners hold office neither for life nor for any specified time, and are within the rule which treats the power of removal as incident to the power of appointment unless otherwise provided. By chapters forty-five and forty-six, justices of the peace, on conviction of the offences enumerated, are removable from office, but these necessarily do not [272 U.S. 227] include all causes which might render the removal of commissioners necessary or advisable. Congress did not provide for the removal of commissioners for the causes for which justices of the peace might be removed, and if this were to be ruled otherwise by construction, the effect would be to hold the commissioners in office for life unless some of those specially enumerated causes became applicable to them. We agree with the Court of Claims that this would be a most unreasonable construction, and would restrict the power of removal in a manner which there is nothing in the case to indicate could have been contemplated by Congress.

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Shurtleff v. United States (1903), 189 U.S. 311, 313. The plaintiff sought to recover his salary as General Appraiser. He was appointed to that office without fixed term, with consent of the Senate, and qualified July 24, 1890. The Act creating the office provided that the incumbents

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shall not be engaged in any other business, avocation or employment, and may be removed from office at any time by the President for inefficiency, neglect of duty or malfeasance in office.

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Shurtleff was dismissed May 3, 1899, without notice or charges and without knowledge of the reasons for the President's action. Through Mr. Justice Peckham, the court said:

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There is, of course, no doubt of the power of Congress to create such an office as is provided for in the above section. Under the provision that the officer might be removed from office at any time for inefficiency, neglect of duty, or malfeasance in office, we are of opinion that, if the removal is sought to be made for those causes, or either of them, the officer is entitled to notice and a hearing. Reagan v. United States, 182 U.S. 419, 425. . . . The appellant contends that, because the statute specified certain causes for which the officer might be removed, it thereby impliedly excluded and denied the right to remove for any other cause, and that the President was [272 U.S. 228] therefore by the statute prohibited from any removal excepting for the causes, or some of them, therein defined. The maxim expressio unius est exclusio alterius is used as an illustration of the principle upon which the contention is founded. We are of opinion that, as thus used, the maxim does not justify the contention of the appellant. We regard it as inapplicable to the facts herein. The right of removal would exist if the statute had not contained a word upon the subject. It does not exist by virtue of the grant, but it inheres in the right to appoint, unless limited by Constitution or statute. It requires plain language to take it away.

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The distinct recognition of the right of Congress to require notice and hearing if removal were made for any specified cause is, of course, incompatible with the notion that the President has illimitable power to remove. And it is well to note the affirmation that the right of removal inheres in the right to appoint.

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XIV

1926, Myers v. United States, 272 U.S. 228

If the framers of the Constitution had intended "the executive power," in Art. II, Sec. 1, to include all power of an executive nature, they would not have added the carefully defined grants of Sec. 2. They were scholarly men, and it exceeds belief

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that the known advocates in the Convention for a jealous grant and cautious definition of federal powers should have silently permitted the introduction of words and phrases in a sense rendering fruitless the restrictions and definitions elaborated by them.

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Why say, the President shall be commander-in-chief; may require opinions in writing of the principal officers in each of the executive departments; shall have power to grant reprieves and pardons; shall give information to Congress concerning the state of the union; shall receive ambassadors; shall take care that the laws be faithfully executed—if all of these things and more had already [272 U.S. 229] been vested in him by the general words? The Constitution is exact in statement. Holmes v. Jennison, 14 Pet. 540. That the general words of a grant are limited when followed by those of special import is an established canon, and an accurate writer would hardly think of emphasizing a general grant by adding special and narrower ones without explanation. "An affirmative grant of special powers would be absurd, as well as useless, if a general authority were intended." Story on the Constitution, § 448. "The powers delegated by the proposed Constitution to the federal government are few and defined." Federalist, No. XLIV.

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Affirmative words are often, in their operation, negative of other objects than those affirmed, and in this case, a negative or exclusive sense must be given to them, or they have no operation at all. It cannot be presumed that any clause in the Constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.

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Marbury v. Madison, p. 174.

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In his address to the Senate (February 16, 1835) on "The Appointing and Removing Power," Mr. Webster considered and demolished the theory that the first section of Art. II conferred all executive powers upon the President except as therein limited—Webster's Works (Little, B. & Co., 1866), vol. 4, pp. 179, 186; Debates of Congress—and showed that the right to remove must be regarded as an incident to that of appointment. He pointed out the evils of uncontrolled removals and, I think, demonstrated that the claim of illimitable executive power here advanced has no substantial foundation. The argument is exhaustive, and ought to be conclusive. A paragraph from it follows:

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It is true that the Constitution declares that the executive power shall be vested in the President; but the first question which then arises is what is executive power? What is the degree, and what are the limitations? Executive power is not a [272 U.S. 230] thing so well known, and so accurately defined, as that the written constitution of a limited government can be supposed to have conferred it in the lump. What is executive power? What are its boundaries? What model or example had the framers of the Constitution in their minds when they spoke of "executive power"? Did they mean executive power as known in England, or as known in France, or as known in Russia? Did they take it as defined by Montesquieu, by Burlamaqui, or by De Lolme? All these differ from one another as to the extent of the executive power of government. What, then, was intended by "the executive power"? Now, Sir, I think it perfectly plain and manifest that, although the framers of the Constitution meant to confer executive power on the President, yet they meant to define and limit that power, and to confer no more than they did thus define and limit. When they say it shall be vested in a President, they mean that one magistrate, to be called a President, shall hold the executive authority; but they mean, further, that he shall hold this authority according to the grants and limitations of the Constitution itself.

1926, Myers v. United States, 272 U.S. 230

XV

1926, Myers v. United States, 272 U.S. 230

Article I provides: "All legislative powers herein granted, shall be vested in a Congress," etc. I hardly suppose, if the words "herein granted" had not been inserted, Congress would possess all legislative power of Parliament, or of some theoretical government, except when specifically limited by other provisions. Such an omission would not have overthrown the whole theory of a government of definite powers and destroyed the meaning and effect of the particular enumeration which necessarily explains and limits the general phrase. When this Article went to the Committee on Style, it provided: "The legislative power shall be vested in a Congress," [272 U.S. 231] etc. The words "herein granted" were inserted by that committee September 12, and there is nothing whatever to indicate that anybody supposed this radically changed what already had been agreed upon. The same general form of words was used as to the legislative, executive and judicial powers in the draft referred to the Committee on Style. The difference between the reported and final drafts was treated as unimportant.

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"That the government of the United States is one of delegated, limited and enumerated powers," and "that the federal government is composed of powers specifically granted, with the reservation of all others to the States or to the people," are propositions which lie at the beginning of any effort rationally to construe the Constitution. Upon the assumption that the President, by immediate grant of the Constitution, is vested with all executive power without further definition or limitation, it becomes impossible to delimit his authority, and the field of federal activity is indefinitely enlarged. Moreover, as the Constitution authorizes Congress

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to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof,

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it likewise becomes impossible to ascertain the extent of congressional power. Such a situation would be intolerable, chaotic indeed.

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If it be admitted that the Constitution by direct grant vests the President with all executive power, it does not follow that he can proceed in defiance of congressional action. Congress, by clear language, is empowered to make all laws necessary and proper for carrying into execution powers vested in him. Here, he was authorized only to appoint an officer of a certain kind, for a certain period, removable only in a certain way. He undertook to proceed under the law so far as agreeable, but repudiated the remainder. I submit that no warrant can be [272 U.S. 232] found for such conduct. This thought was stressed by Mr. Calhoun in his address to the Senate; from which quotation has been made ante.

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XVI

1926, Myers v. United States, 272 U.S. 232

Article III provides:

1926, Myers v. United States, 272 U.S. 232

The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish.

1926, Myers v. United States, 272 U.S. 232

But this did not endow the federal courts with authority to proceed in all matters within the judicial power of the federal government. Except as to the original jurisdiction of the Supreme Court, it is settled that the federal courts have only such jurisdiction as Congress sees fit to confer.

1926, Myers v. United States, 272 U.S. 232

Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. . . . The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an Act of Congress to confer it.

1926, Myers v. United States, 272 U.S. 232

Kline v. Burke Construction Co., 260 U.S. 226, 234.

1926, Myers v. United States, 272 U.S. 232

In Sheldon et al. v. Sill, 8 How. 441, 449, it was argued that Congress could not limit the judicial power vested in the courts by the Constitution—the same theory, let it be observed, as the one now advanced concerning executive power. Replying, through Mr. Justice Grier, this court declared:

1926, Myers v. United States, 272 U.S. 232

In the case of Turner v. Bank of North America [1799], 4 Dall. 10, it was contended, as in this case, that, as it was a controversy between citizens of different States, the Constitution gave the plaintiff a right to sue in the Circuit Court notwithstanding he was an assignee within the restriction of the eleventh section of the Judiciary Act. But the court said—

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The political [272 U.S. 233] truth is that the disposal of the judicial power (except in a few specified instances) belongs to Congress, and Congress is not bound to enlarge the jurisdiction of the federal courts to every subject, in every form which the Constitution might warrant.

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This decision was made in 1799; since that time, the same doctrine has been frequently asserted by this court, as may be seen in McIntire v. Wood, 7 Cranch 506; Kendall v. United States, 12 Peters. 616; Cary v. Curtis, 3 Howard 245.

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The argument of counsel, reported in 4 Dallas, is interesting. The bad reasoning there advanced, although exposed a hundred years ago, is back again asking for a vote of confidence.

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XVII

1926, Myers v. United States, 272 U.S. 233

The Federal Constitution is an instrument of exact expression. Those who maintain that Art. II, Sec. 1, was intended as a grant of every power of executive nature not specifically qualified or denied must show that the term "executive power" had some definite and commonly accepted meaning in 1787. This court has declared that it did not include all powers exercised by the King of England; and, considering the history of the period, none can say that it had then (or afterwards) any commonly accepted and practical definition. If anyone of the descriptions of "executive power" known in 1787 had been substituted for it, the whole plan would have failed. Such obscurity would have been intolerable to thinking men of that time.

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Fleming v. Page, 9 How. 603, 618—

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Neither is it necessary to examine the English decisions which have been referred to by counsel. It is true that most of the States have adopted the principles of English jurisprudence, so far as it concerns private and individual rights. And when such rights are in question, we habitually refer to the English decisions not only with respect, but in many [272 U.S. 234] cases as authoritative. But in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States and the authority and sovereignty which belong to the English crown that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war or any other subject where the rights and powers of the executive arm of the government are brought into question. Our own Constitution and form of government must be our only guide.

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Blackstone, \*190, 250, 252, affirms that "The supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen," and that there are certain

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branches of the royal prerogative which invest thus our sovereign lord, thus all-perfect and immortal in his kingly capacity, with a number of authorities and powers in the execution whereof consists the executive part of government.

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And he defines "prerogative," as "consisting (as Mr. Locke has well defined it) in the discretionary power of acting for the public good where the positive laws are silent."

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Montesquieu's Spirit of Laws, in 1787 the most popular and influential work on government, says:

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In every government, there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations, and the executive in regard to matters that depend on the civil law. By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply the executive power of the state. [272 U.S. 235]

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Perhaps the best statement concerning "executive power" known in 1787 was by Mr. Jefferson in his Draft of a Fundamental Constitution for the Commonwealth of Virginia, proposed in 1783 (Writings, Ford's ed. 184, vol. 3, 155-156):

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The executive powers shall be exercised by a Governor, who shall be chosen by joint ballot of both Houses of Assembly. . . . By executive powers, we mean no reference to those powers exercised under our former government by the crown as of its prerogative, nor that these shall be the standard of what may or may not be deemed the rightful powers of the Governor. We give them those powers only which are necessary to execute the laws (and administer the government), and which are not in their nature either legislative or judiciary. The application of this idea must be left to reason. We do, however, expressly deny him the prerogative powers of erecting courts, offices, boroughs, corporations, fairs, markets, ports, beacons, light-houses, and sea marks; of laying embargoes, of establishing precedence, of retaining within the State, or recalling to it any citizen thereof, and of making denizens, except so far as he may be authorized from time to time by the legislature to exercise any of those powers.

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This document was referred to by Mr. Madison in the Federalist, No. XLVIII.

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Substitute any of these descriptions or statements for the term "executive power" in Art. II, Sec. 1, and the whole plan becomes hopelessly involved—perhaps impossible.

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The term "executive power" is found in most, if not all, of the state constitutions adopted between 1776 and 1787. They contain no definition of it, but certainly it was not intended to signify what is now suggested. It meant in those instruments what Mr. Webster declared it signifies in the federal Constitution—

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When they say it shall be vested in President, they mean that one magistrate, to be called a President, shall hold the executive [272 U.S. 236] authority; but they mean, further, that he shall hold this authority according to the grants and limitations of the Constitution itself.

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The Constitution of New York, much copied in the federal Constitution, declared: "The supreme executive power and authority of this State shall be vested in a Governor." It then defined his powers and duties, among them, "to take care that the laws are faithfully executed to the best of his ability." It further provided, "that the Treasurer of this State shall be appointed by Act of the Legislature;" and entrusted the appointment of civil and military officers to a council. The Governor had no power to remove them, but apparently nobody thought he would be unable to execute the laws through officers designated by another.

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The Constitution of Virginia, 1776, provided:

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The legislative, executive, and judiciary department shall be separate and distinct, so that neither exercise the powers properly belonging to the other.

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It then imposed upon the two Houses of Assembly the duty of selecting by ballot judges, Attorney General and Treasurer.

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New Jersey Constitution, 1776—

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That the Governor . . . shall have the supreme executive power . . . and act as captain-general and commander in chief of all the militia. . . . That captains, and all other inferior officers of the militia, shall be chosen by the companies, in the respective counties; but field and general officers, by the Council and Assembly.

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North Carolina Constitution, 1776—

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That the legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other: . . . That the General Assembly shall, by joint ballot of both houses, appoint Judges of the Supreme Courts of Law and Equity, Judges of Admiralty, and Attorney-General. . . . That the General Assembly shall, by joint ballot of both houses, triennially appoint a Secretary for this State. [272 U.S. 237]

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During the debate of 1789, Congressman Stone well said:

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If gentlemen will tell us that powers, impliedly executive, belong to the President, they ought to go further with the idea, and give us a correct idea of executive power, as applicable to their rule. In an absolute monarchy, there never has been any doubt with respect to implication; the monarch can do what he pleases. In a limited monarchy, the prince has powers incident to kingly prerogative. How far will a federal executive, limited by a Constitution, extend in implications of this kind? Does it go so far as absolute monarchy? Or is it confined to a restrained monarchy? If gentlemen will lay down their rule, it will serve us as a criterion to determine all questions respecting the executive authority of this government. My conception may be dull, but telling me that this is an executive power raises no complete idea in my mind. If you tell me the nature of executive power, and how far the principle extends, I may be able to judge whether this has relation thereto, and how much is due to implication.

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See The Federalist, No. XLVI.

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XVIII

1926, Myers v. United States, 272 U.S. 237

In any rational search for answer to the questions arising upon this record, it is important not to forget—

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That this is a government of limited powers definitely enumerated and granted by a written Constitution.

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That the Constitution must be interpreted by attributing to its words the meaning which they bore at the time of its adoption and in view of commonly accepted canons of construction, its history, early and long-continued practices under it, and relevant opinions of this court.

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That the Constitution endows Congress with plenary powers "to establish post offices and post roads."

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That, exercising this power during the years from 1789 to 1836, Congress provided for postmasters and vested the [272 U.S. 238] power to appoint and remove all of them at pleasure in the Postmaster General.

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That the Constitution contains no words which specifically grant to the President power to remove duly appointed officers. And it is definitely settled that he cannot remove those whom he has not appointed—certainly they can be removed only as Congress may permit.

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That postmasters are inferior officers within the meaning of Art. II, Sec. 2, of the Constitution.

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That, from its first session to the last one, Congress has often asserted its right to restrict the President's power to remove inferior officers, although appointed by him with consent of the Senate.

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That many Presidents have approved statutes limiting the power of the executive to remove, and that from the beginning such limitations have been respected in practice.

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That this court, as early as 1803, in an opinion never overruled and rendered in a case where it was necessary to decide the question, positively declared that the President had no power to remove at will an inferior officer appointed with consent of the Senate to serve for a definite term fixed by an Act of Congress.

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That the power of Congress to restrict removals by the President was recognized by this court as late as 1903, in Shurtleff v. United States.

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That the proceedings in the Constitutional Convention of 1787, the political history of the times, contemporaneous opinion, common canons of construction, the action of Congress from the beginning, and opinions of this court all oppose the theory that, by vesting "the executive power" in the President, the Constitution gave him an illimitable right to remove inferior officers.

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That this court has emphatically disapproved the same theory concerning "the judicial power" vested in the courts by words substantially the same as those which [272 U.S. 239] vest "the executive power" in the President. "The executive power shall be vested in a President of the United States of America."

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The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

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That to declare the President vested with indefinite and illimitable executive powers would extend the field of his possible action far beyond the limits observed by his predecessors, and would enlarge the powers of Congress to a degree incapable of fair appraisement.

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Considering all these things, it is impossible for me to accept the view that the President may dismiss, as caprice may suggest, any inferior officer whom he has appointed with consent of the Senate, notwithstanding a positive inhibition by Congress. In the last analysis, that view has no substantial support, unless it be the polemic opinions expressed by Mr. Madison (and eight others) during the debate of 1789, when he was discussing questions relating to a "superior officer" to be appointed for an indefinite term. Notwithstanding his justly exalted reputation as one of the creators and early expounders of the Constitution, sentiments expressed under such circumstances ought not now to outweigh the conclusion which Congress affirmed by deliberate action while he was leader in the House and has consistently maintained down to the present year, the opinion of this court solemnly announced through the great Chief Justice more than a century ago, and the canons of construction approved over and over again.

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Judgment should go for the appellant. [272 U.S. 240]

BRANDEIS, J., dissenting

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MR. JUSTICE BRANDEIS, dissenting.

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In 1833, Mr. Justice Story, after discussing in §§ 1537-1543 of his Commentaries on the Constitution the much debated question concerning the President's power of removal, said in § 1544:

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If there has been any aberration from the true constitutional exposition of the power of removal (which the reader must decide for himself), it will be difficult, and perhaps impracticable, after forty years' experience, to recall the practice to the correct theory. But, at all events, it will be a consolation to those who love the Union and honor a devotion to the patriotic discharge of duty that, in regard to "inferior officers" (which appellation probably includes ninety-nine out of a hundred of the lucrative offices in the government), the remedy for any permanent abuse is still within the power of Congress by the simple expedient of requiring the consent of the Senate to removals in such cases.

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Postmasters are inferior officers. Congress might have vested their appointment in the head of the department. 1 The Act of July 12, 1876, c. 17, § 6, 19 Stat. 78, 80, reenacting earlier legislation, 2 provided that

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postmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law.

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That statute has been in force unmodified [272 U.S. 241] for half a century. Throughout the period, it has governed a large majority of all civil offices to which appointments are made by and with the advice and consent of the Senate. 3 May the President, having acted under the statute insofar as it creates the office and authorizes the appointment, ignore, while the Senate is in session, the provision which prescribes the condition under which a removal may take place?

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It is this narrow question, and this only, which we are required to decide. We need not consider what power the President, being Commander in Chief, has over officers in the Army and the Navy. We need not determine whether the President, acting alone, may remove high political officers. We need not even determine whether, acting alone, he may remove inferior civil officers when the Senate is not in session. It was in session when the President purported to remove Myers, and for a long time thereafter. All questions of statutory construction have been eliminated by the language of the Act. It is settled that, in the absence of a provision expressly providing for the consent of the Senate to a removal, the clause fixing the tenure will be construed as a limitation, not as a grant, and that, under such legislation, the President, acting alone, has the power of removal. Parsons v. United States, 167 U.S. 324; Burnap v. United States, 252 U.S. 512, 515. But, in defining the tenure, this statute used words of grant. Congress clearly intended to preclude a removal without the consent of the Senate.

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Other questions have been eliminated by the facts found, by earlier decisions of this Court, and by the [272 U.S. 242] nature of the claim made. It is settled that, where the statute creating an office provides for the consent of the Senate to both appointment and removal, a removal by the President will be deemed to have been so made if consent is given to the appointment of a successor. Wallace v. United States, 257 U.S. 541. But, in the case at bar, no successor was appointed until after the expiration of Myers' term. It is settled that, if Congress had, under clause 2 of section 2, Art II, vested the appointment in the Postmaster General, it could have limited his power of removal by requiring consent of the Senate. United States v. Perkins, 116 U.S. 483. It is not questioned here that the President, acting alone, has the constitutional power to suspend an officer in the executive branch of the government. But Myers was not suspended. It is clear that Congress could have conferred upon postmasters the right to receive the salary for the full term unless sooner removed with the consent of the Senate. Compare Embry v. United States, 100 U.S. 680, 685. It is not claimed by the appellant that the Senate has the constitutional right to share in the responsibility for the removal merely because it shared, under the Act of Congress, in the responsibility for the appointment. Thus, the question involved in the action taken by Congress after the great debate of 1789 is not before us. The sole question is whether, in respect to inferior offices, Congress may impose upon the Senate both responsibilities, as it may deny to it participation in the exercise of either function.

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In Marbury v. Madison, 1 Cranch. 137, 167, it was assumed, as the basis of decision, that the President, acting alone, is powerless to remove an inferior civil officer appointed for a fixed term with the consent of the Senate, and that case was long regarded as so deciding. 4 In no [272 U.S. 243] case has this Court determined that the President's power of removal is beyond control, limitation, or regulation by Congress. Nor has any lower federal court ever so decided. 5 This is true of the power as it affects officers in the Army or the Navy and the high political officer like heads of departments, as well as of the power in respect to inferior statutory offices in the executive branch. Continuously for the last fifty-eight years, laws comprehensive in character, enacted from time to time with the approval of the President, have made removal from the [272 U.S. 244] great majority of the inferior presidential offices dependent upon the consent of the Senate. Throughout that period these laws have been continuously applied. We are requested to disregard the authority of Marbury v. Madison and to overturn this long established constitutional practice.

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The contention that Congress is powerless to make consent of the Senate a condition of removal by the President from an executive office rests mainly upon the clause in § 1 of Article II which declares that "The executive Power hall be vested in a President." The argument is that appointment and removal of officials are executive prerogatives; that the grant to the President of "the executive Power" confers upon him, as inherent in the office, the power to exercise these two functions without restriction by Congress, except insofar a the power to restrict his exercise of them is expressly conferred [272 U.S. 245] upon Congress by the Constitution; that, in respect to appointment, certain restrictions of the executive power are so provided for; but that, in respect to removal, there is no express grant to Congress of any power to limit the President's prerogative. The simple answer to the argument is this: the ability to remove a subordinate executive officer, being an essential of effective government, will, in the absence of express constitutional provision to the contrary, be deemed to have been vested in some person or body. Compare Ex parte Hennen, 13 Pet. 230, 259. But it is not a power inherent in a chief executive. The President's power of removal from statutory civil inferior offices, like the power of appointment to them, comes immediately from Congress. It is true that the exercise of the power of removal is said to be an executive act, and that, when the Senate grants or withholds consent to a removal by the President, it participates in an executive act. 6 But the Constitution has confessedly granted to Congress the legislative power to create offices, and to prescribe the tenure thereof, and it has not in terms denied to Congress the power to control removals. To prescribe the tenure involves prescribing the conditions under which incumbency shall cease. For the possibility of removal is a condition or qualification of the tenure. 7 When Congress provides that the incumbent [272 U.S. 246] shall hold the office for four years unless sooner removed with the consent of the Senate, it prescribes the term of the tenure.

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It is also argued that the clauses in Article II, § 3, of the Constitution, which declare that the President "shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States" imply a grant to the President of the alleged uncontrollable power of removal. I do not find in either clause anything which supports this claim. The provision that the President "shall Commission all the Officers of the United States" clearly bears no such implication. Nor can it be spelled out of the direction that "he shall take Care that the Laws be faithfully executed." There is no express grant to the President of incidental powers resembling those conferred upon Congress by clause 18 of Article I, § 8. A power implied on the ground that it is inherent in the executive, must, according to established principles [272 U.S. 247] of constitutional construction, be limited to "the least possible power adequate to the end proposed." Compare Marshall v. Gordon, 243 U.S. 521, 541; Michaelson v. United States, 266 U.S. 42, 66. The end to which the President's efforts are to be directed is not the most efficient civil service conceivable, but the faithful execution of the laws consistent with the provisions therefor made by Congress. A power essential to protection against pressing dangers incident to disloyalty in the civil service may well be deemed inherent in the executive office. But that need, and also insubordination and neglect of duty, are adequately provided against by implying in the President the constitutional power of suspension. 8 Such provisional executive power is comparable to the provisional judicial power of granting a restraining order without notice to the defendant and opportunity to be heard. Power to remove, as well as to suspend, a high political officer might conceivably be deemed indispensable to democratic government and, hence, inherent in the President. But power to remove an inferior administrative officer appointed for a fixed term cannot conceivably be deemed an essential of government.

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To imply a grant to the President of the uncontrollable power of removal from statutory inferior executive offices involves an unnecessary and indefensible limitation upon the constitutional power of Congress to fix the tenure of inferior statutory offices. That such a limitation cannot be justified on the ground of necessity is demonstrated by the practice of our governments, state and national. In none of the original thirteen States did the chief executive [272 U.S. 248] possess such power at the time of the adoption of the Federal Constitution. In none of the forty-eight States has such power been conferred at any time since by a state constitution, 9 with a single possible exception. 10 In a few States, the legislature has granted to the governor, or other [272 U.S. 249] appointing power, the absolute power of removal. 11 The legislative practice of most States reveals a decided tendency to limit, rather than to extend, the governor's power of removal. 12 The practice of the Federal Government will be set forth in detail. [272 U.S. 250]

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Over removal from inferior civil offices, Congress has, from the foundation of our Government, exercised continuously some measure of control by legislation. The instances of such laws are many. Some of the statutes were directory in character. Usually, they were mandatory. Some of them, comprehensive in scope, have endured for generations. During the first forty years of our Government, there was no occasion to curb removals. 13 Then, the power of Congress was exerted to ensure removals. Thus, the Act of September 2, 1789, c. 12, 1 Stat. 65, 67, establishing the Treasury Department, provided by § 8 that, if any person appointed to any office by that Act should be convicted of offending against any of its provisions, he shall "upon conviction be removed from office." The Act of March 3, 1791, c. 18, § 1, 1 Stat. 215, extended the provision to every clerk employed in the Department. [272 U.S. 251] The Act of May 8, 1792, c. 37, § 12, 1 Stat. 279, 281, extended it further to the Commissioner of the Revenue and the Commissioners of Loans, presidential appointments. The first Tenure of Office Act, May, 15, 1820, c. 102, 3 Stat. 582, introduced the four-year term, which was designed to ensure removal under certain conditions. 14 The Act of January 31, 1823, c. 9, § 3, 3 Stat. 723, directed that officers receiving public money and failing to account quarterly shall be dismissed by the President unless they shall account for such default to his satisfaction. The Act of July 2, 1836, c. 270, §§ 26, 37, 5 Stat. 80, 86, 88, which first vested the appointment of postmasters in the President by and with the advice and consent of the Senate, directed that postmasters and others offending against certain prohibitions "be forthwith dismissed from office;" and as to other offences provided [272 U.S. 252] for such dismissal upon conviction by any court. The Act of July 17, 1854, c. 84, § 6, 1 Stat. 305, 306, which authorized the President to appoint registers and receivers, provided that,

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on satisfactory proof that either of said officers, or any other officer, has charged or received fees or other rewards not authorized by law, he shall be forthwith removed from office. 15

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In the later period, which began after the spoils system had prevailed for a generation, 16 the control of Congress over inferior offices was exerted to prevent removals. The removal clause here in question was first introduced by the Currency Act of February 25, 1863, c. 58, § 1, 12 Stat. 665, which was approved by President Lincoln. That statute provided for the appointment of the Comptroller, [272 U.S. 253] and that he "shall hold his office for the term of five years unless sooner removed by the President, by and with the advice and consent of the Senate." In 1867, this provision was inserted in the Tenure of Office Act, March 2, 1867, c. 154, §§ 1, 3, 6, 14 Stat. 431, which applied, in substance, to all presidential offices. It was passed over President Johnson's veto. 17 In 1868, after the termination of the impeachment proceedings, the removal clause was inserted in the Wyoming Act of July 25, 1868, c. 235, §§ 2, 3, 9, 10, 15 Stat. 178-181, which was approved by President Johnson.

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By Act of June 8, 1872, c. 335, 17 Stat. 283, a consolidation and revision of the postal laws was made. T he removal clause was inserted in § 63 in the precise form in which it had first appeared in the Currency Act of 1863. From the Act of 1872, it was carried as § 3830 into Revised Statutes, which consolidated the statutes in force December 1, 1873. The Act of 1872 was amended by the Act of June 23, 1874, c. 456, § 11, 18 Stat. 231, 234, so as to reduce the classes of postmasters outside New York City from five to four. The removal clause was again inserted. When the specific classification of New York City in § 11 of the Act of 1874 was repealed by the Act of July 12 1876, c. 179, § 4, 19 Stat. 80, the removal clause was retained. Thus, postmasters of the first three classes were made, independently of the Tenure of Office Act, subject to the removal clause. Each of these postal statutes was approved by President Grant. When President Cleveland secured, by Act of March 3, 1887, c. 353, 24 Stat. 500, the repeal of §§ 1767 to 1772 of Revised Statutes (which had reenacted as to all presidential offices the removal provision of the Tenure of Office Act), he made no attempt to apply the repeal to postmasters, although postmasters constituted then, as they have ever since, a large majority of all presidential appointees. The removal clause, which [272 U.S. 254] had become operative as to them by specific legislation, was continued in force. For more than half a century, this postal law has stood unmodified. No President has recommended to Congress that it be repealed. A few proposals for repeal have been made by bills introduced in the House. Not one of them has been considered by it. 18 It is significant that President Johnson, who vetoed in 1867 the Tenure of Office Act which required the Senate's consent to the removal of high political officers, approved other acts containing the removal clause which related only to inferior officers. Thus, he had approved the Act [272 U.S. 255] of July 13, 1866, c. 176, § 5, 14 Stat. 90, 92, which provided that

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no officer in the military or naval service shall, in time of peace, be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof. 19

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And in 1868, he approved the Wyoming Act, which required such consent to the removal of inferior officers who had been appointed for fixed terms. It is significant also that the distinction between high political officers and inferior ones had been urged in the Senate in 1867 by Reverdy Johnson, when opposing the passage of the Tenure of Office Act. 20 It had apparently been recognized in 1789 at the time of the great debate in the First Congress, and by Chief Justice Marshall in 1807. 21 [272 U.S. 256] It had been repeatedly pointed out in later years. 22 [272 U.S. 257]

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The administrative action of President Johnson under the Tenure of Office Act indicates likewise a recognition of this distinction between inferior and high political offices. The procedure prescribed in § 2 required of the President a report to the Senate of the reasons for a suspension, and also made its consent essential to a removal. In respect to inferior officers, this course appears to have been scrupulously observed by the President in every case. This is true for the period before the institution of the impeachment proceedings 23 as well as for the later period. 24 On the other hand, in the case of a high political officer, Secretary of War Stanton, President Johnson declined on several grounds to follow the procedure prescribed by the Act. 16 Ex.Journ. 95. The requirement that the President should report reasons for suspension to the Senate was not retained by the amended Tenure of Office Act of April 5, 1869, c. 10, 16 Stat. 6; the other provisions, however, were substantially reenacted, and affirmative evidence of compliance by succeeding Presidents with its requirements as to inferior officers is recorded between 1869 and the repeal of the Act in 1887. Suspensions, and not removals, were made during recess. 25 In those rare instances where removals [272 U.S. 258] were sought by means other than the appointment of a "successor," Presidents Grant, Hayes, Garfield and Arthur requested the Senate's consent to the removals. 26 Where the Senate failed to confirm the nomination of a successor, the former incumbent retained office until either the expiry of his commission or the confirmation of a successor. 27 [272 U.S. 259]

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From the foundation of the Government to the enactment of the Tenure of Office Act, during the period while it remained in force, and from its repeal to this time, the administrative practice in respect to all offices has, so far as appears, been consistent with the existence in Congress of power to make removals subject to the consent of the Senate. 28 The practice during the earlier period was described by Webster in addressing the Senate on February 16, 1835:

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If one man be Secretary of State, and another be appointed, the first goes out by the mere force of the appointment [272 U.S. 260] of the other, without any previous act of removal whatever. And this is the practice of the government, and has been from the first. In all the removals which have been made, they have generally been effected simply by making other appointments. I cannot find a case to the contrary. There is no such thing as any distinct official act of removal. I have looked into the practice and caused inquiries to be made in the departments, and I do not learn that any such proceeding is known as an entry or record of the removal of an officer from office, and the President could only act, in such cases, by causing some proper record or entry to be made, as proof of the [272 U.S. 261] fact of removal. I am aware that there have been some cases in which notice has been sent to persons in office that their services are, or will be, after a given day, dispensed with. These are usually cases in which the object is not to inform the incumbent that he is removed, but to tell him that a successor either is, or by a day named will be, appointed.

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4 Works, 8th ed., 189.

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In 1877, President Hayes, in a communication to the Senate in response to a resolution requesting information as to whether removals had been made prior to the appointment of successors, said:

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In reply, I would respectfully inform the Senate that, in the instances referred to, removals had not been made at the time the nominations were sent to the Senate. The form used for such nominations was one found to have ben in existence and heretofore used in some of the Departments, and was intended to inform the Senate that, if the nomination proposed were approved, it would operate to remove an incumbent whose name was indicated. R. B. Hayes.

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7 Messages and Papers of the President, 481.

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Between 1877 and 1899, the latest date to which the records of the Senate are available for examination, the practice has, with few exceptions, been substantially the same. 29 It is doubtless because of this practice, and the long settled rule recently applied in Wallace v. United States, 257 U.S. 541, 545, that this Court has not had occasion heretofore to pass upon the constitutionality of the removal clause. [272 U.S. 262]

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The practice of Congress to control the exercise of the executive power of removal from inferior offices is evidenced by many statutes which restrict it in many ways besides the removal clause here in question. Each of these restrictive statutes became law with the approval of the President. Every President who had held office since 1861, except President Garfield, approved one or more of such statutes. Some of these statutes, prescribing a fixed term, provide that removal shall be made only or one of several specified causes. 30 Some provide a fixed term, subject generally to removal for cause. 31 Some provide [272 U.S. 263] for removal only after hearing. 32 Some provide a fixed term, subject to removal for reasons to be communicated by the President to the Senate. 33 Some impose the restriction in still other ways. Thus, the Act of August 24, 1912, c. 389, § 6, 37 Stat. 539, 555, which deals only with persons in the classified civil service, prohibits removal "except for such cause as will promote the efficiency of the service and for reasons given in writing," and forbids removal for one cause which had theretofore been specifically prescribed by President Roosevelt and President Taft as a ground for dismissal. 34 The Budget [272 U.S. 264] Act of June 10, 1921, c. 18 § 303, 42 Stat. 20, 24, provides a fixed term for the Comptroller General and the Assistant Comptroller General, and makes these officers removable only by impeachment or by Joint resolution of Congress, after hearing, for one of the causes specified. It should be noted that, while President Wilson had, on June 4, 1920, vetoed an earlier Budget Act, which, like this, denied to the President any participation in the removal, he had approved the Mediation and Conciliation Act of July 15, 1918, and the Railroad Labor Board Act of February 28, 1920, which prohibited removals except for the causes therein specified.

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The assertion that the mere grant by the Constitution of executive power confers upon the President as a prerogative the unrestricted power of appointment and of removal from executive offices, except so far as otherwise expressly provided by the Constitution, is clearly inconsistent also with those statutes which restrict the exercise by the President of the power of nomination. There is not a word in the Constitution which, in terms, authorizes [272 U.S. 265] Congress to limit the President's freedom of choice in making nominations for executive offices. It is to appointment, as distinguished from nomination, that the Constitution imposes in terms the requirement of Senatorial consent. But a multitude of laws have been enacted which limit the President's power to make nominations, and which, through the restrictions imposed, may prevent the selection of the person deemed by him best fitted. Such restriction upon the power to nominate has been exercised by Congress continuously since the foundation of the Government. Every President has approved one or more of such acts. Every President has consistently observed them. This is true of those offices to which he makes appointments without the advice and consent of the Senate, as well as of those for which its consent is required.

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Thus, Congress has, from time to time, restricted the President's selection by the requirement of citizenship. 35 [272 U.S. 266] It has limited the power of nomination by providing that the office may be held only by a resident of the United States; 36 of a State; 37 of a particular State; 38 of a particular [272 U.S. 267] district; 39 of a particular territory; 40 of the District of Columbia; 41 of a particular foreign country. 42 It has limited the power of nomination further by prescribing specific professional attainments, 43 or occupational [272 U.S. 268] experience. 44 It has, in other cases, prescribed the test of examinations. 45 It has imposed the requirement of [272 U.S. 269] age; 46 of sex ; 47 of race; 48 of property; 49 and of habitual temperance in the use of intoxicating liquors. 50 Congress [272 U.S. 270] has imposed like restrictions on the power of nomination by requiring political representation; 51 or that the selection [272 U.S. 271] be made on a nonpartisan basis. 52 It has required in some cases that the representation be industrial; 53 in [272 U.S. 272] others, that it be geographic. 54 It has at times required that the President's nominees be take from, or include [272 U.S. 273] representatives from, particular branches or departments of the Government. 55 By still other statutes, Congress [272 U.S. 274] has confined the President's selection to a small number of persons to be named by others. 56

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The significance of this mass of legislation restricting the power of nomination is heightened by the action which President Jackson and the Senate took when the right to impose such restrictions was, so far as appears, first mooted. On February 3, 1831, the Senate resolved that it was inexpedient to appoint a citizen of one State to an office created or made vacant in another State of which such citizen was not a resident, unless an apparent necessity for such appointment existed. 4 Ex.Journ. 150. [272 U.S. 275] Several nominations having been rejected by the Senate in accordance with the terms of this resolution, President Jackson communicated his protest to the Senate, on March 2, 1833, saying that he regarded "that resolution, in effect, as an unconstitutional restraint upon the authority of the President in relation to appointments to office." Thereupon, the Senate rescinded the resolution of 1831. 4 Ex.Journ. 331. But that Congress had the power was not questioned. The practice of prescribing by statute that nominations to an inferior presidential office shall be limited to residents of a particular State or district has prevailed, without interruption, for three-quarters of a century. 57

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The practical disadvantage to the public service of denying to the President the uncontrollable power of removal from inferior civil offices would seem to have been exaggerated. Upon the service, the immediate effect would ordinarily be substantially the same whether the President, acting alone, has or has not the power of removal. For he can, at any time, exercise his constitutional right to suspend an officer and designate some other person to act temporarily in his stead, and he cannot, while the Senate is in session, appoint a successor without its consent. Compare Embry v. United States, 100 U.S. 680. On the other hand, to the individual in the public service, and to the maintenance of its morale, the existence of a power in Congress to impose upon the Senate the duty to share in the responsibility for a removal is of paramount importance. The Senate's consideration of [272 U.S. 276] a proposed removal may be necessary to protect reputation and emoluments of office from arbitrary executive action. Equivalent protection is afforded to other inferior officers whom Congress has placed in the classified civil service and which it authorizes the heads of departments to appoint and to remove without the consent of the Senate. Act of August 24, 1912, c. 389, § 6, 37 Stat. 539, 55. The existence of some such provision is a common incident of free governments. In the United States, where executive responsibility is not safeguarded by the practice of parliamentary interpellation, such means of protection to persons appointed to office by the President with the consent of the Senate is of special value.

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Until the Civil Service Law, January 16, 1883, c. 27, 22 Stat. 403, was enacted, the requirement of consent of the Senate to removal and appointment was the only means of curbing the abuses of the spoils system. The contest over making Cabinet officers subject to the provisions of the Tenure of Office Act of 1867 has obscured the significance of that measure as an instrument designed to prevent abuses in the civil service. 58 But the importance of the measure as a means of civil service reform was urged at the time of its passage; 59 again, [272 U.S. 277] when its repeal was resisted in 1869 60 and in 1872; 61 and finally in 1887, when its repeal was effected. 62 That Act [272 U.S. 278] was one of two far reaching measures introduced in 1866 aimed at the abuses of executive patronage. The Jenckes bill was to establish the classified service. The Tenure of Office bill was to control removals from presidential offices. Like the Jenckes bill, it applied, when introduced, only to inferior offices. The Jenckes bill, reported by the House Committee on June 13, 1866, was finally tabled in the House on February 6, 1867. 63 The Tenure of Office bill was reported out in the House on December 5, 1866, [272 U.S. 279] was amended by the Conference Committee so as to apply to Cabinet officers, and, having passed both Houses, was sent to the President on February 20, 1867, and passed over his veto on March 2, 1867.

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The fact that the removal clause had been inserted in the Currency bill of 1863, shows that it did not originate in the contest of Congress with President Johnson, as has been sometimes stated. Thirty years before that, it had been recommended by Mr. Justice Story as a remedial measure, after the wholesale removals of the first Jackson administration. The Post Office Department was then the chief field for plunder. Vacancies had been created in order that the spoils of office might be distributed among political supporters. Fear of removal had been instilled in continuing office holders to prevent opposition or lukewarmness in support. Gross inefficiency and hardship had resulted. Several remedies were proposed. One of the remedies urged was to require the President to report to the Senate the reasons for each removal. 64 The second was to take the power of appointing postmasters from the Postmaster General and to confer it upon the President, subject to the consent of the Senate. 65 A third [272 U.S. 280] proposal was to require consent of the Senate also to removals. 66 Experience since has taught that none of these remedies is effective. Then, however, Congress adopted the second measure. The evil continued, and the struggle against the spoils system was renewed. The [272 U.S. 281] other crude remedies which had been rejected—accountability of the President to the Senate 67 and the requirement of its consent to removals 68—were again considered. [272 U.S. 282] And both continued to be urged upon Congress, even after the fourth and the more promising remedy enquiry into fitness for office and competitive examinations had been proposed. For a generation, the reformers failed to secure the adoption of any further measure.

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The first substantial victory of the civil service reform movement, though a brief one, was the insertion of the removal clause in the Currency bill of 1863. 69 The next forward step was taken by the Consular and Diplomatic Appropriation Act, June 20, 1864, c. 136, § 2, 13 Stat. 137, 139-140, also approved by President Lincoln, which contained a provision that consular clerks should be appointed by the President after examination, and that

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no clerk so appointed shall be removed from office except for cause stated in writing, which shall be submitted to congress at the session first following such removal. 70

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It was in the next Congress that the removal clause was applied generally by the Tenure of Office Act. The long delay in adopting legislation to curb removals was not because Congress accepted the doctrine that the Constitution [272 U.S. 283] had vested in the President uncontrollable power over removal. It was because the spoils system held sway.

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The historical data submitted present a legislative practice, established by concurrent affirmative action of Congress and the President, to make consent of the Senate a condition of removal from statutory inferior, civil, executive offices to which the appointment is made for a fixed term by the President with such consent. They show that the practice has existed, without interruption, continuously for the last fifty-eight years; that, throughout this period, it has governed a great majority of all such offices; that the legislation applying the removal clause specifically to the office of postmaster was enacted more than half a century ago, and that recently the practice has, with the President's approval, been extended to several newly created offices. The data show further that the insertion of the removal clause in acts creating inferior civil offices with fixed tenure is part of the broader legislative practice, which has prevailed since the formation of our Government, to restrict or regulate in many ways both removal from and nomination to such offices. A persistent legislative practice which involves a delimitation of the respective powers of Congress and the President, and which has been so established and maintained, should be deemed tantamount to judicial construction in the absence of any decision by any court to the contrary. United States v. Midwest Oil Co., 236 U.S. 459, 469.

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The persuasive effect of this legislative practice is strengthened by the fact that no instance has been found, even in the earlier period of our history, of concurrent affirmative action of Congress and the President which is inconsistent with the legislative practice of the last fifty-eight years to impose the removal clause. Nor has any instance been found of action by Congress which involves [272 U.S. 284] recognition in any other way of the alleged uncontrollable executive power to remove an inferior civil officer. The action taken by Congress in 1789 after the great debate does not present such an instance. The vote then taken did not involve a decision that the President had uncontrollable power. It did not involve a decision of the question whether Congress could confer upon the Senate the right, and impose upon it the duty, to participate in removals. It involved merely the decision that the Senate does not, in the absence of legislative grant thereof, have the right to share in the removal of an officer appointed with its consent, and that the President has, in the absence of restrictive legislation, the constitutional power of removal without such consent. Moreover, as Chief Justice Marshall recognized, the debate and the decision related to a high political office, not to inferior ones. 71

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Nor does the debate show that the majority of those then in Congress thought that the President had the uncontrollable power of removal. The Senators divided equally in their votes. As to their individual views, we lack knowledge; for the debate was secret. 72 In the House, only 24 of the 54 members voting took part in the debate. Of the 24, only 6 appear to have held the opinion that the President possessed the uncontrollable power of removal. The clause which involve a denial of the claim that the Senate had the constitutional right to participate in removals was adopted, so far as appears, by aid of the votes of others who believed it expedient for [272 U.S. 285] Congress to confer the power of removal upon the President alone. 73 This is indicated both by Madison's appeal for support 74 and by the action taken on Benson's motions. 75 [272 U.S. 286]

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It is true that several Presidents have asserted that the Constitution conferred a power of removal uncontrollable [272 U.S. 287] by Congress. 76 But, of the many statutes enacted since the foundation of our Government which in express terms controlled the power of removal, either by the clause here in question or otherwise, only two were met with a veto: The Tenure of Office Act of 1867, which related to high political officers among others, and the Budget Act of 1920, which denied to the President any participation in the removal of the Comptroller and Assistant Comptroller. One was passed over the President's veto; the other was approved by the succeeding President. It is true also that several Presidents have at times insisted that, for the exercise of their power they were not accountable to the Senate. 77 But even these Presidents [272 U.S. 288] have at other times complied with requests that the ground of removal of inferior officers be stated. 78 Many of the Presidents have furnished the desired information [272 U.S. 289] without questioning the right to request it. 79 And neither the Senate nor the House has at any time receded [272 U.S. 290] from the claim that Congress has power both to control by legislation removal from inferior offices and to require the President to report to it the reasons for removals made therefrom. 80 Moreover, no instance has been found in which President refused to comply with an Act of Congress requiring that the reasons for removal of an inferior officer be given. On the contrary, President Cleveland, who refused to accede to the request of the Senate that he state the reasons for the removal of Duskin, had, in the case of Burchard, complied, without protest or reservation, [272 U.S. 291] with the requirement of the Act of February 12, 1873, c. 131, § 1, 17 Stat. 424 (now Rev.Stat. § 343) that the reasons for the removal of the Director of the Mint be communicated by him to the Senate. 25 Ex.Journ. 242. A construction given to the Constitution by the concurrent affirmative action of Congress and the President continued throughout a long period without interruption should be followed despite the isolated utterances, made in the heat of political controversies not involving the question here in issue by individual Presidents supported only by the advice of the Attorney General. 81

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The separation of the powers of government did not make each branch completely autonomous. It left each in some measure dependent upon the others, as it left to each power to exercise, in some respects, functions in their nature executive, legislative and judicial. Obviously the President cannot secure full execution of the [272 U.S. 292] laws, if Congress denies to him adequate means of doing so. Full execution may be defeated because Congress declines to create offices indispensable for that purpose. Or because Congress, having created the office, declines to make the indispensable appropriation. Or because Congress, having both created the office and made the appropriation, prevents, by restrictions which it imposes, the appointment of officials who in quality and character are indispensable to the efficient execution of the law. If, in any such way, adequate means are denied to the President, the fault will lie with Congress. The President performs his full constitutional duty if, with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his best endeavors to secure the faithful execution of the laws enacted. Compare Kendall v. United States, 12 Pet. 524, 613, 626.

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Checks and balances were established in order that this should be "a government of laws, and not of men." As White said in the House in 1789, an uncontrollable power of removal in the Chief Executive "is a doctrine not to be learned in American governments." Such power had been denied in Colonial Charters, 82 and even under Proprietary [272 U.S. 293] Grants 83 and Royal Commissions. 84 It had been denied in the thirteen States before the framing of the Federal Constitution. 85 The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy. In order to prevent arbitrary executive action, the Constitution provided in terms that presidential appointments be made with the consent of the Senate, unless Congress should otherwise provide, and this clause was construed by Alexander Hamilton in The Federalist, No. 77, as requiring like consent to removals. 86 Limiting further executive [272 U.S. 294] prerogatives customary in monarchies, the Constitution empowered Congress to vest the appointment of inferior officers, "as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Nothing in support of the claim of uncontrollable power can be inferred from the silence of the Convention of 1787 on the subject of removal. For the outstanding fact remains that every specific proposal to confer such uncontrollable power upon the President was rejected. 87 In America, as in England, the conviction prevailed then that the people must look to representative [272 U.S. 295] assemblies for the protection of their liberties. And protection of the individual, even if he be an official, from the arbitrary or capricious exercise of power was then believed to be an essential of free government.

Footnotes

TAFT, J., lead opinion (Footnotes)

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\* Maclay shows the vote ten to ten. Journal of William Maclay, 116. John Adams' Diary shows nine to nine. 3 C. F. Adams, Works of John Adams, 412. Ellsworth's name appears in Maclay's list as voting against striking out, but not in that of Adams—evidently an inadvertence.

MCREYNOLDS, J., separate opinion (Footnotes)

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1. The suggestion that different considerations may possibly apply to nonconstitutional judicial officers I regard as a mere smokescreen.

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2. Different phases of this general subject have been elaborately discussed in Congress. See discussions on the following measures: Bill to establish a Department of Foreign Affairs, 1789, Annals 1st Cong.; bill to amend the judicial system of the United States, 1802, Annals 7th Cong., 1st Sess.; bill to amend Act of May 15, 1820, fixing tenure of certain offices, 1835, Debates 23d Cong., 2d Sess.; bill to regulate the tenure of certain civil offices, 1866-1867, Globe, 39th Cong., 3d Sess.; Johnson impeachment trial, 1868, Globe Supplement, 40th Cong., 2d Sess.

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3. This debate began May 19 in the Committee of the Whole on Mr. Madison's motion—

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That it is the opinion of this committee that there shall be established an executive department, to be denominated the Department of Foreign Affairs, at the head of which there shall be an officer, to be called the Secretary to the Department of Foreign Affairs, who shall be appointed by the President, by and with the advice and consent of the Senate, and to be removable by the President.

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The words "who shall be appointed by the President, by and with the advice and consent of the Senate" were objected to as superfluous, since "the Constitution had expressly given the power of appointment in words there used," and Mr. Madison agreed to their elimination.

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Doubts were then expressed whether the officer could be removed by the President. The suggestion was that this could only be done by impeachment. Mr. Madison opposed the suggestion, and said:

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I think the inference would not arise from a fair construction of the words of that instrument. . . . I think it absolutely necessary that the President should have the power of removing from office. . . . On the constitutionality of the declaration I have no manner of doubt.

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Thereupon Mr. Vining, of Delaware, declared:

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There were no negative words in the Constitution to preclude the President from the exercise of this power, but there was a strong presumption that he was invested with it, because it was declared that all executive power should be vested in him, except in cases where it is otherwise qualified; as, for example, he could not fully exercise his executive power in making treaties, unless with the advice and consent of the Senate—the same in appointing to office.

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Mr. Bland and Mr. Jackson further insisted that removal could be effected only through impeachment, and Mr. Madison replied: He

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did not conceive it was a proper construction of the Constitution to say that there was no other mode of removing from office than that by impeachment; he believed this, as applied to the judges, might be the case; but he could never imagine it extended in the manner which gentlemen contended for. He believed they would not assert that any part of the Constitution declared that the only way to remove should be by impeachment; the contrary might be inferred, because Congress may establish offices by law; therefore, most certainly, it is in the discretion of the legislature to say upon what terms the office shall be held, either during good behaviour or during pleasure.

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Later in the day, Mr. Madison discussed various objections offered, and said: "I cannot but believe, if gentlemen weigh well these considerations, they will think it safe and expedient to adopt the clause." Others spoke briefly, and then, as the record recites, "[t]he question was now taken, and carried by a considerable majority, in favor of declaring the power of removal to be in the President." The resolution was reported; the House concurred, and a committee (including Mr. Madison) was appointed to prepare and bring in a bill.

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On June 2, the committee reported a bill, providing for a Secretary, "to be removable from office by the President of the United States," which was read and referred to the Committee of the Whole. It was taken up for consideration June 16, and the discussion continued during five days. Members expressed radically different views. Among other things, Mr. Madison said—

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I have, since the subject was last before the House, examined the Constitution with attention, and I acknowledge that it does not perfectly correspond with the ideas I entertained of it from the first glance. . . . By a strict examination of the Constitution, on what appears to be its true principles, and considering the great departments of the government in the relation they have to each other, I have my doubts whether we are not absolutely tied down to the construction declared in the bill. . . .

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If this is the true construction of this instrument, the clause in the bill is nothing more than explanatory of the meaning of the Constitution, and therefore not liable to any particular objection on that account. If the Constitution is silent, and it is a power the legislature have a right to confer, it will appear to the world, if we strike out the clause, as if we doubted the propriety of vesting it in the President of the United States. I therefore think it best to retain it in the bill.

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June 19,

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the call for the question being now very general, it was put, shall the words "to be removable by the President," be struck out? It was determined in the negative; being yeas 20, nays 34.

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There were further remarks, and "the committee then rose and reported the bill . . . to the House."

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Discussion of the disputed provision was renewed on June 22. Mr. Benson moved to amend the bill "so as to imply the power of removal to be in the President," by providing for a Chief Clerk who should have custody of the records, etc., "whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy." He "hoped his amendment would succeed in reconciling both sides of the House to the decision and quieting the minds of gentlemen." If successful, he would move to strike out the words, "to be removable by the President." After a prolonged discussion, the amendment prevailed; the much-challenged clause was stricken out, and the ambiguous one suggested by Mr. Benson was inserted. June 24 the bill, thus amended, finally passed.

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Five members once delegates to the Constitutional Convention took part in the debate. Mr. Madison, Mr. Baldwin and Mr. Clymer expressed similar views; Mr. Sherman and Mr. Gerry were emphatically of the contrary opinion.

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4. Officers with commissions in the State Department who were removed: Collectors of customs, 17; collectors and inspectors, 25; surveyors of ports, 4; surveyors and inspectors, 9; supervisors, 4; naval officers, 4; marshals, 28; district attorneys, 23; principal assessors, 3; collectors of direct taxes, 4; consuls, 49; ministers abroad, 5; charges des affaires, 2; secretaries of legation, 3; Secretary of State, l; Secretary of War, 1; Secretary of the Treasury, 1; Secretary of the Navy, 1; Attorney General, 1; Commissioner of Loans, 1; receivers of public moneys, 2; registers of land offices, 2; Agent of the Creek Nation, 1; Register of the Treasury, 1; Comptroller of the Treasury, 1; auditors, 2; Treasurer of the United States, 1; Treasurer of the Mint, 1; Commissioner of Public Buildings, 1; Recorder of Land Titles, 1; Judge of territory, 1; secretaries of territories, 2; Commissioner for the adjustment of private land claims, 1; surveyors-general, 2; surveyors of the public lands, 3.

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Officers in the Treasury Department who were removed: Surveyor and inspector, 1; naval officer, 1; appraisers, 2; collectors, 2; surveyors, 2; receivers of public moneys, 12; registers of the land office, 4.

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5. Mr. Lee (theretofore Attorney General of the United States), counsel for Marbury, distinctly claimed that the latter was appointed to serve for a definite term independent of the President's will, and upon that predicate rested the legal right which he insisted should be enforced by mandamus. Unless that right existed, there was no occasion—no propriety, indeed—for considering the court's power to declare an Act of Congress invalid.

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6. At this time, the power of the court to declare Acts of Congress unconstitutional was being vigorously denied. The Supreme Court in United States History, by Charles Warren, Vol. I.

BRANDEIS, J., dissenting (Footnotes)

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1. Prior to the Act of July 2, 1836, c. 270, § 33, 5 Stat. 80, 87, all postmasters were appointed by the Postmaster General. Fourth class postmasters are still appointed by him. See Acts of May 8, 1794, c. 23, § 3, 1 Stat. 354, 357; April 30, 1810, c. 37, §§ 1, 5, 28, 40, 42, 2 Stat. 592; March 3, 1825, c. 64, § 1, 4 Stat. 102; March 3, 1863, c. 71, § 1, 12 Stat. 701; July 1, 1864, c.197, § 1, 13 Stat. 335.

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2. The removal provision was introduced specifically into the postal legislation by Act of Jan 8, 1872, c. 335, § 63, 17 Stat. 283, 292, and reenacted, in substance, in Act of June 23, 1874, c. 456, § 11, 18 Stat. 231, 234; in the Revised Statutes, § 3830, and the Act of 1876.

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3. During the year ending June 30, 1913, there were in the civil service 10,543 presidential appointees. Of these 8,423 were postmasters of the first, second and third classes. Report of U.S. Civil Service Commission for 1913, p. 8. During the year ending June 30, 1923, the number of presidential appointees was 16,148. The number of postmasters of the first, second and third classes was 14,261. Report for 1923, pp. xxxii, 100.

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4. In McAllister v. United States, 141 U.S. 174, 189, it was said by this Court of the decision in Marbury v. Madison:

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On the contrary, the Chief Justice asserted the authority of Congress to fix the term of a Justice of the Peace in the District of Columbia beyond the power of the President to lessen it by removal. . . .

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The same significance is attached to the decision in 1 Kent, Commentaries, 12th ed., 311, note 1.

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Reverdy Johnson, who had been Attorney General, said of Marbury v. Madison while addressing the Senate on Jan. 15, 1867, in opposition to the Tenure of Office bill:

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But, says my brother and friend from Oregon, that case decided that the President had no right to remove. Surely that is an entire misapprehension. The Constitution gives to the President the authority to appoint, by and with the advice and consent of the Senate, to certain high offices, but gives to Congress the power to vest the appointment and to give the removal of inferior officers to anybody they think proper, and these justices of the peace were inferior, and not high, officers within the meaning of those two terms in the Constitution. Congress, therefore, by providing that such an officer should hold his commission for four years, removed the officer from the power of removal of the President, as they could have taken from him the power to appoint. Nobody doubts that, if they were inferior officers, as they were, Congress might have given the power to appoint those officers to the people of the district by election, or to any individual that they might think proper, or to any tribunal other than the executive department of the Government. They had a right, although they thought proper to give it to the President himself, to provide that it should endure for four years against any such power of removal. That is all the case decided upon that question.

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Cong.Globe, 39th Cong., 2d sess., 461. See Note 71, infra.

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5. In United States v. Avery, 1 Deady 204, the statute creating the office did not prescribe a fixed tenure and there was no provision for removal only by and with the consent of the Senate. In United States v. Guthrie, 17 How. 284, 305, Mr. Justice McLean, dissenting, denied that the President's power of removal was uncontrollable. In Ex parte Hennen, 13 Pet. 230, 238, it was stated that, where the power of appointment is vested in the head of a department "the President has certainly no power to remove."

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State courts have uniformly held that, in the absence of express provision in their constitution to the contrary, legislative restrictions upon the power of removal by the governor, or other appointing power, are valid as applied to persons holding statutory offices. Commonwealth v. Sutherland, 3 Serg. & R. 145, 155; Commonwealth v. Bussier, 5 Serg. & R. 451; also Bruce v. Matlock, 86 Ark. 555; People v. Jewett, 6 Cal. 291; Gray v. McLendon, 134 Ga. 224; Dubuc v. Voss, 19 La.Ann. 210; State v. Cowen, 96 Ohio St. 277; Att'y Gen'l v. Brown, 1 Wis. 513. Compare Rankin v. Jauman, 4 Ida. 53; State v. Curtis, 180 Ind.191; Shira v. State, 187 Ind. 441; State v. Henderson, 145 Ia. 657; Markey v. Schunk, 152 Ia. 508; State v. Martin, 87 Kan. 817; State v. Sheppard, 192 Mo. 497; State v. Sanderson, 280 Mo. 258; State v. District Court, 53 Mont. 350;.State v. Archibald, 5 N.D. 359; State v. Canson, 58 Ohio St. 313; Cameron v. Parker, 2 Okla. 277; Christy v. City of Kingfisher, 13 Okla. 585; State v. Hewitt, 3 S.D. 187; State v. Kipp, 10 S.D. 495; Skeen v. Paine, 32 Utah 295; State v. Burke, 8 Wash. 412; State v. Grant, 14 Wyo. 41.

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6. Power to remove has been held not to be inherently an executive power in States whose constitution provides in terms for separation of the powers. See note 12 infra; also Dullan v. Willson, 53 Mich. 392.

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7.

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If a law were to pass declaring that district attorneys or collectors of customs should hold their offices four years unless removed on conviction for misbehavior, no one could doubt its constitutional validity, because the legislature is naturally competent to prescribe the tenure of office. And is a reasonable check on the power of removal anything more than a qualification of the tenure of office?

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Webster, Feb. 16, 1835, 4 Works, 8th ed., 197.

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It is the legislative authority which creates the office, defines its duties, and may prescribe its duration. I speak, of course, of offices not created by the constitution, but the law. The office, coming into existence by the will of Congress, the same will may provide how and in what manner the office and the officer shall both cease to exist. It may direct the conditions on which he shall hold the office, and when and how he shall be dismissed.

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Clay, Feb. 18, 1835, 11 Cong. Deb. 518.

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Congress shall have power to make all laws not only to carry into effect the powers expressly delegated to itself, but those delegated to the Government, or any department or office thereof, and, of course, comprehends the power to pass laws necessary and proper to carry into effect the powers expressly granted to the executive department. It follows, of course, to whatever express grant of power to the Executive the power of dismissal may be supposed to attach, whether to that of seeing the law faithfully executed, or to the still more comprehensive grant, as contended for by some, vesting executive powers in the President, the mere fact that it is a power appurtenant to another power, and necessary to carry it into effect, transfers it, by the provisions of the constitution cited, from the Executive to Congress, and places it under the control of Congress, to be regulated in the manner which it may judge best.

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Calhoun, Feb. 20, 1835, 11 Cong.Deb. 553.

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8. See Debate of 1789 (June 17), Stone:

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All the difficulties and embarrassments that have been mentioned can be removed by giving to the President the power of suspension during the recess of the Senate, and I think that an attention to the Constitution will lead us to decide that this is the only proper power to be vested in the President of the United States.

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1 Ann.Cong. 495; also Gerry, 1 Ann.Cong. 504; Sherman, 1 Ann.Cong. 492; Jackson, 1 Ann.Cong. 489.

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9. New York: Constitution of 1777, amended 1801. The powers of appointment and removal were vested in the Council of Appointment. People v. Foot, 19 Johns. 58. By later constitutions or amendments, varying restrictions were imposed on the governor's power of removal. 4 Lincoln, Constitutional History of New York, 554-594, 724-733. Massachusetts: Constitution of 1780. Appointments to be made by governor with the advice and consent of the council. No express provision for removals. By early practice, the council was associated with the governor in removals. The Constitutional Amendment of 1855 altering the manner of appointment left the practice as to removals unchanged. Opinion of the Justices, 3 Gray 601, 605. New Hampshire: Constitution of 1784. Provision and practice the same as Massachusetts. By Laws of 1850, c. 189, § 4, the legislature further limited the governor's power of removal over certain inferior offices. New Jersey: Constitution of 1776. The "supreme executive power" of the governor was limited to commissioning officers appointed by the council and assembly. Pennsylvania: Constitution of 1790. Appointing power vested in the governor alone. In the absence of restrictive legislation, he exercised the power of removal. Biddle, Autobiography, 283. Control by the legislature of his power of removal from inferior offices had early judicial sanction. Commonwealth v. Sutherland, 3 Serg. & R. 145. Maryland: The governor seems to have had such power under the constitution of 1776, but it was later taken away. The Constitutional Convention of 1851 considered but refused to grant the governor the sole power of removal. Cull v. Wheltle, 114 Md. 58, 80. Illinois: Constitution of 1818 was construed as denying the power of removal to the governor acting alone. Field v. People, 2 Scam. 79. The Constitution of 1870, Art. 5, § 12, conferred the power, but only for certain specified causes. In Maine and Florida, concurrent action of the senate is a constitutional requirement. Opinion of the Justices, 72 Me. 542; Advisor Opinion to the Governor, 69 Fla. 508.

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10. The Pennsylvania Constitution of 1873 provided that "appointed officers . . . may be removed at the pleasure of the power by which they shall have been appointed." Art. VI, § 4. The Supreme Court held as to petty officers or subordinate ministerial agents appointed by the governor, that his power of removal is controllable, and that a statute prohibiting removal except for specified causes is valid. Commonwealth v. Black, 201 Pa.St. 433. Officials deemed agents of the legislature are also held to be without the scope of the governor's power of removal. Commonwealth v. Benn, 284 Pa.St. 421.

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11. Oregon has, by statute, conferred a general power of removal upon the governor. 1920 Olson's Oregon Laws, § 4043. Vermont had also vested the power of removal with the governor. 1917 Vt.Gen.Laws, § 356. It later, however, placed restrictions upon the governor's power of removing members of the State Board of Education. 1917 Vt.Gen.Laws, § 1170. See Wyoming Act of Feb. 20, 1905, c. 59, State v. Grant, 14 Wyo. 41, 59-60. Compare State v. Peterson, 50 Minn. 239; State v. Hawkins, 44 Ohio St. 98.

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12. By statute, in some States, removals can be made only upon concurrence of the senate or legislature with the governor. 1914 Ga.Civ.Code, § 2618; 1924 Ia.Code, § 315; N.Y.Consol.Laws, c. 47, § 3?; 1921 Throckmorton Ohio Gen.Code, § 13; 1913 Pa.Laws, 1374, 1401; 1923 R.I. Gen Laws, § 384; 1924 Va.Code, § 330. In some, the governor is required merely to record his reasons for dismissal. Conn.Rev.Stats. § 86; 1905 Wyo.Laws, c. 59. In many States, the power of removal is limited by statute to specific instances of misconduct or misbehavior in office. 1921 Colo.Comp.Laws, § 138; Carroll's Ky.Stats. § 3750; 1915 Mich.Comp.Laws, §§ 243, 252 (during recess of legislature only); 1913 N.D.Comp.Laws, § 685; 1910 Okla.Rev.Stats. § 8052; 1919 S.D.Rev.Code, §§ 7009, 7010; 1917 Utah Comp.Laws, § 5684 (during recess of legislature only); 1893 Wash.Laws, c. 101. In addition, a statement of record of the reasons for dismissal is often required. 1913 Ariz.Civ.Code, § 247 (inspector of apiaries), § 4757 (board of dental examiners), § 4769 (board of embalmers); 1914 Ga.Code, § 1697(b) (board of medical examiners), § 1963 (state geologist); 1919 Ida.Comp.Stats. § 793 (board of education), § 2398 (utility commissioners); 1855 La.Acts, No. 297, § 13 (public weighers); 1910 Md.Laws, c. 180, § 2 (utility commissioners); 1923 Minn.Gen.Stats. § 2229 (tax officers), § 2356 (tax commission); 1912 Nev.Rev.Laws, § 4432 (dental examiners); 1910 N.Y.Laws, c. 480, § 4 (Public Service Commission); 1921 N.Y.Laws, c. 134 (transit commission); 1921 Throckmorton Ohio Gen.Laws, § 88 (board of clemency), § 488 (utility commissioners), 486-3 (civil service commissioners), § 710-6 (superintendent of banks), § 744-16 (commissioner of securities), § 871-2 (industrial commission), § 1337 (board of embalming examiners), § 1465-2 (tax commission); 1917 Vt.Gen.Laws, § 1170 (board of education). In other States, or for other officers, the laws require the existence of "cause" or provide for notice and hearing. 1919 Mo.Rev.Stat. § 10414 (utility commissioners); 1921 Mont.Pol.Code, § 2820 (industrial accident commission); N.Y.Consol.Laws, c. 46, § 33 (officials appointed by governor alone); 1921 Throckmorton Ohio Gen.Laws, § 1236-4 (board of health), § 1380 (commissioners of state laws); 1920 Tex. Comp.Stats. Art. 4995b (board of water engineers), Art. 6027 (appointees of governor), Art. 6195 (board of prison commissioners), Art. 6286 (board of pharmacy); 1923 Wis.Stats. § 17.07 (appointees of governor). Some statutes make removal dependent upon the recommendation of a board. 1920 Tex. Comp.Stats. Art. 5927 (mining inspectors).

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13. Removals made from 1789 to 1829 of Presidential appointees, exclusive of military officers, were as follows: Washington—17, Adams—19, Jefferson—62, Madison—24, Monroe—27, J. Q. Adams—7, being a total of 156. Fish, Removal of Officials, 1899 Am.Hist.Ass'n Rep. 67. Compare Sen.Rep. No. 576, 47th Cong., 1st sess., Ser. No. 2006, p. iv.

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It was the intention of the founders of our Government that administrative officers should hold office during good behavior. . . . Madison, the expounder of the Constitution, said that the wanton removal of a meritorious officer was an impeachable offense. It was the established usage without question or variation during the first forty years of our Government to permit executive officers, except members of the Cabinet, to hold office during good behavior, and this practice was only changed by the four-year tenure act of 1820, which was passed at the instance of an appointing officer for the purpose of using this power to secure his nomination as a Presidential candidate.

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Report of U.S. Civil Service Commission for 1896, pp. 28-29.

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14. Fish, Civil Service and Patronage, 66-70. Madison, in commenting upon the Four Year Limitation Act of 1820 to President Monroe, recognized the necessary identity of a power to prescribe qualifications of tenure and a power to remove from office.

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Is not the law vacating periodically the described offices an encroachment on the Constitutional attributes of the Executive? . . . If a law can displace an officer at every period of four years, it can do so at the end of every year, or at every session of the Senate, and the tenure will then be the pleasure of the Senate as much as of the President, and not of the President alone.

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3 Letters and Writings, 200.

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15. The provisions of the Acts of 1789, 1791, 1792, 1836 and 1854, were reenacted in the Revised Statutes, and are still in force. Rev.Stats. §§ 243, 244, 2242, 3947 as amended. Mandatory directions of dismissal for specified offenses are also contained in the Act of Mar. 2, 1867, c. 172, § 3, 14 Stat. 489, 492, reenacted in Rev.Stats. § 1546; Act of Feb. 1, 1870, c. 11, 16 Stat. 63, reenacted in Rev.Stats. § 1784 and Act of Aug. 15, 1876, c. 287, § 6, 19 Stat. 143, 169. From the operation of the latter Act executive officers and employees appointed by the President by and with the advice and consent of the Senate are significantly excepted.

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16. Removals made from 1829 to 1869 of Presidential appointees, exclusive of military officers, were as follows: Jackson—180, Van Buren—43, Harrison and Tyler—389, Polk—228, Taylor—491, Fillmore—73, Pierce—771, Buchanan—253, Lincoln—1400, Johnson—726, being a total of 4,554. Fish, Removal of Officials, 1899 Am.Hist.Ass'n Rep. 67. The great increase in removals under President Jackson included offices besides those to which appointments were made by the President and Senate, the accepted estimate during the first year of his administration being 2,000. 2 Story, Constitution, § 1543; House Rep, No 47, 40th Cong., 2d sess., Ser. No. 1352, p. 8. Of these, 491 were postmasters. 1 Am.State Papers, Post Office, 242. The increase in the number of such removals is testified to by the incomplete reports of the following years. The Post Office Department consistently suffered most. See Lucy Salmond, History of the Appointing Power, 1 Am.Hist.Ass'n Papers, No. 5, pp. 67-86.

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17. It was amended by Act of April 5, 1869, c. 10, 16 Stat. 6.

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18. On Feb. 8, 1887, while the bill for the repeal of the Tenure of Office Act was pending, the Committee on Post Offices and Post Roads reported a bill, H.R. 11108, for reclassifying postmasters into three classes, and provided (§ 1) that:

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Postmasters of the first and second classes shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years, subject to the provisions of law respecting their removal or suspension, and the filling of vacancies occurring when the Senate shall not be in session. . . . Postmasters of the third class shall be appointed and commissioned by the Postmaster General, and hold their offices during his pleasure.

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18 Cong.Rec. 1498. The bill was not considered by Congress.

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On Jan. 5, 1892, Sherman Hoar introduced a bill (H.R.196) to provide that all postmasters should hold office during good behavior 23 Cong.Rec. 130. § 1 contained the following proviso: "Provided, however, That the President may at any time remove or suspend a postmaster for cause stated." On Dec. 22, 1895, De Forest introduced H.R. 8328, 27 Cong.Rec. 576. Section 2 provided:

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That postmasters of all classes now in office or hereafter to be appointed shall be appointed to hold their offices for good behavior; Provided, That the President may at any time remove or suspend a postmaster of the first, second or third class for cause, communicated in writing to the Senate at the next subsequent session of Congress after such removal, and that the Postmaster General may at any time remove or suspend a postmaster of the fourth class for cause, communicated in the letter of removal.

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Sec. 3 forbade appointment, removal or suspension for political reasons. On Jan. 28, 1896, Gillett introduced the identical bill (H.R. 8328). 28 Cong.Rec. 1061. None of these three bills was considered even by a committee.

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19. This provision was reenacted by Rev.Stats. § 1229. Comp.Sen.Rep. Apr. 4, 1864, No. 42, 38th Cong. 1st sess., Ser. No. 1178. In Blake v. United States, 103 U.S. 227, 237, this provision was interpreted as not denying "the power of the President, by and with the advice and consent of the Senate, to displace them by the appointment of others in their places." The Act of June 4, 1920, c. 227, Art. 118, 41 Stat. 759, 811, provides:

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ART. 118. OFFICERS, SEPARATION FROM SERVICE.—No officer shall be discharged or dismissed from the service, except by order of the President or by sentence of a general court-martial, and in time of peace no officer shall be dismissed except in pursuance of the sentence of a general court-martial or in mitigation thereof; but the President may at any time drop from the rolls of the Army any officer who has been absent from duty three months without leave or who has been absent in confinement in a prison or penitentiary for three months after final conviction by a court of competent jurisdiction.

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20. See Note 4, p. 242, supra.

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21. See Lawrence, June 17, 1 Ann.Cong. 483-484; Smith, June 17, 1 Ann.Cong. 508-9; Madison, June 18, 1 Ann.Cong., 547-548. A few days subsequent to the debate on the removal provision in the Act establishing a Department of Foreign Affairs, Madison, although he believed that the power to prescribe the tenure of office and the power of removal were, in essence, the same, moved to amend the Act establishing a Treasury Department by providing that the Comptroller should hold office for a limited period of years. To the objection that such a provision was not within the power of Congress he replied:

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When I was up before . . . , I endeavored to show that the nature of this office differed from the others upon which the House had decided; and, consequently, that a modification might take place, without interfering with the former distinction; so that it cannot be said we depart from the spirit of the Constitution.

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1 Ann.Cong. 614. Stone, in support of Madison, added:

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As the Comptroller was an inferior officer, his appointment might be vested in the President by the Legislature; but, according to the determination which had already taken place, it did not necessarily follow that he should have the power of dismissal, and before it was given, its propriety ought to be apparent.

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1 Ann.Cong. 613. See Note 71, infra.

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22. In 1830, Senator Barton, in defense of his resolutions denying an uncontrollable Presidential power of removal, said:

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It is no question whether a President may remove, at his own will and pleasure, his Secretary of State. That was the very question before Congress in the great debate of 1789. . . . Nobody would wish to force a disagreeable member of the cabinet on the President. . . . But the class of officers now before the Senate, and their predecessors, attempted to be removed by the President, were not under consideration in the debate of 1789. This is a class of public officers—or officers of the law—whose term, tenure, and duties of office are fixed and prescribed by the laws of the land, and not by the Executive will, as in the other class. . . . The power is now boldly asserted on this floor by the majority, for the first time since the foundation of the republic, of removing this class of federal officers by the President at discretion, without the slightest restraint by the Senate.

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6 Cong. Deb. 458-459. The same distinction was taken in 1835, by Senators Wright and White, in the debate on the Executive Patronage Bill. 11 Cong.Deb. 480, 487.

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On June 15, 1844, the Senate Committee on Retrenchment dealing with the evils of executive patronage said:

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It will be sufficient for the committee to show that Congress may regulate, by law, as well the power to appoint inferior officers as to remove them. . . . The committee will not protract the argument. It is not known to them that the power of Congress to regulate the appointment and removal of inferior officers has been questioned. It is very certain that the authority of the President to control the departments in the exercise of the power has not at any time been recognised by law.

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Sen.Doc. No. 399, 28th Cong. 1st sess., Ser. No. 437, p. 29-30.

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23. In six instances, President Johnson, in separate messages, communicated his reasons for suspension. 16 Ex.Journ. 3, 109-110, 122, 133. In two further instances, misconduct was given as the ground for suspension. 16 ibid. 1.

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24. Five cases of this nature are on record. 16 Ex.Journ. 411-412.

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25. From President Grant's administration to the close of the first two years of President Cleveland's first administration, nominations of officials to succeed those who had been suspended during the recess follow one of two forms: "I nominate A.B., who was designated during the recess of the Senate, to be \_\_\_, vice C.D. suspended," or "I nominate A.B. to be postmaster at \_\_\_ in place of C.D., suspended under the provisions of the seventeen hundred and sixty-eighth section of the Revised Statutes of the United States." These forms are not used after Mar. 3, 1887. The case of A.C. Botkin, marshal of Montana Territory, is illustrative of the fact that suspension, and not removal, could be effected during the recess. On Jan. 28, 1885, President Arthur nominated E. A. Kreidler in place of A.C. Botkin to be removed. 24 Ex.Journ. 425. The Senate failed to act upon the nomination, and, on Dec. 21, 1885, President Cleveland nominated R.S. Kelly vice A.C. Botkin suspended. For several months, action upon the nomination was delayed, and, on April 28, 1886, the President sent the following message to the Senate:

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I nominated Robert S. Kelly, of Montana, to the Senate on the 21st day of December, 1885, . . . in the place of A.C. Botkin, who was by me suspended under the provisions of section 1708 of the Revised Statutes. On the 12th day of April, 1886, the term of office for which said A.C. Botkin was originally appointed expired. And I renew the nomination of Robert S. Kelly, of Montana, . . . in the place of the said A.C. Botkin, whose term of office has so expired as aforesaid.

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25 Ex.Journ. 441. These years of President Cleveland disclose 78 other cases of a similar nature. 25 ibid. 396-410, 426, 436, 441, 488, 490-494, 497, 501, 516, 539, 563, 714-715.

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26. On Dec. 6, 1869, President Grant requested the consent of the Senate to the removal of certain Indian agents, to whose posts army officers had been assigned. 17 Ex.Journ. 289. On May 17, 1872, the Senate gave its consent to the removal of T. H. Bazin, appraiser of merchandise at Charleston, S.C., 18 ibid. 251. On Dec. 4, 1878, President Hayes requested the Senate's consent to the removal of A.M. Devereux, a third lieutenant in the revenue service. 21 ibid. 393. The Senate during that session took no action. To the three succeeding sessions of the Senate, the same request was made without securing its consent. 22 ibid. 23, 108, 410. President Garfield likewise made the same request, but failed to secure any action by the Senate. 23 ibid. 9, 29. On April 15, 1884, President Arthur recommended to the Senate the removal of F. N. Wicker as collector of customs at Key West. 24 ibid. 246. The Senate concurred in his removal without expressing an opinion upon the constitutional powers of the President and Senate upon the subject of removal. 24 ibid. 249.

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27. The instances are numerous, and a few illustrations will suffice. On Mar. 2, 1883, Paul Strobach was nominated as a marshal vice M.C. Osborn to be removed. 23 Ex.Journ. 711. The Senate took no action during that session, and, in the recess, Osborn was suspended. Strobach was again nominated, but was rejected at the next session of the Senate. Thereupon, on May 8, 1884, J. H. Speed was nominated "vice Paul Strobach, temporarily appointed during the recess of the Senate." 24 Ex.Journ. 265. Pending action upon the nomination, President Arthur, on May 14, 1884, again nominated J. H. Speed

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vice M.C. Osborn, whose term has expired. This nomination is made to correct an error in the nomination of Joseph H. Speed to the above-named office, which was delivered to the Senate on the 8th instant, and which is hereby withdrawn.

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24 Ex.Journ. 267. The correction expressly recognizes that Osborn had never ceased to hold office. Compare 15 Op.A.G. 375. Again, on Mar. 2, 1884, Windus was nominated as a postmaster vice Lambert "whose removal for cause is hereby proposed." 24 Ex.Journ. 220. The Senate rejected Windus, and, on Dec. 17, 1885, President Cleveland nominated Gildea vice Lambert, "whose commission expired May 13, 1885." 25 ibid. 228. On Jan. 6, 1885, Richardson was nominated as a postmaster vice Corson "whose removal for cause is hereby proposed." 24 ibid. 412. The Senate failed to act upon the nomination, and, on April 1, 1885, Cleveland nominated Bonner to the post vice Corson "whose removal for cause is hereby proposed." 25 ibid. 45.

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28. Since the enactment of the Tenure of Office Act, various forms have been used to nominate officials to succeed those whose removal is thereby sought. Examination of their use over a period of thirty-two years indicates that no significance is to be attached to the use of any particular form. Thus, the nomination is sometimes in the form A. B. vice C. D. "removed"; sometimes it is "to be removed"; sometimes "removed for cause "; sometimes "whose removal for cause is hereby proposed."

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"whose

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"removed removal for

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"re- "to be for cause is here

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moved" removed" cause" by proposed"

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1867-1869 (Johnson). . . . . 37 72 3

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1869-1873 (Grant). . . . . . 468 464 17

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1873-1877 (Grant). . . . . . 120 144 19

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1877-1881 (Hayes). . . . . . 8 102 10 42

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1881 (Garfield). . . . . . . 1 19

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1881-1885 (Arthur) . . . . . 4 78 69

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1885-1887 (Cleveland). . . . 15 19 24

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1887-1889 (Cleveland). . . . 178 1

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1889-1893 (Harrison) . . . . 1080 118 9

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1893-1897 (Cleveland). . . . 808 101

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1897-1899 (McKinley) . . . . 813 26

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Postmasters will be found included within all these categories. 16-31 Ex.Journ., passim. The form "who has been removed" was twice used by President Grant and once by President Harrison. On one occasion, President Grant used the form "whom I desire to remove," and on six occasions President Hayes used the form "to be thus removed." The simple form "removed," which has been exclusively used for postmasters since 1887, does not imply that removal has already been accomplished. That form was used in the Parsons and Shurtleff cases, where the notification of removal sent to the incumbent stated that the removal would take effect upon the qualification of a successor. 29 Ex.Journ. 11; 31 ibid. 1328.

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29. Cases in this Court dealing with the removal of civil officers appointed by the President with the advice and consent of the Senate illustrate the practice of securing their removal by the appointment of a successor. In recent years, the formal notification of removal commonly reads: "Sir: You are hereby removed from the office of \_\_\_, to take effect upon the appointment and qualification of your successor." Parsons v. United States, 167 U.S. 324, 325; Shurtleff v. United States, 189 U.S. 311, 312.

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30. Provisions authorizing removal for

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(a) Inefficiency, neglect of duty, malfeasance in office, but for no other cause: Act of May 27, 1908, c. 205, § 3, 35 Stat. 403, 406, amending Act of June 10, 1890, c. 407, § 12, 26 Stat. 131, 136, Board of General Appraisers; Act of July 15, 1913, c. 6, § 11, 38 Stat. 103, 108, Commissioner of Mediation and Conciliation (misconduct in office only); Act of June 2, 1924, c. 234, § 900b, 43 Stat. 253, 336, Board of Tax Appeals.

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(b) Neglect of duty or malfeasance in office, but for no other cause: Act of Feb. 28, 1920, c. 91, § 306(b), 41 Stat. 456, 470, Railroad Labor Board; Act of Sept. 22, 1922, c. 412, § 1, 42 Stat. 1023, amended by Act of Mar. 4, 1923, c. 248, § 1, 42 Stat. 1446, United States Coal Commission.

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(c) Inefficiency, neglect of duty, malfeasance in office, not restricting, however, under Shurtleff v. United States, 189 U.S. 311, the President's power to remove for other than the causes specified: Act of Feb. 4, 1887, c. 104, § 11, 24 Stat. 379, 383, Interstate Commerce Commission; Act of June 10, 1890, c. 407, § 12, 26 Stat. 131, 136, Board of General Appraisers; Act of Sept. 26, 1914, c. 311, 1, 38 Stat. 717, 718, Federal Trade Commission; Act of Sept. 7, 1916, c. 451, § 3, 39 Stat. 728, 729, United States Shipping Board; Act of Sept. 8, 1916, c. 473, § 700, 39 Stat. 756, 795, United States Tariff Commission.

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31. Act of June 7, 1878, c. 162, § 1, 20 Stat. 100, justices of the peace of the District of Columbia; Act of June 6, 1900, c. 786, § 10, 31 Stat. 321, 325, governor, surveyor-general, attorneys, marshals of Alaska; Act of Aug. 24, 1912, c. 389, § 6, 37 Stat. 539, 555, removals from the classified civil service to be only for such cause as will promote the efficiency of the service and for reasons stated in writing; Act of July 17, 1916, c. 245, § 3, 39 Stat. 360, Federal Farm Loan Board; Act of June 3, 1922, c. 205, 42 Stat. 620, Federal Reserve Board. The provision is also common with respect to judgeships. Act of Mar.19, 1906, c. 960, § 1, 34 Stat. 73 (Juvenile Court of the District of Columbia); Act of June 30, 1906, c. 3934, § 7, 34 Stat. 814, 816 (United States Court for China); Act of Mar. 3, 1925, c. 443, § 3a, 43 Stat. 1119 (Police Court of the District of Columbia).

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32. Act of May 27, 1908, c. 205, § 3, 35 Stat. 403, 406, does so in express terms. Shurtleff v. United States, 189 U.S. 311, 314, 317, declares that, by construction, every Act which prescribes specific causes for removal requires that removal be not made for such cause without a hearing. In Reagan v. United States, 182 U.S. 419, 425, it was said:

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The inquiry is therefore whether there were any causes of removal prescribed by law, March 1, 1895, or at the time of the removal. If there were, then the rule would apply that, where causes of removal are specified by constitution or statute, as also where the term of office is for a fixed period, notice and hearing are essential. If there were not, the appointing power could remove at pleasure or for such cause as it deemed sufficient.

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State courts have held that statutes providing for removal "for cause" require that the appointee be given notice and an opportunity to defend himself. State v. Frazier, 47 N.D. 314; Street Commissioners v. Williams, 96 Md. 232; Ham v. Board of Police, 142 Mass. 90; Haight v. Love, 39 N.J.L. 14, aff'd. 39 N.J.L. 476; Biggs v. McBride, 17 Oreg. 640.

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33. Act of June 3, 1864, c. 106, § 1, 13 Stat. 99, Comptroller of the Currency; Act of Feb. 12, 1873, c. 131, § 1, 17 Stat. 424, Director of the Mint.

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34. The executive orders of Jan. 31, 1902, and Jan. 25, 1906, prescribed dismissal as a penalty for agitation by civil employees for an increase in wages. The executive orders of Nov. 26, 1909, and April 8, 1912, forbade communications to members of Congress save through heads of departments. Report of U.S. Civil Service Commission, for 1912, pp. 23-24. Section 6 of the Act of 1912 was intended to override these orders. See 48 Cong.Rec. 5634-5636. On Feb.19, 1886, the National Civil Service Reform League, in a series of resolutions, recommended that the reasons for removal be treated as "part of the public record." 5 Civ.Serv. Rec. 92. On Aug. 9, 1890, Commissioner Roosevelt advocated such a restriction upon removals. 10 Civ.Serv.Rec. 26. A bill reported from the Select Committee of the House on Civil Service Reform in 1891 contained such a provision. House Rep. No. 4038, 51 Cong., 2d sess., Ser. No. 2890. The Attorney General, in 1913, ruled, against an earlier opinion of the Civil Service Commission, that Presidential appointees were excluded from the terms of the Act of 1912. 30 Op.A.G. 181. The Civil Service Act of Jan. 16, 1883, c. 27, § 2, 22 Stat. 403, 404, which was approved by President Arthur, had also provided that failure to subscribe to political funds should not be a ground of dismissal.

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35. Citizens of

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(a) The United States: Act of May 3, 1802, c. 53, § 5, 2 Stat. 195, 196, mayor of the District of Columbia; Act of Mar. 1, 1855, c. 133, § 9, 10 Stat. 619, 623, ministers and their subordinates; Act of Aug. 18, 1856, c. 127, § 7, 11 Stat. 52, 55, consular pupils; Act of June 20, 1864, c. 136, § 2, 13 Stat. 137, 139, consular clerks; Act of Mar. 22, 1902, c. 272, 32 Stat. 76, 78, Act of Feb. 9, 1903, c. 530, 32 Stat. 807, 809, Act of Mar. 12, 1904, c. 543, 33 Stat. 67, 69, Act of Mar. 3, 1905, c. 1407, 33 Stat. 915, 917, Act of June 16, 1906, c. 3337, 34 Stat. 286, 288, Act of Feb. 22, 1907, c. 1184, 34 Stat. 916, 918, Act of May 21, 1908, c. 183, 35 Stat. 171, 172, Act of Mar. 2, 1909, c. 235, 35 Stat. 672, 674, Act of May 6, 1910, c. 199, 36 Stat. 337, 339, Act of Mar. 3, 1911, c. 208, 36 Stat. 1027, 1029, Act of April 30, 1912, c. 97, 37 Stat. 94, 96, Act of Feb. 28, 1913, c. 86, 37 Stat. 688, 689, Act of June 30, 1914, c. 132, 38 Stat. 442, 444, Act of Mar. 4, 1915, c. 145, 38 Stat. 1116, 1117, Act of July 1, 1916, c. 208, 39 Stat. 252, 253, Act of Mar. 3, 1917, c. 161, 39 Stat. 1047, 1049, Act of April 15, 1918, c. 52, 40 Stat. 519, 520, Act of Mar. 4, 1919, c. 123, 40 Stat. 1325, 1327, Act of June 4, 1920, c. 223, 41 Stat. 739, 741, Act of Mar. 2, 1921, c. 113, 41 Stat. 1205, 1207, Act of June 1, 1922, c. 204, 42 Stat. 599, 601, Act of Jan. 3, 1923, c. 21, 42 Stat. 1068, 1070, student interpreters for China, Japan and Turkey; Act of April 5, 1906, c. 1366, § 5, 34 Stat. 99, 101, clerks in consular office receiving more than $1,000 per annum; Act of July 17, 1916, c. 245, § 3, 39 Stat. 360, Federal Farm Loan Board; Act of Feb. 23, 1917, c. 114, § 6, 39 Stat. 929, 932, Federal Board for Vocational Education; Act of May 24, 1924, c. 182, § 5, 43 Stat. 140, 141, Foreign Service officers; Act of June 7, 1924, c. 287, § 7, 43 Stat. 473, 474, board of advisors to the Federal Industrial Institution for Women.

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(b) A State: Act of Mar. 3, 1891, c. 539, § 2, 26 Stat. 854, 855, attorney and interpreter for the Court of Private Land Claims.

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(c) A Particular State: Act of July 27, 1854, c. 110, § 1, 10 Stat. 313, commissioner to adjust Indiana land claims; Act of Mar. l, 1907, c. 2285, 34 Stat. 1015, 1036, Act of May 30, 1910, c. 260, § 4, 36 Stat. 448, 450, Act of June 1, 1910, c. 264, § 7, 36 Stat. 455, 457, Act of Aug. 3, 1914, c. 224, § 3, 38 Stat. 681, 682, various commissions to appraise unallotted Indian lands.

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(d) A Particular Territory: Act of April 12, 1900, c.191, § 40, 31 Stat. 77, 86, commission to revise the laws of Porto Rico; Act of April 30, 1900, c. 339, §§ 66, 69, 31 Stat. 141, 153, 154, governor and secretary of Hawaii; Act of July 9, 1921, c. 42, §§ 303, 313, 42 Stat. 108, 116, 119, governor, attorney and marshal of Hawaii.

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(e) District of Columbia: Act of Mar. 3, 1855, c.199, § 2, 10 Stat. 682, board of visitors for Government Hospital for the Insane; Act of Feb. 21, 1871, c. 62, § 37, 16 Stat. 419, 426, Board of Public Works; Act of June 11, 1878, c. 180, § 2, 20 Stat. 102, 103, commissioners of the District; Act of Sept. 27, 1890, c. 1001, § 2, 26 Stat. 492, Rock Creek Park Commission.

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36. Act of Mar. 1, 1855, c. 133, § 9, 10 Stat. 619, 623, ministers and their subordinates.

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37. Act of Mar. 3, 1891, c. 539, § 2, 26 Stat. 854, 855, attorney and interpreter for the Court of Private Land Claims.

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38. Act of Mar. 29, 1867, c. 14, § 1, 15 Stat. 9, commissioners to ascertain the amount raised in Indiana in enrolling the militia; Act of Mar. 1, 1907, c. 2285, 34 Stat. 1015, 1036, Act of May 30, 1910, c. 260, § 4, 36 Stat. 448, 450, Act of June 1, 1910, c. 264, § 7, 36 Stat. 455, 457, Act of Aug. 3, 1914, c. 224 § 3, 38 Stat. 681, 682, various commissions for the appraisal of unallotted Indian lands.

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39. Act of July 1, 1862, c. 119, § 2, 12 Stat. 432, 433, assessors and collectors of internal revenue, and semble, Act of July 2, 1836, c. 270, § 36, 5 Stat. 80, 88, postmasters.

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40. Act of Mar. 26, 1804, c. 38, § 4, 2 Stat. 283, 284, legislative council of Louisiana; Act of Mar. 3, 1891, c. 564, § 2, 26 Stat. 1104, territorial mine inspectors; Act of July 9, 1921, c. 42, §§ 303, 313, 42 Stat. 108, 116, 119, governor, attorney and marshal of Hawaii.

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41. Act of May 3, 1802, c. 53, § 5, 2 Stat. 195, 196, mayor of the District of Columbia; Act of April 16, 1862, c. 54, § 3, 12 Stat. 376, commissioners for claims arising from the abolition of slavery; Act of Feb. 21, 1874, c. 62, § 37, 16 Stat. 419, 426, Board of Public Works; Act of June 7, 1878, c. 162, § 5, 20 Stat. 100, 101, notaries public; Act of June 11, 1878, c. 180, § 2, 20 Stat. 102, 103, commissioners of the District.

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42. Act of Mar. 3, 1819, c. 101, § 2, 3 Stat. 532, 533, agents on the coast of Africa to receive negroes from vessels seized in the slave trade.

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43. Professional qualifications:

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(a) Learning in the Law: Act of Sept. 24, 1789, c. 20, § 35, 1 Stat. 73, 92, Attorney General and district attorneys; Act of Mar. 26, 1804, c. 38, § 8, 2 Stat. 283, 286, attorney for Louisiana Territory; Act of April 3, 1818, c. 29, § 4, 3 Stat. 413, attorney for Mississippi; Act of Mar. 3, 1819, c. 70, § 4, 3 Stat. 502, 503, attorney for Illinois; Act of April 21, 1820, c. 47 § 6, 3 Stat. 564, 565, attorney for Alabama; Act of Mar. 16, 1822, c. 12, § 4, 3 Stat. 653, attorney for Missouri; Act of Mar. 30, 1822, c. 13, § 7, 3 Stat. 654, 656, attorney for Florida Territory; Act of Mar. 3, 1823, c. 28, § 9, 3 Stat. 750, 752, attorney for Florida Territory; Act of May 26, 1824, c. 163, § 3, 4 Stat. 45, 46, attorney for Florida Territory; Act of May 29, 1830, c. 153, § 1, 4 Stat. 414, solicitor of the Treasury; Act of June 15, 1836, c. 100, § 6, 5 Stat. 50, 51, attorney for Arkansas; Act of July 1, 1836, c. 234, § 4, 5 Stat. 61, 62, attorney for Michigan; Act of Mar. 3, 1845, c. 75, § 7, 5 Stat. 788, attorney for Florida; Act of Mar. 3, 1845, c. 76, § 4, 5 Stat. 789, attorney for Iowa; Act of Dec. 29, 1845, c. 1, § 3, 9 Stat. 1, attorney for Texas; Act of Aug. 6, 1846, c. 89, § 5, 9 Stat. 56, 57, attorney for Wisconsin; Act of Feb. 23, 1847, c. 20, § 5, 9 Stat. 131, attorney for Florida; Act of Sept. 28, 1850, c. 86, § 8, 9 Stat. 521, 522, attorney for California; Act of Mar. 3, 1851, c. 41, § 4, 9 Stat. 631, agent for California Land Commission; Act of Aug. 31, 1852, c. 108, § 12, 10 Stat. 76, 99, law agent for California; Act of July 27, 1854, c. 110, § 1, 10 Stat. 313, commissioner to adjust land claims; Act of Mar. 4, 1855, c. 174, § 1, 10 Stat. 642, commissioners to revise District of Columbia laws; Act of Mar. 3, 1859, c. 80, 11 Stat. 410, 420, Assistant Attorney General; Act of Mar. 2, 1861, c. 88, § 2, 12 Stat. 246, examiners in chief in Patent Office; Act of May 20, 1862, c. 79, § 1, 12 Stat. 403, commissioners to revise District of Columbia laws; Act of Mar. 3, 1863, c. 91, § 17, 12 Stat. 762, 765, commissioners to revise District of Columbia laws; Act of Mar. 3, 1863, c. 101, § 2, 12 Stat. 795, solicitor to Peruvian Commissioners; Act of June 27, 1866, c. 140, § 1, 14 Stat. 74, commissioners to revise United States laws, Joint Res. of May 27, 1870, No. 66, § 1, 16 Stat. 378, examiner of claims for the Department of State; Act of June 22, 1870, c. 150, §§ 2, 3, 16 Stat. 162, Solicitor General and Assistant Attorney Generals; Act of July 8, 1870, c. 230, § 10, 16 Stat. 198, 200, examiners in chief in Patent Office; Act of Mar. 2, 1877, c. 82, § 1, 19 Stat. 268, commissioner for a new edition of the Revised Statutes; Act of Mar. 6, 1890, c. 27, § 1, 26 Stat. 17, delegates to the International Conference at Madrid in patent and trademark laws; Act of Mar. 3, 1891, c. 539, § 2, 26 Stat. 854, 855, attorney of the Court of Private Land Claims; Act of Mar. 2, 1901, c. 800, § 1, 31 Stat. 877, Spanish claims commissioners; Act of June 13, 1902, c. 1079, § 4, 32 Stat. 331, 373, commission on Canadian boundary waters to include one lawyer experienced in international and riparian law.

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(b) Versed in Spanish and English Languages: Act of Mar. 3, 1849, c. 107, § 2, 9 Stat. 393, secretary to Mexican Treaty Commissioners; Act of Mar. 3, 1851, c. 41, § 4, 9 Stat. 631, agent for California Land Commission; Act of Aug. 31, 1852, c. 108, § 12, 10 Stat. 76, 99, law agent in California; Act of May 16, 1860, c. 48, § 2, 12 Stat. 15, secretary of Paraguay Commission; Act of Feb. 20, 1861, c. 45, § 2, 12 Stat. 145, secretary of New Granada Commission; Act of Mar. 3, 1863, c. 101, §§ 2, 3, 12 Stat. 795, solicitor and secretary of Peruvian Commissioners; Joint Res. of Jan. 12, 1871, No. 7, § 1, 16 Stat. 591, secretary of San Domingo Commissioners; Act of Mar. 3, 1891, c. 539, § 2, 26 Stat. 854, 855, interpreter to the Court of Private Land Claims.

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(c) Engineering: Act of Feb. 21, 1871, c. 62, 37, 16 Stat. 19, 426, District of Columbia Board of Public Works: Act of April 4, 1871, c. 9, § 1, 17 Stat. 3, commission to examine Sutro Tunnel; Act of June 22, 1874, c. 411, § 1, 18 Stat. 199, commission to examine alluvial basin of Mississippi River; Act of June 28, 1879, c. 43, § 2, 21 Stat. 3?, Mississippi River Commission; Act of June 4, 1897, c. 2, 30 Stat. 11, 59, Nicaragua Canal Commission; Act of June 13, 1902, c. 1079, § 4, 32 Stat. 331, 373, commission on Canadian boundary waters; Act of June 28, 1902, c. 1302, § 7, 32 Stat. 481, 483, Isthmian Canal Commission; Act of Aug. 24, 1912, c. 387, § 18, 37 Stat. 512, 517, Alaskan Railroad Commission; Act of Aug. 8, 1917, c. 49, § 18, 40 Stat. 250, 269, Inland Waterways Commission; Act of May 13, 1924, c. 153, 43 Stat. 118, Rio Grande Commission.

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(d) Miscellaneous: Joint Res. of July 5, 1866, No. 66, § 1, 14 Stat. 362, commissioners to Paris Universal Exhibition to be professional and scientific men; Act of June 10, 1896, c. 398, 29 Stat. 321, 342, commissioners to locate Indian boundaries to be surveyors; Act of Aug. 24, 1912, c. 387, § 18, 37 Stat. 512, 517, Alaskan Railroad Commission to include one geologist in charge of Alaskan survey.

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44. Act of Aug. 26, 1852, c. 91, § 2, lo Stat. 30, superintendent of public printing to be a practical printer; Act of Aug. 31, 1852, c. 112, § 8, 10 Stat. 112, 119, Light House Board to include civilian of high scientific attainments; Act of July 27, 1866, c. 284, § 1, 14 Stat. 302, appraiser for New York to have had experience as an appraiser or to be practically acquainted with the quality and value of some one or more of the chief articles of importation subject to appraisement; Joint Res. of Feb. 9, 1871, No. 22, § 1, 16 Stat. 593, 594, commissioner for fish and fisheries to be a person of proved scientific and practical acquaintance with the fishes of the coast; Act of Feb. 28, 1871, c. 100, § 23, 63, 16 Stat. 440, 448, 458, supervising inspectors of steam vessels to be selected for their knowledge, skill, and practical experience in the uses of steam for navigation and to be competent judges of the character and qualities of steam vessels and of all parts of the machinery employed in steaming, inspector general to be selected with reference to his fitness and ability to systematize and carry into effect all the provisions of law relating to the steamboat inspection service, Act of June 23, 1874, c. 480, § 2, 18 Stat. 277, 278, inspector of gas in the District of Columbia to be a chemist, assistant inspector to be a gasfitter by trade; Joint Res. of Dec. 15, 1877, No. 1, § 2, 20 Stat. 245, commissioners to the International Industrial Exposition in Paris to include three practical artisan experts, four practical agriculturists, and nine scientific experts; Act of June 18, 1878, c. 265, § 6, 20 Stat. 163, 164, superintendent of Life Saving Service to be familiar with the various means employed in the Life Saving Service for the saving of life and property from shipwrecked vessels; Act of June 29, 1888, c. 503, § 8, 25 Stat. 217, 238, superintendent of Indian schools to be a person of knowledge and experience in the management, training and practical education of children; Act of July 9, 1888, c. 593, § 1, 25 Stat. 243, delegates to the International Marine Conference to include two masters of merchant marine (one sailing and one steam), and two civilians familiar with shipping and admiralty practice; Act of Mar. 3, 1891, c. 564, § 2, 26 Stat. 1104, mine inspectors in the territories to be practical miners; Act of July 13, 1892, c. 164, 27 Stat. 120, 139, Indian commissioners to be familiar with Indian affairs; Act of Jan. 12, 1895, c. 23, § 17, 28 Stat. 601, 603, public printer to be a practical printer; Act of Mar. 3, 1899, c. 419, § 2, 30 Stat. 1014, assistant director of the Census to be an experienced practical statistician; Act of May 16, 1910, c. 240, § 1, 36 Stat. 369, Director of Bureau of Mines to be equipped by technical education and experience; Act of Dec. 23, 1913, c. 6, § 10, 38 Stat. 251, 260, Federal Reserve Board to include two members experienced in banking or finance; Act of Mar. 3, 1919, c. 97, § 3, 40 Stat. 1291, 1292, assistant director of the Census to be an experienced practical statistician; Act of June 2, 1924, c. 234, § 900b, 43 Stat. 253, 336, Board of Tax Appeals to be selected solely on grounds of fitness to perform duties of the office.

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45. Act of Mar. 3, 1853, c. 97, § 3, 10 Stat. 189, 211, examination required of clerks in the Departments of Treasury, War, Navy, Interior, and Post Office; Act of June 20, 1864, c. 136, § 2, 13 Stat. 137, 139, examination required of consular clerks; Act of Jan. 16, 1883, c. 27, § 2, 22 Stat. 403, examinations for civil service employees; Act of Jan. 4, 1889, c.19, § 1, 25 Stat. 639, medical officers of Marine Hospital Service; Act of May 22, 1917, c. 20, § 16, 40 Stat. 84, 88, officers of the Coast and Geodetic Survey; Act of Oct. 27, 1918, c.196, § 16, 40 Stat. 1017, examinations for Public Health Service Reserve; Act of May 24, 1924, c. 182, § 5, 43 Stat. 140, 141, examination for appointments as Foreign Service officers in Diplomatic Corps.

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46. Act of June 20, 1864, c. 136, § 2, 13 Stat. 137, 139, consular clerks; Act of April 30, 1900, c. 339, § 66, 31 Stat. 141, 153, governor of Hawaii; Act of July 9, 1921, c. 42, § 303, 42 Stat. 108, 116, governor of Hawaii.

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47. Joint Res. of Feb. 23, 1900, No. 9, 31 Stat. 711, one commissioner to represent the United States at the unveiling of the statue of Lafayette to be a woman; Act of June 5, 1920, c. 248, § 2, 41 Stat. 987, Director of Women's Bureau to be a woman.

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48. Act of July 1, 1902, c. 1362, § 59, 32 Stat. 641, 654, commission to sell coal and asphalt deposits in Indian lands to include two Indians.

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49. Act of Mar. 26, 1804, c. 38, § 4, 2 Stat. 283, 284, legislative council of Louisiana to be selected from those holding real estate.

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50. Act of Jan. 16, 1883, c. 27, § 8, 22 Stat. 403, 406, civil service appointees.

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51. Act of Mar. 22, 1882, c. 47, § 9, 22 Stat. 30, 32, board of elections in Utah Territory; Act of Jan. 16, 1883, c. 27, § 1, 22 Stat. 403, Civil Service Commission; Act of Feb. 4, 1887, c. 104, § 11, 24 Stat. 379, 383, amended by Act of June 29, 1906, c. 3591, § 8, 34 Stat. 584, 595, Act of Aug. 9, 1917, c. 50, § 1, 40 Stat. 270, and Act of Feb. 28, 1920, c. 91, § 440, 41 Stat. 456, 497, Interstate Commerce Commission; Act of June 10, 1890, c. 407, § 12, 26 Stat. 131, 136, Board of General Appraisers; Act of Mar. 2, 1889, c. 412, § 14, 25 Stat. 980, 1005, Act of Aug.19, 1890, c. 807, 26 Stat. 336, 354, Act of July 13, 1892, c. 164, 27 Stat. 120, 138, 139, Act of June 10, 1896, c. 398, 29 Stat. 321, 342, various commissions to negotiate Indian treaties; Act of Sept. 26, 1914, c. 311, § 1, 38 Stat. 717, Federal Trade Commission; Act of July 17, 1916, c. 245, § 3, 39 Stat. 360, Federal Farm Loan Board; Act of Sept. 7, 1916, c. 451, § 3, 39 Stat. 728, 729, amended by Act of June 5, 1920, c. 250, § 3a, 41 Stat. 988, 989, United States Shipping Board; Act of Sept. 7, 1916, c. 458, § 28, 39 Stat. 742, 748, United States Employees' Compensation Commission; Act of Sept. 8, 1916, c. 463, § 700, 39 Stat. 756, 795, United States Tariff Commission; Act of Sept. 21, 1922, c. 356, § 518, 42 Stat. 858, 972, Board of General Appraisers; Act of Feb. 28, 1923, c. 146, § 2, 42 Stat. 1325, 1326, World War Foreign Debt Commission.

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52. Act of Mar. 3, 1901, c 864, § 2, 31 Stat. 1440, Louisiana Purchase Exposition commission; Act of Mar. 22, 1902, c. 272, 32 Stat. 76, 78, Act of Feb. 9, 1903, c. 530, 32 Stat. 807, 809, Act of Mar. 12, 1904, c. 543, 33 Stat. 67, 69, Act of Mar. 3, 1905, c. 1407, 33 Stat. 915, 917, Act of June 16, 1906, c. 3337, 34 Stat. 286, 288, Act of Feb. 22, 1907, c. 1184, 34 Stat. 916, 918, Act of May 21, 1908, c. 183, 35 Stat. 171, 172, Act of Mar. 2, 1909, c. 235, 35 Stat. 672, 674, Act of May 6, 1910, c. 199, 36 Stat. 337, 339, Act of Mar. 3, 1911, c. 208, 36 Stat. 1027, 1029, Act of April 30, 1912, c. 97, 37 Stat. 94, 96, Act of Feb. 28, 1913, c. 86, 37 Stat. 688, 689, Act of June 30, 1914, c. 132, 38 Stat. 442, 444, Act of Mar. 4, 1915, c. 145, 38 Stat. 1116, 1117, Act of July 1, 1916, c. 208, 39 Stat. 252, 253, Act of Mar. 3, 1917, c. 161, 39 Stat. 1047, 1049, Act of April 15, 1918, c. 52, 40 Stat. 519, 520, Act of Mar. 4, 1919, c. 123, 40 Stat. 1325, 1327, Act of June 4, 1920, c 223, 41 Stat. 739, 741, Act of Mar. 2, 1921, c. 113, 41 Stat. 1205, 1207, Act of June 1, 1922, c. 204, 42 Stat. 599, 601, Act of Jan. 3, 1923, c. 21, 42 Stat. 1068, 1070, student interpreters for China, Japan, and Turkey.

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53. Joint Res. of Dec. 15, 1877, No. 1, § 2, 20 Stat. 245, commissioners to the International Industrial Exposition in Paris; Act of June 18, 1898, c. 466, § 1, 30 Stat. 476, Industrial Commission; Act of Aug. 23, 1912, c. 351, § 1, 37 Stat. 415, Commission on Industrial Relations; Act of Dec. 23, 1913, c. 6, § 10, 38 Stat. 251, 260, amended by Act of June 3, 1922, c. 205, 42 Stat. 620, Federal Reserve Board; Act of Feb. 23, 1917, c. 114, § 6, 39 Stat. 929, 932, Federal Board for Vocational Education; Act of Feb. 28, 1920, c. 91, § 304, 41 Stat. 456, 470.

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54. Act of Aug. 6, 1861, c. 62, § 3, 12 Stat. 320, Board of Police Commissioners for the District of Columbia; Act of Feb. 16, 1863, c. 37, § 3, 12 Stat. 652, 653, commissioners to settle Sioux Indians' claims; Act of Mar. 3, 1863, c. 106, § 1, 12 Stat. 799, levy court of the District of Columbia; Act of Mar. 3, 1871, c. 105, § 2, 16 Stat. 470, 471, commissioners to the Philadelphia Exposition; Joint Res. of Dec. 15, 1877, No. 1, § 2, 20 Stat. 245, commissioners to the International Industrial Exposition in Paris; Act of Mar. 3, 1879, c. 202, § 1, 20 Stat. 484, National Board of Health; Act of Aug. 5, 1882, c. 389, § 4, 22 Stat. 219, 255, civil employees of certain departments; Act of Jan. 16, 1883, c. 27, § 2, 22 Stat. 403, civil service appointees; Act of Feb. 10, 1883, § 3, 22 Stat. 413, commissioners of World's Industrial and Cotton Centennial Exposition; Act of April 25, 1890, c. 156, § 3, 26 Stat. 62, World's Columbian Exposition Commission; Act of Aug.19, 1890, c. 807, 26 Stat. 336, 354-355, commissions to negotiate Indian treaties and investigate reservations; Act of Mar. 3, 1893, c. 209, § 1, 27 Stat. 612, 633, commission to select allotted Indian lands; Act of June 10, 1896, c. 398, 29 Stat. 321, 342, commission to adjust Indian boundaries; Act of Sept. 7, 1916, c. 451, § 3, 39 Stat. 728, 729, amended by Act of June 5, 1920, c. 250, § 3a, 41 Stat. 988, 989, United States Shipping Board; Act of Mar. 4, 1921, c. 171,-§ 3, 41 Stat. 1441, 1442, commission to appraise buildings of Washington Market Company; Act of June 3, 1922, c. 205, 42 Stat. 620, Federal Reserve Board; Joint Res. of Mar. 3, 1925, c. 482, § 1, 43 Stat. 1253, National Advisory Commission to the Sesquicentennial Exhibition Association.

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55. (a) Selection to be from civil employees: Joint Res. of Feb. 9, 1871, No. 22, § 1, 16 Stat. 593, 594, commissioner of fish and fisheries; Act of May 27, 1908, c. 200, § 11, 35 Stat. 317, 388, board of managers of Alaska-Yukon-Pacific Exposition; Act of June 23, 1913, c. 3, 38 Stat. 4, 76, Panama-Pacific Exposition Government Exhibit Board.

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(b) Selection to be from particular civil employees: Act of April 5, 1906, c, 1366, § 4, 34 Stat. 99, 100, consulate inspectors from consulate force.

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(c) Selection to be from army officers: Act of July 20, 1867, c. 32, § 1, 15 Stat. 17, commission to treat with hostile Indians; Act of Mar. 3, 1873, c. 316, § 1, 17 Stat. 622, commission to report on irrigation in the San Joaquin valley; Act of Mar. 1, 1893, c. 183, § 1, 27 Stat. 507, California Debris Commission; Act of June 4, 1897, c. 2, 30 Stat. 11, 51, board to examine Arkansas Pass; Joint Res. of Aug. 9, 1912, No. 40, § 2, 37 Stat. 641, commission to investigate Mexican insurrection claims; Act of Mar. 4, 1923, c. 283, § 1, 42 Stat. 1509, secretary of American Battle Monuments Commission.

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(d) Selection to be from army and navy: Act of April 14, 1818, c 58, § 1, 3 Stat. 425, coast surveyors.

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(e) Boards to include civilian representative of the Government: Act of Mar. 1, 1907, c. 2285, 34 Stat. 1015, 1036, Act of May 30, 1910, c. 260, § 4, 36 Stat. 448, 450, Act of June 1, 1910, c. 264, § 7, 36 Stat. 455, 457, Act of Aug. 3, 1914, c. 224, § 3, 38 Stat. 681, 682, various commissions to appraise unallotted Indian lands to include one representative of the Indian Bureau; Joint Res. of Mar. 4, 1911, No. 16, 36 Stat. 1458, commission to investigate cost of handling mail to include one Supreme Court Justice.

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(f) Commissions to include army officers: Act of April 4, 1871, c. 9, § 1, 17 Stat. 3, commission to examine Sutro Tunnel; Act of June 13, 1902, c. 1079, § 4, 32 Stat. 331, 373, commission on Canadian boundary waters; Act of Aug. 8, 1917, c. 49, § 18, 40 Stat. 250, 269, Inland Waterways Commission.

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(g) Commissions to include army and navy officers: Act of Aug. 31 1852, c. 1 2 § 8, 10 Stat. 112, 119, Light House Board; Act of June 4, 1897, c. 2, 30 Stat. 11, 59, Nicaragua Canal Commission; Act of June 28, 1902, c. 1302, § 7, 32 Stat. 481, 483, Isthmian Canal Commission; Joint Res. of June 28, 1906, No. 37, 34 Stat. 835, commission to appraise Chesapeake and Delaware Canal; Act of Aug. 24, 1912, c. 387, § 18, 37 Stat. 512, 517, Alaskan Railroad Commission.

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(h) Commissions to include army and coast survey officers; Act of June 23, 1874, c. 457, § 3, 18 Stat. 237, 244, board of harbor engineers; Act of June 28, 1879, c. 43, § 2, 21 Stat. 37, Mississippi River Commission.

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(i) Board to include navy officers and official of Life Saving Service: Act of July 9, 1888, c. 593, § 1, 25 Stat. 243, delegates to International Marine Conference.

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56. Act of Feb. 25, 1863, c. 58, § 1, 12 Stat. 665, Comptroller of the Currency, on nomination of the Secretary of the Treasury, amended by Act of June 3, 1864, c. 106, § 1, 13 Stat. 99; Act of April 23, 1880, c. 60, § 4, 21 Stat. 77, 78, United States International Commission, on nominations of state governors; Act of Feb. 10, 1883, c. 42, §§ 2, 3, 22 Stat. 413, managers of World's Industrial and Cotton Centennial Exposition, on recommendation of executive committee of National Cotton Planters' Association and majority of subscribers to enterprise in the city where it shall be located, commissioners to the Exposition to be appointed on nomination of state governors; Act of July 1, 1902, c. 1362, § 59, 32 Stat. 641, 654, commission to sell coal and asphalt deposits in Indian lands, one appointment to be made on recommendation of principal chief of Choctaw Nation, one on recommendation of Governor of Chickasaw Nation; Act of Feb. 23, 1920, c. 91, § 304, 41 Stat. 456, 470, Railroad Labor Board, three to be appointed from six nominees made by employees, three to be appointed from six nominees made by carriers.

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57. On July 25, 1868, the Senate, having confirmed the nomination of J. Marr as collector of internal revenue in Montana Territory, voted to reconsider the nomination, and ordered the nomination to be returned to the President "with the notification that the nominee is ineligible on account of nonresidence in the district for which he is nominated." 16 Ex.Journ. 372. President Johnson thereafter did not press Marr's nomination, but appointed A. J. Simmons to the office. 16 ibid. 429.

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58. The Tenure of Office Act as originally introduced excepted from its operation the Secretaries of State, Treasury, War, Navy, Interior and the Postmaster General. Howe's attempts to strike out this exception, opposed by Senators Edmunds and Sherman, who were the principal sponsors of the Act, failed twice in the Senate. A similar attempt in the House succeeded after first being rejected. The Senate again refused to concur in the House amendment. The amendment was, however, insisted upon by the House conferees. Finally, the Senate, by a margin of three, votes agreed to accept the conference report. Cong.Globe, 39th Cong., 2d sess., 1518.

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59. The occasion of the passage of the Tenure of Office Act was the threatened attempt of President Johnson to interfere with the reconstruction policies of Congress through his control over patronage. An attempt by Schenck to secure its recommitment to the Joint Select Committee on Retrenchment was placed upon the ground that "this whole subject was expressly referred to that committee" which had before it "the bill introduced by the select committee on the civil service, at the head of which is the gentleman from Rhode Island [Mr. Jenckes]." Cong.Globe, 39th Cong., 2d sess., 23. Senator Edmunds, in resisting an attempt to expand the Tenure of Office Act to require the concurrence of the Senate in the appointment of all civil officers receiving more than $1,000 per annum, referred to the Jenckes bill as "another branch of the subject which is under consideration elsewhere." Ibid., 489. The committee, in introducing the Tenure of Office Act, speaking through Senator Edmunds,

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recommended the adoption of this rule respecting the tenure of officers as a permanent and systematic, and as they believe an appropriate regulation of the Government for all Administrations and for all time.

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Ibid., 382.

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60. The attempt on the part of the House to repeal the Act in 1869 brought forth the opposition of those members of the Senate who were most active in the general movement for civil service reform. Jenckes had voted against the repeal in the House. Carl Schurz, who, on Dec. 20, 1869, introduced a bill for the competitive principle in the civil service, opposed the repeal, and urged that it be recast at the next session more effectually to effect the desired civil service reform. Cong.Globe, 41st Cong., 1st sess., 155-156. Trumbull, speaking for the Committee on Judiciary, said that

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they were unwilling after Congress had with such unanimity adopted this law within the last two years, and adopted it upon the principle that some law of this kind was proper to regulate the civil service, to recommend its absolute repeal . . . they thought it better to recommend the suspension of the act until the next session of Congress, and then Congress can either repeal it or adopt some civil service bill which in its judgment shall be thought to be for the best and permanent interests of the country.

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Ibid,. 88. The National Quarterly Review, recognizing the essential unanimity of purpose between the Tenure of Office Act and other measures for civil service reform, said in 1867:

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The recent legislation on this subject by Congress was the first step in the right direction; Mr. Jencke's bill is the second; but the one without the other is incomplete and unsafe.

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House Rep. No. 47, 40th Cong., 2d sess., Ser. No. 1352, p 93

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61. The attempt to repeal the Act was resisted in the House by Holman on the ground that, since

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the general impression exists in the country that executive patronage should be in some form reduced, rather than increased . . . this fragment of the original law should remain in force.

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Cong.Globe, 42nd Cong., 2d sess., 3411.

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62. Edmunds, one of the few Senators still acquainted with the circumstances of its passage, thus protested against the passage of the repealing Act:

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It is, as it looks to me, as if we were to turn our backs now and here upon the principle of civil service reform . . . the passage of this bill would be the greatest practical step backward on the theory of the reformation of the civil service of the United States.

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18 Cong.Rec. 137.

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63. The Jenckes bill was introduced in the House on Dec. 20, 1865. Sumner had already, on April 30, 1864, presented in the Senate a bill for a classified civil service. On June 1, 1866, the House Committee on Civil Service Reform reported out the Jenckes bill. It contained, among other provisions, a section requiring the proposed commission to prescribe, subject to the approval of the President, the misconduct or inefficiency which would be sufficient ground for removal, and also the manner by which such charges were to be proved. This provision was retained in the succeeding bills sponsored by Jenckes in the House. The provision was expressly omitted from the Pendleton bill, which later became the Civil Service Act of 1883, in order not to endanger the passage of a measure for a classified civil service by impinging upon the controversial ground of removal. Senators Sherman and Brown attempted to secure legislation restricting removal by amendments to the Pendleton bill. 14 Cong.Rec. 210, 277, 364. In the First Session of the Thirty-ninth Congress, no action was taken upon the Jenckes bill, but the bill was reintroduced in the following session on Jan. 29, 1867. An attempt on the part of Jenckes, after the initial passage of the Tenure of Office Act, to secure the passage of his bill resulted in the tabling of his scheme on Feb. 6, 1867, by a vote of 72 to 66.

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64. This measure appears to have been first suggested on May 4, 1826, in a bill which accompanied the report presented by Benton from the Select Committee of the Senate appointed to investigate executive patronage, when abuse of the power by President John Quincy Adams was apprehended. Sen.Doc. No. 88, 19th Cong., 1st sess., Ser. No. 128. On Mar. 23, 1830, Barton's resolution asserting the right to such information was reported. Sen.Doc. 103, 21st Cong., 1st sess., Ser. No.193. On April 28, 1830, the proposal was renewed in a resolution introduced by Holmes. 6 Cong.Deb. 385. In 1835, it was embodied in the Executive Patronage Bill, which passed the Senate on two successive occasions, but failed of action in the House.

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65. This measure appears to have been first suggested by President Monroe in his message of Dec. 2, 1823. 41 Ann.Cong. 20. Its proposal for enactment into law was first suggested on May 4, 1826, by the report of the Select Committee appointed by the Senate on possible abuses of Executive Patronage. In 1832, the proposal was again brought forward by Vance of Ohio in the nature of an amendment to the postal legislation, 8 Cong.Deb.1913. On Mar. 7, 1834, Clay's resolutions, that advocated the concurrence of the Senate in removals, also included a proposal for the appointment of postmasters by the President with the concurrence of the Senate. On Jan. 28, 1835, a report by the Senate Committee on Post Offices called attention to the extended removals of postmasters. Sen.Doc. No. 86, 23rd Cong., 2d sess., Ser. No. 268, p. 88. This report led to the introduction in 1835, and passage by the Senate of a bill reorganizing the Post Office which contained the proposal under consideration. The House having failed to act upon the 1835 bill, it was reintroduced at the next session and passed by both Houses. Act of July 2, 1836, c. 270, 5 Stat. 80. See also Sen.Doc. No. 362, 24th Cong., 1st sess., Ser. No. 283.

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66. This measure appears to have been first proposed in Congress by Clay on Mar. 7, 1834. 10 Cong. Deb. 834. In 1835, it was, in substance, embodied in an amendment proposed by him to the Executive Patronage Bill, which read:

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That in all instances of appointment to office by the President, by and with the advice and consent of the Senate, the power of removal shall be exercised only in concurrence with the Senate; and, when the Senate is not in session, the President may suspend any such officer, communicating his reasons for the suspension during the first month of its succeeding session, and if the Senate concur with him, the officer shall be removed; but if it do not concur with him, the officer shall be restored to office.

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11 Cong.Deb. 523. In 1836 when a Senate Committee of Commerce investigated the removal of a gauger for political reasons, Levi Woodbury, then Secretary of the Treasury, suggested the assumption of Congressional control over removals, saying:

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The Department deems it proper to add that . . . a great relief would be experienced if . . . the power of original appointment and removal in all these cases should be vested in Congress, if the exercise of it there is deemed more convenient and safe, and, at the same time, constitutional.

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Sen.Doc. No. 430, 24th Cong., 1st sess., Ser. No. 284, p. 30.

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67. On July 1, 1841, Benton again reintroduced a proposal of this nature. Cong.Globe, 27th Cong., 1st sess., 63. On May 23, 1842, a Select Committee on Retrenchment reported to the House on the necessity of diminishing and regulating executive patronage, saying

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they entertain no doubt of the power of Congress to prescribe, and of the propriety of prescribing, that, in all cases of removal by the President, he shall assign his reasons to the Senate at its next session.

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House Rep. No 741, 27th Cong., 2d sess., Ser. No. 410, p. 5. See also Report of July 27, 1842, House Rep. No. 945, 27th Cong., 2d sess., Ser. No. 410; 5 Ex.Journ. 401. On Jan. 3, 1844, after an attempt to impeach President Tyler for misusing the appointing power had failed, Thomasson in the House again sought to secure the adoption of such a measure. On December 24, 1849, after the Post Office Department under Taylor's administration had recorded 3,406 removals, Bradbury proposed a resolution requiring the President to give the number and reasons for removals made from the beginning of his term of office. Senator Mangum, in order to cut short debate on the resolution, contended that it was an unconstitutional invasion of executive powers, and called for a test vote upon the resolution. The Senate divided 29 to 23 in upholding its right to demand reasons for removals. Cong.Globe, 31st Cong., 1st sess., 160. On Jan. 4, 1850, the Senate adopted a resolution calling for a report upon the number and reasons for removals of deputy postmasters. Ibid. 100.

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68. The character that this movement to restrict the power of removal had assumed in consequence of the continuance of the spoils system is illustrated by the remarks of Bell in the Senate in 1850:

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To restrain this power by law, I would urge as one of the greatest reforms of the age, so far as this Government is concerned. . . . Sir, I repeat, that to restrain by law this unlimited, arbitrary, despotic power of the Executive over the twenty or thirty thousand valuable public officers of the country—the tendency of which is to make them slave of his will—is the greatest reform demanded by the true interest of the country, no matter who may at any time be the tenant of the White House.

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Cong.Globe, 31st Cong., 1st sess., App. 1043. Restrictions were twice advocated in the official utterances of President Tyler. 4 Messages and Papers of the Presidents, 50, 89. See also Report of June 15, 1844, by Sen. Com. on Retrenchment; Sen.Doc. 399, 28th Cong., 1st sess., Ser. No. 437, p. 55; Resolution of Dec. 17, 1844, by Grider in the House, Cong.Globe, 28th Cong., 2d sess., 40.

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69. Act of Feb. 25, 1863, c. 58, § 1, 12 Stat. 665.

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70. By the Act of Mar. 3, 1853, c. 97, § 3, 10 Stat. 189, 211, clerks in the departments of the Treasury, War, Navy, Interior and Post Office were to be classified, and appointments to the various classes were to be made only after examination by a select board. This scheme was later abandoned after it became evident that the examinations prescribed were conducted arbitrarily, and with no attempt to determine the fitness of candidates for positions. Fish, Civil Service and Patronage, 183. By the Act of Aug. 18, 1856, c. 127, § 7, 11 Stat. 52, 55, the appointment of twenty-five consular pupils was authorized, and examinations were to be conducted to determine the fitness of applicants for appointment. This provision was, however, stricken from the diplomatic and consular appropriation bill in the next session of Congress. The principle was not returned to again until the Act of June 20, 1864, c. 136, § 2, 13 Stat. 137, 139.

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71. Chief Justice Marshall said of the proceedings of 1789:

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In organizing the departments of the executive, the question in what manner the high officers who filled them should be removable came on to be discussed.

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5 Marshall, Life of Washington, 196.

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72. Of the ten Senators who had been members of the Constitutional Convention of 1787, four voted against the bill. A fifth, Bassett, changed sides during the debate. Maclay, Sketches of Debate, 110.

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73. The six who held that the Constitution vested a sole power of removal in the President were Baldwin, 1 Ann.Cong. 557-560; Benson, 1 ibid. 505-507; Boudinot, 1 ibid. 526-532; Clymer, 1 ibid. 489; Madison, 1 ibid. 546; Vining. 1 ibid. 585. Madison, at first, considered it subject to Congressional control. 1 Ann.Cong. 374-375. Seven held that the power of removal was a subject for Congressional determination, and that it was either expedient or inexpedient to grant it to the President alone. Hartley, 1 Ann.Cong. 585; Lawrence, 1 ibid. 583; Lee, 1 ibid. 523-526; Sedgwick, 1 ibid. 582-583; Sherman, 1 ibid. 491-492; Sylvester, 1 ibid. 560-563; Tucker, 1 ibid. 584-585. Five held that the power of removal was constitutionally vested in the President and Senate. Gerry, 1 Ann.Cong. 502; Livermore, 1 ibid. 477-479; Page, 1 ibid. 519-520; Stone, 1 ibid. 567; White, 1 ibid. 517. Two held that impeachment was the exclusive method of removal. Jackson, 1 Ann.Cong. 374, 529-532; Smith, of South Carolina, 1 Ann.Cong. 457, 507-510. Three made desultory remarks, Goodhue, 1 Ann.Cong. 378, 533-534; Huntington, 1 Ann.Cong. 459, and Scott, 1 Ann.Cong. 532-533, which do not admit of definitive classification. Ames was only certain that the Senate should not participate in removals, and did not differentiate between a power vested in the President by the Constitution and a power granted him by the legislature. 1 Ann.Cong. 473-477, 538-543. He inclined, however, towards Madison's construction. 1 Works of Fisher Ames, 56. During the earlier debate upon the resolutions for the creation of Executive Departments, Bland had contended that the Senate shared in the power of removal. 1 Ann.Cong. 373-374. The conclusion that a majority of the members of the House did not hold the view that the Constitution vested the sole power of removal in the President was expressed by Senator Edmunds. 3 Impeachment of Andrew Johnson, 84. It had been expressed twenty years earlier by Lockwood, J., of the Supreme Court of Illinois, in a case involving a similar question and decided adversely to Madison's contention. Field v. People, 2 Scamm. 79, 162-173.

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74. Madison's plea for support was addressed not only to those who conceived the power of removal to be vested in the President, but also to those who believed that Congress had power to grant the authority to the President and that, under the circumstances it was expedient to confer such authority. After expressing his own views on the subject, he continued:

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If this is the true construction of this instrument, the clause in the bill is nothing more than explanatory of the meaning of the Constitution, and therefore not liable to any particular objection on that account. If the Constitution is silent, and it is a power the Legislature have a right to confer, it will appear to the world, if we strike out the clause, as if we doubted the propriety of vesting it in the President of the United States. I therefore think it best to retain it in the bill.

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1 Ann.Cong. 464.

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75. The initial vote of 34 to 20, defeating a motion to strike out the words "to be removable by the President," was indecisive save as a determination that the Senate had no constitutional right to share in removals. Madison, June 22, 1789, 1 Ann.Cong. 5757. "Indeed, the express grant of the power to the president rather implied a right in the legislature to give or withhold it at their discretion." 5 Marshall, Life of Washington, 200. Benson, therefore, proposed to remove this ambiguity by striking out the words "to be removable by the President," and inserting "whenever the said principal officer shall be removed from office by the President of the United States," thus implying the existence of the power in the President irrespective of legislative grant. The motions were successful, and their adoption has been generally interpreted as a legislative declaration of Benson's purpose. Such interpretation, although oft repeated, is not warranted by the facts of record. The individual votes on these two motions are given. An examination of the votes of those whose opinions are also on record shows that Benson's first motion succeeded only as a result of coalition between those who accepted Madison's views and those who considered removal subject to Congressional control but deemed it advisable to vest the power in the President. The vote on Benson's second motion to strike out the words "to be removable by the President" brought forth a different alignment. The minority now comprised those who, though they believed the grant of power to be expedient, did not desire to imply the existence of a power in the President beyond legislative control. Whereas the majority exhibits a combination of diverse views—those who held to Madison's construction, those who initially had sought to strike out the clause on the ground that the Senate should share in removals, and those who deemed it unwise to make any legislative declaration of the Constitution. Thus, none of the three votes in the House revealed its sense upon the question whether the Constitution vested an uncontrollable power of removal in the President. On the contrary, the votes on Benson's amendments reveal that the success of this endeavor was due to the strategy of dividing the opposition, and not to unanimity of constitutional conceptions.

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76. Presidents Jackson, 3 Messages and Papers of the Presidents, 133; Johnson, 6 ibid. 492; Cleveland, 8 ibid. 379; Wilson, 59 Cong.Rec. 8609.

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77. On Feb. 2, 1835, the Senate adopted a resolution requesting the President to communicate to the Senate copies of the charges against Gideon Fitz, surveyor-general, in that such information was necessary for its constitutional action upon the nomination of his successor. 4 Ex.Journ. 465. On Feb. 10, 1835, President Jackson refused to comply with these alleged " unconstitutional demands." 4 Ex.Journ. 468. On Jan. 25, 1886, the Senate adopted a resolution directing the Attorney General to transmit copies of documents on file in the Department of Justice relating to the management of the office of district attorney for the southern district of Alabama. J. D. Burnett had been nominated to the office in place of G. M. Duskin suspended. 25 Ex.Journ. 294. On Feb. 1, 1886, a letter from the Attorney General was laid before the Senate refusing to accede with the request by direction of the President. On Mar. 1, 1886, President Cleveland, in a message to the Senate, denied the constitutional right of the Senate to demand such information. 8 Messages and Papers of the Presidents, 375.

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78. During March, 1830, prior to the Fitz episode, three resolutions to request the President to communicate grounds for the removal of inferior officials failed of adoption in the Senate. 4 Ex.Journ. 75, 76, 79. However, during April, 1830, in the case of nominations sent to the Senate for confirmation, resolutions requesting the President to communicate information relative to the character and qualifications of the appointees were adopted and complied with by President Jackson. 4 ibid. 86, 88, 92.

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The instances of President Johnson's compliance with the second section of the Tenure of Office Act, requiring the communication of reasons for the suspension of inferior officials during the recess of the Senate, have been enumerated. See Notes 23 and 24, supra. President Johnson also complied with a resolution adopted by the Senate on Dec. 16, 1867, requesting him to furnish the petitions of Idaho citizens, filed with him, remonstrating against the removal of Governor Ballard. 16 Ex.Journ. 109, 121. Also, on April 5, 1867, his Attorney General complied with a Senate resolution calling for papers and other information relating to the charges against a judge of Idaho Territory whose removal the President was seeking through the appointment of a successor. 15 ibid. 630, 644. On Feb. 18, 1867, his Postmaster General, in compliance with a House resolution of Dec. 6, 1866, transmitted the number and reasons for the removals of postmasters, appointed by the President, between July 28, 1866, an Dec. 6, 1866. House Ex.Doc. No. 96, 39th Cong., 2d sess., Ser. No. 1293. His Secretary of the Interior also complied with a House resolution requesting information as to removals and reasons therefor in the department. House Ex.Doc. No. 113 39th Cong., 2d sess., Ser. No. 1293.

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Prior to the date on which President Cleveland upheld his right to refuse the Senate information as to the conduct of a suspended official, his Secretary of the Treasury twice complied with requests of the Senate for such information. 25 Ex.Journ. 312, 317. These requests were couched in substantially the same form as that which was refused in the Duskin case. Subsequent to that date, compliances with similar resolutions are recorded in four further cases, two by the Secretary of the Treasury, one by the Postmaster General and one by the Attorney General. 25 Ex. Journ 362, 368, 480, 559.

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79. On Mar. 2, 1847, President Polk complied with a Senate resolution requesting reasons and papers relating to the failure to send in Captain H. Holmes' name for promotion. 7 Ex.Journ. 227. On Sept. 2, 1850, President Fillmore complied with a Senate resolution requesting the President to communicate correspondence relating to "the alleged resignation" of Lieut. E. C. Anderson. 8 ibid. 226. Fillmore, in compliance with a Senate resolution of Aug. 14, 1850, laid before the Senate a report of the Postmaster General communicating the charges on file against the deputy postmaster at Milwaukee. 8 ibid. 220. Nominations having been made for the collectorships of New York and Chicago and the former incumbents suspended, Edmunds on Nov. 26, 1877, proposed a resolution directing the Secretary of the Treasury to transmit all papers bearing upon the expediency of removing the collectors. On Jan. 15, 1879, the Secretary of the Treasury communicated to the Senate an official report, and on Jan. 31, 1879, President Hayes forwarded his reasons for the suspensions. 21 ibid. 140, 455, 497.

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Compliances with Senate resolutions directed to the Heads of Departments relative to the removal of Presidential appointees are also on record. In response to a House resolution of Feb. 13, 1843, requesting the charges against Roberts and Blythe, collectors, and the names of the persons who petitioned for their removal, the Secretary of the Treasury transmitted the material that he had in his control. House Doc. No. 158, 27th Cong., 3rd sess., Ser. No. 422. On Jan. 14, 1879, the Secretary of the Treasury complied with a Senate resolution requesting the charges on file against the Supervising Inspector-General of Steamboats. 21 Ex.Journ. 454. On Jan. 20, 1879, the Secretary of the Treasury complied with a Senate resolution calling for the papers showing why Lieutenant Devereux was discharged from the Revenue Marine Service. 21 ibid. 470. The Secretary of the Navy complied with a Senate resolution of Feb 25, 1880, asking why Edward Bellows was dropped from the roll of paymasters. Sen.Doc. No. 113, 46th Cong., 2d sess., Ser. No. 1885.

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Presidents Van Buren and Tyler also complied with resolutions requesting the number of removals. Sen.Doc. No. 399, 28th Cong., 1st sess., Ser. No. 437, p. 351; House Doc. No. 48, 27th Cong., 1st sess., Ser. No. 392.

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Senate resolutions, occasioned by the nomination of the successor in place of a former incumbent, requesting information as to the conduct or ability of the successor, have been complied with by Presidents Monroe on Feb. 1, 1822 (3 Ex.Journ. 273); Jackson on April 12, and 15, 1830 (4 ibid. 88, 92), and on April 24, 1834 (4 ibid. 390); by Tyler on June 29, 1842 (6 ibid. 97); by Polk on June 23, 1848 (7 ibid. 435); by Fillmore on Sept. 16, 1850 (8 ibid. 232); by Buchanan on Mar. 2, 1858 (10 ibid. 237); by Grant on Dec. 21, 1869 (17 ibid. 326), and by Heads of departments under Polk on June 23, 184 (7 ibid. 435); under Fillmore on Sept. 25, 1850, and Feb. 17, 1853 (8 ibid. 250, 9 ibid. 33); under Lincoln on Jan. 22, 1862, and on Feb. 23, 1865 (12 ibid. 95, 14 ibid. 135). The practice appears to have been suggested by President Washington. The Senate having rejected a nomination, President Washington, on Aug. 7, 1789, in nominating a successor, said:

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Permit me to submit to your consideration whether, on occasions when the propriety of nominations appears questionable to you, it would not be expedient to communicate that circumstance to me, and thereby avail yourselves of the information which led me to make them, and which I would with pleasure lay before you.

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1 Ex.Journ. 16.

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80. The Executive Patronage Bill, containing such a requirement, passed the Senate on Feb. 21, 1835, and on Feb. 3, 1836. A test vote on the Senate's right in 1850 is also on record. See Note 67, supra. Following the protest of President Cleveland, resolutions condemnatory of the Attorney General's refusal "under whatever influence" to communicate the information requested were favorably reported to the Senate, debated at length, and passed. Among the members of the committee advocating the adoption of the resolutions were Hoar and Evarts, the two most energetic opponents of the Tenure of Office Act. Sen.Rep. No. 135, 49th Cong., 1st sess., Ser. No. 2358. The Acts of 1864 and 1873, approved by Presidents Lincoln and Grant, embody such a requirement. See Note 33, supra.

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^81. Attorneys General Legare, Clifford, and Crittenden seem to have been of the opinion that the President possessed an absolute power of removal. 4 Op.A.G. 1, 603; 5 ibid. 288. Legare, however, having occasion to consider Story's contention that the power of removal might be restricted by legislation with respect to inferior officers, said that he was "not prepared to dissent from any part of this sweeping proposition." 4 ibid. 165, 166. In 1818, Attorney General Wirt, in holding that, where an Act of Congress gave the President power to appoint an officer, whose tenure of office was not defined, that officer was subject to removal by the President, said:

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Whenever Congress intend a more permanent tenure, (during good behaviour, for example), they take care to express that intention clearly and explicitly. . . .

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1 ibid. 212, 213. Following the passage of the Tenure of Office Act, the subject was considered by Attorney General Evarts, who disposed of the problem "within the premises of the existing legislation." 12 ibid. 443, 449. In 1873, Attorney General Akerman refused to concede the President a power of removal in that, under that Act, he was limited to a power of suspension. 13 ibid. 300. In 1877, Attorney General Devens concurred in the provisions of the Tenure of Office Act restoring a suspended officer to his office upon the failure of the Senate to act upon the confirmation of his successor. 15 ibid. 375.

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82. The Connecticut Charter of 1662, vested the appointment of practically all officers in the assembly, and provided that such officers were to be removable by the Governor, Assistants, and Company for any misdemeanor or default. The Rhode Island Charter of 1663 contained the same provisions. The Massachusetts Charter of 1691 provided for the appointment of officers by and with the advice and consent of the Council. Under Governors Phipps and Stroughton, the council asserted its rights over appointments and dismissals, and in 1741, Shirley was prevented from going back to the earlier arbitrary practice of Governor Belcher. Spencer, Constitutional Conflict in Massachusetts, 28. The Georgia Charter of 1732 provided that the common council should have power to nominate and appoint and

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at their will and pleasure to displace, remove and put out such treasurer or treasurers, secretary or secretaries, and all such other officers, ministers and servants.

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83. As early as 1724, Mrs. Hannah Penn, in her instructions to Sir William Keith, governor of Pennsylvania, protested against his dismissal of the Secretary without seeking the advice of his council. The practice of seeking such advice continued in later years. Shepherd, Proprietary Government in Pennsylvania, 321, 370.

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84. In the Royal Colonies, there was a recognized tendency to guard against arbitrariness in removals by making the governor responsible to the home government, instead of the local representative assembly. In New Hampshire, the first and second Andros Commissions entrusted the power to the governor alone, but the Bellomont Commission of 1697, the Dudley Commission of 1702, the Shute Commission of 1716, the Burnet Commission of 1728, the Belcher Commission of 1729, the Wentworth Commission of 1741, and the John Wentworth Commission of 1766 were accompanied with instructions requiring either that removals be made only upon good and sufficient cause or upon cause signified to the home government in the "fullest & most distinct manner." In Virginia, similar instructions accompanied the issuance of commissions to Governor Howard in 1683 and to Governor Dunmore in 1771.

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85. Smith of South Carolina, June 17, 1789, 1 Ann.Cong. 471; Gerry, June 17, 1789, 1 Ann.Cong. 504. See Note 9, supra.

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86. Hamilton's opinion is significant in view of the fact that it was he who, on June 5, 1787, suggested the association of the Senate with the President in appointments as a compromise measure for dealing with the appointment of judges. 1 Farrand, Records of the Federal Convention, 128. The proposition that such appointments should be made by and with the advice and consent of the Senate was first brought forward by Nathaniel Corham of Massachusetts, "in the mode prescribed by the constitution of Masts." 2 ibid. 41. Later, this association of the President and the Senate was carried over generally to other appointments. The suggestion for the concurrence of the Senate in appointments of executive officials was advanced on May 29 by Pinckney in his "draught of a foederal government" and by Hamilton in resolutions submitted by him on June 18, 1787, 1 ibid. 292; 3 ibid. 599.

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87. Rogers, Executive Power of Removal, 11, 39. On August 6, 1787, the Committee of Five reported the draft of the Constitution that, in Art. X, Sect. 2, provided for a single executive who "shall appoint officers in all cases not otherwise provided for by this Constitution." 2 Farrand, Records of the Federal Convention, 185. On August 20 propositions were submitted to the Committee of Five for the creation of a Council of State consisting of the Chief Justice, the Secretaries of domestic affairs, commerce and finance, foreign affairs, war, marine and state. All the Secretaries were to be appointed by the President and hold office during his pleasure. 2 ibid. 335-337. That proposition was rejected because "it was judged that the Presidt. by persuading his council to concur in his wrong measures, would acquire their protection. . . ." 2 ibid. 542. The criticism of Wilson, who had proposed the Council of State, and Mason of the Senate's participation in appointments was based upon this rejection. The lack of such a Council was the "fatal defect" from which "has arisen the improper power of the Senate in the appointment of public officers." 2 ibid. 537, 639.

Tyson & Bro. v. Banton, 1927

Title: Tyson & Brother v. Banton

Author: U.S. Supreme Court

Date: February 28, 1927

Source: 273 U.S. 418

This case was argued October 6 and 7, 1926, and was decided February 28, 1927.

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APPEAL FROM THE UNITED STATES DISTRICT COURT

1927, Tyson & Brother v. Banton, 273 U.S. 418

FOR THE SOUTHERN DISTRICT OF NEW YORK

Syllabus

1927, Tyson & Brother v. Banton, 273 U.S. 418

1. Sections 167 and 172, c. 590, N.Y.Laws.1922, the former declaring that the price of or charge for admission to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held, is a matter affected with a public interest, and the latter forbidding the resale of any ticket or other evidence of the right of entry to any theatre, etc., at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry, contravene the Fourteenth Amendment. Pp. 429, 445.

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2. The validity of the declaration (§ 167) that the price of admission is a matter "affected with a public interest," is, in this case, necessarily involved in determining the question directly [273 U.S. 419] presented, viz., the validity of the price restriction on resales of tickets. P. 429.

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3. The right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself, and, as such, within the protection of the Due Process of Law clauses of the Fifth and Fourteenth Amendments. P. 429.

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4. The power to regulate property, services or business can be invoked only under special circumstances, and it does not follow that, because the power may exist to regulate in some particulars, it exists to regulate in others or in all. P. 430.

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5. The authority to regulate the conduct of a business or to require a license, comes from a branch of the police power, which may be quite distinct from the power to fix prices. P. 430.

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6. The power to fix prices does not exist in respect of merely private property or business, but exists only where the business or the property involved has become "affected with a public interest." P. 430.

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7. A business is not affected with a public interest merely because it is large, or because the public are warranted in having a feeling of concern in respect of its maintenance. Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease or enjoyment, from the existence or operation of the business, and, while the word has not always been limited narrowly as strictly denoting "a right," that synonym more nearly than any other expresses the sense in which it is to be understood. P. 430.

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8. Characterizations of businesses as "quasi-public, not strictly private," and the like, while well enough as a basis for upholding police regulations in respect of the conduct of particular businesses, cannot be accepted as equivalents for the description "affected with a public interest" as that phrase is used in the decisions of this Court as the basis for legislative regulation of prices. P. 430.

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9. A declaration of the legislature that a business is affected with a public interest is not conclusive upon the judiciary in determining the validity of a regulation fixing prices in the business. P. 431.

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10. The language of an opinion (Munn v. Illinois, 94 U.S. 113, 126) must be limited to the case under consideration. P. 433.

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11. A business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby, in effect, granted to the public. P. 434. [273 U.S. 420]

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12. Each of the decisions of this Court upholding governmental price regulation, aside from cases involving legislation to tide over temporary emergencies, has turned upon the existence of conditions, peculiar to the business under consideration, which bore such a substantial and definite relation to the public interest as to justify an indulgence of the legal fiction of a grant by the owner to the public of an interest in the use. P. 438.

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13. A theatre, though a license may be required, is a private enterprise; the license is not a franchise putting the proprietor under a duty to furnish entertainment to the public and admit all who apply. P 439.

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14. The contention that, historically considered, places of entertainment may be regarded as so affected with a public interest as to justify legislative regulation of their charges is rejected. P. 441.

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15. A statutory provision fixing the prices at which theatre tickets may be resold cannot be sustained as a measure for preventing fraud, extortion, and collusive arrangements between theatre managers and ticket brokers. P. 442.

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16. Constitutional principles, applied as they are written, must be assumed to operate justly and wisely as a general thing, and they may not be remolded by lawmakers or judges to save exceptional cases of inconvenience, hardship, or injustice. P. 445.

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Reversed.

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APPEAL from a decree of the District Court denying a temporary injunction in a suit brought by the appellant, a licensed ticket-broker corporation in New York, to restrain the District Attorney of New York County and the State Comptroller from forfeiting the license, forfeiting the bond accompanying the same, and prosecuting criminal proceedings, under the state law, because of the appellant's failure to conform to a provision thereof limiting the prices at which it may resell tickets, which it challenges as invalid under the Fourteenth Amendment. [273 U.S. 426]

SUTHERLAND, J., lead opinion

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MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

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Appellant is engaged in the business of reselling tickets of admission to theatres and other places of entertainment in the City of New York. It employs a large number of salesmen, messenger boys and others. Its expenses are very large, and its sales average approximately 300,000 tickets per annum. These tickets are obtained either from the box office of the theatre or from other brokers and distributors. It is duly licensed under § 168, c. 590, New York Laws, 1922, and has given a bond under § 169 of that chapter in the penal sum of $1,000, with sureties conditioned, among other things, that it will not be guilty of any fraud or extortion. See Weller v. New York, 268 U.S. 319, 322. [273 U.S. 427]

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Section 167 of chapter 590 declares that the price of or charge for admission to theatres, etc., is a matter affected with a public interest, and subject to state supervision in order to safeguard the public against fraud, extortion, exorbitant rates, and similar abuses. Section 172 forbids the resale of any ticket or other evidence of the right of entry to any theatre, etc., "at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry," such printing being required by that section. Both sections are reproduced in the margin.\*

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This suit was brought to enjoin respondents from proceeding either at law or in equity to enforce the last named section, and from revoking plaintiff's license, enforcing by suit or otherwise the penalty of the bond or prosecuting criminally appellant or any of its officers or agents for reselling or attempting to resell any ticket or other evidence of the right of entry to any theatre, etc., at a price in excess of fifty cents in advance of the printed [273 U.S. 428] price. The bill alleges threats on the part of appellees to enforce the statute against appellant, to forfeit its license, enforce the penalty of its bond and institute criminal prosecutions against appellant, its officers and agents. It is further alleged that the terms of the statute are so drastic, and the penalties for its violation so great [imprisonment for one year or a fine of $250 or both], that appellant may not resell any ticket or evidence of the right of entry at a price beyond that fixed by the statute even for the purpose of testing the validity of the law, and that appellant will be compelled to submit to the statute whether valid or invalid unless its suit be entertained, and thereby will be deprived of its property and liberty without due process of law and denied the equal protection of the law, in contravention of the Fourteenth Amendment to the federal Constitution. Following the rule frequently announced by this court, that

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equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property,

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we sustain the jurisdiction of the district court. Packard v. Banton, 264 U.S. 140, 143, and cases there cited.

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The case was heard below by a statutory court of three judges and a decree rendered denying appellant's prayer for a temporary injunction and holding the statute assailed to be valid and constitutional. The provision of the statute in question also has been upheld in a judgment of the New York state court of appeals, People v. Weller, 237 N.Y. 316, brought here on writ of error. That case, however, directly involved only § 168, requiring a license, and although it was insisted that § 172 restricting prices should also be considered, upon the ground that the two provisions were inseparable, this court held otherwise, sustained the validity of the license section, and declined to [273 U.S. 429] pass upon the other one. Weller v. New York, 268 U.S. 319, 325.

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Strictly, the question for determination relates only to the maximum price for which an entrance ticket to a theatre, etc., may be resold. But the answer necessarily must be to a question of greater breadth. The statutory declaration (§ 167) is that the price of or charge for admission to a theatre, place of amusement or entertainment or other place where public exhibitions, games, contests or performances are held, is matter affected with a public interest. To affirm the validity of § 172 is to affirm this declaration completely, since appellant's business embraces the resale of entrance tickets to all forms of entertainment therein enumerated. And since the ticket broker is a mere appendage of the theatre, etc., and the price of or charge for admission is the essential element in the statutory declaration, it results that the real inquiry is whether every public exhibition, game, contest or performance to which an admission charge is made is clothed with a public interest, so as to authorize a lawmaking body to fix the maximum amount of the charge which its patrons may be required to pay.

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In the endeavor to reach a correct conclusion in respect of this inquiry, it will be helpful, by way of preface, to state certain pertinent considerations. The first of these is that the right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself, Case of the State Freight Tax, 15 Wall. 232, 278, and, as such, within the protection of the due process of law clauses of the Fifth and Fourteenth Amendments. See City of Carrollton v. Bazzette, 159 Ill. 284, 294. The power to regulate property, services or business can be invoked only under special circumstances, and it does not follow that, because the power may exist to regulate in some particulars, it exists to regulate in others, or in all. [273 U.S. 430]

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The authority to regulate the conduct of a business or to require a license, comes from a branch of the police power which may be quite distinct from the power to fix prices. The latter, ordinarily, does not exist in respect of merely private property or business, Chesapeake & Potomac Tel. Co. v. Manning, 186 U.S. 238, 246, but exists only where the business or the property involved has become "affected with a public interest." This phrase, first used by Lord Hale 200 years ago, Munn v. Illinois, 94 U.S. 113, 126, it is true, furnishes, at best, an indefinite standard, and attempts to define it have resulted, generally, in producing little more than paraphrases which themselves require elucidation. Certain properties and kinds of business it obviously includes, like common carriers, telegraph and telephone companies, ferries, wharfage, etc. Beyond these, its application not only has not been uniform, but many of the decisions disclose the members of the same court in radical disagreement. Its full meaning, like that of many other generalizations, cannot be exactly defined—it can only be approximated.

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A business is not affected with a public interest merely because it is large, or because the public are warranted in having a feeling of concern in respect of its maintenance. Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease or enjoyment from the existence or operation of the business, and, while the word has not always been limited narrowly as strictly denoting "a right," that synonym more nearly than any other expresses the sense in which it is to be understood.

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The characterizations in some decisions of businesses as "quasi-public," People v. King, 110 N.Y. 418, 428, "not `strictly' private," Aaron v. Ward, 203 N.Y. 351, 356, and the like, while well enough for the purpose for which they were employed, namely, as a basis for upholding police regulations in respect of the conduct of particular [273 U.S. 431] businesses, cannot be accepted as equivalents for the description "affected with a public interest" as that phrase is used in the decisions of this court as the basis for legislative regulation of prices. The latter power is not only a more definite and serious invasion of the rights of property and the freedom of contract, but its exercise cannot always be justified by circumstances which have been held to justify legislative regulation of the manner in which a business shall be carried on.

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And finally, the mere declaration by the legislature that a particular kind of property or business is affected with a public interest is not conclusive upon the question of the validity of the regulation. The matter is one which is always open to judicial inquiry. Wolff Co. v. Industrial Court, 262 U.S. 522, 536.

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In the Wolff case, this court held invalid the wage-fixing provision of the compulsory arbitration statute of Kansas as applied to a meat packing establishment. The power of a legislature, under any circumstances, to fix prices or wages in the business of preparing and selling food was seriously doubted, but the court concluded that, even if the legislature could do so in a public emergency, no such emergency appeared, and, in any event, the power would not extend to giving compulsory continuity to the business by compulsory arbitration. In the course of the opinion (p. 535), it was said that business characterized as clothed with a public interest might be divided into three classes:

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(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers, and public utilities.

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(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest [273 U.S. 432] times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and grist mills. State v. Edwards, 86 Me. 102; Terminal Taxicab Co. v. District of Columbia, 241 U.S. 252, 254.

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(3) Businesses which, though not public at their inception, may be fairly said to have risen to be such, and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner, by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest, although the property continues to belong to its private owner and to be entitled to protection accordingly.

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Citing the Munn case and others.

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If the statute now under review can be sustained as valid, it must be in virtue of the doctrine laid down in the third paragraph, and it will aid in the effort to reach a correct conclusion in that respect if we shall first consider the principal decisions of this court where that doctrine has been applied. The leading, as well as the earliest, definite decision dealing with a business falling within that class is Munn v. Illinois, supra, which sustained the validity of an Illinois statute fixing the maximum charge to be made for the use of elevators and warehouses for the elevation and storage of grain.

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As ground for that decision, the opinion recites, among other things, that grain came from the west and northwest by water and rail to Chicago, where the greater part of it was shipped by vessel to the seaboard, and some of it by railway to eastern ports; that Chicago had been made the greatest grain market in the world, and that the business had created a demand for means by which the immense quantity of grain could be handled or stored, and these had been found in grain elevators. In this way, the largest [273 U.S. 433] traffic between the country north and west of Chicago and that lying on the Atlantic coast north of Washington was in grain passing through the elevators at Chicago. The trade in grain between seven or eight of the great states of the west and four or five of those lying on the seashore formed the largest part of the interstate commerce in these states. The elevators in Chicago were immense structures, holding from 300,00 to 1,000,000 bushels at one time. Under these circumstances, it was said that the elevators stood in the very "gateway of commerce," and took toll from all who passed; that their business certainly tended to a common charge, and had become a thing of public interest and use; that every bushel of grain, for its passage, paid a toll, which was a common charge; and, finally, that, if any business could be clothed "with a public interest, and cease to be juris privati only," this had been made so by the facts.

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There is some general language in the opinion which, superficially, might seem broad enough to cover cases like the present one. It was said, for example, (p. 126):

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Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large.

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Literally, that would include all the large industries, and some small ones; but, in accordance with the well settled rule, the words must be limited to the case under consideration. Cohens v. Virginia, 6 Wheat. 264, 399; Plumley v. Massachusetts, 155 U.S. 461, 474. Indeed, the language quoted is qualified immediately by a statement of the general rule, that

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When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.

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The significant requirement is that the property shall be devoted to a use in which the public has an interest, [273 U.S. 434] which simply means, as in terms it is expressed at page 130, that it shall be devoted to " a public use." Stated in another form, a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been devoted to a public use, and its use thereby, in effect, granted to the public. See Louisvlle &c. R.R. Co. v. West Coast Co., 198 U.S. 483, 500. The subsequent elevator and warehouse cases, Budd v. New York, 143 U.S. 517, and Brass v. Stoeser, 153 U.S. 391, while presenting conditions of less gravity, rest upon the authority of the Munn case. The differences among the three cases are in matters of degree.

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In Cotting v. Kansas City Stock Yards Co., &c., 183 U.S. 79, 85, Mr. Justice Brewer, speaking on that point for himself and two other members of the court, said that, tested by the Munn case, the stockyards of the company, situated in one of the gateways of commerce and so located that they furnished important facilities to all seeking transportation of cattle, were subject to governmental price regulation. But the majority of the court, without referring to this view, assented to a reversal upon a ground specifically stated (pp. 114-115), and the authority of the case must be limited by the terms of that statement.

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German Alliance Ins. Co. v. Kansas, 233 U.S. 389, carries the doctrine further, and marks the extreme limit to which this court thus far has gone in sustaining price-fixing legislation. There, the court said that a business might be affected with a public interest so as to permit price regulation although no public trust was impressed upon the property and although the public might not have a legal right to demand and receive service, and it was held that fire insurance was such a business. Mr. Justice McKenna, speaking for the court, pointed out that, in an insurance business, each risk was not individual; [273 U.S. 435] that "there can be standards and classification of risks, determined by the law of averages," and, while there might be variations, that rates are fixed and accommodated to such standards. Discussing the question whether the business was affected with a public interest so as to justify regulation of rates, it was then said (p. 406):

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And we mean a broad and definite public interest. In some degree, the public interest is concerned in every transaction between men, the sum of the transactions constituting the activities of life. But there is something more special than this, something of more definite consequence, which makes the public interest that justifies regulatory legislation.

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The business of common carriers, transmission of intelligence, furnishing water and light, gas and electricity, were cited as examples, and the Munn, Budd, and Brass cases reviewed. The fact that the contract of fire insurance was personal in character, it was said, did not preclude regulation, and, in that connection, it was pointed out that insurance companies were so regulated by state legislation to show that the lawmaking bodies of the country, without exception, regarded the business of insurance as so far affecting the public welfare as to invoke and require governmental regulation. And it was then said (p. 412-413):

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Accidental fires are inevitable, and the extent of loss very great. The effect of insurance—indeed, it has been said to be its fundamental object—is to distribute the loss over as wide an area as possible. In other words, the loss is spread over the country, the disaster to an individual is shared by many, the disaster to a community shared by other communities; great catastrophes are thereby lessened, and, it may be, repaired. In assimilation of insurance to a tax, the companies have been said to be the mere machinery by which the inevitable losses by fire are distributed so as to fall as lightly as [273 U.S. 436] possible on the public at large, the body of the insured, not the companies, paying the tax.

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And again (p. 413):

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Contracts of insurance, therefore, have greater public consequence than contracts between individuals to do or not to do a particular thing whose effect stops with the individuals.

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And again (p. 414):

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We have shown that the business of insurance has very definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary businesses of the commercial world, to pursue which a greater liberty may be asserted. The transactions of the latter are independent and individual, terminating in their effect with the instances. The contracts of insurance may be said to be interdependent. They cannot be regarded singly or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositories of the money of the insured, possessing great power thereby and charged with great responsibility.

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Answering the objection that the reasoning of the opinion would subject every act of human endeavor and the price of every article of human use to regulation, it was said (p. 415):

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And both by the expression of the principle and the citation of the examples, we have tried to confine our decision to the regulation of the business of insurance, it having become "clothed with a public interest," and therefore subject "to be controlled by the public for the common good."

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This observation fairly may be regarded as a warning at least to be cautious about invoking the decision as a precedent for the determination of cases involving other kinds of business. And this view is borne out by a general consideration of the case. The decision proceeds [273 U.S. 437] upon the ground that the insurance business is to be distinguished from ordinary private business; that an insurance company, in effect, is an instrumentality which gathers funds upon the basis of equality of risk from a great number of persons—sufficiently large in number to cause the element of chance to step out and the law of averages to step in as the controlling factor—and holds the numerous amounts so collected as a general fund to be paid out to those who shall suffer losses. Insurance companies do not sell commodities—they do not sell anything. They are engaged in making contracts with and collecting premiums from a large number of persons, the effect of their activities being to constitute a guaranty against individual loss and to put a large number of individual contributions into a common fund for the purpose of fulfilling the guaranty. In this fund, all are interested not in some vague or sentimental way, but in a very real, practical and definite sense. It was from the foregoing and other considerations peculiar to the insurance business that the court drew its conclusion that the business was clothed with a public interest.

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Wilson v. New, 243 U.S. 332 (involving the Adamson law), Block v. Hirsh, 256 U.S. 135, and Marcus Brown Co. v. Feldman, 256 U.S. 170 (the rental cases), are relied upon to sustain the statute now under review. But, in these cases, the statutes involved were of a temporary character, to tide over grave emergencies, Adkins v. Children's Hospital, 261 U.S. 525, 551-552, the emergency in the New case being of nationwide extent, and it is clear that, in the opinion of this court, at least the business of renting houses and apartments is not so affected with a public interest as to justify legislative fixing of prices unless some great emergency exists. Block v. Hirsh, supra, p. 157; Chastleton Corp. v. Sinclair, 264 U.S. 543, 548. And even with the emergency, the statutes [273 U.S. 438] "went to the verge of the law." Penna. Coal Co. v. Mahon, 260 U.S. 393, 416.

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Nor is the sale of ordinary commodities of trade affected with a public interest so as to justify legislative price-fixing. This court said in Wolff Co. v. Industrial Court, supra, p. 537:

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It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the woodchopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation. It is true that, in the days of the early common law, an omnipotent Parliament did regulate prices and wages as it chose, and occasionally a Colonial legislature sought to exercise the same power; but nowadays, one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances.

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See also United States v. Bernstein, 267 Fed. 295, 296.

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From the foregoing review, it will be seen that each of the decisions of this court upholding governmental price regulation, aside from cases involving legislation to tide over temporary emergencies, has turned upon the existence of conditions, peculiar to the business under consideration, which bore such a substantial and definite relation to the public interest as to justify an indulgence of the legal fiction of a grant by the owner to the public of an interest in the use.

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Lord Hale's statement that, when private property is "affected with a public interest, it ceases to be juris privati only," is accepted by this court as the guiding principle in cases of this character. That this phrase was not intended by its author to include private undertakings like those enumerated in the statute now under consideration [273 U.S. 439] is apparent when we consider the connection in which it was used. It occurs in Lord Hale's manuscript, De Portibus Maris, 1 Harg.Law Tracts, 78, in which the threefold rights of the proprietor, the public, and the king in ports are considered. It first is pointed out that no man can erect a public port without the king's license, though, if he set up a port for his private advantage, he may take what rates he and his customers can agree upon. But, it is said, if the king or the subject have a public wharf, to which all persons must come, because it is the wharf only licensed by the king, or there is no other wharf in that port, arbitrary and excessive charges cannot be made. For it is then affected with a public interest, and ceases to be juris privati only,

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as if a man set out a street in new building on his own land, it is now no longer bare private interest, but it is affected with a public interest.

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It is clear that, as there announced, the rule is confined to conveniences made public because the privilege of maintaining them has been granted by government or because there has arisen what may be termed a constructive grant of the use to the public. That this is what Lord Hale had in mind is borne out, and the question now under consideration is illuminated, by the illustration, which he evidently conceived to be pertinent, of a street opened to the public, in which case the assumed grant and resulting public right of use is very apparent.

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A theatre or other place of entertainment does not meet this conception of Lord Hale's aphorism or fall within the reasons of the decisions of this court based upon it. A theatre is a private enterprise which, in its relation to the public, differs obviously and widely, both in character and degree, from a grain elevator, standing at the gateway of commerce and exacting toll, amounting to a common charge for every bushel of grain which passes on its way among the states; or stockyards, standing in [273 U.S. 440] like relation to the commerce in livestock; or an insurance company engaged as a sort of common agency in collecting and holding a guaranty fund in which definite and substantial rights are enjoyed by a considerable portion of the public sustaining interdependent relations in respect of their interests in the fund. Sales of theatre tickets bear no relation to the commerce of the country, and they are not interdependent transactions, but stand, both in form and effect, separate and apart from each other, "terminating in their effect with the instances." And, certainly, a place of entertainment is in no legal sense a public utility; and quite as certainly, its activities are not such that their enjoyment can be regarded under any conditions from the point of view of an emergency.

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The interest of the public in theatres and other places of entertainment may be more nearly, and with better reason, assimilated to the like interest in, provision stores and markets and in the rental of houses and apartments for residence purposes, although in importance it falls below such an interest in the proportion that food and shelter are of more moment than amusement or instruction. As we have shown, there is no legislative power to fix the prices of provisions or clothing or the rental charge for houses or apartments in the absence of some controlling emergency, and we are unable to perceive any dissimilarities of such quality or degree as to justify a different rule in respect of amusements and entertainments.

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A theatre ticket may be in the form of a revocable license or of a contract. If the former, it may be revoked at the will of the proprietor; if the latter, it may be made nontransferable or otherwise conditioned. A theatre, of course, may be regulated so as to preserve the public peace, insure good order, protect public morals, and the like. A license may be required, but such a license is [273 U.S. 441] not a franchise which puts the proprietor under the duty of furnishing entertainment to the public or, if furnished, of admitting everyone who applies. See Collister v. Hymn, 183 N.Y. 250, 253. How far the power of the legislature may be exerted to prevent discriminating selection by the proprietor of his patrons upon the basis of race, color, creed, etc., People v. King, 110 N.Y. 418, need not be determined, for, in any event, such power and the other powers of regulation just enumerated fall far short of the one here invoked to fix prices.

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The contention that, historically considered, places of entertainment may be regarded as so affected with a public interest as to justify legislative regulation of their charges does not seem to us impressive. It may be true, as asserted, that, among the Greeks, amusement and instruction of the people through the drama was one of the duties of government. But certainly no such duty devolves upon any American government. The most that can be said is that the theatre and other places of entertainment, generally have been regarded as of high value to the people, to be encouraged, but, at the same time, regulated within limits already stated. While theatres have existed for centuries, and have been regulated in a variety of ways, and while price-fixing by legislation is an old story, it does not appear that any attempt hitherto has been made to fix their charges by law. This is a fact of some significance in connection with the historical argument, and, when set in contrast with the practice in respect of innkeepers and others, whose charges have been subjected to legislative regulation from a very early period, it persuasively suggests that, by general legislative acquiescence, theatres historically have been regarded as falling outside the classes of things which should be thus controlled. It will not do to say that this failure of legislative bodies to act in the matter has been due to the absence of complaints on the part of the public, [273 U.S. 442] for it hardly is probable that a privilege as ancient and as amply exercised as that of complaining about prices in general has not been freely indulged in the matter of charges for entertainment. Indeed, it is judicially recorded that, as long ago as 1809, there was a riot in the Royal Theatre, London, for the purpose of compelling a reduction in prices of admission. In deciding a case growing out of the disturbance, Clifford v. Brandon, 2 Campb. 358, 368, the court summarily disposed of the claim that people had a right to express their disapprobation of high prices in such a tumultuous manner, by saying that

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the proprietors of a theatre have a right to manage their property in their own way, and to fix what prices of admission they think most for their own advantage,

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and that any person who did not approve could stay away.

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If it be within the legitimate authority of government to fix maximum charges for admission to theatres, lectures (where perhaps the lecturer alone is concerned), baseball, football and other games of all degrees of interest, circuses, shows (big and little), and every possible form of amusement, including the lowly merry-go-round with its adjunct, the hurdy-gurdy, Commonwealth v. Bow, 177 Mass. 347, it is hard to see where the limit of power in respect of price-fixing is to be drawn.

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It is urged that the statutory provision under review may be upheld as an appropriate method of preventing fraud, extortion, collusive arrangements between the management and those engaged in reselling tickets, and the like. That such evils exist in some degree in connection with the theatrical business and its ally, the ticket broker, is undoubtedly true, as it unfortunately is true in respect of the same or similar evils in other kinds of business. But evils are to be suppressed or prevented by legislation which comports with the Constitution, and not by such as strikes down those essential rights of private property protected by that instrument against undue governmental [273 U.S. 443] interference. One vice of the contention is that the statute itself ignores the righteous distinction between guilt and innocence, since it applies wholly irrespective of the existence of fraud, collusion or extortion (if that word can have any legal significance as applied to transaction of the kind here dealt with—Commonwealth v. O'Brien & Others, 12 Cush. 84, 90), and fixes the resale price as well where the evils are absent as where they are present. It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught.

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What this court said in Adams v. Tanner, 244 U.S. 590, 594, in the course of its opinion holding invalid a statute of Washington penalizing the collection of fees for securing employment, is apposite:

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Because abuses may, and probably do, grow up in connection with this business is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices, and as to every one of them, no doubt some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked.

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The evil of collusive alliances between the proprietors of theatres and ticket brokers or scalpers seems to have been effectively dealt with in Illinois by an ordinance [273 U.S. 444] which required (1) that the price of every theatre ticket shall be printed on its face, and (2) that no proprietor, employee, etc., of a theatre shall receive or enter into any arrangement or agreement to receive more. This ordinance was sustained as valid by the state supreme court in The People v. Thompson, 283 Ill. 87, 97, and that decision is cited here in support of the present statute. But the important distinction between that case and this is that the ordinance did not forbid the resale of the ticket by a purchaser of it for any price he was able to secure, or forbid the fixing of any price by the proprietor which he thought fit, provided that price was printed on the face of the ticket.

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That court had held in the earlier case of The People v. Steele, 231 Ill. 340, 344, that the business of conducting a theatre was a private one; that the legislature had the power to regulate it as a place of public amusement, and might require a license; that the legislature had the same power to regulate such a business as it had to regulate any other private business, and no more. And an act which prohibited the resale of tickets for more than the price printed thereon was held to be invalid as an arbitrary and unreasonable interference with the rights of the ticket broker. It was distinctly held that the intending purchaser of the ticket had no right to buy at any price except that fixed by the holder; that the manager might fix the price arbitrarily, and raise or lower it at his will; that having advertised a performance, he was not bound to give it, and having advertised a price, he was not bound to sell at that price, and that the business of dealing in theatre tickets and the right to contract with regard to them were entitled to protection. To the same effect, see Ex parte Quarg, 149 Cal. 79.

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This doctrine was reaffirmed in the Thompson case, but held to have no application to the ordinance there considered, and not to be inconsistent with the holding (p. 97) [273 U.S. 445] that the manager of a place of public entertainment might

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be compelled to treat patrons impartially by putting an end to an existing system by which theatre owners and ticket scalpers are confederated together to compel a portion of the public to pay a different price from others.

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It should not be difficult similarly to define and penalize in specific terms other practices of a fraudulent character the existence or apprehension of which is suggested in brief and argument. But the difficulty or even the impossibility of thus dealing with the evils, if that should be conceded, constitutes no warrant for suppressing them by methods precluded by the Constitution. Such subversions are not only illegitimate, but are fraught with the danger that, having begun on the ground of necessity, they will continue on the score of expediency, and finally as a mere matter of course. Constitutional principles, applied as they are written, it must be assumed, operate justly and wisely as a general thing, and they may not be remolded by lawmakers or judges to save exceptional cases of inconvenience, hardship or injustice.

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We are of opinion that the statute assailed contravenes the Fourteenth Amendment, and that the decree must be

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Reversed.

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MR. JUSTICE HOLMES, dissenting.

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We fear to grant power, and are unwilling to recognize it when it exists. The States very generally have stripped jury trials of one of their most important characteristics by forbidding the judges to advise the jury upon the facts (Graham v. United States, 231 U.S. 474, 480), and when legislatures are held to be authorized to do anything considerably affecting public welfare, it is covered by apologetic phrases like the police power, or the statement that the business concerned has been dedicated to a public use. The former expression is convenient, to be sure, to conciliate the mind to something that needs explanation: the fact that the constitutional requirement of compensation [273 U.S. 446] when property is taken cannot be pressed to its grammatical extreme; that property rights may be taken for public purposes without pay if you do not take too much; that some play must be allowed to the joints if the machine is to work. But police power often is used in a wide sense to cover and, as I said, to apologize for, the general power of the legislature to make a part of the community uncomfortable by a change.

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I do not believe in such apologies. I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain. Coming down to the case before us, I think, as I intimated in Adkins v. Children's Hospital, 261 U.S. 525, 569, that the notion that a business is clothed with a public interest and has been devoted to the public use is little more than a fiction intended to beautify what is disagreeable to the sufferers. The truth seems to me to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it. Lotteries were thought useful adjuncts of the State a century or so ago; now they are believed to be immoral, and they have been stopped. Wine has been thought good for man from the time of the Apostles until recent years. But when public opinion changed, it did not need the Eighteenth Amendment, notwithstanding the Fourteenth, to enable a State to say that the business should end. Mugler v. Kansas, 123 U.S. 623. What has happened to lotteries and wine might happen to theatres in some moral storm of the future, not because theatres were devoted to a public use, but because people had come to think that way. [273 U.S. 447]

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But if we are to yield to fashionable conventions, it seems to me that theatres are as much devoted to public use as anything well can be. We have not that respect for art that is one of the glories of France. But to many people, the superfluous is the necessary, and it seems to me that Government does not go beyond its sphere in attempting to make life livable for them. I am far from saying that I think this particular law a wise and rational provision. That is not my affair. But if the people of the State of New York, speaking by their authorized voice, say that they want it, I see nothing in the Constitution of the United States to prevent their having their will.

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MR. JUSTICE BRANDEIS concurs in this opinion.

STONE, J., dissenting

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MR. JUSTICE STONE, dissenting.

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I can agree with the majority that

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constitutional principles, applied as they are written, it must be assumed, operate justly and wisely as a general thing, and they may not be remolded by lawmakers or judges to save exceptional cases of inconvenience, hardship, or injustice.

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But I find nothing written in the Constitution, and nothing in the case or common law development of the Fourteenth Amendment, which would lead me to conclude that the type of regulation attempted by the State of New York is prohibited.

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The scope of our inquiry has been repeatedly defined by the decisions of this Court. As was said in Munn v. Illinois, 94 U.S. 113, 132, by Chief Justice Waite,

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For us, the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void because in excess of the legislative power of the state. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power the legislature [273 U.S. 448] is the exclusive judge.

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The attitude in which we should approach new problems in the field of price regulation was indicated in German Alliance Ins. Co. v. Kansas, 233 U.S. 389, 409:

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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 the 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 constitutional guarantees impaired.

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Again, in sustaining the constitutionality of a zoning ordinance under the Fourteenth Amendment, this Court has recently said,

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Regulations the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.

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Village of Euclid v. Ambler Realty Co., 272 U.S. 365.

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The question with which we are here concerned is much narrower than the one which has been principally discussed by the Court. It is not whether there is constitutional power to fix the price which theatre owners and producers may charge for admission. Although the statute in question declares that the price of tickets of admission to places of amusement is affected with a public interest, it does not purport to fix prices of admission. The producer or theatre proprietor is free to charge any price he chooses. The statute requires only that the sale price, whatever it is, be printed on the face of the ticket, and prohibits the licensed ticket broker, an intermediary [273 U.S. 449] in the marketing process, from reselling the ticket at an advance of more than fifty cents above the printed price. 1 Nor is it contended that this limit on the profit is unreasonable. It appear affirmatively that the business is now being carried on profitably by ticket brokers under this very restriction. But if it were not, there could be judicial relief without affecting the constitutionality of the measure. In these respects, the case resembles Munn v. Illinois, supra, where the attempt was not to fix the price of grain, but to fix the price of the service rendered by the proprietors of grain elevators in connection with the transportation and distribution of grain, the cost of which entered into the price ultimately paid by the consumer. The statute there, as the statute here, was designed in part to protect a large class of consumers from [273 U.S. 450] exorbitant prices made possible by the strategic position of a group of intermediaries in the distribution of a product from producer to consumer.

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There are about sixty first class theatres in the borough of Manhattan. Brokers annually sell about two million tickets, principally for admission to these theatres. Appellant sells three hundred thousand tickets annually. The practice of the brokers, as revealed by the record, is to subscribe, in advance of the production of the play and frequently before the cast is chosen, for tickets covering a period sf eight weeks. The subscriptions must be paid two weeks in advance, and about twenty-five percent. of the tickets unsold may be returned. A virtual monopoly of the best seats, usually the first fifteen rows, is thus acquired, and the brokers are enabled to demand extortionate prices of theatre goers. Producers and theatre proprietors are eager to make these advance sales, which are an effective insurance against loss arising from unsuccessful productions. The brokers are in a position to prevent the direct purchase of tickets to the desirable seats, and to exact from the patrons of the successful productions a price sufficient to pay the loss of those which are unsuccessful, plus an excessive profit to the broker.

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It is undoubtedly true, as a general proposition, that one of the incidents of the ownership of property is the power to fix the price at which it may be disposed. It may be also assumed that, as a general proposition, under the decisions of this Court, the power of state governments to regulate and control prices may be invoked only in special and not well defined circumstances. But when that power is invoked in the public interest and in consequence of the gross abuse of private right disclosed by this record, we should make searching and critical examination of those circumstances which in the past have been deemed sufficient to justify the exercise of the power before concluding that it may not be exercised here. [273 U.S. 451]

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The phrase "business affected with a public interest" seems to me to be too vague and illusory to carry us very far on the way to a solution. It tends in use to become only a convenient expression for describing those businesses regulation of which has been permitted in the past. To say that only those businesses affected with a public interest may be regulated is but another way of stating that all those businesses which may be regulated are affected with a public interest. It is difficult to use the phrase free of its connotation of legal consequences, and hence, when used as a basis of judicial decision, to avoid begging the question to be decided. The very fact that it has been applied to businesses unknown to Lord Hale, who gave sanction to its use, should caution us against the assumption that the category has now become complete or fixed, and that there may not be brought into it new classes of business or transactions not hitherto included in consequence of newly devised methods of extortionate price exaction.

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The constitutional theory that prices normally may not be regulated rests upon the assumption that the public interest and private right are both adequately protected when there is "free" competition among buyers and sellers, and that, in such a state of economic society, the interference with so important an incident of the ownership of private property as price-fixing is not justified, and hence is a taking of property without due process of law.

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Statutory regulation of price is commonly directed toward the prevention of exorbitant demands of buyers or sellers. An examination of the decisions of this Court in which price regulation has been upheld will disclose that the element common to all is the existence of a situation or a combination of circumstances materially restricting the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the [273 U.S. 452] bargaining struggle that serious economic consequences result to a very large number of members of the community. Whether this situation arises from the monopoly conferred upon public service companies or from the circumstance that the strategical position of a group is such as to enable it to impose its will in matters of price upon those who sell, buy or consume, as in Munn v. Illinois, supra; or from the predetermination of prices in the councils of those who sell, promulgated in schedules of practically controlling constancy, as in German Alliance Ins. Co. v. Kansas, supra, or from a housing shortage growing out of a public emergency as in Block v. Hirsh, 256 U.S. 135; Marcus Brown Co. v. Feldman, 256 U.S. 170; Levy Leasing Co. v. Siegel, 258 U.S. 242; cf. Chastleton Corp. v. Sinclair, 264 U.S. 543, the result is the same. Self interest is not permitted to invoke constitutional protection at the expense of the public interest and reasonable regulation of price is upheld.

1927, Tyson & Brother v. Banton, 273 U.S. 452

That should be the result here. We need not attempt to lay down any universal rule to apply to new and unknown situations. It is enough for present purposes that this case falls within the scope of the earlier decisions, and that the exercise of legislative power now considered was not arbitrary. The question, as stated, is not one of reasonable prices, but of the constitutional right in the circumstances of this case to exact exorbitant profits beyond reasonable prices. The economic consequence of this regulation upon individual ownership is no greater, nor is it essentially different from, that inflicted by regulating rates to be charged by laundries, Oklahoma Operating Co. v. Love, 252 U.S. 331 (semble), by anti-monopoly laws, Sunday laws, usury statutes, Griffith v. Connecticut, 218 U.S. 563; Workmen's Compensation Acts, New York Central R.R. v. White, 243 U.S. 188; the zoning ordinance upheld in Village of Euclid v. Ambler Realty Co., supra; or state statutes restraining the owner of land [273 U.S. 453] from leasing it to Japanese or Chinese aliens, upheld in Terrace v. Thompson, 263 U.S. 197; Webb v. O'Brien, 263 U.S. 313; or state prohibition laws upheld in Mugler v. Kansas, 123 U.S. 623; or legislation prohibiting option contracts for future sales of grain, Booth v. Illinois, 184 U.S. 425, or invalidating sales of stock on margin or for "futures," Otis v. Parker, 187 U.S. 606; or statutes preventing the maintenance of pool parlors, Murphy v. California, 225 U.S. 623, or in numerous other cases in which the exercise of private rights has been restrained in the public interest. Noble State Bank v. Haskell, 219 U.S. 104; Central Lumber Co. v. South Dakota, 226 U.S. 157; St. Louis Poster Advertising Co. v. St. Louis, 249 U.S. 269; Terminal Taxicab Co. v. Dist. of Columbia, 241 U.S. 252; Mutual Loan Co. v. Martell, 222 U.S. 225; Schmidinger v. Chicago, 226 U.S. 578; cf. Green v. Frazier, 253 U.S. 233; National Ins. Co. v. Wanberg, 260 U.S. 71; Clark v. Nash, 198 U.S. 361. Nor is the exercise of the power less reasonable because the interests protected are in some degree less essential to life than some others. Laws against monopoly which aim at the same evil and accomplish their end by interference with private rights quite as much as the present law are not regarded as arbitrary or unreasonable or unconstitutional because they are not limited in their application to dealings in the bare necessities of life.

1927, Tyson & Brother v. Banton, 273 U.S. 453

The problem sought to be dealt with has been the subject of earlier legislation in New York, and has engaged the attention of the legislators of other states. 2 That it is [273 U.S. 454] one involving serious injustice to great numbers of individuals who are powerless to protect themselves cannot be questioned. Its solution turns upon considerations of economics about which there may be reasonable differences of opinion. Choice between these views takes us from the judicial to the legislative field. The judicial function ends when it is determined that there is basis for legislative action in a field not withheld from legislative power by the Constitution as interpreted by the decisions of this Court. Holding these views, I believe the judgment below should be affirmed.

1927, Tyson & Brother v. Banton, 273 U.S. 454

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS join in this dissent.

SANFORD, J., dissenting

1927, Tyson & Brother v. Banton, 273 U.S. 454

MR. JUSTICE SANFORD, dissenting.

1927, Tyson & Brother v. Banton, 273 U.S. 454

I regret that I cannot agree with the opinion of the Court in this case. My own view is more nearly that expressed by Mr. Justice Stone. Shortly stated, it is this: the case, I think, does not involve the question whether the business of theatre owners offering their separate entertainments is so affected with a public interest that the price which they themselves charge for tickets is subject to regulation by the legislature, but the very different question whether the business of ticket brokers who intervene between the theatre owners and the general public in the sale of theatre tickets is affected with a public interest, and may, under the circumstances disclosed in this case, be [273 U.S. 455] regulated by the legislature to the extent of preventing them from selling tickets at more than a reasonable advance upon the theatre prices. The facts stated by Mr. Justice Stone are substantially those found by the District Court. They show, as I think, clearly, that the ticket brokers, by virtue of arrangements which they make with the theatre owners, ordinarily acquire an absolute control of the most desirable seats in the theatres, by which they deprive the public of access to the theatres themselves for the purpose of buying such tickets at the regular prices, and are enabled to exact an extortionate advance in prices for the sale of such tickets to the public.

1927, Tyson & Brother v. Banton, 273 U.S. 455

In Munn v. Illinois, 94 U.S. 113, 132—although there was no holding that the sale of grain was, in itself, a business affected with a public interest which could be regulated by the legislature—it was held that the separate business of grain elevators, which "stood in the very gateway of commerce" in grain, "taking toll" from all who passed and tending to a common charge, had become, by the facts, clothed "with a public interest," and was subject to public regulation limiting the charges to a reasonable toll. So, I think, that here—without reference to the character of the business of the theatres themselves—the business of the ticket brokers, who stand in "the very gateway" between the theatres and the public, depriving the public of access to the theatres for the purchase of desirable seats at the regular prices, and, exacting toll from patrons of the theatres desiring to purchase such seats, has become clothed with a public interest and is subject to regulation by the legislature limiting their charges to reasonable exactions and protecting the public from extortion and exorbitant rates. See People v. Weller, 207 App.Div. 337, 343, and 237 N.Y. 316, 331, in which the constitutionality of this statute was sustained by the New York courts, and Opinion of the Justices to the Senate, 247 Mass. 589, 598. And in Wolff Co. v. Industrial Court, 262 U.S. 522, 535, it was recognized that a business, [273 U.S. 456] although not public at its inception, might become clothed with a public interest justifying some government regulation, by coming "to hold such a peculiar relation to the public that this is superimposed" upon it. This, I think, is the case here.

Footnotes

SUTHERLAND, J., lead opinion (Footnotes)

1927, Tyson & Brother v. Banton, 273 U.S. 456

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1927, Tyson & Brother v. Banton, 273 U.S. 456

§ 167. Matters of Public Interest. It is hereby determined and declared that the price of or charge for admission to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held is a matter affected with a public interest and subject to the supervision of the state for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses.

1927, Tyson & Brother v. Banton, 273 U.S. 456

§ 172. Restriction as to Price. No licensee shall resell any such ticket or other evidence of the right of entry to any theatre, place of amusement or entertainment, or other place where public exhibitions, games, contests or performances are given at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry. Every person, firm, or corporation who owns, operates or controls a theatre, place of amusement or entertainment, or other place where public exhibitions, games, contests or performances are held shall, if a price be charged for admission thereto, print on the face of each such ticket or other evidence of the right of entry the price charged therefor by such person, firm or corporation.

STONE, J., dissenting (Footnotes)

1927, Tyson & Brother v. Banton, 273 U.S. 456

1. Turning to the broader question, the public importance of theatres has been manifested in regulatory legislation in this country from the earliest times. Beale, Innkeepers, § 325n; Cecil v. Green, 161 Ill. 265, 268. In New York, physical construction of theatres with respect to fire escapes, exits and seating is regulated, Village Law, § 90, par. 25; licenses to produce shows are required, Town Law, § 217; Sunday entertainments of certain kinds, Penal Code, § 2145, cf. People v. Hoym, 20 How.Prac. 76; Newendorff v. Duryea, 6 Daly 276; discrimination because of race or color, Penal Code, § 514, People v. King, 110 N.Y. 418, or against persons wearing United States uniforms, Penal Code, § 517; appearance of children under fourteen upon the stage, People v. Ewer, 141 N.Y. 129; admission of children under sixteen, Penal Code, § 484; presentation of certain types of exhibitions, Penal Code, §§ 831, 833; or immoral shows and exhibitions, Penal Code, § 1140a; or plays in which a living character represents the Deity, Penal Code, § 2074; are all prohibited. Section 3657, Page, Ohio Gen.Code, empowering municipalities to require licensing of theatrical exhibitions and theatre ticket selling, and § 12600-2 et seq., regulating physical construction, etc., are typical of present day statutes. This Court has upheld legislation regulating admissions to public entertainments, Western Turf Association v. Greenberg, 204 U.S. 359, and providing for censorship of motion pictures, Mutual Film Corp. v. Ohio Industrial Commission, 236 U.S. 230.

1927, Tyson & Brother v. Banton, 273 U.S. 456

2. An earlier ordinance of New York City, substantially similar to the present act, was construed in People v. Newman, 109 Misc. 622, overruled by People v. Weller, 237 N.Y. 316. Section 1534 Penal Code, makes it a misdemeanor for brokers to sell tickets on the street.

1927, Tyson & Brother v. Banton, 273 U.S. 456

Acts & Resolves of Mass. 1924, c. 497, controlling resale of tickets with maximum brokerage charges similar to the New York statute, was approved in Opinion of Justices, 247 Mass. 497. Conn.Pub.Acts, 1923, c. 48; New Jersey Laws 1923, c. 71; Cal.Penal Code, § 526, make it a misdemeanor to sell tickets in excess of the printed price. The California Act was declared unconstitutional in Ex parte Quarg, 149 Cal. 79. A similar statute in Illinois was held invalid, People v. Steele, 231 Ill. 340. A license ordinance of ticket peddlers was also declared invalid in California. Ex parte Dees, 46 Cal.App. 656. Those enactments are clearly more drastic than the New York statute. A Chicago ordinance prohibiting secret alliances and profit sharing between proprietors and scalpers was upheld. People v. Thompson, 283 Ill. 87. See also Laws of Ill.1923, p. 322.

Nixon v. Herndon, 1927

Title: Nixon v. Herndon

Author: U.S. Supreme Court

Date: March 7, 1927

Source: 273 U.S. 536

This case was argued January 4, 1927, and was decided March 7, 1927.

1927, Nixon v. Herndon, 273 U.S. 536

ERROR TO THE UNITED STATES DISTRICT COURT

1927, Nixon v. Herndon, 273 U.S. 536

FOR THE WESTERN DISTRICT OF TEXAS

Syllabus

1927, Nixon v. Herndon, 273 U.S. 536

1. An action for damages may be maintained against judge of election for unlawfully denying to a qualified voter the right to vote at a state primary election. P. 540.

1927, Nixon v. Herndon, 273 U.S. 536

2. A State statute (Texas, 1923, Art. 309a) barring negroes from participation in Democratic party primary elections held in the State for the nomination of candidates for senator and representatives in Congress, and state and other offices, violates the Fourteenth Amendment. P. 540.

1927, Nixon v. Herndon, 273 U.S. 536

Reversed.

1927, Nixon v. Herndon, 273 U.S. 536

ERROR to a judgment of the District Court which dismissed an action for damages brought by a negro against judges of election in Texas, based on their refusal to permit the plaintiff to vote at a primary election. [273 U.S. 539]

HOLMES, J., lead opinion

1927, Nixon v. Herndon, 273 U.S. 539

MR. JUSTICE HOLMES delivered the opinion of the Court.

1927, Nixon v. Herndon, 273 U.S. 539

This is an action against the Judges of Elections for refusing to permit the plaintiff to vote at a primary election in Texas. It lays the damages at five thousand dollars. The petition alleges that the plaintiff is a negro, a citizen of the United States and of Texas and a resident of El Paso, and in every way qualified to vote, as set forth in detail, except that the statute to be mentioned interferes with his right; that, on July 26, 1924, a primary election was held at El Paso for the nomination of candidates for a senator and representatives in Congress and State and other offices, upon the Democratic ticket; that [273 U.S. 540] the plaintiff, being a member of the Democratic party, sought to vote but was denied the right by defendants; that the denial was based upon a Statute of Texas enacted in May, 1923, and designated Article 3093a, by the words of which "in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas," &c., and that this statute is contrary to the Fourteenth and Fifteenth Amendments to the Constitution of the United States. The defendants moved to dismiss upon the ground that the subject matter of the suit was political, and not within the jurisdiction of the Court and that no violation of the Amendments was shown. The suit was dismissed, and a writ of error was taken directly to this Court. Here, no argument was made on behalf of the defendants, but a brief was allowed to be filed by the Attorney General of the State.

1927, Nixon v. Herndon, 273 U.S. 540

The objection that the subject matter of the suit is political is little more than a play upon words. Of course, the petition concerns political action, but it alleges and seeks to recover for private damage. That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years, since Ashby v. White, 2 Ld.Raym. 938, 3 id. 320, and has been recognized by this Court. Wiley v. Sinkler, 179 U.S. 58, 64, 65. Giles v. Harris, 189 U.S. 475, 485. See also Judicial Code, § 24(11), (12), (14). Act of March 3, 1911, c. 231; 36 Stat. 1087, 1092. If the defendants' conduct was a wrong to the plaintiff, the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result.

1927, Nixon v. Herndon, 273 U.S. 540

The important question is whether the statute can be sustained. But although we state it as a question, the answer does not seem to us open to a doubt. We find it unnecessary to consider the Fifteenth Amendment, because [273 U.S. 541] it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth. That Amendment, while it applies to all, was passed, as we know, with a special intent to protect the blacks from discrimination against them. Slaughter House Cases, 16 Wall. 36. Strauder v. West Virginia, 100 U.S. 303. That Amendment

1927, Nixon v. Herndon, 273 U.S. 541

not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws. . . . What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?

1927, Nixon v. Herndon, 273 U.S. 541

Quoted from the last case in Buchanan v. Warley, 245 U.S. 60, 77. See Yick Wo v. Hopkins, 118 U.S. 356, 374. The statute of Texas in the teeth of the prohibitions referred to assumes to forbid negroes to take part in a primary election the importance of which we have indicated, discrminating against them by the distinction of color alone. States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case

1927, Nixon v. Herndon, 273 U.S. 541

Judgment reversed.

Buck v. Bell, 1927

Title: Buck v. Bell

Author: U.S. Supreme Court

Date: May 2, 1927

Source: 274 U.S. 200

This case was argued April 22, 1927, and was decided May 2, 1927.

1927, Buck v. Bell, 274 U.S. 200

ERROR TO THE SUPREME COURT OF APPEALS

1927, Buck v. Bell, 274 U.S. 200

OF THE STATE OF VIRGINIA

Syllabus

1927, Buck v. Bell, 274 U.S. 200

1. The Virginia statute providing for the sexual sterilization of inmates of institutions supported by the State who shall be found to be afflicted with an hereditary form of insanity or imbecility, is within the power of the State under the Fourteenth Amendment. P. 207.

1927, Buck v. Bell, 274 U.S. 200

2. Failure to extend the provision to persons outside the institutions named does not render it obnoxious to the Equal Protection Clause. P. 208.

1927, Buck v. Bell, 274 U.S. 200

143 Va. 310, affirmed.

1927, Buck v. Bell, 274 U.S. 200

ERROR to a judgment of the Supreme Court of Appeals of the State of Virginia which affirmed a judgment ordering [274 U.S. 201] the Superintendent of the State Colony of Epileptics and Feeble Minded to perform the operation of salpingectomy on Carrie Buck, the plaintiff in error. [274 U.S. 205]

HOLMES, J., lead opinion

1927, Buck v. Bell, 274 U.S. 205

Mr. JUSTICE HOLMES delivered the opinion of the Court.

1927, Buck v. Bell, 274 U.S. 205

This is a writ of error to review a judgment of the Supreme Court of Appeals of the State of Virginia affirming a judgment of the Circuit Court of Amherst County by which the defendant in error, the superintendent of the State Colony for Epileptics and Feeble Minded, was ordered to perform the operation of salpingectomy upon Carrie Buck, the plaintiff in error, for the purpose of making her sterile. 143 Va. 310. The case comes here upon the contention that the statute authorizing the judgment is void under the Fourteenth Amendment as denying to the plaintiff in error due process of law and the equal protection of the laws.

1927, Buck v. Bell, 274 U.S. 205

Carrie Buck is a feeble minded white woman who was committed to the State Colony above mentioned in due form. She is the daughter of a feeble minded mother in the same institution, and the mother of an illegitimate feeble minded child. She was eighteen years old at the time of the trial of her case in the Circuit Court, in the latter part of 1924. An Act of Virginia, approved March 20, 1924, recites that the health of the patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives, under careful safeguard, &c.; that the sterilization may be effected in males by vasectomy and in females by salpingectomy, without serious pain or substantial danger to life; that the Commonwealth is supporting in various institutions many defective persons who, if now discharged, would become [274 U.S. 206] a menace, but, if incapable of procreating, might be discharged with safety and become self-supporting with benefit to themselves and to society, and that experience has shown that heredity plays an important part in the transmission of insanity, imbecility, &c. The statute then enacts that, whenever the superintendent of certain institutions, including the above-named State Colony, shall be of opinion that it is for the best interests of the patients and of society that an inmate under his care should be sexually sterilized, he may have the operation performed upon any patient afflicted with hereditary forms of insanity, imbecility, &c., on complying with the very careful provisions by which the act protects the patients from possible abuse.

1927, Buck v. Bell, 274 U.S. 206

The superintendent first presents a petition to the special board of directors of his hospital or colony, stating the facts and the grounds for his opinion, verified by affidavit. Notice of the petition and of the time and place of the hearing in the institution is to be served upon the inmate, and also upon his guardian, and if there is no guardian, the superintendent is to apply to the Circuit Court of the County to appoint one. If the inmate is a minor, notice also is to be given to his parents, if any, with a copy of the petition. The board is to see to it that the inmate may attend the hearings if desired by him or his guardian. The evidence is all to be reduced to writing, and, after the board has made its order for or against the operation, the superintendent, or the inmate, or his guardian, may appeal to the Circuit Court of the County. The Circuit Court may consider the record of the board and the evidence before it and such other admissible evidence as may be offered, and may affirm, revise, or reverse the order of the board and enter such order as it deems just. Finally any party may apply to the Supreme Court of Appeals, which, if it grants the appeal, is to hear the case upon the record of the trial [274 U.S. 207] in the Circuit Court, and may enter such order as it thinks the Circuit Court should have entered. There can be no doubt that, so far as procedure is concerned, the rights of the patient are most carefully considered, and, as every step in this case was taken in scrupulous compliance with the statute and after months of observation, there is no doubt that, in that respect, the plaintiff in error has had due process of law.

1927, Buck v. Bell, 274 U.S. 207

The attack is not upon the procedure, but upon the substantive law. It seems to be contended that in no circumstances could such an order be justified. It certainly is contended that the order cannot be justified upon the existing grounds. The judgment finds the facts that have been recited, and that Carrie Buck

1927, Buck v. Bell, 274 U.S. 207

is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health, and that her welfare and that of society will be promoted by her sterilization,

1927, Buck v. Bell, 274 U.S. 207

and thereupon makes the order. In view of the general declarations of the legislature and the specific findings of the Court, obviously we cannot say as matter of law that the grounds do not exist, and, if they exist, they justify the result. We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Jacobson v. Massachusetts, 197 U.S. 11. Three generations of imbeciles are enough. [274 U.S. 208]

1927, Buck v. Bell, 274 U.S. 208

But, it is said, however it might be if this reasoning were applied generally, it fails when it is confined to the small number who are in the institutions named and is not applied to the multitudes outside. It is the usual last resort of constitutional arguments to point out shortcomings of this sort. But the answer is that the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow. Of course, so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached.

1927, Buck v. Bell, 274 U.S. 208

Judgment affirmed.

1927, Buck v. Bell, 274 U.S. 208

MR. JUSTICE BUTLER dissents.

Whitney v. California, 1927

Title: Whitney v. California

Author: U.S. Supreme Court

Date: May 16, 1927

Source: 274 U.S. 357

This case was argued October 6, 1925, and was reargued March 18, 1926. The case was decided May 16, 1927.

1927, Whitney v. California, 274 U.S. 357

ERROR TO THE DISTRICT COURT OF APPEAL, FIRST APPELLATE

1927, Whitney v. California, 274 U.S. 357

DISTRICT, DIVISION ONE, OF THE STATE OF CALIFORNIA

Syllabus

1927, Whitney v. California, 274 U.S. 357

1. This Court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error unless it affirmatively appears on the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court. P. 360.

1927, Whitney v. California, 274 U.S. 357

2. Where the fact that a federal question was considered and passed upon by the state court does not appear by the record, it may be shown by a certified copy of an order of that court made after the return of the writ of error and brought here as an addition to the record. P. 361.

1927, Whitney v. California, 274 U.S. 357

3. In reviewing the judgment of a state court, this Court will consider only such federal questions as are shown to have been presented to the state court and expressly or necessarily decided by it. P. 362.

1927, Whitney v. California, 274 U.S. 357

4. The question whether the petitioner, who joined and assisted in the organization of a Communist Labor Party contravening the California Criminal Syndicalism Act, did so with knowledge of its unlawful character and purpose, was a mere question of the weight of the evidence, foreclosed by the verdict of guilty approved by the state court, and not a question of the constitutionality of the Act, reviewable by this Court. P. 366.

1927, Whitney v. California, 274 U.S. 357

5. The California Criminal Syndicalism Act, which defines "criminal syndicalism" as

1927, Whitney v. California, 274 U.S. 357

any doctrine or precept advocating, teaching [274 U.S. 358] or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change,

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and declares guilty of a felony any person who

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organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism,

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is sufficiently clear and explicit to satisfy the requirement of due process of law. P. 368.

1927, Whitney v. California, 274 U.S. 358

6. The statute does not violate the Equal Protection Clause of the Fourteenth Amendment in penalizing those who advocate a resort to violent and unlawful methods as a means of changing industrial and political conditions while not penalizing those who may advocate a resort to such methods for maintaining such conditions, since the distinction is not arbitrary, but within the discretionary power of the State to direct its legislation against what it deems an evil without covering the whole field of possible abuses. P. 369.

1927, Whitney v. California, 274 U.S. 358

7. Such a statute is not open to objection unless the classification on which it is based is so lacking in any adequate or reasonable basis as to preclude the assumption that it was made in the exercise of the legislative judgment and discretion. P. 369.

1927, Whitney v. California, 274 U.S. 358

8. This Act is not class legislation; it affects all alike, no matter what their business associations or callings, who come within its terms and do the things prohibited. P. 370.

1927, Whitney v. California, 274 U.S. 358

9. Nor is it repugnant to the Due Process Clause as a restraint of the rights of free speech, assembly, and association. P. 371.

1927, Whitney v. California, 274 U.S. 358

10. The determination of the legislature that the acts defined involve such danger to the public peace and security of the State that they should be penalized in the exercise of the police power must be given great weight, and every presumption be indulged in favor of the validity of the statute, which could be declared unconstitutional only if an attempt to exercise arbitrarily and unreasonably the authority vested in the State in the public interest. P. 371.

1927, Whitney v. California, 274 U.S. 358

57 Cal.App. 449; ib., 453, affirmed.

1927, Whitney v. California, 274 U.S. 358

ERROR to a judgment of the District Court of Appeal of California, which affirmed a conviction of the petitioner under the state act against criminal syndicalism. The Supreme Court of California denied a petition for appeal.

1927, Whitney v. California, 274 U.S. 358

On the first hearing in this Court, the writ of error was [274 U.S. 359] dismissed for want of jurisdiction, but later a petition for rehearing was granted. 269 U.S. 530, 538.

SANFORD, J., lead opinion

1927, Whitney v. California, 274 U.S. 359

MR. JUSTICE SANFORD delivered the opinion of the Court.

1927, Whitney v. California, 274 U.S. 359

By a criminal information filed in the Superior Court of Alameda County, California, the plaintiff in error was charged, in five counts, with violations of the Criminal Syndicalism Act of that State. Statutes, 1919, c. 188, p. 281. She was tried, convicted on the first count, and sentenced to imprisonment. The judgment was affirmed by the District Court of Appeal. 57 Cal.App. 449. Her petition to have the case heard by the Supreme Court\* was denied. Ib., 453. And the case was brought here on a writ of error which was allowed by the Presiding Justice of the Court of Appeal, the highest court of the State in which a decision could be had. Jud.Code, § 237.

1927, Whitney v. California, 274 U.S. 359

On the first hearing in this Court, the writ of error was dismissed for want of jurisdiction. 269 U.S. 530. Thereafter, a petition for rehearing was granted, ib., 538, and the case was again heard and reargued both as to the jurisdiction and the merits.

1927, Whitney v. California, 274 U.S. 359

The pertinent provisions of the Criminal Syndicalism Act are:

1927, Whitney v. California, 274 U.S. 359

Section 1. The term "criminal syndicalism" as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission [274 U.S. 360] of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.

1927, Whitney v. California, 274 U.S. 360

Sec. 2. Any person who: . . . 4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism

1927, Whitney v. California, 274 U.S. 360

Is guilty of a felony and punishable by imprisonment.

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The first count of the information, on which the conviction was had charged that, on or about November 28, 1919, in Alameda County, the defendant, in violation of the Criminal Syndicalism Act,

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did then and there unlawfully, willfully, wrongfully, deliberately and feloniously organize and assist in organizing, and was, is, and knowingly became a member of an organization, society, group and assemblage of persons organized and assembled to advocate, teach, aid and abet criminal syndicalism.

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It has long been settled that this Court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error unless it affirmatively appears on the face of the record that a federal question constituting an appropriate ground for such review was presented in, and expressly or necessarily decided by, such state court. Crowell v. Randell, 10 Pet. 368, 392; Railroad Co. v. Rock, 4 Wall, 177, 180; California Powder Works v. Davis, 151 U.S. 389, 393; Cincinnati, etc. Railway v. Slade, 216 U.S. 78, 83; Hiawassee Power Co. v. Carolina-Tenn. Co., 252 U.S. 341, 343; New York v. Kleinert, 268 U.S. 646, 650.

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Here, the record does not show that the defendant raised, or that the State courts considered or decided, any [274 U.S. 361] Federal question whatever, excepting as appears in an order made and entered by the Court of Appeal after it had decided the case and the writ of error had issued and been returned to this Court. A certified copy of that order, brought here as an addition to the record, shows that it was made and entered pursuant to a stipulation of the parties, approved by the court, and that it contains the following statement:

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The question whether the California Criminal Syndicalism Act . . . and its application in this case are repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States providing that no state shall deprive any person of life, liberty, or property without due process of law, and that all persons shall be accorded the equal protection of the laws, was considered and passed upon by this Court.

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In Cincinnati Packet Co. v. Bay, 200 U.S. 179, 182, where it appeared that a federal question had been presented in a petition in error to the State Supreme Court in a case in which the judgment was affirmed without opinion, it was held that the certificate of that court to the effect that it had considered and necessarily decided this question was sufficient to show its existence. And see Marvin v. Trout, 199 U.S. 212, 217, et seq.; Consolidated Turnpike v. Norfolk, etc. Railway, 228 U.S. 596, 599.

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So—while the unusual course here taken to show that federal questions were raised and decided below is not to be commended—we shall give effect to the order of the Court of Appeal as would be done if the statement had been made in the opinion of that court when delivered. See Gross v. United States Mortgage Co., 108 U.S. 477, 484-486; Philadelphia Fire Association v. New York, 119 U.S. 110, 116; Home for Incurables v. City of New York, 187 U.S. 155, 157; Land & Water Co. v. San Jose Ranch Co., 189 U.S. 177, 179-180; Rector v. City Deposit Bank, [274 U.S. 362] 200 U.S. 405, 412; Haire v. Rice, 204 U.S. 291, 299; Chambers v. Baltimore, etc. Railroad, 207 U.S. 142, 148; Atchison, etc. Railway v. Sowers, 213 U.S. 55, 62; Consolidated Turnpike Co. v. Norfolk, etc. Railway, 228 U.S. 596, 599; Miedrech v. Lauenstein, 232 U.S. 236, 242; North Carolina Railroad v. Zachary, 232 U.S. 248, 257; Chicago, etc. Railway v. Perry, 259 U.S. 548, 551.

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And here, since it appears from the statement in the order of the Court of Appeal that the question whether the Syndicalism Act and its application in this case was repugnant to the due process and equal protection clauses of the Fourteenth Amendment was considered and passed upon by that court—this being a federal question constituting an appropriate ground for a review of the judgment—we conclude that this Court has acquired jurisdiction under the writ of error. The order dismissing the writ for want of jurisdiction will accordingly be set aside.

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We proceed to the determination, upon the merits, of the constitutional question considered and passed upon by the Court of Appeal. Of course, our review is to be confined to that question, since it does not appear, either from the order of the Court of Appeal or from the record otherwise, that any other federal question was presented in and either expressly or necessarily decided by that court. National Bank v. Commonwealth, 9 Wall. 353, 363; Edwards v. Elliott, 21 Wall. 532, 557; Dewey v. Des Moines, 173 U.S. 193, 200; Keokuk & Hamilton Bridge Co. v. Illinois, 175 U.S. 626, 633; Capital City Dairy Co. v. Ohio, 183 U.S. 238, 248; Haire v. Rice, 204 U.S. 291, 301; Selover, Bates & Co. v. Walsh, 226 U.S. 112, 126. Missouri Pacific Railway v. Coal Co., 256 U.S. 134, 135. It is not enough that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a federal nature. Dewey v. Des Moines, supra, 199; Keokuk & Hamilton Bridge Co. v. Illinois, supra, 634. And this necessarily excludes from our consideration [274 U.S. 363] a question sought to be raised for the first time by the assignments of error here—not presented in or passed upon by the Court of Appeal—whether apart from the constitutionality of the Syndicalism Act, the judgment of the Superior Court, by reason of the rulings of that court on questions of pleading, evidence and the like, operated as a denial to the defendant of due process of law. See Oxley Stave Co. v. Butler County, 166 U.S. 648, 660; Capital City Dairy Co. v. Ohio, supra, 248; Manhattan Life Ins. Co. v. Cohen, 234 U.S. 123, 134; Bass, etc. Ltd. v. Tax Commission, 266 U.S. 271, 283.

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The following facts, among many others, were established on the trial by undisputed evidence: the defendant, a resident of Oakland, in Alameda County, California, had been a member of the Local Oakland branch of the Socialist Party. This Local sent delegates to the national convention of the Socialist Party held in Chicago in 1919, which resulted in a split between the "radical" group and the old-wing Socialists. The "radicals"—to whom the Oakland delegates adhered—being ejected, went to another hall, and formed the Communist Labor Party of America. Its Constitution provided for the membership of persons subscribing to the principles of the Party and pledging themselves to be guided by its Platform, and for the formation of state organizations conforming to its Platform as the supreme declaration of the Party. In its "Platform and Program," the Party declared that it was in full harmony with "the revolutionary working class parties of all countries," and adhered to the principles of Communism laid down in the Manifesto of the Third International at Moscow, and that its purpose was "to create a unified revolutionary working class movement in America," organizing the workers as a class in a revolutionary class struggle to conquer the capitalist state for the overthrow of capitalist rule, the conquest of political power and the establishment [274 U.S. 364] of a working class government, the Dictatorship of the Proletariat, in place of the state machinery of the capitalists, which should make and enforce the laws, reorganize society on the basis of Communism, and bring about the Communist Commonwealth—advocated, as the most important means of capturing state power, the action of the masses, proceeding from the shops and factories, the use of the political machinery of the capitalist state being only secondary; the organization of the workers into "revolutionary industrial unions"; propaganda pointing out their revolutionary nature and possibilities, and great industrial battles showing the value of the strike as a political weapon—commended the propaganda and example of the Industrial Workers of the World and their struggles and sacrifices in the class war—pledged support and cooperation to "the revolutionary industrial proletariat of America" in their struggles against the capitalist class—cited the Seattle and Winnipeg strikes and the numerous strikes all over the country "proceeding without the authority of the old reactionary Trade Union officials," as manifestations of the new tendency—and recommended that strikes of national importance be supported and given a political character, and that propagandists and organizers be mobilized "who cannot only teach, but actually help to put in practice the principles of revolutionary industrial unionism and Communism."

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Shortly thereafter, the Local Oakland withdrew from the Socialist Party and sent accredited delegates, including the defendant, to a convention held in Oakland in November, 1919, for the purpose of organizing a California branch of the Communist Labor Party. The defendant, after taking out a temporary membership in the Communist Labor Party, attended this convention as a delegate and took an active part in its proceedings. She was elected a member of the Credentials Committee, and, as its chairman, made a report to the convention upon [274 U.S. 365] which the delegates were seated. She was also appointed a member of the Resolutions Committee, and, as such, signed the following resolution in reference to political action, among others proposed by the Committee:

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The C.L.P. of California fully recognizes the value of political action as a means of spreading communist propaganda; it insists that, in proportion to the development of the economic strength of the working class, it, the working class, must also develop its political power. The C.L.P. of California proclaims and insists that the capture of political power, locally or nationally by the revolutionary working class, can be of tremendous assistance to the workers in their struggle of emancipation. Therefore, we again urge the workers who are possessed of the right of franchise to cast their votes for the party which represents their immediate and final interest—the C.L.P.—at all elections, being fully convinced of the utter futility of obtaining any real measure of justice or freedom under officials elected by parties owned and controlled by the capitalist class.

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The minutes show that this resolution, with the others proposed by the committee, was read by its chairman to the convention before the Committee on the Constitution had submitted its report. According to the recollection of the defendant, however, she herself read this resolution. Thereafter, before the report of the Committee on the Constitution had been acted upon, the defendant was elected an alternate member of the State Executive Committee. The Constitution, as finally read, was then adopted. This provided that the organization should be named the Communist Labor Party of California; that it should be "affiliated with" the Communist Labor Party of America, and subscribe to its Program, Platform and Constitution, and, "through this affiliation," be "joined with the Communist International of Moscow;" and that the qualifications for membership should be those prescribed in the [274 U.S. 366] National Constitution. The proposed resolutions were later taken, up and all adopted except that on political action, which caused a lengthy debate, resulting in its defeat and the acceptance of the National Program in its place. After this action, the defendant, without, so far as appears, making any protest, remained in the convention until it adjourned. She later attended as an alternate member one or two meetings of the State Executive Committee in San Jose and San Francisco, and stated, on the trial, that she was then a member of the Communist Labor Party. She also testified that it was not her intention that the Communist Labor Party of California should be an instrument of terrorism or violence, and that it was not her purpose or that of the Convention to violate any known law.

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In the light of this preliminary statement, we now take up, insofar as they require specific consideration, the various grounds upon which it is here contended that the Syndicalism Act and its application in this case is repugnant to the due process and equal protection clauses of the Fourteenth Amendment.

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1. While it is not denied that the evidence warranted the jury in finding that the defendant became a member of and assisted in organizing the Communist Labor Party of California, and that this was organized to advocate, teach, aid or abet criminal syndicalism as defined by the Act, it is urged that the Act, as here construed and applied, deprived the defendant of her liberty without due process of law in that it has made her action in attending the Oakland convention unlawful by reason of "a subsequent event brought about against her will by the agency of others," with no showing of a specific intent on her part to join in the forbidden purpose of the association, and merely because, by reason of a lack of "prophetic" understanding, she failed to foresee the quality that others would give to the convention. The argument is, [274 U.S. 367] in effect, that the character of the state organization could not be forecast when she attended the convention; that she had no purpose of helping to create an instrument of terrorism and violence; that she

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took part in formulating and presenting to the convention a resolution which, if adopted, would have committed the new organization to a legitimate policy of political reform by the use of the ballot;

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that it was not until after the majority of the convention turned out to be "contrary-minded, and other less temperate policies prevailed," that the convention could have taken on the character of criminal syndicalism, and that, as this was done over her protest, her mere presence in the convention, however violent the opinions expressed therein, could not thereby become a crime. This contention, while advanced in the form of a constitutional objection to the Act, is in effect nothing more than an effort to review the weight of the evidence for the purpose of showing that the defendant did not join and assist in organizing the Communist Labor Party of California with a knowledge of its unlawful character and purpose. This question, which is foreclosed by the verdict of the jury—sustained by the Court of Appeal over the specific objection that it was not supported by the evidence—is one of fact merely, which is not open to review in this Court, involving, as it does, no constitutional question whatever. And we may add that the argument entirely disregards the facts: that the defendant had previously taken out a membership card in the National Party, that the resolution which she supported did not advocate the use of the ballot to the exclusion of violent and unlawful means of bringing about the desired changes in industrial and political conditions, and that, after the constitution of the California Party had been adopted, and this resolution had been voted down and the National Program accepted, she not only remained in the convention, without [274 U.S. 368] protest, until its close, but subsequently manifested her acquiescence by attending as an alternate member of the State Executive Committee and continuing as member of the Communist Labor Party.

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2. It is clear that the Syndicalism Act is not repugnant to the due process clause by reason of vagueness and uncertainty of definition. It has no substantial resemblance to the statutes held void for uncertainty under the Fourteenth and Fifth Amendments in International Harvester Co. v. Kentucky, 234 U.S. 216, 221, and United States v. Cohen Grocery, 255 U.S. 81, 89, because not fixing an ascertainable standard of guilt. The language of § 2, subd. 4, of the Act, under which the plaintiff in error was convicted, is clear, the definition of "criminal syndicalism "specific.

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The Act, plainly, meets the essential requirement of due process that a penal statute be "sufficiently explicit to inform those who are subject to it, what conduct on their part will render them liable to its penalties," and be couched in terms that are not "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Construction Co., 269 U.S. 385, 391. And see United States v. Brewer, 139 U.S. 278, 288; Chicago, etc., Railway v. Dey, (C.C.) 35 Fed. 866, 876; Tozer v. United States, (C.C.) 52 Fed. 917, 919. In Omaechevarria v. Idaho, 246 U.S. 343, 348, in which it was held that a criminal statute prohibiting the grazing of sheep on any "range" previously occupied by cattle "in the usual and customary use" thereof, was not void for indefiniteness because it failed to provide for the ascertainment of the boundaries of a "range" or to determine the length of time necessary to constitute a prior occupation a "usual" one, this Court said:

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Men familiar with range conditions and desirous of observing the law will have little difficulty [274 U.S. 369] in determining what is prohibited by it. Similar expressions are common in the criminal statutes of other States. This statute presents no greater uncertainty or difficulty, in application to necessarily varying facts, than has been repeatedly sanctioned by this court. Nash v. United States, 229 U.S. 373, 377; Miller v. Strahl, 239 U.S. 426, 434.

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So, as applied here, the Syndicalism Act required of the defendant no "prophetic" understanding of its meaning.

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And similar Criminal Syndicalism statutes of other States, some less specific in their definitions, have been held by the State courts not to be void for indefiniteness. State v. Hennessy, 114 Wash. 351, 364; State v. Laundy, 103 Ore. 443, 460; People v. Ruthenberg, 229 Mich. 31, 325. And see Fox v. Washington, 236 U.S. 273, 277; People v. Steelik, 187 Cal. 361, 372; People v. Lloyd, 304 Ill. 23, 34.

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3. Neither is the Syndicalism Act repugnant to the equal protection clause on the ground that, as its penalties are confined to those who advocate a resort to violent and unlawful methods as a means of changing industrial and political conditions, it arbitrarily discriminates between such persons and those who may advocate a resort to these methods as a means of maintaining such conditions.

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It is, settled by repeated decisions of this Court that the equal protection clause does not take from a State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary, and that one who assails the classification must carry the burden of showing that it does not rest upon any reasonable basic, but is essentially arbitrary. Lindsley v. National Cabonic Gas Co., 220 U.S. 61, 78, and case cited. [274 U.S. 370]

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A statute does not violate the equal protection clause merely because it is not all-embracing; Zucht v. King, 260 U.S. 174, 177; James-Dickinson Farm Mortgage Co. v. Harry, 273 U.S. 119. A State may properly direct its legislation against what it deems an existing evil without covering the whole field of possible abuses. Patsone v. Pennsylvania, 232 U.S. 138, 144; Farmers Bank v. Federal Reserve Bank, 262 U.S. 649, 661; James-Dickinson Mortgage Co. v. Harry, supra. The statute must be presumed to be aimed at an evil where experience shows it to be most felt, and to be deemed by the legislature coextensive with the practical need, and is not to be overthrown merely because other instances may be suggested to which also it might have been applied, that being a matter for the legislature to determine unless the case is very clear. Keokee Coke Co. v Taylor, 234 U.S. 224, 227. And it is not open to objection unless the classification is so lacking in any adequate or reasonable basis as to preclude the assumption that it was made in the exercise of the legislative judgment and discretion. Stebbins v. Riley, 268 U.S. 137, 143; Graves v. Minnesota, 272 U.S. 425; Swiss Oil Corporation v. Shanks, 273 U.S. 407.

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The Syndicalism Act is not class legislation; it affects all alike, no matter what their business associations or callings, who come within its terms and do the things prohibited. See State v. Hennessy, supra, 361; State v. Laundy, supra, 460. And there is no substantial basis for the contention that the legislature has arbitrarily or unreasonably limited its application to those advocating the use of violent and unlawful methods to effect changes in industrial and political conditions, there being nothing indicating any ground to apprehend that those desiring to maintain existing industrial and political conditions did or would advocate such methods. That there is a widespread conviction of the necessity for legislation of [274 U.S. 371] this character is indicated by the adoption of similar statutes in several other States.

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4. Nor is the Syndicalism Act, as applied in this case, repugnant to the due process clause as a restraint of the rights of free speech, assembly, and association.

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That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom, and that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question. Gitlow v. New York, 268 U.S. 652, 666-668, and cases cited.

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By enacting the provisions of the Syndicalism Act, the State has declared, through its legislative body, that to knowingly be or become a member of or assist in organizing an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or terrorism as a means of accomplishing industrial or political changes involves such danger to the public peace and the security of the State, that these acts should be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute, Mugler v. Kansas, 123 U.S. 623, 661, and it may not be declared unconstitutional unless it is an arbitrary or unreasonable attempt to exercise the authority vested in the State in the public interest. Great Northern Railway v. Clara City, 246 U.S. 434, 439.

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The essence of the offense denounced by the Act is the combining with others in an association for the accomplishment [274 U.S. 372] of the desired ends through the advocacy and use of criminal and unlawful methods. It partakes of the nature of a criminal conspiracy. See People v. Steelik, supra, 376. That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals is clear. We cannot hold that, as here applied, the Act is an unreasonable or arbitrary exercise of the police power of the State, unwarrantably infringing any right of free speech, assembly or association, or that those persons are protected from punishment by the due process clause who abuse such rights by joining and furthering an organization thus menacing the peace and welfare of the State.

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We find no repugnancy in the Syndicalism Act as applied in this case to either the due process or equal protection clauses of the Fourteenth Amendment on any of the grounds upon which its validity has been here challenged.

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The order dismissing the writ of error will be vacated and set aside, and the judgment of the Court of Appeal Affirmed.

BRANDEIS, J., concurring

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MR. JUSTICE BRANDEIS, concurring.

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Miss Whitney was convicted of the felony of assisting in organizing, in the year 1919, the Communist Labor Party of California, of being a member of it, and of assembling with it. These acts are held to constitute a crime because the party was formed to teach criminal syndicalism. The statute which made these acts a crime restricted the right of free speech and of assembly theretofore existing. The claim is that the statute, as applied, denied to Miss Whitney the liberty guaranteed by the Fourteenth Amendment.

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The felony which the statute created is a crime very unlike the old felony of conspiracy or the old misdemeanor [274 U.S. 373] of unlawful assembly. The mere act of assisting in forming a society for teaching syndicalism, of becoming a member of it, or of assembling with others for that purpose, is given the dynamic quality of crime. There is guilt although the society may not contemplate immediate promulgation of the doctrine. Thus, the accused is to be punished not for contempt, incitement, or conspiracy, but for a step in preparation, which, if it threatens the public order at all, does so only remotely. The novelty in the prohibition introduced is that the statute aims not at the practice of criminal syndicalism, nor even directly at the preaching of it, but at association with those who propose to preach it.

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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. Thus, all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. The right of free speech, the right to teach, and the right of assembly are, of course, fundamental rights. See Meyer v. Nebraska, 262 U.S. 390; Pierce v. Society of Sisters, 268 U.S. 510; Gitlow v. New York, 268 U.S. 652, 666; Farrington v. Tokushige, 273 U.S. 284. These may not be denied or abridged. But, although the rights of free speech and assembly are fundamental, they are not, in their nature, absolute. Their exercise is subject to restriction if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic, or moral. That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent has been settled. See Schenck v. United States, 249 U.S. 47, 52. [274 U.S. 374]

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It is said to be the function of the legislature to determine whether, at a particular time and under the particular circumstances, the formation of, or assembly with, a society organized to advocate criminal syndicalism constitutes a clear and present danger of substantive evil, and that, by enacting the law here in question, the legislature of California determined that question in the affirmative. Compare Gitlow v. New York, 268 U.S. 652, 668-671. The legislature must obviously decide, in the first instance, whether a danger exists which calls for a particular protective measure. But where a statute is valid only in case certain conditions exist, the enactment of the statute cannot alone establish the facts which are essential to its validity. Prohibitory legislation has repeatedly been held invalid, because unnecessary, where the denial of liberty involved was that of engaging in a particular business. 1 The power of the courts to strike down an offending law is no less when the interests involved are not property rights, but the fundamental personal rights of free speech and assembly.

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This Court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present, and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgement of free speech and assembly as the means of protection. To reach sound conclusions on these matters, we must bear in mind why a State is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence. [274 U.S. 375]

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Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that, in its government, the deliberative forces should prevail over the arbitrary. They valued liberty both as an end, and as a means. They believed liberty to be the secret of happiness, and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that, without free speech and assembly, discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty, and that this should be a fundamental principle of the American government. 2 They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence [274 U.S. 376] coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

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Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech, there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. 3 Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger, it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated. [274 U.S. 377]

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Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. 4 Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.

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Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive. Thus, a State might, in the exercise of its police power, make any trespass upon the [274 U.S. 378] land of another a crime, regardless of the results or of the intent or purpose of the trespasser. It might, also, punish an attempt, a conspiracy, or an incitement to commit the trespass. But it is hardly conceivable that this Court would hold constitutional a statute which punished as a felony the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross unenclosed, unposted, wastelands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass. The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly.

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The California Syndicalism Act recites in § 4:

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Inasmuch as this act concerns and is necessary to the immediate preservation of the public peace and safety, for the reason that, at the present time, large numbers of persons are going from place to place in this state advocating, teaching and practicing criminal syndicalism, this act shall take effect upon approval by the Governor.

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This legislative declaration satisfies the requirement of the constitution of the State concerning emergency legislation. In re McDermott, 180 Cal. 783. But it does not preclude enquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution. As a statute, even if not void on its face, may be challenged because invalid as applied, Dahnke-Walker Milling Co. v. Bondrant, 257 U.S. 282, the result of such an enquiry may depend upon the specific facts of the particular case. Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, [274 U.S. 379] it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent, and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature. The legislative declaration, like the fact that the statute was passed and was sustained by the highest court of the State, creates merely a rebuttable presumption that these conditions have been satisfied.

1927, Whitney v. California, 274 U.S. 379

Whether in 1919, when Miss Whitney did the things complained of, there was in California such clear and present danger of serious evil might have been made the important issue in the case. She might have required that the issue be determined either by the court or the jury. She claimed below that the statute, as applied to her, violated the Federal Constitution; but she did not claim that it was void because there was no clear and present danger of serious evil, nor did she request that the existence of these conditions of a valid measure thus restricting the rights of free speech and assembly be passed upon by the court or a jury. On the other hand, there was evidence on which the court or jury might have found that such danger existed. I am unable to assent to the suggestion in the opinion of the Court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment. In the present case, however, there was other testimony which tended to establish the existence of a conspiracy, on the part of members of the International Workers of the World, to commit present serious crimes, and likewise to show that such a conspiracy would be furthered by the activity of the society of which Miss Whitney was a member. Under these circumstances, the judgment of the state court cannot be disturbed. [274 U.S. 380]

1927, Whitney v. California, 274 U.S. 380

Our power of review in this case is limited not only to the question whether a right guaranteed by the Federal Constitution was denied, Murdock v. City of Memphis, 20 Wall. 590; Haire v. Rice, 204 U.S. 291, 301; but to the particular claims duly made below, and denied. Seaboard Air Line Ry. v. Duvall, 225 U.S. 477, 485-488. We lack here the power occasionally exercised on review of judgments of lower federal courts to correct in criminal cases vital errors, although the objection was not taken in the trial court. Wiborg v. United States, 163 U.S. 632, 658-660; Clyatt v. United States, 197 U.S. 207, 221-222. This is a writ of error to a state court. Because we may not enquire into the errors now alleged, I concur in affirming the judgment of the state court.

1927, Whitney v. California, 274 U.S. 380

MR. JUSTICE HOLMES joins in this opinion.

Footnotes

SANFORD, J., lead opinion (Footnotes)

1927, Whitney v. California, 274 U.S. 380

\* 1 Statutes, 1919, c. 58, p. 88.

BRANDEIS, J., concurring (Footnotes)

1927, Whitney v. California, 274 U.S. 380

1. Compare Frost v. R.R. Comm. of California, 271 U.S. 583; Weaver v. Palmer Bros. Co., 270 U.S. 402; Jay Burns Baking Co. v. Bryan, 264 U.S. 504; Pennsylvania Coal Co. v. Mahon, 260 U.S. 393; Adams v. Tanner, 244 U.S. 590.

1927, Whitney v. California, 274 U.S. 380

2. Compare Thomas Jefferson:

1927, Whitney v. California, 274 U.S. 380

We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors and especially when the law stands ready to punish the first criminal act produced by the false reasonings; these are safer corrections than the conscience of the judge.

1927, Whitney v. California, 274 U.S. 380

Quoted by Charles A. Beard, The Nation, July 7, 1926, vol. 123, p. 8. Also in first Inaugural Address:

1927, Whitney v. California, 274 U.S. 380

If there be any among us who would wish to dissolve this union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.

1927, Whitney v. California, 274 U.S. 380

3. Compare Judge Learned Hand in Masses Publishing Co. v. Patten, 244 Fed. 535, 540; Judge Amidon in United States v. Fontana, Bull. Dept. of Justice No. 148, pp. 4-5; Chafee, "Freedom of Speech," pp. 456, 174.

1927, Whitney v. California, 274 U.S. 380

4. Compare Z. Chafee, Jr., "Freedom of Speech", pp. 24-39, 207-221, 228, 262-265; H. J. Laski, "Grammar of Politics", pp. 120, 121; Lord Justice Scrutton in Rex v. Secretary of Home Affairs, Ex parte O'Brien, [1923] 2 K.B. 361, 382:

1927, Whitney v. California, 274 U.S. 380

You really believe in freedom of speech if you are willing to allow it to men whose opinions seem to you wrong and even dangerous; . . .

1927, Whitney v. California, 274 U.S. 380

Compare Warren, "The New Liberty Under the Fourteenth Amendment," 39 Harvard Law Review, 431, 461.

Fiske v. Kansas, 1927

Title: Fiske v. Kansas

Author: U.S. Supreme Court

Date: May 16, 1927

Source: 274 U.S. 380

This case was argued May 3, 1926, and was decided May 16, 1927.

1927, Fiske v. Kansas, 274 U.S. 380

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS

Syllabus

1927, Fiske v. Kansas, 274 U.S. 380

1. A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that, if so applied, the statute was void under the federal Constitution necessarily affirms the validity of the statute as so applied, and the judgment is therefore reviewable by writ of error under § 237 of the Judicial Code. P. 385.

1927, Fiske v. Kansas, 274 U.S. 380

2. The inquiry then is whether the statute is constitutional as applied and enforced in respect to the situation presented. P. 385.

1927, Fiske v. Kansas, 274 U.S. 380

3. This Court will review the finding of facts by a state court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a federal right, and a finding of fact, are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts. P. 385.

1927, Fiske v. Kansas, 274 U.S. 380

4. A Kansas statute defining "criminal syndicalism" as

1927, Fiske v. Kansas, 274 U.S. 380

the doctrine which advocates crime, physical violence, arson, destruction of property, sabotage, or other unlawful acts or methods as a means of accomplishing or effecting industrial or political ends, or as a [274 U.S. 381] means of effecting industrial or political revolution, or for profit . . .

1927, Fiske v. Kansas, 274 U.S. 381

and punishing any person who "advocates, affirmatively suggests, or teaches the duty, necessity, propriety or expediency of crime, criminal syndicalism, or sabotage" was applied by the state court as covering a case where it was charged and proved merely that the defendant secured members in an organzation whose constitution proclaimed

1927, Fiske v. Kansas, 274 U.S. 381

[t]hat the working class and the employing class have nothing in common, and that there can be no peace so long as hunger and want are found among millions of working people and the few who make up the employing class have all the good things of life. Between these two classes, a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production, and abolish the wage system. Instead of the conservative motto, "A fair day's wage for a fair day's work," we must inscribe on our banner the revolutionary watchword, "Abolition of the wage system." By organizing industrially, we are forming the structure of the new society within the shell of the old.

1927, Fiske v. Kansas, 274 U.S. 381

Held: that there being no charge or evidence that the organization advocated any crime, violence, or other unlawful acts or methods as a means of effecting industrial or political changes or revolution, thus applied, the statute is a violation of the Due Process Clause of the Fourteenth Amendment. P. 386.

1927, Fiske v. Kansas, 274 U.S. 381

117 Kan. 69 reversed.

1927, Fiske v. Kansas, 274 U.S. 381

Error to a judgment of the Supreme Court of Kansas which affirmed a conviction of Fiske under the Kansas Criminal Syndicalism Act.

SANFORD, J., lead opinion

1927, Fiske v. Kansas, 274 U.S. 381

MR. JUSTICE SANFORD delivered the opinion of the Court.

1927, Fiske v. Kansas, 274 U.S. 381

The plaintiff in error was tried and convicted in the District Court of Rice County, Kansas, upon an information charging him with violating the Criminal Syndicalism Act of that State. Laws Spec.Sess. 1920, c. 37. The judgment was affirmed by the Supreme Court of the [274 U.S. 382] State, 117 Kan. 69, 230 P. 88; and this writ of error was allowed by the Chief Justice of that court.

1927, Fiske v. Kansas, 274 U.S. 382

The only substantial Federal question presented to and decided by the State court, and which may therefore be reexamined by this Court, is whether the Syndicalism Act, as applied in this case, is repugnant to the due process clause of the Fourteenth Amendment.

1927, Fiske v. Kansas, 274 U.S. 382

The relevant provisions of the Act are:

1927, Fiske v. Kansas, 274 U.S. 382

Section 1. "Criminal syndicalism" is hereby defined to be the doctrine which advocates crime, physical violence, arson, destruction of property, sabotage, or other unlawful acts or methods, as a means of accomplishing or effecting industrial or political ends, or as a means of effecting industrial or political revolution, or for profit. . . .

1927, Fiske v. Kansas, 274 U.S. 382

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1927, Fiske v. Kansas, 274 U.S. 382

Sec. 3. Any person who, by word of mouth, or writing, advocates, affirmatively suggests or teaches the duty, necessity, propriety or expediency of crime, criminal syndicalism, or sabotage . . . is guilty of a felony. . . .

1927, Fiske v. Kansas, 274 U.S. 382

The information charged that the defendant did

1927, Fiske v. Kansas, 274 U.S. 382

by word of mouth and by publicly displaying and circulating certain books and pamphlets and written and printed matter, advocate, affirmatively suggest and teach the duty, necessity, propriety and expediency of crime, criminal syndicalism, and sabotage by . . . knowingly and feloniously persuading, inducing and securing

1927, Fiske v. Kansas, 274 U.S. 382

certain persons "to sign an application for membership in . . . and by issuing to" them "membership cards" in a certain Workers' Industrial Union,

1927, Fiske v. Kansas, 274 U.S. 382

a branch of and component part of the Industrial Workers of the World organization, said defendant then and there knowing that said organization unlawfully teaches, advocates and affirmatively suggests:

1927, Fiske v. Kansas, 274 U.S. 382

That the working class and the employing class have nothing in common, and that there can be no peace so long as hunger and want are found among millions of working people and the few who make up the employing class have all the good things [274 U.S. 383] of life.

1927, Fiske v. Kansas, 274 U.S. 383

And that

1927, Fiske v. Kansas, 274 U.S. 383

Between these two classes a struggle must go on until the workers of the World organize as a class, take possession of the earth and the machinery of production and abolish the wage system.

1927, Fiske v. Kansas, 274 U.S. 383

And that:

1927, Fiske v. Kansas, 274 U.S. 383

Instead of the conservative motto, "A fair day's wages for a fair day's work," we must inscribe on our banner the revolutionary watchword, "Abolition of the wage system." By organizing industrially we are forming the structure of the new society within the shell of the old.

1927, Fiske v. Kansas, 274 U.S. 383

The defendant moved to quash the information as insufficient, for the reason, among others, that it failed to specify the character of the organization in which he was alleged to have secured members. This was overruled.

1927, Fiske v. Kansas, 274 U.S. 383

On the trial, the State offered no evidence as to the doctrines advocated, suggested or taught by the Industrial Workers of the World organization other than a copy of the preamble to the constitution of that organization containing the language set forth and quoted in the information. The defendant, who testified in his own behalf, stated that he was a member of that organization and understood what it taught; that, while it taught the matters set forth in this preamble, it did not teach or suggest that it would obtain industrial control in any criminal way or unlawful manner, but in a peaceful manner; that he did not believe in criminal syndicalism or sabotage, and had not at any time advocated, suggested or taught the duty, necessity, propriety and expediency of crime, criminal syndicalism or sabotage, and did not know that they were advocated, taught or suggested by the organization; and that, in taking the applications for membership in the organization, which contained the preamble to the Constitution, he had explained the principles of the organization so far as he knew them by letting the applicants read this preamble.

1927, Fiske v. Kansas, 274 U.S. 383

The jury was instructed that, before the defendant could be convicted, they must be satisfied from the evidence, beyond a reasonable doubt, that the Industrial Workers [274 U.S. 384] of the World was an organization that taught criminal syndicalism as defined by the Syndicalism Act.

1927, Fiske v. Kansas, 274 U.S. 384

The defendant moved in arrest of judgment upon the ground, among others, that the evidence and the facts stated did not constitute a public offense and substantiate the charges alleged in the information. And he also moved for a new trial upon the grounds, among others, that the verdict was contrary to the law and the evidence and wholly unsupported by the evidence. Both of these motions were overruled.

1927, Fiske v. Kansas, 274 U.S. 384

On the appeal to the Supreme Court of the State, among the errors assigned were, generally, that the court erred in overruling his motions to quash the information, his demurrer to the evidence—which does not appear in the record—and his motions in arrest of judgment and for a new trial; and specifically, that the

1927, Fiske v. Kansas, 274 U.S. 384

court erred in refusing to quash the information, in overruling the demurrer to the evidence, and in overruling the motion in arrest of judgment, because the information and the cause of action attempted to be proved were based upon

1927, Fiske v. Kansas, 274 U.S. 384

the Kansas Syndicalism Act, "which, insofar as it sustains this prosecution, is in violation . . . of the Constitution of the United States, and especially of the Fourteenth Amendment," including the due process clause thereof.

1927, Fiske v. Kansas, 274 U.S. 384

The Supreme Court of the State, in its opinion, said: The information

1927, Fiske v. Kansas, 274 U.S. 384

does not in set phrase allege that the association known as the Industrial Workers of the World advocates, affirmatively suggests or teaches criminal syndicalism, but, when read as a whole, it clearly signifies this, and also that the language quoted (which the evidence shows to be taken from the preamble of the constitution of that organization) was employed to express that doctrine. . . . The language quoted from the I.W.W. preamble need not—in order to sustain the judgment—be held necessarily and as a matter of law, to advocate, [274 U.S. 385] teach or even affirmatively suggest physical violence as a means of accomplishing industrial or political ends. It is open to that interpretation, and is capable of use to convey that meaning. . . . The jury were not required to accept the defendant's testimony as a candid and accurate statement. There was room for them to find, as their verdict shows they did, that the equivocal language of the preamble and of the defendant in explaining it to his prospects was employed to convey and did convey the sinister meaning attributed to it by the state. A final contention is that the statute . . . is obnoxious to the due process of law clause of the Fourteenth Amendment to the Federal Constitution. Statutes penalizing the advocacy of violence in bringing about governmental changes do not violate constitutional guarantees of freedom of speech.

1927, Fiske v. Kansas, 274 U.S. 385

A decision of a State court applying and enforcing a State statute of general scope against a particular transaction as to which there was a distinct and timely insistence that, if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is therefore reviewable by writ of error under section 237 of the Judicial Code. Dahnke-Walker Co. v. Bondurant, 257 U.S. 282, 288. The inquiry then is whether the statute is constitutional as applied and enforced in respect of the situation presented. Ward & Gow v. Krinsky, 259 U.S. 503, 510; Cudahy Co. v. Parramore, 263 U.S. 418, 422. And see St. Louis &c. Railway v. Wynne, 224 U.S. 354, 359.

1927, Fiske v. Kansas, 274 U.S. 385

And this Court will review the finding of facts by a State court where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it, or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal [274 U.S. 386] question, to analyze the facts. Northern Pacific Railway v. North Dakota, 236 U.S. 585, 593; Aetna Life Ins. Co. v. Dunken, 266 U.S. 389, 394, and cases cited.

1927, Fiske v. Kansas, 274 U.S. 386

Here, the State court held the Syndicalism Act not to be repugnant to the due process clause as applied in a case in which the information in effect charged the defendant with violation of the Act in that he had secured members in an organization which taught, advocated and affirmatively suggested the doctrines set forth in the extracts from the preamble to its constitution, and in which there was no evidence that the organization, taught, advocated or suggested any other doctrines. No substantial inference can, in our judgment, be drawn from the language of this preamble that the organization taught, advocated or suggested the duty, necessity, propriety, or expediency of crime, criminal syndicalism, sabotage, or other unlawful acts or methods. There is no suggestion in the preamble that the industrial organization of workers, as a class, for the purpose of getting possession of the machinery of production and abolishing the wage system, was to be accomplished by any other than lawful methods; nothing advocating the overthrow of the existing industrial or political conditions by force, violence or unlawful means. And, standing alone, as it did in this case, there was nothing which warranted the court or jury in ascribing to this language, either as an inference of law or fact, "the sinister meaning attributed to it by the state." In this respect, the language of the preamble is essentially different from that of the manifesto involved in Gitlow v. New York, 268 U.S. 652, 665, and lacks the essential elements which brought that document under the condemnation of the law. And it is not as if the preamble were shown to have been followed by further statements or declarations indicating that it was intended to mean, and to be understood as advocating, that the ends outlined therein would be accomplished or brought about [274 U.S. 387] by violence or other related unlawful acts or methods. Compare Whitney v. California and Burns v. United States, ante, pp. 357, 328.

1927, Fiske v. Kansas, 274 U.S. 387

The result is that the Syndicalism Act has been applied in this case to sustain the conviction of the defendant without any charge or evidence that the organization in which he secured members advocated any crime, violence or other unlawful acts or methods as a means of effecting industrial or political changes or revolution. Thus applied, the Act is an arbitrary and unreasonable exercise of the police power of the State, unwarrantably infringing the liberty of the defendant in violation of the due process clause of the Fourteenth Amendment. The judgment is accordingly reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

1927, Fiske v. Kansas, 274 U.S. 387

Reversed.

Marron v. United States, 1927

Title: Marron v. United States

Author: U.S. Supreme Court

Date: November 21, 1927

Source: 275 U.S. 192

This case was argued October 12, 1927, and was decided November 21, 1927.

1927, Marron v. United States, 275 U.S. 192

CERTIORARI TO THE CIRCUIT COURT OF APPEALS

1927, Marron v. United States, 275 U.S. 192

FOR THE NINTH CIRCUIT

Syllabus

1927, Marron v. United States, 275 U.S. 192

1. The requirement of the Fourth Amendment that warrants shall particularly describe the things to be seized makes general searches under them impossible, and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant. P. 195.

1927, Marron v. United States, 275 U.S. 192

2. Under the Fourth Amendment and Title 18, U.S. Code, a search warrant describing intoxicating liquors and articles for their manufacture does not authorize the seizure of a ledger and bills of account found in a search of the premises specified in the warrant. P. 196.

1927, Marron v. United States, 275 U.S. 192

3. Officers, in making a lawful search of premises where intoxicating liquors are being unlawfully sold, may lawfully arrest, without a warrant, a person there actually in charge of the premises and actually engaged, in the presence of the officers, in a conspiracy to maintain them, and may contemporaneously, as an incident to the arrest, seize account books and papers not described in the search warrant, but which are used in carrying on the criminal enterprise and are found on the premises and in the immediate possession and control of the person arrested. P. 198.

1927, Marron v. United States, 275 U.S. 192

18 F.2d 218 affirmed.

1927, Marron v. United States, 275 U.S. 192

Certiorari, 274 U.S. 727, to a judgment of the Circuit Court of Appeals affirming the conviction of Marron on a second trial for conspiracy to maintain a nuisance in violation of the Prohibition Act. See also 8 F.2d 251. [275 U.S. 193]

BUTLER, J., lead opinion

1927, Marron v. United States, 275 U.S. 193

MR. JUSTICE BUTLER delivered the opinion of the Court.

1927, Marron v. United States, 275 U.S. 193

October 17, 1924, the above-named petitioner, one Birdsall, and five others were indicted in the Southern division of the Northern district of California. It was charged that they conspired to commit various offenses against the National Prohibition Act, including the maintenance of a nuisance at 1249 Polk street, San Francisco. Section 37, Criminal Code (U.S.C. Tit. 18, § 88 ). One defendant was never apprehended; one was acquitted; the rest were found guilty. Of these, Marron, Birdsall, and two others obtained review in the Circuit Court of Appeals. The judgment was affirmed as to all except petitioner. He secured reversal and a new trial. 8 F.2d 251. He was again found guilty, and the conviction was affirmed, 18 F.2d 218.

1927, Marron v. United States, 275 U.S. 193

Petitioner insists that a ledger and certain bills were obtained through an illegal search and seizure and put in evidence against him, in violation of the Fourth and Fifth Amendments. The question arose at the first trial. The Circuit Court of Appeals held that the book and papers were lawfully seized, and admissible. When the second conviction was before it, that court held the earlier decision governed the trial, established the law of the case, and foreclosed further consideration.

1927, Marron v. United States, 275 U.S. 193

For some time prior to October 1, 1924, petitioner was the lessee of the entire second floor of 1249 Polk street. On that day, a prohibition agent obtained from a United States commissioner a warrant for the search of that place, particularly describing the things to be seized—intoxicating liquors and articles for their manufacture. The next day, four prohibition agents went to the place and secured admission by causing the doorbell to be rung. There were six or seven rooms, containing slot machines, [275 U.S. 194] an ice box, tables, chairs, and a cash register. The evidence shows that the place was used for retailing and drinking intoxicating liquors. About a dozen men and women were there, and some of them were being furnished intoxicating liquors. The petitioner was not there; Birdsall was in charge. The agents handed him the warrant and put him under arrest. They searched for and found large quantities of liquor, some of which were in a closet. While in the closet, they noticed a ledger showing inventories of liquors, receipts, expenses, including gifts to police officers, and other things relating to the business. And they found, beside the cash register, a number of bills against petitioner for gas, electric light, water, and telephone service furnished on the premises. They seized the ledger and bills. The return made on the search warrant showed only the seizure of the intoxicating liquors. It did not show the discovery or seizure of the ledger or bills. After indictment and before trial, petitioner applied to the court for the return of the ledger and bills and to suppress evidence concerning them. The application was denied. At the trial, there was evidence to show that petitioner made most of the entries in the ledger, and that he was concerned as proprietor or partner in carrying on the business of selling intoxicating liquors.

1927, Marron v. United States, 275 U.S. 194

It has long been settled that the Fifth Amendment protects every person against incrimination by the use of evidence obtained through search or seizure made in violation of his rights under the Fourth Amendment. Agnello v. United States, 269 U.S. 20, 34, and cases cited.

1927, Marron v. United States, 275 U.S. 194

The petitioner insists that, because the ledger and bills were not described in the warrant and as he was not arrested with them on his person, their seizure violated the Fourth Amendment. The United States contends that the seizure may be justified either as an incident to the execution of the search warrant or as an incident to the [275 U.S. 195] right of search arising from the arrest of Birdsall while in charge of the saloon. Both questions are presented. Lower courts have expressed divers views in respect of searches in similar cases. The brief for the government states that the facts of this case present one of the most frequent causes of appeals in current cases. And for these reasons, we deal with both contentions.

1927, Marron v. United States, 275 U.S. 195

1. The Fourth Amendment declares that the right to be secure against unreasonable searches shall not be violated, and it further declares that:

1927, Marron v. United States, 275 U.S. 195

no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

1927, Marron v. United States, 275 U.S. 195

General searches have long been deemed to violate fundamental rights. It is plain that the amendment forbids them. In Boyd v. United States, 116 U.S. 616, , Mr. Justice Bradley, writing for the Court, said (p. 624):

1927, Marron v. United States, 275 U.S. 195

In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms "unreasonable searches and seizures," it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in this discretion, to search suspected places for smuggled goods, which James Otis pronounced "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book," since they placed "the liberty of every man in the hands of every petty officer."

1927, Marron v. United States, 275 U.S. 195

And in Weeks v. United States, 232 U.S. 383, Mr. Justice Day, writing for the Court, said (p. 391):

1927, Marron v. United States, 275 U.S. 195

The effect of the Fourth Amendment is to put the courts of the United States and federal officials, in the [275 U.S. 196] exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

1927, Marron v. United States, 275 U.S. 196

The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

1927, Marron v. United States, 275 U.S. 196

And the Congress, in enacting the laws governing the issue and execution of this search warrant, was diligent to limit seizures to things particularly described. Section 39 of Title 27, U.S.C. provides that such warrant may issue as provided in title 18, §§ 611 to 631 and § 633.\* Section 613 provides that a search warrant cannot be issued but upon probable cause supported by affidavit naming or describing the person and particularly describing property and place to be searched. Section [275 U.S. 197] 622 requires the officer executing the warrant to give to the person in whose possession the property taken was found a receipt specifying it in detail. Section 623 requires him forthwith to return the warrant to the judge or commissioner with a verified inventory and detailed account of the property taken. Section 624 gives the person from whom the property is taken a right to have a copy of the inventory. Section 626 provides that, if it appears that the property or paper taken is not the same as that described in the warrant, the judge or commissioner must cause it to be returned to the person from whom it was taken. And section 631 provides for punishment of an officer who willfully exceeds his authority in executing a search warrant.

1927, Marron v. United States, 275 U.S. 197

The Government relies on Adams v. New York, 192 U.S. 585. That was a prosecution in a state court. It involved no search or seizure under a law, or by an officer, of the United States. Adams was convicted of having gambling paraphernalia in violation of the Penal Code of New York. It appeared that he occupied an office where were his desk, trunk, tin boxes and other articles. Officers came and stated that they had a search warrant. He said it was not his office. They arrested him, searched the place, found "policy slips," etc., and also papers relating to his private affairs. The policy papers were introduced in evidence. There were endorsements in his handwriting on some of them. Over his objection, the private papers were received to furnish specimens of his writing and to show that he occupied the office. He had taken no steps to secure the return of his private papers or to prevent their use as evidence. But, at the trial, he contended their seizure violated his right to be secure against unreasonable searches, and that their use as evidence compelled him to be a witness against himself in violation of the Fourth and Fifth Amendments and in violation of similar provisions of [275 U.S. 198] the state constitution. The Court of Appeals (176 N.Y. 351) held that the provisions of the federal Constitution did not apply; that the use of the private papers as evidence did not violate the state constitution; declared that it expressed no opinion as to the seizure, and applied the rule that a court, when engaged in trying a criminal case, will not take notice of the manner in which the witnesses obtained papers offered in evidence. And this court, assuming, without deciding, that the Fourth and Fifth Amendments were applicable, held the use of the private papers as evidence did not violate any right safeguarded by these amendments, and, after reference to the procedure at the trial, declared that "courts do not stop to inquire as to the means by which the evidence was obtained." The court did not decide whether the seizure violated the Fourth Amendment. It decided that the admission in evidence of the private papers did not infringe the Fourth or Fifth Amendments. The case does not support the Government's contention. And see Weeks v. United States, supra, 394-396; Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392; Agnello v. United States, supra, 34. And it is clear that the seizure of the ledger and bills in the case now under consideration was not authorized by the warrant. Cf. Kirvin v. United States, 5 F.2d 282, 285; United States v. Kirschenblatt, 16 F.2d 202; Steele v. United States, 267 U.S. 498.

1927, Marron v. United States, 275 U.S. 198

2. When arrested, Birdsall was actually engaged in a conspiracy to maintain, and was actually in charge of, the premises where intoxicating liquors were being unlawfully sold. Every such place is by the National Prohibition Act declared to be a common nuisance the maintenance of which is punishable by fine, imprisonment or both. Section 21, Tit. II, Act of October 28, 1919, 41 Stat. 305, 314 (U.S.C. Tit. 27, § 33). The officers were authorized to arrest for crime being committed in their presence, and [275 U.S. 199] they lawfully arrested Birdsall. They had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise. Agnello v. United States, supra, 30; Carroll v. United States, 267 U.S. 132, 158; Weeks v. United States, supra, 392. The closet in which liquor and the ledger were found was used as a part of the saloon. And, if the ledger was not as essential to the maintenance of the establishment as were bottles, liquors and glasses, it was nonetheless a part of the outfit or equipment actually used to commit the offense. And, while it was not on Birdsall's person at the time of his arrest, it was in his immediate possession and control. The authority of officers to search and seize the things by which the nuisance was being maintained extended to all parts of the premises used for the unlawful purpose. Cf. Sayers v. United States, 2 F.2d 146; Kirvin v. United States, supra; United States v. Kirschenblatt, supra. The bills for gas, electric light, water, and telephone services disclosed items of expense; they were convenient, if not in fact necessary, for the keeping of the accounts; and, as they were so closely related to the business, it is not unreasonable to consider them as used to carry it on. It follows that the ledger and bills were lawfully seized as an incident of the arrest.

1927, Marron v. United States, 275 U.S. 199

Judgment affirmed.

Footnotes

BUTLER, J., lead opinion (Footnotes)

1927, Marron v. United States, 275 U.S. 199

1 Section 25, title 2, Act of October 28, 1919, 41 Stat. 305, 315, is section 39, Title 27, U.S.C. It provides that a search warrant may issue as provided in Title XI of the Espionage Act (June 15, 1917), 40 Stat. 217, 228. Title XI is sections 611 to 631 and § 633, Title 18, U.S.C.

Republican Platform of 1928

Title: Republican Platform of 1928

Author: Republican Party

Date: 1928

Source: National Party Platforms, pp.280-291

National Party Platforms, Republican Platform of 1928, p.280

The Republican Party in national convention assembled presents to the people of the Nation this platform of its principles, based on a record of its accomplishments, and asks and awaits a new vote of confidence. We reaffirm our devotion to the Constitution of the United States and the principles and institution of the American system of representative government.

The National Administration

National Party Platforms, Republican Platform of 1928, p.280

We endorse without qualification the record of the Coolidge administration.

National Party Platforms, Republican Platform of 1928, p.280

The record of the Republican Party is a record of advancement of the nation. Nominees of Republican National conventions have for 52 of the 72 years since the creation of our party been the chief executives of the United States. Under Republican inspiration and largely under Republican executive direction the continent has been bound with steel rails, the oceans and great rivers have been joined by canals, waterways have been deepened and widened for ocean commerce, and with all a high American standard of wage and living has been established.

National Party Platforms, Republican Platform of 1928, p.280

By unwavering adherence to sound principles, through the wisdom of Republican policies, and the capacity of Republican administrations, the foundations have been laid and the greatness and prosperity of the country firmly established.

National Party Platforms, Republican Platform of 1928, p.280

Never has the soundness of Republican policies been more amply demonstrated and the Republican genius for administration been better exemplified than during the last five years under the leadership of President Coolidge.

National Party Platforms, Republican Platform of 1928, p.280

No better guaranty of prosperity and contentment among all our people at home, no more reliable warranty of protection and promotion of American interests abroad can be given than the pledge to maintain and continue the Coolidge policies. This promise we give and will faithfully perform.

National Party Platforms, Republican Platform of 1928, p.280

Under this Administration the country has been lifted from the depths of a great depression to a level of prosperity. Economy has been raised to the dignity of a principle of government. A standard of character in public service has been established under the chief Executive, which has given to the people of the country a feeling of stability and confidence so all have felt encouraged [p.281] to proceed on new undertakings in trade and commerce. A foreign policy based on the traditional American position and carried on with wisdom and steadfastness has extended American influence throughout the world and everywhere promoted and protected American interests.

National Party Platforms, Republican Platform of 1928, p.281

The mighty contribution to general well-being which can be made by a government controlled by men of character and courage, whose abilities are equal to their responsibilities, is self-evident, and should not blind us to the consequences which its loss would entail. Under this administration a high level of wages and living has been established and maintained. The door of opportunity has been opened wide to all. It has given to our people greater comfort and leisure, and the mutual profit has been evident in the increasingly harmonious relations between employers and employees, and the steady rise by promotion of the men in the shops to places at the council tables of the industries. It has also been made evident by the increasing enrollments of our youth in the technical schools and colleges, the increase in savings and life insurance accounts, and by our ability, as a people, to lend the hand of succor not only to those overcome by disasters in our own country but in foreign lands. With all there has been a steady decrease in the burden of Federal taxation, releasing to the people the greatest possible portion of the results of their labor from Government exactions.

National Party Platforms, Republican Platform of 1928, p.281

For the Republican Party we are justified in claiming a major share of the credit for the position which the United States occupies today as the most favored nation on the globe, but it is well to remember that the confidence and prosperity which we enjoy can be shattered, if not destroyed, if this belief in the honesty and sincerity of our government is in any way affected. A continuation of this great public peace of mind now existing, which makes for our material well being, is only possible by holding fast to the plans and principles which have marked Republican control.

National Party Platforms, Republican Platform of 1928, p.281

The record of the present Administration is a guaranty of what may be expected of the next. Our words have been made deeds. We offer not promises but accomplishments.

Public Economy

National Party Platforms, Republican Platform of 1928, p.281

The citizen and taxpayer has a natural right to be protected from unnecessary and wasteful expenditures. This is a rich but also a growing nation with constantly increasing legitimate demands for public funds. If we are able to spend wisely and meet these requirements, it is first necessary that we save wisely. Spending extravagantly not only deprives men through taxation of the fruits of their labor, but oftentimes means the postponement of vitally important public works. We commend President Coolidge for his establishment of this fundamental principle of sound administration and pledge ourselves to live up to the high standard he has set.

Finance and Taxation

National Party Platforms, Republican Platform of 1928, p.281

The record of the United States Treasury under Secretary Mellon stands unrivalled and unsurpassed. The finances of the nation have been managed with sound judgment. The financial policies have yielded immediate and substantial results.

National Party Platforms, Republican Platform of 1928, p.281

In 1921 the credit of our government was at a low ebb. We were burdened with a huge public debt, a load of war taxes, which in variety and weight exceeded anything in our national life, while vast unfunded intergovernmental debts disorganized the economic life of the debtor nations and seriously affected our own by reason of the serious obstacles which they presented to commercial intercourse. This critical situation was evidenced by a serious disturbance in our own life which made for unemployment.

National Party Platforms, Republican Platform of 1928, p.281

Today all these major financial problems have been solved.

The Public Debt

National Party Platforms, Republican Platform of 1928, p.281

In seven years the public debt has been reduced by $6,411,000,000. From March 1921 to September 1928 over eleven billion dollars of securities, bearing high rates of interest, will have been retired or refunded into securities bearing a low rate of interest, while Liberty Bonds, which were selling below par, now command a premium. These operations have resulted in an annual saving in interest charges of not less than $275,000,000, without which the most recent tax reduction measure would not have been made possible. The Republican Party will continue to reduce our National debt as rapidly as possible and in accordance with the provision of existing laws and the present program.[p.282]

Tax Reduction

National Party Platforms, Republican Platform of 1928, p.282

Wise administrative management under Republican control and direction has made possible a reduction of over a billion eight hundred million dollars a year in the tax bill of the American people. Four separate tax reduction measures have been enacted, and millions of those least able to pay have been taken from the tax rolls.

National Party Platforms, Republican Platform of 1928, p.282

Excessive and uneconomic rates have been radically modified, releasing for industrial and payroll expansion and development great sums of money which formerly were paid in taxes to the Federal government.

National Party Platforms, Republican Platform of 1928, p.282

Practically all the war taxes have been eliminated and our tax system has been definitely restored to a peace time basis.

National Party Platforms, Republican Platform of 1928, p.282

We pledge our party to a continuation of these sound policies and to such further reduction of the tax burden as the condition of the Treasury may from time to time permit.

Tariff

National Party Platforms, Republican Platform of 1928, p.282

We reaffirm our belief in the protective tariff as a fundamental and essential principle of the economic life of this nation. While certain provisions of the present law require revision in the light of changes in the world competitive situation since its enactment, the record of the United States since 1922 clearly shows that the fundamental protective principle of the law has been fully justified. It has stimulated the development of our natural resources, provided fuller employment at higher wages through the promotion of industrial activity, assured thereby the continuance of the farmer's major market, and further raised the standards of living and general comfort and well-being of our people. The great expansion in the wealth of our nation during the past fifty years, and particularly in the past decade, could not have been accomplished without a protective tariff system designed to promote the vital interests of all classes.

National Party Platforms, Republican Platform of 1928, p.282

Nor have these manifest benefits been restricted to any particular section of the country. They are enjoyed throughout the land either directly or indirectly. Their stimulus has been felt in industries, farming sections, trade circles, and communities in every quarter. However, we realize that there are certain industries which cannot now successfully compete with foreign producers because of lower foreign wages and a lower cost of living abroad, and we pledge the next Republican Congress to an examination and where necessary a revision of these schedules to the end that American labor in these industries may again command the home market, may maintain its standard of living, and may count upon steady employment in its accustomed field.

National Party Platforms, Republican Platform of 1928, p.282

Adherence to that policy is essential for the continued prosperity of the country. Under it the standard of living of the American people has been raised to the highest levels ever known. Its example has been eagerly followed by the rest of the world whose experts have repeatedly reported with approval the relationship of this policy to our prosperity, with the resultant emulation of that example by other nations.

National Party Platforms, Republican Platform of 1928, p.282

A protective tariff is as vital to American agriculture as it is to American manufacturing. The Republican Party believes that the home market, built up under the protective policy, belongs to the American farmer, and it pledges its support of legislation which will give this market to him to the full extent of his ability to supply it. Agriculture derives large benefits not only directly from the protective duties levied on competitive farm products of foreign origin, but also, indirectly, from the increase in the purchasing power of American workmen employed in industries similarly protected. These benefits extend also to persons engaged in trade, transportation, and other activities.

National Party Platforms, Republican Platform of 1928, p.282

The Tariff Act of 1922 has justified itself in the expansion of our foreign trade during the past five years. Our domestic exports have increased from 3.8 billions of dollars in 1922 to 4.8 billions in 1927. During the same period imports have increased from 3.1 billions to 4.4 billions. Contrary to the prophesies of its critics, the present tariff law has not hampered the natural growth in the exportation of the products of American agriculture, industry, and mining, nor has it restricted the importation of foreign commodities which this country can utilize without jeopardizing its economic structure.

National Party Platforms, Republican Platform of 1928, p.282

The United States is the largest customer in the world today. If we were not prosperous and able to buy, the rest of the world also would suffer. It is inconceivable that American labor will ever consent to the abolition of protection which would bring the American standard of living down to the level of that in Europe, or that the American [p.283] farmer could survive if the enormous consuming power of the people in this country were curtailed and its market at home, if not destroyed, at least seriously impaired.

Foreign Debts

National Party Platforms, Republican Platform of 1928, p.283

In accordance with our settled policy and platform pledges, debt settlement agreements have been negotiated with all of our foreign debtors with the exception of Armenia and Russia. That with France remains as yet unratified. Those with Greece and Austria are before the Congress for necessary authority. If the French Debt Settlement be included, the total amount funded is eleven billion five hundred twenty-two million three hundred fifty-four thousand dollars. We have steadfastly opposed and will continue to oppose cancellation of foreign debts.

National Party Platforms, Republican Platform of 1928, p.283

We have no desire to be oppressive or grasping, but we hold that obligations justly incurred should be honorably discharged. We know of no authority which would permit public officials, acting as trustees, to shift the burden of the War from the shoulders of foreign taxpayers to those of our own people. We believe that the settlements agreed to are fair to both the debtor nation and to the American taxpayer. Our Debt Commission took into full consideration the economic condition and resources of the debtor nations, and were ever mindful that they must be permitted to preserve and improve their economic position, to bring their budgets into balance, to place their currencies and finances on a sound basis, and to improve the standard of living of their people. Giving full weight to these considerations, we know of no fairer test than ability to pay, justly estimated.

National Party Platforms, Republican Platform of 1928, p.283

The people can rely on the Republican Party to adhere to a foreign debt policy now definitely established and clearly understood both at home and abroad.

Settlement of War Claims

National Party Platforms, Republican Platform of 1928, p.283

A satisfactory solution has been found for the question of War Claims. Under the Act, approved by the President on March 10, 1928, a provision was made for the settlement of War Claims of the United States and its citizens against the German, Austrian and Hungarian Governments, and of the claims of the nationals of these governments against the United States; and for the return to its owners of the property seized by the Alien Property Custodian during the War, in accordance with our traditional policy of respect for private property.

Foreign Policies

National Party Platforms, Republican Platform of 1928, p.283

We approve the foreign policies of the Administration of President Coolidge. We believe they express the will of the American people in working actively to build up cordial international understanding that will make world peace a permanent reality. We endorse the proposal of the Secretary of State for a multilateral treaty proposed to the principal powers of the world and open to the signatures of all nations, to renounce war as an instrument of national policy and declaring in favor of pacific settlement of international disputes, the first step in outlawing war. The idea has stirred the conscience of mankind and gained widespread approval, both of governments and of the people, and the conclusion of the treaty will be acclaimed as the greatest single step in history toward the conservation of peace.

National Party Platforms, Republican Platform of 1928, p.283

In the same endeavor to substitute for war the peaceful settlement of international disputes the administration has concluded arbitration treaties in a form more definite and more inclusive than ever before and plans to negotiate similar treaties with all countries willing in this manner to define their policy peacefully to settle justiciable disputes. In connection with these, we endorse the Resolution of the Sixth Pan American Conference held at Havana, Cuba, in 1928, which called a conference on arbitration and conciliation to meet in Washington during the year and express our earnest hope that such conference will greatly further the principles of international arbitration. We shall continue to demand the same respect and protection for the persons and property of American citizens in foreign countries that we cheerfully accord in this country to the persons and property of aliens.

National Party Platforms, Republican Platform of 1928, p.283

The commercial treaties which we have negotiated and those still in the process of negotiation are based on strict justice among nations, equal opportunity for trade and commerce on the most-favored-nation principle and are simplified so as to eliminate the danger of misunderstanding. The object and the aim of the United States is to further the cause of peace, of strict justice between nations with due regard for the rights of others in all international dealings. Out of justice [p.284] grows peace. Justice and consideration have been and will continue to be the inspiration of our nation.

National Party Platforms, Republican Platform of 1928, p.284

The record of the Administration toward Mexico has been consistently friendly and with equal consistency have we upheld American rights. This firm and at the same time friendly policy has brought recognition of the inviolability of legally acquired rights. This condition has been reached without threat or without bluster, through a calm support of the recognized principles of international law with due regard to the rights of a sister sovereign state. The Republican Party will continue to support American rights in Mexico, as elsewhere in the world, and at the same time to promote and strengthen friendship and confidence.

National Party Platforms, Republican Platform of 1928, p.284

There has always been, as there always will be, a firm friendship with Canada. American and Canadian interests are in a large measure identical. Our relationship is one of fine mutual understanding and the recent exchange of diplomatic officers between the two countries is worthy of commendation.

National Party Platforms, Republican Platform of 1928, p.284

The United States has an especial interest in the advancement and progress of all the Latin American countries. The policy of the Republican Party will always be a policy of thorough friendship and co-operation. In the case of Nicaragua, we are engaged in co-operation with the government of that country upon the task of assisting to restore and maintain peace, order and stability, and in no way to infringe upon her sovereign rights. The Marines, now in Nicaragua, are there to protect American lives and property and to aid in carrying out an agreement whereby we have undertaken to do what we can to restore and maintain order and to insure a fair and free election. Our policy absolutely repudiates any idea of conquest or exploitation, and is actuated solely by an earnest and sincere desire to assist a friendly and neighboring state which has appealed for aid in a great emergency. It is the same policy the United States has pursued in other cases in Central America.

National Party Platforms, Republican Platform of 1928, p.284

The Administration has looked with keen sympathy on the tragic events in China. We have avoided interference in the internal affairs of that unhappy nation merely keeping sufficient naval and military forces in China to protect the lives of the Americans who are there on legitimate business and in still larger numbers for nobly humanitarian reasons. America has not been stampeded into making reprisals but, on the other hand, has consistently taken the position of leadership among the nations in a policy of wise moderation. We shall always be glad to be of assistance to China when our duty is clear.

National Party Platforms, Republican Platform of 1928, p.284

The Republican Party maintains the traditional American policy of non-interference in the political affairs of other nations. This government has definitely refused membership in the League of Nations and to assume any obligations under the covenant of the League. On this we stand.

National Party Platforms, Republican Platform of 1928, p.284

In accordance, however, with the long established American practice of giving aid and assistance to other peoples, we have most usefully assisted by co-operation in the humanitarian and technical work undertaken by the League, without involving ourselves in European politics by accepting membership.

National Party Platforms, Republican Platform of 1928, p.284

The Republican Party has always given and will continue to give its support to the development of American foreign trade, which makes for domestic prosperity. During this administration extraordinary strides have been made in opening up new markets for American produce and manufacture. Through these foreign contacts a mutually better international understanding has been reached which aids in the maintenance of world peace.

National Party Platforms, Republican Platform of 1928, p.284

The Republican Party promises a firm and consistent support of American persons and legitimate American interests in all parts of the world. This support will never contravene the rights of other nations. It will always have in mind and support in every way the progressive development of international law, since it is through the operation of just laws, as well as through the growth of friendly understanding, that world peace will be made permanent. To that end the Republican Party pledges itself to aid and assist in the perfection of principles of international law and the settlement of international disputes.

Civil Service

National Party Platforms, Republican Platform of 1928, p.284

The merit system in government service originated with and has been developed by the Republican Party. The great majority of our public service employees are now secured through and maintained in the government service rules. Steps have already been taken by the Republican Congress [p.285] to make the service more attractive as to wages and retirement privileges, and we commend what has been done, as a step in the right direction.

Agriculture

National Party Platforms, Republican Platform of 1928, p.285

The agricultural problem is national in scope and, as such, is recognized by the Republican Party which pledges its strength and energy to the solution of the same. Realizing that many farmers are facing problems more difficult than those which are the portion of many other basic industries, the party is anxious to aid in every way possible. Many of our farmers are still going through readjustments, a relic of the years directly following the great war. All the farmers are being called on to meet new and perplexing conditions created by foreign competition, the complexities of domestic marketing, labor problems, and a steady increase in local and state taxes.

National Party Platforms, Republican Platform of 1928, p.285

The general depression in a great basic industry inevitably reacts upon the conditions in the country as a whole and cannot be ignored. It is a matter of satisfaction that the desire to help in the correction of agricultural wrongs and conditions is not confined to any one section of our country or any particular group.

National Party Platforms, Republican Platform of 1928, p.285

The Republican Party and the Republican Administration, particularly during the last five years, have settled many of the most distressing problems as they have arisen, and the achievements in aid of agriculture are properly a part of this record. The Republican Congresses have been most responsive in the matter of agricultural appropriations, not only to meet crop emergencies, but for the extension and development of the activities of the Department of Agriculture.

National Party Platforms, Republican Platform of 1928, p.285

The protection of the American farmer against foreign farm competition and foreign trade practices has been vigorously carried on by the Department of State. The right of the farmers to engage in collective buying and co-operative selling as provided for by the Capper-Volstead Act of 1922 has been promulgated through the Department of Agriculture and the Department of Justice, which have given most valuable aid and assistance to the heads of the farm organizations. The Treasury Department and the proper committees of Congress have lightened the tax burden on farming communities, and through the Federal Farm Loan System there has been made available to the farmers of the nation one billion eight hundred fifty millions of dollars for loaning purposes at a low rate of interest, and through the Intermediate Credit Banks six hundred fifty-five million dollars of short term credits have been made available to the farmers. The Post Office Department has systematically and generously extended the Rural Free Delivery routes into even the most sparsely settled communities.

National Party Platforms, Republican Platform of 1928, p.285

When a shortage of transportation facilities threatened to deprive the farmers of their opportunity to reach waiting markets overseas, the President, appreciative and sensitive of the condition and the possible loss to the communities, ordered the reconditioning of Shipping Board vessels, thus relieving a great emergency.

National Party Platforms, Republican Platform of 1928, p.285

Last, but not least, the Federal Tariff Commission has at all times shown a willingness under the provisions of the Flexible Tariff Act to aid the farmers when foreign competition, made possible by low wage scales abroad, threatened to deprive our farmers of their domestic markets. Under this Act the President has increased duties on wheat, flour, mill feed, and dairy products. Numerous other farm products are now being investigated by the Tariff Commission.

National Party Platforms, Republican Platform of 1928, p.285

We promise every assistance in the reorganization of the marketing system on sounder and more economical lines and, where diversification is needed, Government financial assistance during the period of transition.

National Party Platforms, Republican Platform of 1928, p.285

The Republican Party pledges itself to the enactment of legislation creating a Federal Farm Board clothed with the necessary powers to promote the establishment of a farm marketing system of farmer-owned-and-controlled stabilization corporations or associations to prevent and control surpluses through orderly distribution.

National Party Platforms, Republican Platform of 1928, p.285

We favor adequate tariff protection to such of our agricultural products as are affected by foreign competition.

National Party Platforms, Republican Platform of 1928, p.285

We favor, without putting the Government into business, the establishment of a Federal system of organization for co-operative and orderly marketing of farm products.

National Party Platforms, Republican Platform of 1928, p.285

The vigorous efforts of this Administration towards broadening our exports market will be continued.

National Party Platforms, Republican Platform of 1928, p.285

The Republican Party pledges itself to the development and enactment of measures which will [p.286] place the agricultural interests of America on a basis of economic equality with other industries to insure its prosperity and success.

Mining

National Party Platforms, Republican Platform of 1928, p.286

The money value of the mineral products of the country is second only to agriculture. We lead the countries of the world in the production of coal, iron, copper and silver. The nation suffers as a whole from any disturbance in the securing of any one of these minerals, and particularly when the coal supply is affected. The mining industry has always been self-sustaining, but we believe that the Government should make every effort to aid the industry by protection by removing any restrictions which may be hampering its development, and by increased technical and economic research investigations which are necessary for its welfare and normal development. The Party is anxious, hopeful, and willing to assist in any feasible plan for the stabilization of the coal mining industry, which will work with justice to the miners, consumers and producers.

Highways

National Party Platforms, Republican Platform of 1928, p.286

Under the Federal Aid Road Act, adopted by the Republican Congress in 1921, and supplemented by generous appropriations each year, road construction has made greater advancement than for many decades previous. Improved highway conditions is a gauge of our rural developments and our commercial activity. We pledge our support to continued appropriations for this work commensurate with our needs and resources.

National Party Platforms, Republican Platform of 1928, p.286

We favor the construction of roads and trails in our national forests necessary to their protection and utilization. In appropriations therefor the taxes which these lands would pay if taxable should be considered as a controlling factor.

Labor

National Party Platforms, Republican Platform of 1928, p.286

The Labor record of the Republican Party stands unchallenged. For 52 of the 72 years of our national existence Republican Administrations have prevailed. Today American labor enjoys the highest wage and the highest standard of living throughout the world. Through the saneness and soundness of Republican rule the American workman is paid a "real wage" which allows comfort for himself and his dependents, and an opportunity and leisure for advancement. It is not surprising that the foreign workman, whose greatest ambition still is to achieve a "living wage," should look with longing towards America as the goal of his desires.

National Party Platforms, Republican Platform of 1928, p.286

The ability to pay such wages and maintain such a standard comes from the wisdom of the protective legislation which the Republican Party has placed upon the national statute books, the tariff which bars cheap foreign-made goods from the American market and provides continuity of employment for our workmen and fair profits for the manufacturers, the restriction of immigration which not only prevents the glutting of our labor market, but allows to our newer immigrants a greater opportunity to secure a footing in their upward struggle.

National Party Platforms, Republican Platform of 1928, p.286

The Party favors freedom in wage contracts, the right of collective bargaining by free and responsible agents of their own choosing, which develops and maintains that purposeful co-operation which gains its chief incentive through voluntary agreement.

National Party Platforms, Republican Platform of 1928, p.286

We believe that injunctions in labor disputes have in some instances been abused and have given rise to a serious question for legislation.

National Party Platforms, Republican Platform of 1928, p.286

The Republican Party pledges itself to continue its efforts to maintain this present standard of living and high wage scale.

Railroads

National Party Platforms, Republican Platform of 1928, p.286

Prompt and effective railroad service at the lowest rates which will provide for its maintenance and allow a reasonable return to the investor so they may be encouraged to advance new capital for acquired developments, has long been recognized by the Republican Party as a necessity of national existence.

National Party Platforms, Republican Platform of 1928, p.286

We believe that the present laws under which our railroads are regulated are soundly based on correct principles, the spirit of which must always be preserved. Because, however, of changes in the public demands, trade conditions and of the character of the competition, which even the greatest railroads are now being called upon to meet, we feel that in the light of this new experience possible modifications or amendments, the need of which is proved, should be considered.

National Party Platforms, Republican Platform of 1928, p.286

The Republican Party initiated and set in operation the Interstate Commerce Commission. This body has developed a system of railroad control and regulation which has given to the transportation [p.287] public an opportunity not only to make suggestions for the improvement of railroad service, but to protest against discriminatory rates or schedules. We commend the work which that body is accomplishing under mandate of law in considering these matters and seeking to distribute equitably the burden of transportation between commodities based on their ability to bear the same.

Merchant Marine

National Party Platforms, Republican Platform of 1928, p.287

The Republican Party stands for the American-built, American-owned, and American-operated merchant marine. The enactment of the White-Jones Bill is in line with a policy which the party has long advocated.

National Party Platforms, Republican Platform of 1928, p.287

Under this measure, substantial aid and encouragement are offered for the building in American yards of new and modern ships which will carry the American flag.

National Party Platforms, Republican Platform of 1928, p.287

The Republican Party does not believe in government ownership or operation, and stands specifically for the sale of the present government vessels to private owners when appropriate arrangements can be made. Pending such a sale, and because private owners are not ready as yet to operate on certain of the essential trade routes, the bill enacted allows the maintenance of these necessary lines under government control till such transfer can be made.

Mississippi Flood Relief and Control

National Party Platforms, Republican Platform of 1928, p.287

The Mississippi Valley flood in which seven hundred thousand of our fellow citizens were placed in peril of life, and which destroyed hundreds of million of dollars' worth of property, was met with energetic action by the Republican Administration.

National Party Platforms, Republican Platform of 1928, p.287

During this disaster the President mobilized every public and private agency under the direction of Secretary Hoover of the Department of Commerce and Dwight Davis, the Secretary of War. Thanks to their joint efforts, a great loss of life was prevented and everything possible was done to rehabilitate the people in their homes and to relieve suffering and distress.

National Party Platforms, Republican Platform of 1928, p.287

Congress promptly passed legislation authorizing the expenditure of $325,000,000 for the construction of flood control works, which it is believed will prevent the recurrence of such a disaster.

Radio

National Party Platforms, Republican Platform of 1928, p.287

We stand for the administration of the radio facilities of the United States under wise and expert government supervision which will:

National Party Platforms, Republican Platform of 1928, p.287

(1) Secure to every home in the nation, whether city or country, the great educational and inspirational values of broadcast programs, adequate in number and varied in character, and

National Party Platforms, Republican Platform of 1928, p.287

(2) Assign the radio communication channels, regional, continental, and transoceanic,—in the best interest of the American business man, the American farmer, and the American public generally.

Waterways

National Party Platforms, Republican Platform of 1928, p.287

Cheaper transportation for bulk goods from the midwest agricultural sections to the sea is recognized by the Republican Party as a vital factor for the relief of agriculture. To that end we favor the continued development in inland and in intra-coastal waterways as an essential part of our transportation system.

National Party Platforms, Republican Platform of 1928, p.287

The Republican Administration during the last four years initiated the systematic development of the Mississippi system of inland transportation lanes, and it proposes to carry on this modernization of transportation to speedy completion. Great improvements have been made during this administration in our harbors, and the party pledges itself to continue these activities for the modernization of our national equipment.

Veterans

National Party Platforms, Republican Platform of 1928, p.287

Our country is honored whenever it bestows relief on those who have faithfully served its flag. The Republican Party, appreciative of this solemn obligation and honor, has made its sentiments evident in Congress. Our expenditures for the benefit of all our veterans now aggregate 750 million dollars annually. Increased hospital facilities have been provided, payments in compensation have more than doubled, and in the matter of rehabilitations, pensions, and insurance, generous provision has been made. The administration of laws dealing with the relief of veterans and their dependents has been a difficult task, but every effort has been made to carry service to the veteran and bring about not only a better and generous interpretation of the law, but a sympathetic consideration of the many problems of the veteran. Full and adequate relief for our disabled veterans is [p.288] our aim, and we commend the action of Congress in further liberalizing the laws applicable to veterans' relief.

Public Utilities

National Party Platforms, Republican Platform of 1928, p.288

Republican Congresses and Administrations have steadily strengthened the Interstate Commerce Commission. The protection of the public from exactions or burdens in rates for service by reason of monopoly control, and the protection of the smaller organizations from suppression in their own field, has been a fundamental idea in all regulatory enactments. While recognizing that at times Federal regulations might be more effective than State regulations in controlling intrastate utilities, the Party favors and has sustained State regulations, believing that such responsibility in the end will create a force of State public opinion which will be more effective in preventing discriminations and injustices.

Conservation

National Party Platforms, Republican Platform of 1928, p.288

We believe in the practical application of the conservation principle by the wise development of our natural resources. The measure of development is our national requirement, and avoidance of waste so that future generations may share in this natural wealth. The Republican policy is to prevent monopolies in the control and utilization of natural resources. Under the General Leasing Law, enacted by a Republican Congress, the ownership of the mineral estate remains in the Government, but development occurs through private capital and energy. Important for the operation of this law is the classification and appraisement of public lands according to their mineral content and value. Over five hundred million acres of public land have been thus classified.

National Party Platforms, Republican Platform of 1928, p.288

To prevent wasteful exploitation of our oil products, President Coolidge appointed an Oil Conservation Board, which is now conducting an inquiry into all phases of petroleum production, in the effort to devise a national policy for the conservation and proper utilization of our oil resources.

National Party Platforms, Republican Platform of 1928, p.288

The Republican Party has been forehanded in assuring the development of water power in accordance with public interest. A policy of permanent public retention of the power sites on public land and power privileges in domestic and international navigable streams, and one-third of the potential water power resources in the United States on public domain, has been assured by the Federal Water Powers Act, passed by a Republican Congress.

Law Enforcement

National Party Platforms, Republican Platform of 1928, p.288

We reaffirm the American Constitutional Doctrine as announced by George Washington in his "Farewell Address," to-wit:

National Party Platforms, Republican Platform of 1928, p.288

"The Constitution which at any time exists until changed by the explicit and authentic act by the whole people is sacredly obligatory upon all."

National Party Platforms, Republican Platform of 1928, p.288

We also reaffirm the attitude of the American people toward the Federal Constitution as declared by Abraham Lincoln:

National Party Platforms, Republican Platform of 1928, p.288

"We are by both duty and inclination bound to stick by that Constitution in all its letter and spirit from beginning to end. I am for the honest enforcement of the Constitution. Our safety, our liberty, depends upon preserving the Constitution of the United States, as our forefathers made it inviolate."

National Party Platforms, Republican Platform of 1928, p.288

The people through the method provided by the Constitution have written the Eighteenth Amendment into the Constitution. The Republican Party pledges itself and its nominees to the observance and vigorous enforcement of this provision of the Constitution.

Honesty in Government

National Party Platforms, Republican Platform of 1928, p.288

We stand for honesty in government, for the appointment of officials whose integrity cannot be questioned. We deplore the fact that any official has ever fallen from this high standard and that certain American citizens of both parties have so far forgotten their duty as citizens as to traffic in national interests for private gain. We have prosecuted and shall always prosecute any official who subordinates his public duty to his personal interest.

National Party Platforms, Republican Platform of 1928, p.288

The Government today is made up of thousands of conscientious, earnest, self-sacrificing men and women, whose single thought is service to the nation.

National Party Platforms, Republican Platform of 1928, p.288

We pledge ourselves to maintain and, if possible, to improve the quality of this great company of Federal employees.[p.289]

Campaign Expenditures

National Party Platforms, Republican Platform of 1928, p.289

Economy, honesty, and decency in the conduct of political campaigns are a necessity if representative government is to be preserved to the people and political parties are to hold the respect of the citizens at large.

National Party Platforms, Republican Platform of 1928, p.289

The Campaign of 1924 complied with all these requirements. It was a campaign, the expenses of which were carefully budgeted in advance, and, which, at the close, presented a surplus and not a deficit.

National Party Platforms, Republican Platform of 1928, p.289

There will not be any relaxing of resolute endeavor to keep our elections clean, honest and free from taint of any kind. The improper use of money in governmental and political affairs is a great national evil. One of the most effective remedies for this abuse is publicity in all matters touching campaign contributions and expenditures. The Republican Party, beginning not later than August 1, 1928, and every 30 days thereafter,—the last publication being not later than five days before the election—will file with the Committees of the House and Senate a complete account of all contributions, the names of the contributors, the amounts expended, and for what purposes, and will at all times hold its records and books touching such matters open for inspection.

National Party Platforms, Republican Platform of 1928, p.289

The party further pledges that it will not create, or permit to be created, any deficit which shall exist at the close of the campaign.

Reclamation

National Party Platforms, Republican Platform of 1928, p.289

Federal reclamation of arid lands is a Republican policy, adopted under President Roosevelt, carried forward by succeeding Republican Presidents, and put upon a still higher plane of efficiency and production by President Coolidge. It has increased the wealth of the nation and made the West more prosperous.

National Party Platforms, Republican Platform of 1928, p.289

An intensive study of the methods and practices of reclamation has been going on for the past four years under the direction of the Department of the Interior in an endeavor to create broader human opportunities and their financial and economic success. The money value of the crops raised on reclamation projects is showing a steady and gratifying increase as well as the number of farms and people who have settled on the lands.

National Party Platforms, Republican Platform of 1928, p.289

The continuation of a surplus of agricultural products in the selling markets of the world has influenced the Department to a revaluation of plans and projects. It has adopted a ten-year program for the completion of older projects and will hold other suggestions in abeyance until the surveys now under way as to the entire scope of the work are completed.

Commercial Aviation

National Party Platforms, Republican Platform of 1928, p.289

Without governmental grants or subsidies and entirely by private initiative, the nation has made extraordinary advances in the field of commercial aviation. Over 20,000 miles of air mail service privately operated are now being flown daily, and the broadening of this service is an almost weekly event. Because of our close relations with our sister republics on the south and our neighbor on the north, it is fitting our first efforts should be to establish an air communication with Latin-America and Canada.

National Party Platforms, Republican Platform of 1928, p.289

The achievements of the aviation branches of the Army and Navy are all to the advantage of commercial aviation, and in the Mississippi flood disaster the work performed by civil and military aviators was of inestimable value.

National Party Platforms, Republican Platform of 1928, p.289

The development of a system of aircraft registration, inspection and control is a credit to the Republican Administration, which, quick to appreciate the importance of this new transportation development, created machinery for its safeguarding.

Immigration

National Party Platforms, Republican Platform of 1928, p.289

The Republican Party believes that in the interest of both native and foreign-born wage-earners, it is necessary to restrict immigration. Unrestricted immigration would result in widespread unemployment and in the breakdown of the American standard of living. Where, however, the law works undue hardships by depriving the immigrant of the comfort and society of those bound by close family ties, such modification should be adopted as will afford relief.

National Party Platforms, Republican Platform of 1928, p.289

We commend Congress for correcting defects for humanitarian reasons and for providing an effective system of examining prospective immigrants in their home countries.

Naturalization

National Party Platforms, Republican Platform of 1928, p.289

The priceless heritage of American citizenship is our greatest gift to our friends of foreign birth. [p.290] Only those who will be loyal to our institutions, who are here in conformity with our laws, and who are in sympathy with our national traditions, ideals, and principles, should be naturalized.

Navy

National Party Platforms, Republican Platform of 1928, p.290

We pledge ourselves to round out and maintain the Navy in all types of combatant ships to the full ratio provided for the United States by the Washington Treaty for the Limitation of Naval Armament and any amendment thereto.

Hawaii-Alaska

National Party Platforms, Republican Platform of 1928, p.290

We favor a continuance for the Territory of Hawaii of Federal assistance in harbor improvements, the appropriation of its share of federal funds and the systematic extension of the settlement of public lands by the Hawaiian race.

National Party Platforms, Republican Platform of 1928, p.290

We indorse the policy of the present administration with reference to Alaska and favor a continuance of the constructive development of the territory.

Women and Public Service

National Party Platforms, Republican Platform of 1928, p.290

Four years ago at the Republican National Convention in Cleveland women members of the National Committee were welcomed into full association and responsibility in party management. During the four years which have passed they have carried with their men associates an equal share of all responsibilities and their contribution to the success of the 1924 campaign is well recognized.

National Party Platforms, Republican Platform of 1928, p.290

The Republican Party, which from the first has sought to bring this development about, accepts wholeheartedly equality on the part of women, and in the public service it can present a record of appointments of women in the legal, diplomatic, judicial, treasury and other governmental departments. We earnestly urge on the women that they participate even more generally than now in party management and activity.

National Defense

National Party Platforms, Republican Platform of 1928, p.290

We believe that in time of war the nation should draft for its defense not only its citizens but also every resource which may contribute to success. The country demands that should the United States ever again be called upon to defend itself by arms, the President be empowered to draft such material resources and such services as may be required, and to stabilize the prices of services and essential commodities, whether utilized in actual warfare or private activity.

Our Indian Citizens

National Party Platforms, Republican Platform of 1928, p.290

National citizenship was conferred upon all native born Indians in the United States by the General Indian Enfranchisement Act of 1924. We favor the creation of a Commission to be appointed by the President including one or more Indian citizens to investigate and report to Congress upon the existing system of the administration of Indian affairs and to report any inconsistencies that may be found to exist between that system and the rights of the Indian citizens of the United States. We also favor the repeal of any law and the termination of any administrative practice which may be inconsistent with Indian citizenship, to the end that the Federal guardianship existing over the persons and properties of Indian tribal communities may not work a prejudice to the personal and property rights of Indian citizens of the United States. The treaty and property rights of the Indians of the United States must be guaranteed to them.

The Negro

National Party Platforms, Republican Platform of 1928, p.290

We renew our recommendation that the Congress enact at the earliest possible date a Federal Anti-Lynching Law so that the full influence of the Federal Government may be wielded to exterminate this hideous crime.

Home Rule

National Party Platforms, Republican Platform of 1928, p.290

We believe in the essential unity of the American people. Sectionalism in any form is destructive of national life. The Federal Government should zealously protect the national and international rights of its citizens. It should be equally zealous to respect and maintain the rights of the States and territories and to uphold the vigor and balance of our dual system of government. The Republican party has always given its energies to supporting the Government in this direction when any question has arisen.

National Party Platforms, Republican Platform of 1928, p.290

There are certain other well-defined Federal obligations such as interstate commerce, the development of rivers and harbors, and the guarding and conservation of national resources. The effort, which, however, is being continually made to have the Federal Government move into the [p.291] field of state activities, has never had, and never will have the support of the Republican Party. In the majority of the cases state citizens and officers are most pressing in their desire to have the Federal Government take over these state functions. This is to be deplored for it weakens the sense of initiative and creates a feeling of dependence which is unhealthy and unfortunate for the whole body politic.

National Party Platforms, Republican Platform of 1928, p.291

There is a real need of restoring the individual and local sense principles; there is a real need of restoring the individual and local sense of responsibility and self-reliance; there is a real need for the people once more to grasp the fundamental fact that under our system of government they are expected to solve many problems themselves through their municipal and State governments, and to combat the tendency that is all too common to turn to the Federal Government as the easiest and least burdensome method of lightening their own responsibilities.

Democratic Platform of 1928

Title: Democratic Platform of 1928

Author: Democratic Party

Date: 1928

Source: National Party Platforms, pp.270-278

National Party Platforms, Democratic Platform of 1928, p.270

We, the Democratic Party in convention assembled, pause to pay our tribute of love and respect to the memory of him who in his life and in his official actions voiced the hopes and aspirations of all good men and women of every race and clime, the former President of the United States, Woodrow Wilson. His spirit moves on and his example and deeds will exalt those who come after us as they have inspired us.

National Party Platforms, Democratic Platform of 1928, p.270

We are grateful that we were privileged to work with him and again pay tribute to his high ideals and accomplishments.

National Party Platforms, Democratic Platform of 1928, p.270

We reaffirm our devotion to the principles of Democratic government formulated by Jefferson and enforced by a long and illustrious line of Democratic Presidents.

National Party Platforms, Democratic Platform of 1928, p.270

We hold that government must function not to centralize our wealth but to preserve equal opportunity so that all may share in our priceless resources; and not confine prosperity to a favored few. We, therefore, pledge the Democratic Party to encourage business, small and great alike; to conserve human happiness and liberty; to break the shackles of monopoly and free business of the nation; to respond to the popular will.

National Party Platforms, Democratic Platform of 1928, p.270

The function of a national platform is to declare general principles and party policies. We do not, therefore, assume to bind our party respecting local issues or details of legislation.

National Party Platforms, Democratic Platform of 1928, p.270

We, therefore, declare the policy of the Democratic Party with regard to the following dominant national issues:

The Rights of the States

National Party Platforms, Democratic Platform of 1928, p.270

We demand that the constitutional rights and powers of the states shall be preserved in their full vigor and virtue. These constitute a bulwark against centralization and the destructive tendencies of the Republican Party.

National Party Platforms, Democratic Platform of 1928, p.270

We oppose bureaucracy and the multiplication of offices and officeholders.

National Party Platforms, Democratic Platform of 1928, p.270

We demand a revival of the spirit of local self-government, without which free institutions cannot be preserved.

Republican Corruption

National Party Platforms, Democratic Platform of 1928, p.270

Unblushingly the Republican Party offers as its record agriculture prostrate, industry depressed, American shipping destroyed, workmen without employment; everywhere disgust and suspicion, and corruption unpunished and unafraid.

National Party Platforms, Democratic Platform of 1928, p.270

Never in the entire history of the country has there occurred in any given period of time or, indeed, in all time put together, such a spectacle of sordid corruption and unabashed rascality as that which has characterized the administration of federal affairs under eight blighting years of Republican rule. Not the revels of reconstruction, nor all the compounded frauds succeeding that [p.271] evil era, have approached in sheer audacity the shocking thieveries and startling depravities of officials high and low in the public service at Washington. From cabinet ministers, with their treasonable crimes, to the cheap vendors of official patronage, from the purchasers of seats in the United States Senate to the vulgar grafters upon alien trust funds, and upon the hospital resources of the disabled veterans of the World War; from the givers and receivers of stolen funds for Republican campaign purposes to the public men who sat by silently consenting and never revealing a fact or uttering a word in condemnation, the whole official organization under Republican rule has become saturated with dishonesty defiant of public opinion and actuated only by a partisan desire to perpetuate its control of the government.

National Party Platforms, Democratic Platform of 1928, p.271

As in the time of Samuel J. Tilden, from whom the presidency was stolen, the watchword of the day should be: "Turn the rascals out." This is the appeal of the Democratic Party to the people of the country. To this fixed purpose should be devoted every effort and applied every resource of the party; to this end every minor difference on non-essential issues should be put aside and a determined and a united fight be made to rescue the government from those who have betrayed their trust by disgracing it.

Economy And Reorganization

National Party Platforms, Democratic Platform of 1928, p.271

The Democratic Party stands for efficiency and economy in the administration of public affairs and we pledge:

National Party Platforms, Democratic Platform of 1928, p.271

(a) Business-like reorganization of all the departments of the government.

National Party Platforms, Democratic Platform of 1928, p.271

(b) Elimination of duplication, waste and overlapping.

National Party Platforms, Democratic Platform of 1928, p.271

(c) Substitution of modern business-like methods for existing obsolete and antiquated conditions.

National Party Platforms, Democratic Platform of 1928, p.271

No economy resulted from the Republican Party rule. The savings they claim take no account of the elimination of expenditures following the end of the World War, the large sums realized from the sale of war materials, nor its failure to supply sufficient funds for the efficient conduct of many important governmental activities.

Financing and Taxation

National Party Platforms, Democratic Platform of 1928, p.271

(a) The Federal Reserve system, created and inaugurated under Democratic auspices, is the greatest legislative contribution to constructive business ever adopted. The administration of the system for the advantage of stock market speculators should cease. It must be administered for the benefit of farmers, wage earners, merchants, manufacturers and others engaged in constructive business.

National Party Platforms, Democratic Platform of 1928, p.271

(b) The taxing function of governments, free or despotic, has for centuries been regarded as the power above all others which requires vigilant scrutiny to the end that it be not exercised for purposes of favor or oppression.

National Party Platforms, Democratic Platform of 1928, p.271

Three times since the World War the Democrats in Congress have favored a reduction of the tax burdens of the people in face of stubborn opposition from a Republican administration; and each time these reductions have largely been made for the relief of those least able to endure the exactions of a Republican fiscal policy. The tax bill of the session recently ended was delayed by Republican tactics and juggled by partisan considerations so as to make impossible a full measure of relief to the greater body of taxpayers. The moderate reductions afforded were grudgingly conceded and the whole proceeding in Congress, dictated as far as possible from the White House and the treasury, denoted the proverbial desire of the Republican Party always to discriminate against the masses in favor of privileged classes.

National Party Platforms, Democratic Platform of 1928, p.271

The Democratic Party avows its belief in the fiscal policy inaugurated by the last Democratic Administration, which provided a sinking fund sufficient to extinguish the nation's indebtedness within a reasonable period of time, without harassing the present and next succeeding generations with tax burdens which, if not unendurable, do in fact check initiative in enterprise and progress in business. Taxes levied beyond the actual requirements of the legally established sinking fund are but an added burden upon the American people, and the surplus thus accumulated in the federal treasury is an incentive to the increasingly extravagant expenditures which have characterized Republican administrations. We, therefore, favor a further reduction of the internal taxes of the people.

Tariff

National Party Platforms, Democratic Platform of 1928, p.271

The Democratic tariff legislation will be based on the following policies:

National Party Platforms, Democratic Platform of 1928, p.272

(a) The maintenance of legitimate business [p.272] and a high standard of wages for American labor.

National Party Platforms, Democratic Platform of 1928, p.272

(b) Increasing the purchasing power of wages and income by the reduction of those monopolistic and extortionate tariff rates bestowed in payment of political debts.

National Party Platforms, Democratic Platform of 1928, p.272

(c) Abolition of log-rolling and restoration of the Wilson conception of a fact-finding tariff commission, quasi-judicial and free from the executive domination which has destroyed the usefulness of the present commission.

National Party Platforms, Democratic Platform of 1928, p.272

(d) Duties that will permit effective competition, insure against monopoly and at the same time produce a fair revenue for the support of government. Actual difference between the cost of production at home and abroad, with adequate safeguard for the wage of the American laborer must be the extreme measure of every tariff rate.

National Party Platforms, Democratic Platform of 1928, p.272

(e) Safeguarding the public against monopoly created by special tariff favors.

National Party Platforms, Democratic Platform of 1928, p.272

(f) Equitable distribution of the benefits and burdens of the tariff among all.

National Party Platforms, Democratic Platform of 1928, p.272

Wage-earner, farmer, stockman, producer and legitimate business in general have everything to gain from a Democratic tariff based on justice to all.

Civil Service

National Party Platforms, Democratic Platform of 1928, p.272

Grover Cleveland made the extension of the merit system a tenet of our political faith. We shall preserve and maintain the civil service.

Agriculture

National Party Platforms, Democratic Platform of 1928, p.272

Deception upon the farmer and stock raiser has been practiced by the Republican Party through false and delusive promises for more than fifty years. Specially favored industries have been artificially aided by Republican legislation. Comparatively little has been done for agriculture and stock raising, upon which national prosperity rests. Unsympathetic inaction with regard to this problem must cease. Virulent hostility of the Republican administration to the advocates of farm relief and denial of the right of farm organizations to lead in the development of farm policy must yield to Democratic sympathy and friendliness.

National Party Platforms, Democratic Platform of 1928, p.272

Four years ago the Republican Party, forced to acknowledge the critical situation, pledged itself to take all steps necessary to bring back a balanced condition between agriculture and other industries and labor. Today it faces the country not only with that pledge unredeemed but broken by the acts of a Republican President, who is primarily responsible for the failure to offer a constructive program to restore equality to agriculture.

National Party Platforms, Democratic Platform of 1928, p.272

While he has had no constructive and adequate program to offer in its stead, he has twice vetoed farm relief legislation and has sought to justify his disapproval of agricultural legislation partly on grounds wholly inconsistent with his acts, making industrial monopolies the beneficiaries of government favor; and in endorsing the agricultural policy of the present administration the Republican Party, in its recent convention, served notice upon the farmer that the so-called protective system is not meant for him; that while it offers protection to the privileged few, it promises continued world prices to the producers of the chief cash crops of agriculture.

National Party Platforms, Democratic Platform of 1928, p.272

We condemn the policy of the Republican Party which promises relief to agriculture only through a reduction of American farm production to the needs of the domestic market. Such a program means the continued deflation of agriculture, the forcing of additional millions from the farms, and the perpetuation of agricultural distress for years to come, with continued bad effects on business and labor throughout the United States.

National Party Platforms, Democratic Platform of 1928, p.272

The Democratic Party recognizes that the problems of production differ as between agriculture and industry. Industrial production is largely under human control, while agricultural production, because of lack of coordination among the 6,500,000 individual farm units, and because of the influence of weather, pests and other causes, is largely beyond human control. The result is that a large crop frequently is produced on a small acreage and a small crop on a large acreage; and, measured in money value, it frequently happens that a large crop brings less than a small crop.

National Party Platforms, Democratic Platform of 1928, p.272

Producers of crops whose total volume exceeds the needs of the domestic market must continue at a disadvantage until the government shall intervene as seriously and as effectively in behalf of the farmer as it has intervened in behalf of labor and industry. There is a need of supplemental legislation for the control and orderly handling of agricultural surpluses, in order that the price of the surplus may not determine the price of the whole crop. Labor has benefited by collective [p.273] bargaining and some industries by tariff. Agriculture must be as effectively aided.

National Party Platforms, Democratic Platform of 1928, p.273

The Democratic Party in its 1924 platform pledged its support to such legislation. It now reaffirms that stand and pledges the united efforts of the legislative and executive branches of government, as far as may be controlled by the party, to the immediate enactment of such legislation, and to such other steps as are necessary to establish and maintain the purchasing power of farm products and the complete economic equality of agriculture.

National Party Platforms, Democratic Platform of 1928, p.273

The Democratic Party has always stood against special privilege and for common equality under the law. It is a fundamental principle of the party that such tariffs as are levied must not discriminate against any industry, class or section. Therefore, we pledge that in its tariff policy the Democratic Party will insist upon equality of treatment between agriculture and other industries.

National Party Platforms, Democratic Platform of 1928, p.273

Farm relief must rest on the basis of an economic equality of agriculture with other industries. To give this equality a remedy must be found which will include among other things:

National Party Platforms, Democratic Platform of 1928, p.273

(a) Credit aid by loans to co-operatives on at least as favorable a basis as the government aid to the merchant marine.

National Party Platforms, Democratic Platform of 1928, p.273

(b) Creation of a federal farm board to assist the farmer and stock raiser in the marketing of their products, as the Federal Reserve Board has done for the banker and business man. When our archaic banking and currency system was revised after its record of disaster and panic under Republican administrations, it was a Democratic Congress in the administration of a Democratic President that accomplished its stabilization through the Federal Reserve Act creating the Federal Reserve Board, with powers adequate to its purpose. Now, in the hour of agriculture's need, the Democratic Party pledges the establishment of a new agricultural policy fitted to present conditions, under the direction of a farm board vested with all the powers necessary to accomplish for agriculture what the Federal Reserve Board has been able to accomplish for finance, in full recognition of the fact that the banks of the country, through voluntary cooperation, were never able to stabilize the financial system of the country until the government powers were invoked to help them.

National Party Platforms, Democratic Platform of 1928, p.273

(e) Reduction through proper government agencies of the spread between what the farmer and stock raiser gets and the ultimate consumer pays, with consequent benefits to both.

National Party Platforms, Democratic Platform of 1928, p.273

(d) Consideration of the condition of agriculture in the formulation of government financial and tax measures.

National Party Platforms, Democratic Platform of 1928, p.273

We pledge the party to foster and develop co-operative marketing associations through appropriate governmental aid. We recognize that experience has demonstrated that members of such associations alone can not successfully assume the full responsibility for a program that benefits all producers alike. We pledge the party to an earnest endeavor to solve this problem of the distribution of the cost of dealing with crop surpluses over the marketed units of the crop whose producers are benefited by such assistance. The solution of this problem would avoid government subsidy, to which the Democratic Party has always been opposed. The solution of this problem will be a prime and immediate concern of a Democratic administration.

National Party Platforms, Democratic Platform of 1928, p.273

We direct attention to the fact that it was a Democratic Congress, in the administration of a Democratic President, which established the federal loan system and laid the foundation for the entire rural credits structure, which has aided agriculture to sustain in part the shock of the policies of two Republican administrations; and we promise thorough-going administration of our rural credits laws, so that the farmers in all sections may secure the maximum benefits intended under these acts.

Mining

National Party Platforms, Democratic Platform of 1928, p.273

Mining is one of the basic industries of this country. We produce more coal, iron and copper than any other country. The value of our mineral production is second only to agriculture. Mining has suffered like agriculture, and from similar causes. It is the duty of our government to foster this industry and to remove the restrictions that destroy its prosperity.

Foreign Policy

National Party Platforms, Democratic Platform of 1928, p.273

The Republican administration has no foreign policy; it has drifted without plan. This great nation can not afford to play a minor role in world politics. It must have a sound and positive foreign policy, not a negative one. We declare for a constructive foreign policy based on these principles:

National Party Platforms, Democratic Platform of 1928, p.273

(a) Outlawry of war and an abhorrence of militarism, conquest and imperialism.

National Party Platforms, Democratic Platform of 1928, p.274

[p.274] (b) Freedom from entangling political alliances with foreign nations.

National Party Platforms, Democratic Platform of 1928, p.274

(c) Protection of American lives and rights. (d) Non-interference with the elections or other internal political affairs of any foreign nation. This principle of non-interference extends to Mexico, Nicaragua and all other Latin-American nations. Interference in the purely internal affairs of Latin-American countries must cease.

National Party Platforms, Democratic Platform of 1928, p.274

(e) Rescue of our country from its present impaired world standing and restoration to its former position as a leader in the movement for international arbitration, conciliation, conference and limitation of armament by international agreement.

National Party Platforms, Democratic Platform of 1928, p.274

(f) International agreements for reduction of all armaments and the end of competitive war preparations, and, in the meantime, the maintenance of an army and navy adequate for national defense.

National Party Platforms, Democratic Platform of 1928, p.274

(g) Full, free and open co-operation with all other nations for the promotion of peace and justice throughout the world.

National Party Platforms, Democratic Platform of 1928, p.274

(h) In our foreign relations this country should stand as a unit, and, to be successful, foreign policies must have the approval and the support of the American people.

National Party Platforms, Democratic Platform of 1928, p.274

(i) Abolition of the practice of the President of entering into and carrying out agreements with a foreign government, either de facto or de jure, for the protection of such government against revolution or foreign attack, or for the supervision of its internal affairs, when such agreements have not been advised and consented to by the Senate, as provided in the Constitution of the United States, and we condemn the administration for carrying out such an unratified agreement that requires us to use our armed forces in Nicaragua.

National Party Platforms, Democratic Platform of 1928, p.274

(j) Recognition that the Monroe Doctrine is a cardinal principle of this government promulgated for the protection of ourselves and our Latin-American neighbors. We shall seek their friendly co-operation in the maintenance of this doctrine.

National Party Platforms, Democratic Platform of 1928, p.274

(k) We condemn the Republican administration for lack of statesmanship and efficiency in negotiating the 1921 treaty for the limitation of armaments, which limited only the construction of battleships and ships of over ten thousand tons. Merely a gesture towards peace, it accomplished no limitation of armament, because it simply substituted one weapon of destruction for another. While it resulted in the destruction of our battleships and the blueprints of battleships of other nations, it placed no limitation upon construction of aircraft, submarines, cruisers, warships under ten thousand tons, poisonous gases or other weapons of destruction. No agreement was ratified with regard to submarines and poisonous gases. The attempt of the President to remedy the failure of 1921 by the Geneva Conference of 1928 was characterized by the same lack of statesmanship and efficiency and resulted in entire failure.

National Party Platforms, Democratic Platform of 1928, p.274

In consequence, the race between nations in the building of unlimited weapons of destruction still goes on and the peoples of the world are still threatened with war and burdened with taxation for additional armament.

Waterpower, Waterways and Flood Control

National Party Platforms, Democratic Platform of 1928, p.274

The federal government and state governments, respectively, now have absolute and exclusive sovereignty and control over enormous water-powers, which constitute one of the greatest assets of the nation. This sovereign title and control must be preserved respectively in the state and federal governments, to the end that the people may be protected against exploitation of this great resource and that water powers may be expeditiously developed under such regulations as will insure to the people reasonable rates and equitable distribution.

National Party Platforms, Democratic Platform of 1928, p.274

We favor and will promote deep waterways from the Great Lakes to the Gulf and to the Atlantic Ocean.

National Party Platforms, Democratic Platform of 1928, p.274

We favor the fostering and building up of water transportation through improvement of inland waterways and removal of discrimination against water transportation. Flood control and the lowering of flood levels are essential to the safety of life and property, and the productivity of our lands, the navigability of our streams, the reclaiming of our wet and overflowed lands. We favor expeditious construction of flood relief works on the Mississippi and Colorado rivers and such reclamation and irrigation projects upon the Colorado River as may be found feasible.

National Party Platforms, Democratic Platform of 1928, p.274

We favor appropriations for prompt co-ordinated surveys by the United States to determine the possibilities of general navigation improvements [p.275] and waterpower development on navigable streams and their tributaries and to secure reliable information as to the most economical navigation improvement, in combination with the most efficient and complete development of waterpower.

National Party Platforms, Democratic Platform of 1928, p.275

We favor the strict enforcement of the Federal Waterpower Act, a Democratic act, and insist that the public interest in waterpower sites, ignored by two Republican administrations, be protected.

National Party Platforms, Democratic Platform of 1928, p.275

Being deeply impressed by the terrible disasters from floods in the Mississippi Valley during 1927, we heartily endorse the Flood Control Act of last May, which recognizes that the flood waters of the Mississippi River and its tributaries constitute a national problem of the gravest character and makes provision for their speedy and effective control. This measure is a continuation and expansion of the policy established by a Democratic Congress in 1917 in the act of that year for controlling floods on the Mississippi and Sacramento rivers. It is a great piece of constructive legislation, and we pledge our party to its vigorous and early enforcement.

Conservation And Reclamation

National Party Platforms, Democratic Platform of 1928, p.275

We shall conserve the natural resources of our country for the benefit of the people and to protect them against waste and monopolization. Our disappearing resources of timber call for a national policy of reforestation. The federal government should improve and develop its public lands so that they may go into private ownership and become subjected to taxation for the support of the states wherein they exist. The Democratic administration will actively, efficiently and economically carry on reclamation projects and make equitable adjustments with the homestead entry-men for the mistakes the government has made, and extend all practical aid to refinance reclamation and drainage projects.

Transportation

National Party Platforms, Democratic Platform of 1928, p.275

Efficient and economical transportation is essential to the prosperity of every industry. Cost of transportation controls the income of every human being and materially affects the cost of living. We must, therefore, promote every form of transportation to a state of highest efficiency. Recognizing the prime importance of air transportation, we shall encourage its development by every possible means. Improved roads are of vital importance not only to commerce and industry, but also to agriculture and rural life. The federal government should construct and maintain at its own expense roads upon its public lands. We reaffirm our approval of the Federal Roads Law, enacted by a Democratic administration. Common carriers, whether by land, water or rail, must be protected in all equal opportunity to compete, so that governmental regulations against exorbitant rates and inefficiency will be aided by competition.

Labor

National Party Platforms, Democratic Platform of 1928, p.275

(a) We favor the principle of collective bargaining, and the Democratic principle that organized labor should choose its own representatives without coercion or interference.

National Party Platforms, Democratic Platform of 1928, p.275

(b) Labor is not a commodity. Human rights must be safeguarded. Labor should be exempt from the operation of anti-trust laws.

National Party Platforms, Democratic Platform of 1928, p.275

(c) We recognize that legislative and other investigations have shown the existence of grave abuse in the issuance of injunctions in labor disputes. No injunctions should be granted in labor disputes except upon proof of threatened irreparable injury and after notice and hearing and the injunction should be confined to those acts which do directly threaten irreparable injury. The expressed purpose of representatives of capital, labor and the bar to devise a plan for the elimination of the present evils with respect to injunctions must be supported and legislation designed to accomplish these ends formulated and passed.

National Party Platforms, Democratic Platform of 1928, p.275

(d) We favor legislation providing that products of convict labor shipped from one state to another shall be subject to laws of the latter state, as though they had been produced therein.

Unemployment

National Party Platforms, Democratic Platform of 1928, p.275

Unemployment is present, widespread and increasing. Unemployment is almost as destructive to the happiness, comfort, and well-being of human beings as war. We expend vast sums of money to protect our people against the evils of war, but no governmental program is anticipated to prevent the awful suffering and economic losses of unemployment. It threatens the well-being of millions of our people and endangers the prosperity of the nation. We favor the adoption by the government, after a study of this subject, of a scientific plan whereby during periods of [p.276] unemployment appropriations shall be made available for the construction of necessary public works and the lessening, as far as consistent with public interests, of government construction work when labor is generally and satisfactorily employed in private enterprise.

National Party Platforms, Democratic Platform of 1928, p.276

Study should also be made of modern methods of industry and a constructive solution found to absorb and utilize the surplus human labor released by the increasing use of machinery.

Accident Compensation to Government Employees

National Party Platforms, Democratic Platform of 1928, p.276

We favor legislation making fair and liberal compensation to government employees who are injured in accident or by occupational disease and to the dependents of such workers as may die as a result thereof.

Federal Employees

National Party Platforms, Democratic Platform of 1928, p.276

Federal employees should receive a living wage based upon American standards of decent living. Present wages are, in many instances, far below that standard. We favor a fair and liberal retirement law for government employees in the classified service.

Veterans

National Party Platforms, Democratic Platform of 1928, p.276

Through Democratic votes, and in spite of two Republican Presidents' opposition, the Congress has maintained America's traditional policy to generously care for the veterans of the World War. In extending them free hospitalization, a statutory award for tuberculosis, a program of progressive hospital construction, and provisions for compensation for the disabled, the widows and orphans, America has surpassed the record of any nation in the history of the world. We pledge the veterans that none of the benefits heretofore accorded by the Wilson administration and the votes of Democrat members of Congress shall be withdrawn; that these will be added to more in accordance with the veterans' and their dependents' actual needs. Generous appropriations, honest management, the removal of vexatious administration delays, and sympathetic assistance for the veterans of all wars, is what the Democratic Party demands and promises.

Women and Children

National Party Platforms, Democratic Platform of 1928, p.276

We declare for equality of women with men in all political and governmental matters.

National Party Platforms, Democratic Platform of 1928, p.276

Children are the chief asset of the nation. Therefore their protection through infancy and childhood against exploitation is an important national duty.

National Party Platforms, Democratic Platform of 1928, p.276

The Democratic Party has always opposed the exploitation of women in industry and has stood for such conditions of work as will preserve their health and safety.

National Party Platforms, Democratic Platform of 1928, p.276

We favor an equal wage for equal service; and likewise favor adequate appropriations for the women's and children's bureau.

Immigration

National Party Platforms, Democratic Platform of 1928, p.276

Laws which limit immigration must be preserved in full force and effect, but the provisions contained in these laws that separate husbands from wives and parents from infant children are inhuman and not essential to the purpose or the efficacy of such laws.

Radio

National Party Platforms, Democratic Platform of 1928, p.276

Government supervision must secure to all the people the advantage of radio communication and likewise guarantee the right of free speech. Official control in contravention of this guarantee should not be tolerated. Governmental control must prevent monopolistic use of radio communication and guarantee equitable distribution and enjoyment thereof.

Coal

National Party Platforms, Democratic Platform of 1928, p.276

Bituminous coal is not only the common base of manufacture, but it is a vital agency in our interstate transportation. The demoralization of this industry, its labor conflicts and distress, its waste of a national resource and disordered public service, demand constructive legislation that will allow capital and labor a fair share of prosperity, with adequate protection to the consuming public.

Congressional Election Reform

National Party Platforms, Democratic Platform of 1928, p.276

We favor legislation to prevent defeated members of both houses of Congress from participating in the sessions of Congress by fixing the date for convening the Congress immediately after the biennial national election.

Law Enforcement

National Party Platforms, Democratic Platform of 1928, p.276

The Republican Party, for eight years in complete control of the government at Washington, presents the remarkable spectacle of feeling compelled in its national platform to promise obedience [p.277] to a provision of the federal Constitution, which it has flagrantly disregarded and to apologize to the country for its failure to enforce laws enacted by the Congress of the United States. Speaking for the national Democracy, this convention pledges the party and its nominees to an honest effort to enforce the eighteenth amendment and all other provisions of the federal Constitution and all laws enacted pursuant thereto.

Campaign Expenditures

National Party Platforms, Democratic Platform of 1928, p.277

We condemn the improper and excessive use of money in elections as a danger threatening the very existence of democratic institutions. Republican expenditures in senatorial primaries and elections have been so exorbitant as to constitute a national scandal. We favor publicity in all matters affecting campaign contributions and expenditures. We shall, beginning not later than August 1, 1928, and every thirty days thereafter, the last publication and filing being not later than five days before the election, publish in the press and file with the appropriate committees of the House and Senate a complete account of all contributions, the names of the contributors, the amounts expended and the purposes for which the expenditures are made, and will, at all times, hold open for public inspection the books and records relating to such matters. In the event that any financial obligations are contracted and not paid, our National Committee will similarly report and publish, at least five days before the election, all details respecting such obligations.

National Party Platforms, Democratic Platform of 1928, p.277

We agree to keep and maintain a permanent record of all campaign contributions and expenditures and to insist that contributions by the citizens of one state to the campaign committees of other states shall have immediate publicity.

Merchant Marine

National Party Platforms, Democratic Platform of 1928, p.277

We reaffirm our support of an efficient, dependable American merchant marine for the carriage of the greater portion of our commerce and for the national defense.

National Party Platforms, Democratic Platform of 1928, p.277

The Democratic Party has consistently and vigorously supported the shipping services maintained by the regional United States Shipping Board in the interest of all ports and all sections of our country, and has successfully opposed the discontinuance of any of these lines. We favor the transfer of these lines gradually to the local private American companies, when such companies can show their ability to take over and permanently maintain the lines. Lines that can not now be transferred to private enterprise should continue to be operated as at present and should be kept in an efficient state by remodeling of some vessels and replacement of others.

National Party Platforms, Democratic Platform of 1928, p.277

We are unalterably opposed to a monopoly in American shipping and are opposed to the operation of any of our services in a manner that would retard the development of any ports or section of our country.

National Party Platforms, Democratic Platform of 1928, p.277

We oppose such sacrifices and favoritism as exhibited in the past in the matter of alleged sales, and insist that the primary purpose of legislation upon this subject be the establishment and maintenance of an adequate American merchant marine.

Armenia

National Party Platforms, Democratic Platform of 1928, p.277

We favor the most earnest efforts on the part of the United States to secure the fulfillment of the promises and engagements made during and following the World War by the United States and the allied powers to Armenia and her people.

Education

National Party Platforms, Democratic Platform of 1928, p.277

We believe with Jefferson and other founders of the Republic that ignorance is the enemy of freedom and that each state, being responsible for the intellectual and moral qualifications of its citizens and for the expenditure of the moneys collected by taxation for the support of its schools, shall use its sovereign right in all matters pertaining to education.

National Party Platforms, Democratic Platform of 1928, p.277

The federal government should offer to the states such counsel, advice, results of research and aid as may be made available through the federal agencies for the general improvement of our schools in view of our national needs.

Monopolies and Anti-Trust Laws

National Party Platforms, Democratic Platform of 1928, p.277

During the last seven years, under Republican rule, the anti-trust laws have been thwarted, ignored and violated so that the country is rapidly becoming controlled by trusts and sinister monopolies formed for the purpose of wringing from the necessaries of life an unrighteous profit. These combinations are formed and conducted in violation of law, encouraged, aided and abetted in their activities by the Republican administration and are driving all small tradespeople and small industrialists out of business. Competition is one [p.278] of the most sacred, cherished and economic rights of the American people. We demand the strict enforcement of the anti-trust laws and the enactment of other laws, if necessary, to control this great menace to trade and commerce, and thus to preserve the right of the small merchant and manufacturer to earn a legitimate profit from his business.

National Party Platforms, Democratic Platform of 1928, p.278

Dishonest business should be treated without influence at the national capitol. Honest business, no matter its size, need have no fears of a Democratic administration. The Democratic Party will ever oppose illegitimate and dishonest. business. It will foster, promote, and encourage all legitimate enterprises.

Canal Zone

National Party Platforms, Democratic Platform of 1928, p.278

We favor the employment of American citizens in the operation and maintenance of the Panama Canal in all positions above the grade of messenger and favor as liberal wages and conditions of employment as prevailed under previous Democratic administrations.

Alaska—Hawaii

National Party Platforms, Democratic Platform of 1928, p.278

We favor the development of Alaska and Hawaii in the traditional American way, through self-government. We favor the appointment of only bona fide residents to office in the territories. We favor the extension and improvement of the mail, air mail, telegraph and radio, agricultural experimenting, highway construction, and other necessary federal activities in the territories.

Puerto Rico

National Party Platforms, Democratic Platform of 1928, p.278

We favor granting to Puerto Rico such territorial form of government as would meet the present economic conditions of the island, and provide for the aspirations of her people, with the view to ultimate statehood accorded to all territories of the United States since the beginning of our government, and we believe any officials appointed to administer the government of such territories should be qualified by previous bona fide residence therein.

Philippines

National Party Platforms, Democratic Platform of 1928, p.278

The Filipino people have succeeded in maintaining a stable government and have thus fulfilled the only condition laid down by the Congress as a prerequisite to the granting of independence. We declare that it is now our duty to keep our promise to these people by granting them immediately the independence which they so honorably covet.

Public Health

National Party Platforms, Democratic Platform of 1928, p.278

The Democratic Party recognizes that not only the productive wealth of the nation but its contentment and happiness depends upon the health of its citizens. It, therefore, pledges itself to enlarge the existing Bureau of Public Health and to do all things possible to stamp out communicable and contagious diseases, and to ascertain preventive means and remedies for these diseases, such as cancer, infantile paralysis and others which heretofore have largely defied the skill of physicians.

National Party Platforms, Democratic Platform of 1928, p.278

We pledge our party to spare no means to lift the apprehension of diseases from the minds of our people, and to appropriate all moneys necessary to carry out this pledge.

Conclusion

National Party Platforms, Democratic Platform of 1928, p.278

Affirming our faith in these principles, we submit our cause to the people.

Olmstead v. United States, 1928

Title: Olmstead v. United States

Author: U.S. Supreme Court

Date: June 4, 1928

Source: 277 U.S. 438

This case was argued February 20 and 21, 1928, and was decided June 4, 1928.

1928, Olmstead v. United States, 277 U.S. 438

CERTIORARI TO THE CIRCUIT COURT OF APPEALS

1928, Olmstead v. United States, 277 U.S. 438

FOR THE NINTH CIRCUIT

Syllabus

1928, Olmstead v. United States, 277 U.S. 438

1. Use in evidence in a criminal trial in a federal court of an incriminating telephone conversation voluntarily conducted by the accused and secretly overheard from a tapped wire by a government officer does not compel the accused to be a witness against himself in violation of the Fifth Amendment. P. 462.

1928, Olmstead v. United States, 277 U.S. 438

2. Evidence of a conspiracy to violate the Prohibition Act was obtained by government officers by secretly tapping the lines of a telephone company connected with the chief office and some of the residences of the conspirators, and thus clandestinely overhearing and recording their telephonic conversations concerning the conspiracy and in aid of its execution. The tapping connections were made in the basement of a large office building and on public streets, and no trespass was committed upon any property of the defendants. Held, that the obtaining of the evidence and its use at the trial did not violate the Fourth Amendment. Pp. 457- 466.

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3. The principle of liberal construction applied to the Amendment to effect its purpose in the interest of liberty will not justify enlarging it beyond the possible practical meaning of "persons, houses, papers, and effects," or so applying "searches and seizures" as to forbid hearing or sight. P. 465.

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4. The policy of protecting the secrecy of telephone messages by making them, when intercepted, inadmissible as evidence in federal criminal trials may be adopted by Congress through legislation, but it is not for the courts to adopt it by attributing an enlarged and unusual meaning to the Fourth Amendment. P. 465.

1928, Olmstead v. United States, 277 U.S. 438

5. A provision in an order granting certiorari limiting the review to a single specific question does not deprive the Court of jurisdiction to decide other questions presented by the record. P. 466.

1928, Olmstead v. United States, 277 U.S. 438

6. The common law of evidence having prevailed in the State of Washington since a time antedating her transformation from a [277 U.S. 439] Territory to a State, those rule apply in the trials of criminal cases in the federal courts sitting in that State. P. 466.

1928, Olmstead v. United States, 277 U.S. 439

7. Under the common law, the admissibility of evidence is not affected by the fact of its having been obtained illegally. P. 467.

1928, Olmstead v. United States, 277 U.S. 439

8. The rule excluding from the federal Courts evidence of crime procured by government officers by methods forbidden by the Fourth and Fifth Amendments is an exception to the common law rule. Id.

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9. Without the sanction of an Act of Congress, federal courts have no discretion to exclude evidence, the admission of which is not unconstitutional, because it was unethically procured. P. 468.

1928, Olmstead v. United States, 277 U.S. 439

10. The statute of Washington, adopted in 1909, making the interception of telephone messages a misdemeanor cannot affect the rules of evidence applicable in federal courts in criminal cases. Id.

1928, Olmstead v. United States, 277 U.S. 439

19 F. (2d) 842, 848, 850, affirmed.

1928, Olmstead v. United States, 277 U.S. 439

CERTIORARI, 276 U.S. 609, to judgments of the Circuit Court of Appeals affirming convictions of conspiracy to violate the Prohibition Act. See 5 F.2d 712; 7 F.2d 756, 760. The order granting certiorari confined the hearing to the question whether the use in evidence of private telephone conversations, intercepted by means of wiretapping, violated the Fourth and Fifth Amendments. [277 U.S. 455]

TAFT, J., lead opinion

1928, Olmstead v. United States, 277 U.S. 455

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

1928, Olmstead v. United States, 277 U.S. 455

These cases are here by certiorari from the Circuit Court of Appeals for the Ninth Circuit. 19 F.2d 842 and 850. The petition in No. 493 was filed August 30, 1927; in Nos. 532 and 533, September 9, 1927. They were granted with the distinct limitation that the hearing should be confined to the single question whether the use of evidence of private telephone conversations between the defendants and others, intercepted by means of wiretapping amounted to a violation of the Fourth and Fifth Amendments.

1928, Olmstead v. United States, 277 U.S. 455

The petitioners were convicted in the District Court for the Western District of Washington of a conspiracy to violate the National Prohibition Act by unlawfully possessing, transporting and importing intoxicating liquors and maintaining nuisances, and by selling intoxicating liquors. Seventy-two others in addition to the petitioners were indicted. Some were not apprehended, some were acquitted, and others pleaded guilty.

1928, Olmstead v. United States, 277 U.S. 455

The evidence in the records discloses a conspiracy of amazing magnitude to import, possess and sell liquor unlawfully. [277 U.S. 456] It involved the employment of not less than fifty persons, of two seagoing vessels for the transportation of liquor to British Columbia, of smaller vessels for coastwise transportation to the State of Washington, the purchase and use of a ranch beyond the suburban limits of Seattle, with a large underground cache for storage and a number of smaller caches in that city, the maintenance of a central office manned with operators, the employment of executives, salesmen, deliverymen, dispatchers, scouts, bookkeepers, collectors and an attorney. In a bad month, sales amounted to $176,000; the aggregate for a year must have exceeded two millions of dollars.

1928, Olmstead v. United States, 277 U.S. 456

Olmstead was the leading conspirator and the general manager of the business. He made a contribution of $10,000 to the capital; eleven others contributed $1,000 each. The profits were divided one-half to Olmstead and the remainder to the other eleven. Of the several offices in Seattle, the chief one was in a large office building. In this there were three telephones on three different lines. There were telephones in an office of the manager in his own home, at the homes of his associates, and at other places in the city. Communication was had frequently with Vancouver, British Columbia. Times were fixed for the deliveries of the "stuff," to places along Puget Sound near Seattle, and from there the liquor was removed and deposited in the caches already referred to

1928, Olmstead v. United States, 277 U.S. 456

One of the chief men was always on duty at the main office to receive orders by telephones and to direct their filling by a corps of men stationed in another room—the " bull pen." The call numbers of the telephones were given to those known to be likely customers. At times, the sales amounted to 200 cases of liquor per day.

1928, Olmstead v. United States, 277 U.S. 456

The information which led to the discovery of the conspiracy and its nature and extent was largely obtained by intercepting messages on the telephones of the conspirators by four federal prohibition officers. Small [277 U.S. 457] wires were inserted along the ordinary telephone wires from the residences of four of the petitioners and those leading from the chief office. The insertions were made without trespass upon any property of the defendants. They were made in the basement of the large office building. The taps from house lines were made in the streets near the houses.

1928, Olmstead v. United States, 277 U.S. 457

The gathering of evidence continued for many months. Conversations of the conspirators, of which refreshing stenographic notes were currently made, were testified to by the government witnesses. They revealed the large business transactions of the partners and their subordinates. Men at the wires heard the orders given for liquor by customers and the acceptances; they became auditors of the conversations between the partners. All this disclosed the conspiracy charged in the indictment. Many of the intercepted conversations were not merely reports, but parts of the criminal acts. The evidence also disclosed the difficulties to which the conspirators were subjected, the reported news of the capture of vessels, the arrest of their men and the seizure of cases of liquor in garages and other places. It showed the dealing by Olmstead, the chief conspirator, with members of the Seattle police, the messages to them which secured the release of arrested members of the conspiracy, and also direct promises to officers of payments as soon as opportunity offered.

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The Fourth Amendment provides—

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The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

1928, Olmstead v. United States, 277 U.S. 457

And the Fifth: "No person . . . shall be compelled, in any criminal case, to be a witness against himself." [277 U.S. 458]

1928, Olmstead v. United States, 277 U.S. 458

It will be helpful to consider the chief cases in this Court which bear upon the construction of these Amendments.

1928, Olmstead v. United States, 277 U.S. 458

Boyd v. United States, 116 U.S. 616, was an information filed by the District Attorney in the federal court in a cause of seizure and forfeiture against thirty-five cases of plate glass, which charged that the owner and importer, with intent to defraud the revenue, made an entry of the imported merchandise by means of a fraudulent or false invoice. It became important to show the quantity and value of glass contained in twenty-nine cases previously imported. The fifth section of the Act of June 22, 1874, provided that, in cases not criminal under the revenue laws, the United States Attorney, whenever he thought an invoice belonging to the defendant would tend to prove any allegation made by the United States, might, by a written motion describing the invoice and setting forth the allegation which he expected to prove, secure a notice from the court to the defendant to produce the invoice, and, if the defendant refused to produce it, the allegations stated in the motion should be taken as confessed, but if produced, the United States Attorney should be permitted, under the direction of the court, to make an examination of the invoice, and might offer the same in evidence. This Act had succeeded the Act of 1867, which provided that, in such cases, the District Judge, on affidavit of any person interested, might issue a warrant to the marshal to enter the premises where the invoice was and take possession of it and hold it subject to the order of the judge. This had been preceded by the Act of 1863 of a similar tenor, except that it directed the warrant to the collector, instead of the marshal. The United States Attorney followed the Act of 1874 and compelled the production of the invoice.

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The court held the Act of 1874 repugnant to the Fourth and Fifth Amendments. As to the Fourth Amendment, Justice Bradley said (page 621): [277 U.S. 459]

1928, Olmstead v. United States, 277 U.S. 459

But, in regard to the Fourth Amendment, it is contended that, whatever might have been alleged against the constitutionality of the acts of 1863 and 1867, that of 1874, under which the order in the present case was made, is free from constitutional objection because it does not authorize the search and seizure of books and papers, but only requires the defendant or claimant to produce them. That is so; but it declares that, if he does not produce them, the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production, for the prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of. It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting, and, to this extent, the proceeding under the Act of 1874 is a mitigation of that which was authorized by the former acts; but it accomplishes the substantial object of those acts in forcing from a party evidence against himself. It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution in all cases in which a search and seizure would be, because it is a material ingredient, and effects the sole object and purpose of search and seizure.

1928, Olmstead v. United States, 277 U.S. 459

Concurring, Mr. Justice Miller and Chief Justice Waite said that they did not think the machinery used to get this evidence amounted to a search and seizure, but they agreed that the Fifth Amendment had been violated.

1928, Olmstead v. United States, 277 U.S. 459

The statute provided an official demand for the production of a paper or document by the defendant for official search and use as evidence on penalty that, by refusal, he should be conclusively held to admit the incriminating [277 U.S. 460] character of the document as charged. It was certainly no straining of the language to construe the search and seizure under the Fourth Amendment to include such official procedure.

1928, Olmstead v. United States, 277 U.S. 460

The next case, and perhaps the most important, is Weeks v. United States, 232 U.S. 383—a conviction for using the mails to transmit coupons or tickets in a lottery enterprise. The defendant was arrested by a police officer without a warrant. After his arrest, other police officers and the United States marshal went to his house, got the key from a neighbor, entered the defendant's room and searched it, and took possession of various papers and articles. Neither the marshal nor the police officers had a search warrant. The defendant filed a petition in court asking the return of all his property. The court ordered the return of everything not pertinent to the charge, but denied return of relevant evidence. After the jury was sworn, the defendant again made objection, and, on introduction of the papers, contended that the search without warrant was a violation of the Fourth and Fifth Amendments, and they were therefore inadmissible. This court held that such taking of papers by an official of the United States, acting under color of his office, was in violation of the constitutional rights of the defendant, and, upon making seasonable application, he was entitled to have them restored, and that, by permitting their use upon the trial, the trial court erred.

1928, Olmstead v. United States, 277 U.S. 460

The opinion cited with approval language of Mr. Justice Field in Ex parte Jackson, 96 U.S. 727, 733, saying that the Fourth Amendment, as a principle of protection, was applicable to sealed letters and packages in the mail, and that, consistently with it, such matter could only be opened and examined upon warrants issued on oath or affirmation particularly describing the thing to be seized.

1928, Olmstead v. United States, 277 U.S. 460

In Silverthorne Lumber Company v. United States, 251 U.S. 385, the defendants were arrested at their homes and [277 U.S. 461] detained in custody. While so detained, representatives of the Government, without authority, went to the office of their company and seized all the books, papers and documents found there. An application for return of the things was opposed by the District Attorney, who produced a subpoena for certain documents relating to the charge in the indictment then on file. The court said:

1928, Olmstead v. United States, 277 U.S. 461

Thus, the case is not that of knowledge acquired through the wrongful act of a stranger, but it must be assumed that the Government planned, or at all events ratified, the whole performance.

1928, Olmstead v. United States, 277 U.S. 461

And it held that the illegal character of the original seizure characterized the entire proceeding, and, under the Weeks case, the seized papers must be restored.

1928, Olmstead v. United States, 277 U.S. 461

In Amos v. United States, 255 U.S. 313, the defendant was convicted of concealing whiskey on which the tax had not been paid. At the trial, he presented a petition asking that private property seized in a search of his house and store "within his curtilage" without warrant should be returned. This was denied. A woman who claimed to be his wife was told by the revenue officers that they had come to search the premises for violation of the revenue law. She opened the door; they entered, and found whiskey. Further searches in the house disclosed more. It was held that this action constituted a violation of the Fourth Amendment, and that the denial of the motion to restore the whiskey and to exclude the testimony was error.

1928, Olmstead v. United States, 277 U.S. 461

In Gouled v. The United States, 255 U.S. 298, the facts were these: Gouled and two others were charged with conspiracy to defraud the United States. One pleaded guilty, and another was acquitted. Gouled prosecuted error. The matter was presented here on questions propounded by the lower court. The first related to the admission in evidence of a paper surreptitiously taken from the office of the defendant by one acting under the direction [277 U.S. 462] of an officer of the Intelligence Department of the Army of the United States. Gouled was suspected of the crime. A private in the U.S. Army, pretending to make a friendly call on him, gained admission to his office and, in his absence, without warrant of any character, seized and carried away several documents. One of these belonging to Gouled, was delivered to the United States Attorney, and by him introduced in evidence. When produced, it was a surprise to the defendant. He had had no opportunity to make a previous motion to secure a return of it. The paper had no pecuniary value, but was relevant to the issue made on the trial. Admission of the paper was considered a violation of the Fourth Amendment.

1928, Olmstead v. United States, 277 U.S. 462

Agnello v. United States, 269 U.S. 20, held that the Fourth and Fifth Amendments were violated by admission in evidence of contraband narcotics found in defendant's house, several blocks distant from the place of arrest, after his arrest, and seized there without a warrant. Under such circumstances, the seizure could not be justified as incidental to the arrest.

1928, Olmstead v. United States, 277 U.S. 462

There is no room in the present case for applying the Fifth Amendment unless the Fourth Amendment was first violated. There was no evidence of compulsion to induce the defendants to talk over their many telephones, They were continually and voluntarily transacting business without knowledge of the interception. Our consideration must be confined to the Fourth Amendment.

1928, Olmstead v. United States, 277 U.S. 462

The striking outcome of the Weeks case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the Amendment. Theretofore, many had supposed that, under the ordinary common law rules, if the tendered evidence was pertinent, the method of obtaining it was [277 U.S. 463] unimportant. This was held by the Supreme Judicial Court of Massachusetts in Commonwealth v. Dana, 2 Metcalf, 329, 337. There it was ruled that the only remedy open to a defendant whose rights under a state constitutional equivalent of the Fourth Amendment had been invaded was by suit and judgment for damages, as Lord Camden held in Entick v. Carrington, 19 Howell State Trials, 1029. Mr. Justice Bradley made effective use of this case in Boyd v. United States. But in the Weeks case, and those which followed, this Court decided with great emphasis, and established as the law for the federal courts, that the protection of the Fourth Amendment would be much impaired unless it was held that not only was the official violator of the rights under the Amendment subject to action at the suit of the injured defendant, but also that the evidence thereby obtained could not be received.

1928, Olmstead v. United States, 277 U.S. 463

The well known historical purpose of the Fourth Amendment, directed against general warrants and writs of assistance, was to prevent the use of governmental force to search a man's house, his person, his papers and his effects, and to prevent their seizure against his will. This phase of the misuse of governmental power of compulsion is the emphasis of the opinion of the Court in the Boyd case. This appears too in the Weeks case, in the Silverthorne case, and in the Amos case.

1928, Olmstead v. United States, 277 U.S. 463

Gouled v. United States carried the inhibition against unreasonable searches and seizures to the extreme limit. Its authority is not to be enlarged by implication, and must be confined to the precise state of facts disclosed by the record. A representative of the Intelligence Department of the Army, having by stealth obtained admission to the defendant's office, seized and carried away certain private papers valuable for evidential purposes. This was held an unreasonable search and seizure within the Fourth Amendment. A stealthy entrance in such circumstances [277 U.S. 464] became the equivalent to an entry by force. There was actual entrance into the private quarters of defendant, and the taking away of something tangible. Here we have testimony only of voluntary conversations secretly overheard.

1928, Olmstead v. United States, 277 U.S. 464

The Amendment itself shows that the search is to be of material things—the person, the house, his papers, or his effects. The description of the warrant necessary to make the proceeding lawful is that it must specify the place to be searched and the person or things to be seized.

1928, Olmstead v. United States, 277 U.S. 464

It is urged that the language of Mr. Justice Field in Ex parte Jackson, already quoted, offers an analogy to the interpretation of the Fourth Amendment in respect of wiretapping. But the analogy fails. The Fourth Amendment may have proper application to a sealed letter in the mail because of the constitutional provision for the Post Office Department and the relations between the Government and those who pay to secure protection of their sealed letters. See Revised Statutes, §§ 3978 to 3988, whereby Congress monopolizes the carriage of letters and excludes from that business everyone else, and § 3929, which forbids any postmaster or other person to open any letter not addressed to himself. It is plainly within the words of the Amendment to say that the unlawful rifling by a government agent of a sealed letter is a search and seizure of the sender's papers or effects. The letter is a paper, an effect, and in the custody of a Government that forbids carriage except under its protection.

1928, Olmstead v. United States, 277 U.S. 464

The United States takes no such care of telegraph or telephone messages as of mailed sealed letters. The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing, and that only. There was no entry of the houses or offices of the defendants. [277 U.S. 465]

1928, Olmstead v. United States, 277 U.S. 465

By the invention of the telephone fifty years ago and its application for the purpose of extending communications, one can talk with another at a far distant place. The language of the Amendment cannot be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office any more than are the highways along which they are stretched.

1928, Olmstead v. United States, 277 U.S. 465

This Court, in Carroll v. United States, 267 U.S. 132, 149, declared:

1928, Olmstead v. United States, 277 U.S. 465

The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted and in a manner which will conserve public interests as well as the interests and rights of individual citizens.

1928, Olmstead v. United States, 277 U.S. 465

Justice Bradley, in the Boyd case, and Justice Clark in the Gouled case, said that the Fifth Amendment and the Fourth Amendment were to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty. But that cannot justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight.

1928, Olmstead v. United States, 277 U.S. 465

Hester v. United States, 265 U.S. 57, held that the testimony of two officers of the law who trespassed on the defendant's land, concealed themselves one hundred yards away from his house, and saw him come out and hand a bottle of whiskey to another was not inadmissible. While there was a trespass, there was no search of person, house, papers or effects. United States v. Lee, 274 U.S. 559, 563; Eversole v. State, 106 Tex.Cr. 567.

1928, Olmstead v. United States, 277 U.S. 465

Congress may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials by direct legislation, [277 U.S. 466] and thus depart from the common law of evidence. But the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment. The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house and messages while passing over them are not within the protection of the Fourth Amendment. Here, those who intercepted the projected voices were not in the house of either party to the conversation.

1928, Olmstead v. United States, 277 U.S. 466

Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house "or curtilage" for the purpose of making a seizure.

1928, Olmstead v. United States, 277 U.S. 466

We think, therefore, that the wiretapping here disclosed did not amount to a search or seizure within the meaning of the Fourth Amendment.

1928, Olmstead v. United States, 277 U.S. 466

What has been said disposes of the only question that comes within the terms of our order granting certiorari in these cases. But some of our number, departing from that order, have concluded that there is merit in the two-fold objection overruled in both courts below—that evidence obtained through intercepting of telephone messages by government agents was inadmissible because the mode of obtaining it was unethical, and a misdemeanor under the law of Washington. To avoid any misapprehension of our views of that objection, we shall deal with it in both of its phases.

1928, Olmstead v. United States, 277 U.S. 466

While a Territory, the English common law prevailed in Washington, and thus continued after her admission in 1889. The rules of evidence in criminal cases in courts of the United States sitting there, consequently, are those of the common law. United States v. Reid, 12 How. 361, [277 U.S. 467] 363, 366; Logan v. United States, 144 U.S. 263, 301; Rosen v. United States, 245 U.S. 467; Withaup v. United States, 127 Fed. 530, 534; Robinson v. United States, 292 Fed. 683, 685.

1928, Olmstead v. United States, 277 U.S. 467

The common law rule is that the admissibility of evidence, is not affected by the illegality of the means by which it was obtained. Professor Greenleaf, in his work on evidence, vol. 1, 12th ed., by Redfield, § 254(a) says:

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It may be mentioned in this place, that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue, to determine that question.

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Mr. Jones, in his work on the same subject, refers to Mr. Greenleaf's statement and says:

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Where there is no violation of a constitutional guaranty, the verity of the above statement is absolute.

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Vol. 5, § 2075, note 3.

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The rule is supported by many English and American cases cited by Jones in vol. 5, 2075, note 3, and § 2076, note 6, and by Wigmore, vol. 4, § 2183. It is recognized by this Court, in Adams v. New York, 192 U.S. 585. The Weeks case announced an exception to the common law rule by excluding all evidence in the procuring of which government officials took part by methods forbidden by the Fourth and Fifth Amendments. Many state courts do not follow the Weeks case. People v. Defore, 242 N.Y. 13. But those who do treat it as an exception to the general common law rule, and required by constitutional limitations. Hughes v. State, 145 Tenn. 544, 551, 566; State v. Wills, 91 W.Va. 659, 677; State v. Slamon, 73 Vt. 212, 214, 215; Gindrat v. People, 138 Ill. 103, 111; People v. Castree, 311 Ill. 392, 396, 397; State v. [277 U.S. 468] Gardner, 77 Mont. 8, 21; State v. Fahn, 53 N.Dak. 203, 210. The common law rule must apply in the case at bar. Nor can we, without the sanction of congressional enactment, subscribe to the suggestion that the courts have a discretion to exclude evidence the admission of which is not unconstitutional because unethically secured. This would be at variance with the common law doctrine generally supported by authority. There is no case that sustains, nor any recognized text book that gives color to, such a view. Our general experience shows that much evidence has always been receivable although not obtained by conformity to the highest ethics. The history of criminal trials shows numerous cases of prosecutions of oath-bound conspiracies for murder, robbery, and other crimes where officers of the law have disguised themselves and joined the organizations, taken the oaths and given themselves every appearance of active members engaged in the promotion of crime, for the purpose of securing evidence. Evidence secured by such means has always been received.

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A standard which would forbid the reception of evidence if obtained by other than nice ethical conduct by government officials would make society suffer and give criminals greater immunity than has been known heretofore. In the absence of controlling legislation by Congress, those who realize the difficulties in bringing offenders to justice may well deem it wise that the exclusion of evidence should be confined to cases where rights under the Constitution would be violated by admitting it.

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The statute of Washington, adopted in 1909, provides (Remington Compiled Statutes, 1922, § 26518) that:

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Every person . . . who shall intercept, read or in any manner interrupt or delay the sending of a message over any telegraph or telephone line . . . shall be guilty of a misdemeanor [277 U.S. 469]

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This statute does not declare that evidence obtained by such interception shall be inadmissible, and, by the common law already referred to, it would not be. People v. McDonald, 177 App.Div. (N.Y.) 806. Whether the State of Washington may prosecute and punish federal officers violating this law and those whose messages were intercepted may sue them civilly is not before us. But clearly a statute, passed twenty years after the admission of the State into the Union cannot affect the rules of evidence applicable in courts of the United States in criminal cases. Chief Justice Taney, in United States v. Reid, 12 How. 361, 363, construing the 34th section of the Judiciary Act, said:

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But it could not be supposed, without very plain words to show it, that Congress intended to give the states the power of prescribing the rules of evidence in trials for offenses against the United States. For this construction would place the criminal jurisprudence of one sovereignty under the control of another.

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See also Withaup v. United States, 127 Fed. 530, 534.

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The judgments of the Circuit Court of Appeals are affirmed. The mandates will go down forthwith under Rule 31.

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Affirmed.

HOLMES, J., separate opinion

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MR. JUSTICE HOLMES:

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My brother BRANDEIS has given this case so exhaustive an examination that I desire to add but a few words. While I do not deny it, I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant, although I fully agree that Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them. Gooch v. Oregon Short line R.R. Co., 258 U.S. 22, 24. But I think, as MR. JUSTICE BRANDEIS says, that, apart from the Constitution, the Government ought not to use [277 U.S. 470] evidence obtained and only obtainable by a criminal act. There is no body of precedents by which we are bound, and which confines us to logical deduction from established rules. Therefore we must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and, to that end, that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crime, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that, in future it will pay for the fruits. We have to choose, and, for my part, I think it a less evil that some criminals should escape than that the Government should play an ignoble part.

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For those who agree with me, no distinction can be taken between the Government as prosecutor and the Government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business, it does not permit the judge to allow such iniquities to succeed. See Silverthorne Lumber Co. v. United States, 251 U.S. 385. And if all that I have said so far be accepted, it makes no difference that, in this case, wiretapping is made a crime by the law of the State, not by the law of the United States. It is true that a State cannot make rules of evidence for Courts of the United States, but the State has authority over the conduct in question, and I hardly think that the United States would appear to greater advantage when paying for an odious crime against State law than when inciting to the disregard of its own. I am aware of the often repeated statement that, in a criminal proceeding, the Court will not take notice of the manner in which papers offered in evidence have been [277 U.S. 471] obtained. But that somewhat rudimentary mode of disposing of the question has been overthrown by Weeks v. United States, 232 U.S. 383, and the cases that have followed it. I have said that we are free to choose between two principles of policy. But if we are to confine ourselves to precedent and logic, the reason for excluding evidence obtained by violating the Constitution seems to me logically to lead to excluding evidence obtained by a crime of the officers of the law.

BRANDEIS, J., dissenting

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MR. JUSTICE BRANDEIS, dissenting.

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The defendants were convicted of conspiring to violate the National Prohibition Act. Before any of the persons now charged had been arrested or indicted, the telephones by means of which they habitually communicated with one another and with others had been tapped by federal officers. To this end, a lineman of long experience in wiretapping was employed on behalf of the Government and at its expense. He tapped eight telephones, some in the homes of the persons charged, some in their offices. Acting on behalf of the Government and in their official capacity, at least six other prohibition agents listened over the tapped wires and reported the messages taken. Their operations extended over a period of nearly five months. The typewritten record of the notes of conversations overheard occupies 775 typewritten pages. By objections seasonably made and persistently renewed, the defendants objected to the admission of the evidence obtained by wiretapping on the ground that the Government's wiretapping constituted an unreasonable search and seizure in violation of the Fourth Amendment, and that the use as evidence of the conversations overheard compelled the defendants to be witnesses against themselves in violation of the Fifth Amendment.

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The Government makes no attempt to defend the methods employed by its officers. Indeed, it concedes [277 U.S. 472] that, if wiretapping can be deemed a search and seizure within the Fourth Amendment, such wiretapping as was practiced in the case at bar was an unreasonable search and seizure, and that the evidence thus obtained was inadmissible. But it relies on the language of the Amendment, and it claims that the protection given thereby cannot properly be held to include a telephone conversation.

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"We must never forget," said Mr. Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, 407, "that it is a constitution we are expounding." Since then, this Court has repeatedly sustained the exercise of power by Congress, under various clauses of that instrument, over objects of which the Fathers could not have dreamed. See Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U.S. 1, 9; Northern Pacific Ry. Co. v. North Dakota, 250 U.S. 135; Dakota Central Telephone Co. v. South Dakota, 250 U.S. 163; Brooks v. United States, 267 U.S. 432. We have likewise held that general limitations on the powers of Government, like those embodied in the due process clauses of the Fifth and Fourteenth Amendments, do not forbid the United States or the States from meeting modern conditions by regulations which, "a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive." Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387; Buck v. Bell, 274 U.S. 200. Clauses guaranteeing to the individual protection against specific abuses of power must have a similar capacity of adaptation to a changing world. It was with reference to such a clause that this Court said, in Weems v. United States, 217 U.S. 349, 373:

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Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions [277 U.S. 473] and purposes. Therefore, a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall "designed to approach immortality as nearly as human institutions can approach it." The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule, a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.

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When the Fourth and Fifth Amendments were adopted, "the form that evil had theretofore taken" had been necessarily simple. Force and violence were then the only means known to man by which a Government could directly effect self-incrimination. It could compel the individual to testify—a compulsion effected, if need be, by torture. It could secure possession of his papers and other articles incident to his private life—a seizure effected, if need be, by breaking and entry. Protection against such invasion of "the sanctities of a man's home and the privacies of life" was provided in the Fourth and Fifth Amendments by specific language. Boyd v. United States, 116 U.S. 616, 630. But "time works changes, brings into existence new conditions and purposes." Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet. [277 U.S. 474]

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Moreover, "in the application of a constitution, our contemplation cannot be only of what has, been but of what may be." The progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping. Ways may someday be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. "That places the liberty of every man in the hands of every petty officer" was said by James Otis of much lesser intrusions than these. 1 To Lord Camden, a far slighter intrusion seemed "subversive of all the comforts of society." 2 Can it be that the Constitution affords no protection against such invasions of individual security?

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A sufficient answer is found in Boyd v. United States, 116 U.S. 616, 627-630, a case that will be remembered as long as civil liberty lives in the United States. This Court there reviewed the history that lay behind the Fourth and Fifth Amendments. We said with reference to Lord Camden's judgment in Entick v. Carrington, 19 Howell's State Trials 1030:

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The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case there before the court, with its adventitious circumstances; they apply to all invasions on the part of the Government and its employes of the sanctities of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, [277 U.S. 475] personal liberty and private property, where that right has never been forfeited by his conviction of some public offence—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence of a crime or to forfeit his goods is within the condemnation of that judgment. In this regard, the Fourth and Fifth Amendments run almost into each other. 3

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In Ex parte Jackson, 96 U.S. 727, it was held that a sealed letter entrusted to the mail is protected by the Amendments. The mail is a public service furnished by the Government. The telephone is a public service furnished by its authority. There is, in essence, no difference between the sealed letter and the private telephone message. As Judge Rudkin said below:

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True, the one is visible, the other invisible; the one is tangible, the other intangible; the one is sealed, and the other unsealed, but these are distinctions without a difference.

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The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded and all conversations [277 U.S. 476] between them upon any subject, and, although proper, confidential and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wiretapping.

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Time and again, this Court in giving effect to the principle underlying the Fourth Amendment, has refused to place an unduly literal construction upon it. This was notably illustrated in the Boyd case itself. Taking language in its ordinary meaning, there is no "search" or "seizure" when a defendant is required to produce a document in the orderly process of a court's procedure. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" would not be violated, under any ordinary construction of language, by compelling obedience to a subpoena. But this Court holds the evidence inadmissible simply because the information leading to the issue of the subpoena has been unlawfully secured. Silverthorne Lumber Co. v. United States, 251 U.S. 385. Literally, there is no "search" or "seizure" when a friendly visitor abstracts papers from an office; yet we held in Gouled v. United States, 255 U.S. 298, that evidence so obtained could not be used. No court which looked at the words of the Amendment, rather than at its underlying purpose, would hold, as this Court did in Ex parte Jackson, 96 U.S. 727, 733, that its protection extended to letters in the mails. The provision against self-incrimination in the Fifth Amendment has been given an equally broad construction. The language is: "No person shall be compelled in any criminal case to be a witness against himself." Yet we have held not only that the [277 U.S. 477] protection of the Amendment extends to a witness before a grand jury, although he has not been charged with crime, Counselman v. Hitchcock, 142 U.S. 547, 562, 586, but that:

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[i]t applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant.

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McCarthy v. Arndsten, 266 U.S. 34, 40. The narrow language of the Amendment has been consistently construed in the light of its object,

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to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard.

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Counselman v. Hitchcock, supra, p. 562.

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Decisions of this Court applying the principle of the Boyd case have settled these things. Unjustified search and seizure violates the Fourth Amendment, whatever the character of the paper; 4 whether the paper when taken by the federal officers was in the home, 5 in an office, 6 or elsewhere; 7 whether the taking was effected by force, 8 by [277 U.S. 478] fraud, 9 or in the orderly process of a court's procedure. 10 From these decisions, it follows necessarily that the Amendment is violated by the officer's reading the paper without a physical seizure, without his even touching it, and that use, in any criminal proceeding, of the contents of the paper so examined—as where they are testified to by a federal officer who thus saw the document, or where, through knowledge so obtained, a copy has been procured elsewhere 11—any such use constitutes a violation of the Fifth Amendment.

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The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights, and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence [277 U.S. 479] in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

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Applying to the Fourth and Fifth Amendments the established rule of construction, the defendants' objections to the evidence obtained by wiretapping must, in my opinion, be sustained. It is, of course, immaterial where the physical connection with the telephone wires leading into the defendants' premises was made. And it is also immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding. 12

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Independently of the constitutional question, I am of opinion that the judgment should be reversed. By the laws of Washington, wiretapping is a crime. 13 Pierce's [277 U.S. 480] Code, 1921, § 8976(18). To prove its case, the Government was obliged to lay bare the crimes committed by its officers on its behalf. A federal court should not permit such a prosecution to continue. Compare Harkin v. Brundage, 276 U.S. 36, id., 604. [277 U.S. 481]

1928, Olmstead v. United States, 277 U.S. 481

The situation in the case at bar differs widely from that presented in Burdeau v. McDowell, 256 U.S. 465. There, only a single lot of papers was involved. They had been obtained by a private detective while acting on behalf of a private party; without the knowledge of any federal official; long before anyone had thought of instituting a [277 U.S. 482] federal prosecution. Here, the evidence obtained by crime was obtained at the Government's expense, by its officers, while acting on its behalf; the officers who committed these crimes are the same officers who were charged with the enforcement of the Prohibition Act; the crimes of these officers were committed for the purpose of securing evidence with which to obtain an indictment and to secure a conviction. The evidence so obtained constitutes the warp and woof of the Government's case. The aggregate of the Government evidence occupies 306 pages of the printed record. More than 210 of them are filled by recitals of the details of the wiretapping and of facts ascertained thereby. 14 There is literally no other evidence of guilt on the part of some of the defendants except that illegally obtained by these officers. As to nearly all the defendants (except those who admitted guilt), the evidence relied upon to secure a conviction consisted mainly of that which these officers had so obtained by violating the state law.

1928, Olmstead v. United States, 277 U.S. 482

As Judge Rudkin said below:

1928, Olmstead v. United States, 277 U.S. 482

Here we are concerned with neither eavesdroppers nor thieves. Nor are we concerned with the acts of private individuals. . . . We are concerned only with the acts of federal agents whose powers are limited and controlled by the Constitution of the United States.

1928, Olmstead v. United States, 277 U.S. 482

The Eighteenth Amendment has not, in terms, empowered Congress to authorize anyone to violate the criminal laws of a State. And Congress has never purported to do so. Compare Maryland v. Soper, 270 U.S. 9. The terms of appointment of federal prohibition agents do not purport to confer upon them authority to violate any criminal law. Their superior officer, the Secretary of the Treasury, has not instructed them to commit [277 U.S. 483] crime on behalf of the United States. It may be assumed that the Attorney General of the United States did not give any such instruction. 15

1928, Olmstead v. United States, 277 U.S. 483

When these unlawful acts were committed, they were crimes only of the officers individually. The Government was innocent, in legal contemplation, for no federal official is authorized to commit a crime on its behalf. When the Government, having full knowledge, sought, through the Department of Justice, to avail itself of the fruits of these acts in order to accomplish its own ends, it assumed moral responsibility for the officers' crimes. Compare The Paquete Habana, 189 U.S. 453, 465; O'Reilly deCamara v. Brooke, 209 U.S. 45, 52; Dodge v. United States, 272 U.S. 530, 532; Gambino v. United States, 275 U.S. 310. And if this Court should permit the Government, by means of its officers' crimes, to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification. If so, the Government itself would become a lawbreaker.

1928, Olmstead v. United States, 277 U.S. 483

Will this Court, by sustaining the judgment below, sanction such conduct on the part of the Executive? The governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands. 16 The maxim of unclean hands comes [277 U.S. 484] from courts of equity. 17 But the principle prevails also in courts of law. Its common application is in civil actions between private parties. Where the Government is the actor, the reasons for applying it are even more persuasive. Where the remedies invoked are those of the criminal law, the reasons are compelling. 18

1928, Olmstead v. United States, 277 U.S. 484

The door of a court is not barred because the plaintiff has committed a crime. The confirmed criminal is as much entitled to redress as his most virtuous fellow citizen; no record of crime, however long, makes one an outlaw. The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. 19 Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. The rule is one, not of action, but of inaction. It is sometimes [277 U.S. 485] spoken of as a rule of substantive law. But it extends to matters of procedure, as well. 20 A defense may be waived. It is waived when not pleaded. But the objection that the plaintiff comes with unclean hands will be taken by the court itself. 21 It will be taken despite the wish to the contrary of all the parties to the litigation. The court protects itself.

1928, Olmstead v. United States, 277 U.S. 485

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that, in the administration of the criminal law, the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

BUTLER, J., dissenting

1928, Olmstead v. United States, 277 U.S. 485

MR. JUSTICE BUTLER, dissenting.

1928, Olmstead v. United States, 277 U.S. 485

I sincerely regret that I cannot support the opinion and judgments of the Court in these cases. [277 U.S. 486]

1928, Olmstead v. United States, 277 U.S. 486

The order allowing the writs of certiorari operated to limit arguments of counsel to the constitutional question. I do not participate in the controversy that has arisen here as to whether the evidence was inadmissible because the mode of obtaining it was unethical and a misdemeanor under state law. I prefer to say nothing concerning those questions, because they are not within the jurisdiction taken by the order.

1928, Olmstead v. United States, 277 U.S. 486

The Court is required to construe the provision of the Fourth Amendment that declares:

1928, Olmstead v. United States, 277 U.S. 486

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not-be violated.

1928, Olmstead v. United States, 277 U.S. 486

The Fifth Amendment prevents the use of evidence obtained through searches and seizures in violation of the rights of the accused protected by the Fourth Amendment.

1928, Olmstead v. United States, 277 U.S. 486

The single question for consideration is this: may the Government, consistently with that clause, have its officers whenever they see fit, tap wires, listen to, take down, and report the private messages and conversations transmitted by telephones?

1928, Olmstead v. United States, 277 U.S. 486

The United States maintains that

1928, Olmstead v. United States, 277 U.S. 486

The "wiretapping" operations of the federal prohibition agents were not a "search and seizure" in violation of the security of the "persons, houses, papers and effects" of the petitioners in the constitutional sense or within the intendment of the Fourth Amendment.

1928, Olmstead v. United States, 277 U.S. 486

The Court, adhering to and reiterating the principles laid down and applied in prior decisions\* construing the search and seizure clause, in substance adopts the contention of the Government.

1928, Olmstead v. United States, 277 U.S. 486

The question at issue depends upon a just appreciation of the facts. [277 U.S. 487]

1928, Olmstead v. United States, 277 U.S. 487

Telephones are used generally for transmission of messages concerning official, social, business and personal affairs, including communications that are private and privileged—those between physician and patient, lawyer and client, parent and child, husband and wife. The contracts between telephone companies and users contemplate the private use of the facilities employed in the service. The communications belong to the parties between whom they pass. During their transmission, the exclusive use of the wire belongs to the persons served by it. Wiretapping involves interference with the wire while being used. Tapping the wires and listening in by the officers literally constituted a search for evidence. As the communications passed, they were heard and taken down.

1928, Olmstead v. United States, 277 U.S. 487

In Boyd v. United States, 116 U.S. 616, there was no "search or seizure" within the literal or ordinary meaning of the words, nor was Boyd—if these constitutional provisions were read strictly according to the letter—compelled in a "criminal case" to be a "witness" against himself. The statute, there held unconstitutional because repugnant to the search and seizure clause, merely authorized judgment for sums claimed by the Government on account of revenue if the defendant failed to produce his books, invoices and papers. The principle of that case has been followed, developed and applied in this and many other courts. And it is in harmony with the rule of liberal construction that always has been applied to provisions of the Constitution safeguarding personal rights (Byars v. United States, 273 U.S. 28, 32), as well as to those granting governmental powers. McCulloch v. Maryland, 4 Wheat. 316, 404, 406, 407, 421. Marbury v. Madison, 1 Cranch. 137, 153, 176. Cohens v. Virginia, 6 Wheat. 264. Myers v. United States, 272 U.S. 52.

1928, Olmstead v. United States, 277 U.S. 487

This Court has always construed the Constitution in the light of the principles upon which it was founded. [277 U.S. 488] The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions. Under the principles established and applied by this Court, the Fourth Amendment safeguards against all evils that are like and equivalent to those embraced within the ordinary meaning of its words. That construction is consonant with sound reason, and in full accord with the course of decisions since McCulloch v. Maryland. That is the principle directly applied in the Boyd case.

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When the facts in these cases are truly estimated, a fair application of that principle decides the constitutional question in favor of the petitioners. With great deference, I think they should be given a new trial.

STONE, J., dissenting

1928, Olmstead v. United States, 277 U.S. 488

MR. JUSTICE STONE, dissenting.

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I concur in the opinions of MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS. I agree also with that of MR. JUSTICE BUTLER so far as it deals with the merits. The effect of the order granting certiorari was to limit the argument to a single question, but I do not understand that it restrains the Court from a consideration of any question which we find to be presented by the record, for, under Jud.Code, § 240(a), this Court determines a case here on certiorari "with the same power and authority, and with like effect, as if the cause had been brought [here] by unrestricted writ of error or appeal."

Footnotes

BRANDEIS, J., dissenting (Footnotes)

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1. Otis' Argument against Writs of Assistance. See Tudor, James Otis, p. 66; John Adams, Works, Vol. II, p. 524; Minot, Continuation of the History of Massachusetts Bay, Vol. II, p 95.

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2. Entick v. Carrington, 19 Howell's State Trials, 1030, 1066.

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3. In Interstate Commerce Commission v. Brimson, 154 U.S. 447, 479, the statement made in the Boyd case was repeated, and the Court quoted the statement of Mr. Justice Field in In re Pacific Railway Commission, 32 Fed. 241, 250:

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Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves not merely protection of his person from assault, but exemption of his private affairs, books, and papers, from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value.

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The Boyd case has been recently reaffirmed in Silverthorne Lumber Co. v. United States, 251 U.S. 385, in Gouled v. United States, 255 U.S. 298, and in Byars v. United States, 273 U.S. 28.

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4. Gouled v. United States, 255 U.S. 298.

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5. Weeks v. United States, 232 U.S. 383; Amos v. United States, 255 U.S. 313; Agnello v. United States, 269 U.S. 20; Byars v. United States, 273 U.S. 28.

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6. Boyd v. United States, 116 U.S. 616; Hale v. Henkel, 201 U.S. 43, 70; Silverthorne Lumber Co. v. United States, 251 U.S. 385; Gouled v. United States, 255 U.S. 298; Marron v. United States, 275 U.S. 192.

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7. Ex parte Jackson, 96 U.S. 727, 733; Carroll v. United States, 267 U.S. 132, 156; Gambino v. United States, 275 U.S. 310.

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8. Weeks v. United States, 232 U.S. 383; Silverthorne Lumber Co. v. United States, 251 U.S. 385; Amos v. United States, 255 U.S. 313; Carroll v. United States, 267 U.S. 132, 156; Agnello v. United States, 269 U.S. 20; Gambino v. United States, 275 U.S. 310.

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9. Gouled v. United States, 255 U.S. 298.

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10. Boyd v. United States, 116 U.S. 616; Hale v. Henkel, 201 U.S. 43, 70. See Gouled v. United States, 255 U.S. 298; Byars v. United States, 273 U.S. 28; Marron v. United States, 275 U.S. 192.

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11. Silverthorne Lumber Co. v. United States, 251 U.S. 385. Compare Gouled v. United States, 255 U.S. 298, 307. In Stroud v. United States, 251 U.S. 15, and Hester v. United States, 265 U.S. 57, the letter and articles admitted were not obtained by unlawful search and seizure. They were voluntary disclosures by the defendant. Compare Smith v. United States, 2 F.2d 715; United States v. Lee, 274 U.S. 559.

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12. The point is thus stated by counsel for the telephone companies, who have filed a brief as amici curiae:

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Criminals will not escape detection and conviction merely because evidence obtained by tapping wires of a public telephone system is inadmissible, if it should be so held; but, in any event, it is better that a few criminals escape than that the privacies of life of all the people be exposed to the agents of the government, who will act at their own discretion, the honest and the dishonest, unauthorized and unrestrained by the courts. Legislation making wiretapping a crime will not suffice if the courts nevertheless hold the evidence to be lawful.

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13. In the following states, it is a criminal offense to intercept a message sent by telegraph and/or telephone: Alabama, Code, 1923, § 5256; Arizona, Revised Statutes, 1913, Penal Code, § 692; Arkansas, Crawford & Moses Digest, 1921, § 10246; California, Deering's Penal Code, 1927, § 640; Colorado, Compiled Laws, 1921, § 6969; Connecticut, General Statutes, 1918, § 6292; Idaho, Compiled Statutes, 1919, §§ 8574, 8586; Illinois, Revised Statutes, 1927, c. 134, § 21; Iowa, Code, 1927, § 13121; Kansas, Revised Statutes, 1923, c. 17, § 1908; Michigan Compiled Laws, 1915, § 15403; Montana, Penal Code, 1921, § 11518; Nebraska, Compiled Statutes, 1922, § 7115; Nevada, Revised Laws, 1912, §§ 4608, 6572(18); New York, Consolidated Laws, c. 40, § 1423(6); North Dakota, Compiled Laws, 1913, § 10231; Ohio, Page's General Code, 1926, § 13402; Oklahoma, Session Laws, 1923, c. 46; Oregon, Olson's Laws, 1920, § 2265; South Dakota, Revised Code, 1919, § 4312; Tennessee, Shannon's Code, 1919, §§ 1839, 1840; Utah, Compiled Laws, 1917, § 8433; Virginia, Code, 1924, § 4477(2), (3); Washington, Pierce's Code, 1921, § 8976(18); Wisconsin, Statutes, 1927, § 348.37; Wyoming, Compiled Statutes, 1920, § 7148. Compare State v. Behringer, 19 Ariz. 502; State v. Norsko, 76 Wash. 472.

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In the following states. it is a criminal offense for a company engaged in the transmission of messages by telegraph and/or telephone, or its employees, or, in many instances, persons conniving with them, to disclose or to assist in the disclosure of any message: Alabama, Code, 1923, §§ 5543, 5545; Arizona, Revised Statutes, 1913, Penal Code, §§ 621, 623, 691; Arkansas, Crawford & Moses Digest, 1921, § 10250; California, Deering's Penal Code, 1927, §§ 619, 621, 639, 641; Colorado, Compiled Laws, 1921, §§ 6966, 6968, 6970; Connecticut, General Statutes, 1918, § 6292; Florida, Revised General Statutes, 1920, §§ 5754, 5755; Idaho, Compiled Statutes, 1919, §§ 8568, 8570; Illinois, Revised Statutes, 1927, c. 134, §§ 7, 7a; Indiana, Burns' Revised Statutes, 1926, § 2862; Iowa, Code, 1924, § 8305; Louisiana, Acts, 1918, c. 134, p. 228; Maine, Revised Statutes, 1916, c. 60, § 24; Maryland, Bagby's Code, 1926, § 489; Michigan, Compiled Statutes, 1915, § 15104; Minnesota, General Statutes, 1923, §§ 10423, 10424; Mississippi, Hemingway's Code, 1927, § 1174; Missouri, Revised Statutes, 1919, § 3605; Montana, Penal Code, 1921, § 11494; Nebraska, Compiled Statutes, 1922, § 7088; Nevada, Revised Laws, 1912, §§ 4603, 4605, 4609, 4631; New Jersey, Compiled Statutes, 1910, p. 5319; New York, Consolidated Laws, c. 40, §§ 552, 553; North Carolina, Consolidated Statutes, 1919, §§ 4497, 4498, 4499; North Dakota, Compiled Laws, 1913, § 10078; Ohio, Page's General Code, 1926, §§ 13388, 13419; Oklahoma, Session Laws, 1923, c. 46; Oregon, Olson's Laws, 1920, §§ 2260, 2262, 2266; Pennsylvania, Statutes, 1920, §§ 6306, 6308, 6309; Rhode Island, General Laws, 1923, § 6104; South Dakota, Revised Code, 1919, §§ 4346, 9801; Tennessee, Shannon's Code, 1919, §§ 1837, 1838; Utah, Compiled Laws, 1917, §§ 8403, 8405, 8434; Washington, Pierce's Code, 1921, §§ 8982, 8983, Wisconsin, Statutes, 1927, § 348.36.

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The Alaskan Penal Code, Act of March 3, 1899, c. 429, 30 Stat. 1253, 1278, provides that,

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if any officer, agent, operator, clerk, or employee of any telegraph company, or any other person, shall willfully divulge to any other person than the party from whom the same was received, or to whom the same was addressed, or his agent or attorney, any message received or sent, or intended to be sent, over any telegraph line, or the contents, substance, purport, effect, or meaning of such message, or any part thereof, . . . the person so offending shall be deemed guilty of a misdemeanor, and shall be punished by a fine not to exceed one thousand dollars or imprisonment not to exceed one year, or by both such fine and imprisonment, in the discretion of the court.

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The Act of October 29, 1918, c.197, 40 Stat. 1017, provided:

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That whoever, during the period of governmental operation of the telephone and telegraph systems of the United States . . . , shall, without authority and without the knowledge and consent of the other users thereof, except as may be necessary for operation of the service, tap any telegraph or telephone line, or willfully interfere with the operation of such telephone and telegraph systems or with the transmission of any telephone or telegraph message, or with the delivery of any such message, or whoever being employed in any such telephone or telegraph service, shall divulge the contents of any such telephone or telegraph message to any person not duly authorized to receive the same, shall be fined not exceeding $1,000 or imprisoned for not more than one year, or both.

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The Radio Act, February 23, 1927, c. 169, § 27, 44 Stat. 1162, 1172, provides that

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no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person.

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14. The above figures relate to Case No. 493. In Nos. 532-533, the Government evidence fills 278 pages, of which 140 are recitals of the evidence obtained by wiretapping.

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15. According to the Government's brief, p. 41, "The Prohibition Unit of the Treasury disclaims it [wiretapping], and the Department of Justice has frowned on it." See also "Prohibition Enforcement," 69th Congress, 2d Session, Senate Doc. No.198, pp. IV, V, 13, 15, referred to Committee, January 25, 1927; also same, Part 2.

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16. See Hannay v. Eve, 3 Cranch 242, 247; Bank of the United States v. Owens, 2 Pet. 527, 538; Bartle v. Coleman, 4 Pet. 184, 188; Kennett v. Chambers, 14 How. 38, 52; Marshall v. Baltimore & Ohio R.R. Co., 16 How. 314, 334; Tool Co. v. Norris, 2 Wall 45, 54; The Ouachita Cotton, 6 Wall. 521, 532; Coppell v. Hall, 7 Wall. 542; Forsyth v. Woods, 11 Wall. 484, 486; Hanauer v. Doane, 12 Wall. 342, 349; Trist v. Child, 21 Wall. 441, 448; Meguire v. Corwine, 101 U.S. 108, 111; Oscanyan v. Arms Co., 103 U.S. 261; Irwin v. Williar, 110 U.S. 499, 510; Woodstock Iron Co. v. Richmond & Danville Extension Co., 129 U.S. 643; Gibbs v. Consolidated Gas Co., 130 U.S. 396, 411; Embrey v. Jemison, 131 U.S. 336, 348; West v. Camden, 135 U.S. 507, 521; McMullen v. Hoffman, 174 U.S. 639, 654; Hazelton v. Sheckells, 202 U.S. 71; Crocker v. United States, 240 U.S. 74, 78. Compare Holman v. Johnson, 1 Cowp. 341.

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17. See Creath's Administrator v. Sims, 5 How. 192, 204; Kennett v. Chambers, 14 How. 38, 49; Randall v. Howard, 2 Black, 585, 586; Wheeler v. Sage, 1 Wall. 518, 530; Dent v. Ferguson, 132 U.S. 50, 64; Pope Manufacturing Co. v. Gormully, 144 U.S. 224, 236; Miller v. Ammon, 145 U.S. 421, 425; Hazelton v. Sheckells, 202 U.S. 71, 79. Compare International News Service v. Associated Press, 248 U.S. 215, 245.

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18. Compare State v. Simmons, 39 Kan. 262, 264-265; State v. Miller, 44 Mo.App. 159, 163-164; In re Robinson, 29 Neb. 135; Harris v. State, 15 Tex.App. 629, 634-635, 639.

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19. See Armstrong v. Toler, 11 Wheat. 258; Brooks v. Martin, 2 Wall 70; Planters' Bank v. Union Bank, 16 Wall. 483, 499-500; Houston & Texas Central R.R. Co. v. Texas, 177 U.S. 66, 99; Bothwell v. Buckbee, Mears Co., 275 U.S. 274.

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20. See Lutton v. Benin, 11 Mod. 50; Barlow v. Hall, 2 Anst. 461; Wells v. Gurney, 8 Barn. & Cress. 769; Ilsley v. Nichols, 12 Pick. 270; Carpenter v. Spooner, 2 Sandf. 717; Metcalf v. Clark, 41 Barb. 45; Williams ads. Reed, 29 N.J.L. 385; Hill v. Goodrich, 32 Conn. 588; Townsend v. Smith, 47 Wis. 623; Blandin v. Ostrander, 239 Fed. 700; Harkin v. Brundage, 276 U.S. 36, id., 604.

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21. Coppell v. Hall, 7 Wall. 542, 558; Oscanyan v. Arms Co., 103 U.S. 261, 267; Higgins v. McCrea, 116 U.S. 671, 685. Compare Evans v. Richardson, 3 Mer. 469; Norman v. Cole, 3 Esp. 253; Northwestern Salt Co. v. Electrolytic Alkali Co., [1913] 3 K.B. 422.

BUTLER, J., dissenting (Footnotes)

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\* Ex parte Jackson, 96 U.S. 727. Boyd v. United States, 116 U.S. 616. Weeks v. United States, 232 U.S. 383. Silverthorne Lumber Co. v. United States, 251 U.S. 385. Gouled v. United States, 255 U.S. 298. Amos v. United States, 255 U.S. 313.

Herbert Hoover's Inaugural Address, 1929

Title: Herbert Hoover's Inaugural Address

Author: Herbert Hoover

Date: March 4, 1929

Source: Public Papers of the Presidents, Herbert Hoover, pp.1-12

[Delivered in person at the Capitol]

Public Papers of the Presidents, Hoover, 1929, p.1

My countrymen:

Public Papers of the Presidents, Hoover, 1929, p.1

This occasion is not alone the administration of the most sacred oath which can be assumed by an American citizen. It is a dedication and consecration under God to the highest office in service of our people. I assume this trust in the humility of knowledge that only through the guidance of Almighty Providence can I hope to discharge its ever-increasing burdens.

Public Papers of the Presidents, Hoover, 1929, p.1

It is in keeping with tradition throughout our history that I should express simply and directly the opinions which I hold concerning some of the matters of present importance.

OUR PROGRESS

Public Papers of the Presidents, Hoover, 1929, p.1–p.2

If we survey the situation of our Nation both at home and abroad, we find many satisfactions; we find some causes for concern. We have emerged from the losses of the Great War and the reconstruction following it with increased virility and strength. From this strength we have contributed to the recovery and progress of the world. What America has done has given renewed hope and courage to all who have faith in government by the people. In the large view, we have reached a higher degree of comfort and security than ever existed before in the history of the world. Through liberation from widespread poverty we have reached a higher degree of individual freedom than ever before. The devotion to and concern for our institutions are deep and sincere. We are steadily building a new race--a new civilization great in its own attainments. The influence and high purposes of our Nation are respected among the peoples of the world. We aspire to distinction in the world, but to a distinction based upon confidence in our sense of justice [p.2] as well as our accomplishments within our own borders and in our own lives. For wise guidance in this great period of recovery the Nation is deeply indebted to Calvin Coolidge.

Public Papers of the Presidents, Hoover, 1929, p.2

But all this majestic advance should not obscure the constant dangers from which self-government must be safeguarded. The strong man must at all times be alert to the attack of insidious disease.

THE FAILURE OF OUR SYSTEM OF CRIMINAL JUSTICE

Public Papers of the Presidents, Hoover, 1929, p.2

The most malign of all these dangers today is disregard and disobedience of law. Crime is increasing. Confidence in rigid and speedy justice is decreasing. I am not prepared to believe that this indicates any decay in the moral fibre of the American people. I am not prepared to believe that it indicates an impotence of the Federal Government to enforce its laws.

Public Papers of the Presidents, Hoover, 1929, p.2

It is only in part due to the additional burdens imposed upon our judicial system by the 18th amendment. 1 The problem is much wider than that. Many influences had increasingly complicated and weakened our law enforcement organization long before the adoption of the 18th amendment.

1 The 18th amendment to the Constitution, ratified January 16, 1919, prohibited "the manufacture, sale, or transportation of intoxicating liquors within, the transportation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes."

Public Papers of the Presidents, Hoover, 1929, p.2

To reestablish the vigor and effectiveness of law enforcement we must critically consider the entire Federal machinery of justice, the redistribution of its functions, the simplification of its procedure, the provision of additional special tribunals, the better selection of juries, and the more effective organization of our agencies of investigation and prosecution that justice may be sure and that it may be swift. While the authority of the Federal Government extends to but part of our vast system of national, State, and local justice, yet the standards which the Federal Government establishes have the most profound influence upon the whole structure.

Public Papers of the Presidents, Hoover, 1929, p.2–p.3

We are fortunate in the ability and integrity of our Federal judges and attorneys. But the system which these officers are called upon to [p.3] administer is in many respects ill adapted to present-day conditions. Its intricate and involved rules of procedure have become the refuge of both big and little criminals. There is a belief abroad that by invoking technicalities, subterfuge, and delay, the ends of justice may be thwarted by those who can pay the cost.

Public Papers of the Presidents, Hoover, 1929, p.3

Reform, reorganization, and strengthening of our whole judicial and enforcement system, both in civil and criminal sides, have been advocated for years by statesmen, judges, and bar associations. First steps toward that end should not longer be delayed. Rigid and expeditious justice is the first safeguard of freedom, the basis of all ordered liberty, the vital force of progress. It must not come to be in our Republic that it can be defeated by the indifference of the citizens, by exploitation of the delays and entanglements of the law, or by combinations of criminals. Justice must not fail because the agencies of enforcement are either delinquent or inefficiently organized. To consider these evils, to find their remedy, is the most sore necessity of our times.

ENFORCEMENT OF THE 18th AMENDMENT

Public Papers of the Presidents, Hoover, 1929, p.3

Of the undoubted abuses which have grown up under the 18th amendment, part are due to the causes I have just mentioned; but part are due to the failure of some States to accept their share of responsibility for concurrent enforcement and to the failure of many State and local officials to accept the obligation under their oath of office zealously to enforce the laws. With the failures from these many causes has come a dangerous expansion in the criminal elements who have found enlarged opportunities in dealing in illegal liquor.

Public Papers of the Presidents, Hoover, 1929, p.3

But a large responsibility rests directly upon our citizens. There would be little traffic in illegal liquor if only criminals patronized it. We must awake to the fact that this patronage from large numbers of law-abiding citizens is supplying the rewards and stimulating crime.

Public Papers of the Presidents, Hoover, 1929, p.3–p.4

I have been selected by you to execute and enforce the laws of the country. I propose to do so to the extent of my own abilities, but the measure of success that the Government shall attain will depend upon the moral support which you, as citizens, extend. The duty of citizens to support the laws of the land is coequal with the duty of their Government [p.4] to enforce the laws which exist. No greater national service can be given by men and women of good will--who, I know, are not unmindful of the responsibilities of citizenship--than that they should, by their example, assist in stamping out crime and outlawry by refusing participation in and condemning all transactions with illegal liquor. Our whole system of self-government will crumble either if officials elect what laws they will enforce or citizens elect what laws they will support. The worst evil of disregard for some law is that it destroys respect for all law. For our citizens to patronize the violation of a particular law on the ground that they are opposed to it is destructive of the very basis of all that protection of life, of homes and property which they rightly claim under other laws. If citizens do not like a law, their duty as honest men and women is to discourage its violation; their right is openly to work for its repeal.

Public Papers of the Presidents, Hoover, 1929, p.4

To those of criminal mind there can be no appeal but vigorous enforcement of the law. Fortunately they are but a small percentage of our people. Their activities must be stopped.

A NATIONAL INVESTIGATION

Public Papers of the Presidents, Hoover, 1929, p.4

I propose to appoint a national commission for a searching investigation of the whole structure of our Federal system of jurisprudence, to include the method of enforcement of the 18th amendment and the causes of abuse under it. Its purpose will be to make such recommendations for reorganization of the administration of Federal laws and court procedure as may be found desirable. In the meantime it is essential that a large part of the enforcement activities be transferred from the Treasury Department to the Department of Justice as a beginning of more effective organization. 2

2 Although the final sentence of this paragraph was included in the official text printed as Senate Document 1 (71st Cong., special sess.), it was reported in the press that the President omitted the sentence in his delivery of the address.

THE RELATION OF GOVERNMENT TO BUSINESS

Public Papers of the Presidents, Hoover, 1929, p.4–p.5

The election has again confirmed the determination of the American people that regulation of private enterprise and not Government ownership [p.5] or operation is the course rightly to be pursued in our relation to business. In recent years we have established a differentiation in the whole method of business regulation between the industries which produce and distribute commodities on the one hand and public utilities on the other. In the former, our laws insist upon effective competition; in the latter, because we substantially confer a monopoly by limiting competition, we must regulate their services and rates. The rigid enforcement of the laws applicable to both groups is the very base of equal opportunity and freedom from domination for all our people, and it is just as essential for the stability and prosperity of business itself as for the protection of the public at large. Such regulation should be extended by the Federal Government within the limitations of the Constitution and only when the individual States are without power to protect their citizens through their own authority. On the other hand, we should be fearless when the authority rests only in the Federal Government.

COOPERATION BY THE GOVERNMENT

Public Papers of the Presidents, Hoover, 1929, p.5

The larger purpose of our economic thought should be to establish more firmly stability and security of business and employment and thereby remove poverty still further from our borders. Our people have in recent years developed a new-found capacity for cooperation among themselves to effect high purposes in public welfare. It is an advance toward the highest conception of self-government. Self-government does not and should not imply the use of political agencies alone. Progress is born of cooperation in the community--not from governmental restraints. The Government should assist and encourage these movements of collective self-help by itself cooperating with them. Business has by cooperation made great progress in the advancement of service, in stability, in regularity of employment, and in the correction of its own abuses. Such progress, however, can continue only so long as business manifests its respect for law.

Public Papers of the Presidents, Hoover, 1929, p.5–p.6

There is an equally important field of cooperation by the Federal Government with the multitude of agencies, State, municipal, and [p.6] private, in the systematic development of those processes which directly affect public health, recreation, education, and the home. We have need further to perfect the means by which Government can be adapted to human service.

EDUCATION

Public Papers of the Presidents, Hoover, 1929, p.6

Although education is primarily a responsibility of the States and local communities, and rightly so, yet the Nation as a whole is vitally concerned in its development everywhere to the highest standards and to complete universality. Self-government can succeed only through an instructed electorate. Our objective is not simply to overcome illiteracy. The Nation has marched far beyond that. The more complex the problems of the Nation become, the greater is the need for more and more advanced instruction. Moreover, as our numbers increase and as our life expands with science and invention, we must discover more and more leaders for every walk of life. We cannot hope to succeed in directing this increasingly complex civilization unless we can draw all the talent of leadership from the whole people. One civilization after another has been wrecked upon the attempt to secure sufficient leadership from a single group or class. If we would prevent the growth of class distinctions and would constantly refresh our leadership with the ideals of our people, we must draw constantly from the general mass. The full opportunity for every boy and girl to rise through the selective processes of education can alone secure to us this leadership.

PUBLIC HEALTH

Public Papers of the Presidents, Hoover, 1929, p.6

In public health the discoveries of science have opened a new era. Many sections of our country and many groups of our citizens suffer from diseases the eradication of which are mere matters of administration and moderate expenditure. Public health service should be as fully organized and as universally incorporated into our governmental system as is public education. The returns are a thousandfold in economic benefits, and infinitely more in reduction of suffering and promotion of human happiness.

WORLD PEACE

Public Papers of the Presidents, Hoover, 1929, p.7

The United States fully accepts the profound truth that our own progress, prosperity, and peace are interlocked with the progress, prosperity, and peace of all humanity. The whole world is at peace. The dangers to a continuation of this peace today are largely the fear and suspicion which still haunt the world. No suspicion or fear can be rightly directed toward our country.

Public Papers of the Presidents, Hoover, 1929, p.7

Those who have a true understanding of America know that we have no desire for territorial expansion, for economic or other domination of other peoples. Such purposes are repugnant to our ideals of human freedom. Our form of government is ill adapted to the responsibilities which inevitably follow permanent limitation of the independence of other peoples. Superficial observers seem to find no destiny for our abounding increase in population, in wealth and power except that of imperialism. They fail to see that the American people are engrossed in the building for themselves of a new economic system, a new social system, a new political system--all of which are characterized by aspirations of freedom of opportunity and thereby are the negation of imperialism. They fail to realize that because of our abounding prosperity our youth are pressing more and more into our institutions of learning; that our people are seeking a larger vision through art, literature, science, and travel; that they are moving toward stronger moral and spiritual life--that from these things our sympathies are broadening beyond the bounds of our Nation and race toward their true expression in a real brotherhood of man. They fail to see that the idealism of America will lead it to no narrow or selfish channel, but inspire it to do its full share as a Nation toward the advancement of civilization. It will do that not by mere declaration but by taking a practical part in supporting all useful international undertakings. We not only desire peace with the world, but to see peace maintained throughout the world. We wish to advance the reign of justice and reason toward the extinction of force.

Public Papers of the Presidents, Hoover, 1929, p.7–p.8

The recent treaty for the renunciation of war as an instrument of national policy sets an advanced standard in our conception of the relations [p.8] of nations. Its acceptance should pave the way to greater limitation of armament, the offer of which we sincerely extend to the world. But its full realization also implies a greater and greater perfection in the instrumentalities for pacific settlement of controversies between nations. In the creation and use of these instrumentalities we should support every sound method of conciliation, arbitration, and judicial settlement. American statesmen were among the first to propose, and they have constantly urged upon the world, the establishment of a tribunal for the settlement of controversies of a justiciable character. The Permanent Court of International Justice in its major purpose is thus peculiarly identified with American ideals and with American statesmanship. No more potent instrumentality for this purpose has ever been conceived and no other is practicable of establishment. The reservations placed upon our adherence should not be misinterpreted. The United States seeks by these reservations no special privilege or advantage but only to clarify our relation to advisory opinions and other matters which are subsidiary to the major purpose of the Court. The way should, and I believe will, be found by which we may take our proper place in a movement so fundamental to the progress of peace.

Public Papers of the Presidents, Hoover, 1929, p.8

Our people have determined that we should make no political engagements such as membership in the League of Nations, which may commit us in advance as a nation to become involved in the settlements of controversies between other countries. They adhere to the belief that the independence of America from such obligations increases its ability and availability for service in all fields of human progress.

Public Papers of the Presidents, Hoover, 1929, p.8–p.9

I have lately returned from a journey among our sister Republics of the Western Hemisphere. 3 I have received unbounded hospitality and courtesy as their expression of friendliness to our country. We are held by particular bonds of sympathy and common interest with them. They are each of them building a racial character and a culture which is an impressive contribution to human progress. We wish only for the maintenance of their independence, the growth of their stability and their prosperity. While we have had wars in the Western Hemisphere, yet [p.9] on the whole the record is in encouraging contrast with that of other parts of the world. Fortunately the New World is largely free from the inheritances of fear and distrust which have so troubled the Old World. We should keep it so.

3 See Supplement IV of this volume.

Public Papers of the Presidents, Hoover, 1929, p.9

It is impossible, my countrymen, to speak of peace without profound emotion. In thousands of homes in America, in millions of homes around the world, there are vacant chairs. It would be a shameful confession of our unworthiness if it should develop that we have abandoned the hope for which all these men died. Surely civilization is old enough, surely mankind is mature enough so that we ought in our own lifetime to find a way to permanent peace. Abroad, to west and east, are nations whose sons mingled their blood with the blood of our sons on the battlefields. Most of these nations have contributed to our race, to our culture, our knowledge, and our progress. From one of them we derive our very language and from many of them much of the genius of our institutions. Their desire for peace is as deep and sincere as our own.

Public Papers of the Presidents, Hoover, 1929, p.9

Peace can be contributed to by respect for our ability in defense. Peace can be promoted by the limitation of arms and by the creation of the instrumentalities for peaceful settlement of controversies. But it will become a reality only through self-restraint and active effort in friendliness and helpfulness. I covet for this administration a record of having further contributed to advance the cause of peace.

PARTY RESPONSIBILITIES

Public Papers of the Presidents, Hoover, 1929, p.9–p.10

In our form of democracy the expression of the popular will can be effected only through the instrumentality of political parties. We maintain party government not to promote intolerant partisanship but because opportunity must be given for expression of the popular will, and organization provided for the execution of its mandates and for accountability of government to the people. It follows that the government both in the executive and the legislative branches must carry out in good faith the platforms upon which the party was entrusted with power. But the government is that of the whole people; the party is the instrument through which policies are determined and men [p.10] chosen to bring them into being. The animosities of elections should have no place in our Government for government must concern itself alone with the common weal.

SPECIAL SESSION OF THE CONGRESS

Public Papers of the Presidents, Hoover, 1929, p.10

Action upon some of the proposals upon which the Republican Party was returned to power, particularly further agricultural relief and limited changes in the tariff, cannot in justice to our farmers, our labor, and our manufacturers be postponed. I shall therefore request a special session of Congress for the consideration of these two questions. I shall deal with each of them upon the assembly of the Congress.

OTHER MANDATES FROM THE ELECTION

Public Papers of the Presidents, Hoover, 1929, p.10

It appears to me that the more important further mandates from the recent election were the maintenance of the integrity of the Constitution; the vigorous enforcement of the laws; the continuance of economy in public expenditure; the continued regulation of business to prevent domination in the community; the denial of ownership or operation of business by the Government in competition with its citizens; the avoidance of policies which would involve us in the controversies of foreign nations; the more effective reorganization of the departments of the Federal Government; the expansion of public works; and the promotion of welfare activities affecting education and the home.

Public Papers of the Presidents, Hoover, 1929, p.10–p.11

These were the more tangible determinations of the election, but beyond them was the confidence and belief of the people that we would not neglect the support of the embedded ideals and aspirations of America. These ideals and aspirations are the touchstones upon which the day-today administration and legislative acts of government must be tested. More than this, the Government must, so far as lies within its proper powers, give leadership to the realization of these ideals and to the fruition of these aspirations. No one can adequately reduce these things of the spirit to phrases or to a catalogue of definitions. We do know what the attainments of these ideals should be: the preservation of self-government and its full foundations in local government; the [p.11] perfection of justice whether in economic or in social fields; the maintenance of ordered liberty; the denial of domination by any group or class; the building up and preservation of equality of opportunity; the stimulation of initiative and individuality; absolute integrity in public affairs; the choice of officials for fitness to office; the direction of economic progress toward prosperity and the further lessening of poverty; the freedom of public opinion; the sustaining of education and of the advancement of knowledge; the growth of religious spirit and the tolerance of all faiths; the strengthening of the home; the advancement of peace.

Public Papers of the Presidents, Hoover, 1929, p.11

There is no short road to the realization of these aspirations. Ours is a progressive people, but with a determination that progress must be based upon the foundation of experience. Ill-considered remedies for our faults bring only penalties after them. But if we hold the faith of the men in our mighty past who created these ideals, we shall leave them heightened and strengthened for our children.

CONCLUSION

Public Papers of the Presidents, Hoover, 1929, p.11

This is not the time and place for extended discussion. The questions before our country are problems of progress to higher standards; they are not the problems of degeneration. They demand thought and they serve to quicken the conscience and enlist our sense of responsibility for their settlement. And that responsibility rests upon you, my countrymen, as much as upon those of us who have been selected for office.

Public Papers of the Presidents, Hoover, 1929, p.11

Ours is a land rich in resources, stimulating in its glorious beauty, filled with millions of happy homes, blessed with comfort and opportunity. In no nation are the institutions of progress more advanced. In no nation are the fruits of accomplishment more secure. In no nation is the government more worthy of respect. No country is more loved by its people. I have an abiding faith in their capacity, integrity, and high purpose. I have no fears for the future of our country. It is bright with hope.

Public Papers of the Presidents, Hoover, 1929, p.11–p.12

In the presence of my countrymen, mindful of the solemnity of this occasion, knowing what the task means and the responsibility which [p.12] it involves, I beg your tolerance, your aid, and your cooperation. I ask the help of Almighty God in this service to my country to which you have called me.

Public Papers of the Presidents, Hoover, 1929, p.12

NOTE: The President spoke, in a downpour of rain, from a platform erected at the east front of the Capitol. Immediately before the address the oath of office was administered by Chief Justice William Howard Taft. The address was broadcast on worldwide radio.

Public Papers of the Presidents, Hoover, 1929, p.12

For policy statements made by Mr. Hoover before his inauguration as President, see Supplements I, II, and III ofthis volume.

President Hoover's Message to the National Federation of Men's Bible Classes, 1929

Title: President Hoover's Message to the National Federation of Men's Bible Classes

Author: Herbert Hoover

Date: May 5, 1929

Source: Public Papers of the Presidents, Herbert Hoover, p.136

Public Papers of the Presidents, Hoover, 1929, p.136

THERE IS no other book so various as the Bible, nor one so full of concentrated wisdom. Whether it be of law, business, morals, or that vision which leads the imagination in the creation of constructive enterprises for the happiness of mankind, he who seeks for guidance in any of these things may look inside its covers and find illumination. The study of this Book in your Bible classes is a postgraduate course in the richest library of human experience.

Public Papers of the Presidents, Hoover, 1929, p.136

As a nation we are indebted to the Book of Books for our national ideals and representative institutions. Their preservation rests in adhering to its principles.

Public Papers of the Presidents, Hoover, 1929, p.136

NOTE: The President's message was read at the Federation's convention in Baltimore by Representative Walter H. Newton of Minnesota.

Ex parte Bakelite Corp., 1929

Title: Ex parte Bakelite Corporation

Author: U.S. Supreme Court

Date: May 20, 1929

Source: 279 U.S. 438

This case was argued January 2 and 3, 1929, and was decided May 20, 1929.

1929, Ex parte Bakelite Corporation, 279 U.S. 438

PETITION FOR WRIT OF PROHIBITION

Syllabus

1929, Ex parte Bakelite Corporation, 279 U.S. 438

1. The power of this Court to issue a writ of prohibition need not be determined in a case where, assuming the power to exist, there is no basis for exercising it. P. 448.

1929, Ex parte Bakelite Corporation, 279 U.S. 438

2. Article III of the Constitution does not express the full authority of Congress to create courts. Other Articles invest Congress with powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying these powers into execution. P. 449.

1929, Ex parte Bakelite Corporation, 279 U.S. 438

3. Courts established under the specific power given in § 2 of Article III are called constitutional courts. They share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise. Id.

1929, Ex parte Bakelite Corporation, 279 U.S. 438

4. Courts created by Congress in the exertion of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers and are prescribed by Congress independently of § 2 of Article III, and their judges hold for such term as Congress prescribes, whether it be a fixed period of years or during good behavior. Id. [279 U.S. 439]

1929, Ex parte Bakelite Corporation, 279 U.S. 439

5. A duty to give decision which are advisory only, and so without force a judicial judgment, may be laid on a legislative court, but not on a constitutional court established under Article III. P. 454.

1929, Ex parte Bakelite Corporation, 279 U.S. 439

6. In Miles v. Graham, 268 U.S. 501, the question whether the Court of Claims is a statutory or a constitutional court was not mooted; and the decision is not to be taken as attributing to that court a constitutional status contrary to earlier rulings. P. 455.

1929, Ex parte Bakelite Corporation, 279 U.S. 439

7. A court may be a court of the United States within the meaning of § 375 of Title 28 U.S.C., Jud.Code § 260, and yet not be a constitutional court. Id.

1929, Ex parte Bakelite Corporation, 279 U.S. 439

8. The Court of Customs Appeals is a legislative court. P. 458.

1929, Ex parte Bakelite Corporation, 279 U.S. 439

9. The matter involved in this case—an appeal under § 316 of the Tariff Act of 1922 from findings of the Tariff Commission sustaining a charge of unfair competition and from the recommendation of the Commission to the President that the article to which the findings relate shall be excluded from entry—is within the jurisdiction of the Court of Custom Appeals, whether or not it be a case or controversy within the meaning of Article III, § 2, of the Constitution. P. 460.

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Prohibition denied.

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Petition for a writ of prohibition to the Court of Customs Appeals prohibiting it from entertaining an appeal from findings of the Tariff Commission. See also 16 Ct.Cust. App. 191; 53 T.D. 716. [279 U.S. 446]

VANDEVANTER, J., lead opinion

1929, Ex parte Bakelite Corporation, 279 U.S. 446

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

1929, Ex parte Bakelite Corporation, 279 U.S. 446

This is a petition for a writ of prohibition to the Court of Customs Appeals prohibiting it from entertaining an appeal from findings of the Tariff Commission in a proceeding begun and conducted under section 316 of the Tariff Act of 1922, c. 356, 42 Stat. 858, 943; §§ 174-180, Title 19, U.S.C. A rule to show cause was issued; return was made to the rule; and a hearing has been had on the petition and return.

1929, Ex parte Bakelite Corporation, 279 U.S. 446

Section 316 of the Tariff Act is long, and not happily drafted. A summary of it will suffice for present purposes. It is designed to protect domestic industry and trade against "unfair methods of competition and unfair acts" in the importation of articles into the United States and in their sale after importation. To that end, it empowers the President, whenever the existence of any such unfair methods or acts is established to his satisfaction, to deal with them by fixing an additional duty upon the importation of the articles to which the unfair practice relates, or, if he is satisfied the unfairness is extreme, by directing that the articles be excluded from entry.

1929, Ex parte Bakelite Corporation, 279 U.S. 446

The section provides that, "to assist the President" in making decisions thereunder, the Tariff Commission shall investigate allegations of unfair practice, conduct hearings, receive evidence, and make findings and recommendations, subject to a right in the importer or consignee, [279 U.S. 447] if the findings be against him, to appeal to the Court of Customs Appeals on questions of law affecting the findings. There is also a provision purporting to subject the decision of that court to review by this Court upon certiorari. Ultimately, the Commission is required to transmit its findings and recommendations, with a transcript of the evidence, to the President, so that he may consider the matter and act thereon.

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A further provision declares that

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any additional duty or any refusal of entry under this section shall continue in effect until the President shall find and instruct the Secretary of the Treasury that the conditions which led to the assessment of such additional duty or refusal of entry no longer exist.

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The present petitioner, the Bakelite Corporation, desiring to invoke action under that section, filed with the Tariff Commission a sworn complaint charging unfair methods and acts in the importation and subsequent sale of certain articles and alleging a resulting injury to its domestic business of manufacturing and selling similar articles. The Commission entertained the complaint, gave public notice thereof, and conducted a hearing in which interested importers appeared and presented evidence claimed to be in refutation of the charge. The Commission made findings sustaining the charge, and recommended that the articles to which the unfair practice relates be excluded from entry. The importers appealed to the Court of Customs Appeals, where the Bakelite Corporation challenged the court's jurisdiction on constitutional grounds. The court upheld its jurisdiction and announced its purpose to entertain the appeal. Thereupon the Bakelite Corporation presented to this Court its petition for a writ of prohibition. Pending a decision on the petition, further proceedings on the appeal have been suspended. [279 U.S. 448]

1929, Ex parte Bakelite Corporation, 279 U.S. 448

The grounds on which the jurisdiction of the Court of Customs Appeals was challenged in that court, and on which a writ of prohibition is sought here, are:

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1. That the Court of Customs Appeals is an inferior court created by Congress under section 1 of Article 3 of the Constitution, and, as such, it can have no jurisdiction of any proceeding which is not a case or controversy within the meaning of section 2 of the same Article.

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(2) That the proceeding presented by the appeal from the Tariff Commission is not a case or controversy in the sense of that section, but is merely an advisory proceeding in aid of executive action.

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The Court of Customs Appeals considered these grounds in the order just stated, and, by its ruling, sustained the first and rejected the second. 16 Ct.Cust.App. 378, 53 Treasury Decisions 716.

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In this Court, counsel have addressed arguments not only to the two questions bearing on the jurisdiction of the Court of Customs Appeals, but also to the question whether, if that court be exceeding its jurisdiction, this Court has power to issue to it a writ of prohibition to arrest the unauthorized proceedings.

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The power of this Court to issue writs of prohibition never has been clearly defined by statute 1 or by decisions. 2 And the existence of the power in a situation like the present is not free from doubt. But the doubt need not be resolved now, for, assuming that the power exists, there is here, as will appear later on, no tenable basis for exercising it. In such a case, it is admissible, and is common practice, to pass the question of power and to deny the writ because without warrant in other respects. 3 [279 U.S. 449]

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While Article III of the Constitution declares, in section 1, that the judicial power of the United States shall be vested in one Supreme Court and in "such inferior courts as the Congress may from time to time ordain and establish," and prescribes, in section 2, that this power shall extend to cases and controversies of certain enumerated classes, it long has been settled that Article III does not express the full authority of Congress to create courts, and that other articles invest Congress with powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution. But there is a difference between the two classes of courts. Those established under the specific power given in section 2 of Article III are called constitutional courts. They share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise. On the other hand, those created by Congress in the exertion of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers, and are prescribed by Congress independently of section 2 of Article III; and their judges hold for such term as Congress prescribes, whether it be a fixed period of years or during good behavior.

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The first pronouncement on the subject by this Court was in American Insurance Co. v. Canter, 1 Pet. 511, where the status and jurisdiction of courts created by Congress for the Territory of Florida were drawn in question. [279 U.S. 450] Chief Justice Marshall, speaking for the court, said, p. 546:

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These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States.

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That ruling has been accepted and applied from that time to the present in cases relating to territorial courts. 4

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A like view has been taken of the status and jurisdiction of the courts provided by Congress for the District of Columbia. These courts, this Court has held, are created in virtue of the power of Congress "to exercise exclusive legislation" over the district made the seat of the government of the United States, are legislative, rather than constitutional, courts, and may be clothed with the authority and charged with the duty of giving advisory decisions in proceedings which are not cases or controversies within the meaning of Article III, but are merely in aid of legislative or executive action, and therefore outside the admissible jurisdiction of courts established under that article. 5 [279 U.S. 451]

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The United States Court for China and the consular courts are legislative courts created as a means of carrying into effect powers conferred by the Constitution respecting treaties and commerce with foreign countries. They exercise their functions within particular districts in foreign territory, and are invested with a large measure of jurisdiction over American citizens in those districts. 6 The authority of Congress to create them and to clothe them with such jurisdiction has been upheld by this Court, and is well recognized. 7

1929, Ex parte Bakelite Corporation, 279 U.S. 451

Legislative courts also may be created as special tribunals to examine and determine various matters, arising between the government and others, which, from their nature, do not require judicial determination, and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals. 8 [279 U.S. 452]

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Conspicuous among such matters are claims against the United States. These may arise in many ways and may be for money, lands, or other things. They all admit of legislative or executive determination, and yet, from their nature, are susceptible of determination by courts; but no court can have cognizance of them except as Congress makes specific provision therefor. Nor do claimants have any right to sue on them unless Congress consents; and Congress may attach to its consent such conditions as it deems proper, even to requiring that the suits be brought in a legislative court specially created to consider them. 9

1929, Ex parte Bakelite Corporation, 279 U.S. 452

The Court of Claims is such a court. It was created, and has been maintained, as a special tribunal to examine and determine claims for money against the United States. This is a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States. But the function is one which Congress has a discretion either to exercise directly or to delegate to other agencies.

1929, Ex parte Bakelite Corporation, 279 U.S. 452

For 65 years following the adoption of the Constitution, Congress made it a practice not only to determine various claims itself, but also to commit the determination of many to the executive departments. In time, as claims multiplied, that practice subjected Congress and those departments to a heavy burden. To lessen that burden, Congress created the Court of Claims, and delegated to it the examination and determination of all claims within stated classes. 10 Other claims have since been included in the delegation, and some have been excluded. But the court is still what Congress, at the outset, declared it [279 U.S. 453] should be—"a court for the investigation of claims against the United States." The matters made cognizable therein include nothing which inherently or necessarily requires judicial determination. On the contrary, all are matters which are susceptible of legislative or executive determination, and can have no other save under and in conformity with permissive legislation by Congress.

1929, Ex parte Bakelite Corporation, 279 U.S. 453

The nature of the proceedings in the Court of Claims and the power of Congress over them are illustrated in McElrath v. United States, 102 U.S. 426, where particular attention was given to the statutory provisions authorizing that court, when passing on claims against the government, to consider and determine any asserted set-offs or counterclaims, and directing that all issues of fact be tried by the court without a jury. The claimant in that case objected that these provisions were in conflict with the Seventh Amendment to the Constitution, which preserves the right of trial by jury in suits at common law where the value in controversy exceeds $20. This Court disposed of the objection by saying (p. 440):

1929, Ex parte Bakelite Corporation, 279 U.S. 453

There is nothing in these provisions which violates either the letter or spirit of the Seventh Amendment. Suits against the government in the Court of Claims, whether reference be had to the claimant's demand, or to the defence, or to any set-off, or counterclaim which the government may assert, are not controlled by the Seventh Amendment. They are not suits at common law within its true meaning. The government cannot be sued except with its own consent. It can declare in what court it may be sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits. It may restrict the jurisdiction of the court to a consideration of only certain classes of claims against the United States. Congress, by the act in question, informs the claimant that, if he avails himself of the privilege of suing the [279 U.S. 454] government in the special court organized for that purpose, he may be met with a setoff, counterclaim, or other demand of the government upon which judgment may go against him without the intervention of a jury if the court, upon the whole case, is of opinion that the government is entitled to such judgment. If the claimant avails himself of the privilege thus granted, he must do so subject to the conditions annexed by the government to the exercise of the privilege.

1929, Ex parte Bakelite Corporation, 279 U.S. 454

While what has been said of the creation and special function of the court definitely reflects its status as a legislative court, there is propriety in mentioning the fact that Congress always has treated it as having that status. From the outset, Congress has required it to give merely advisory decisions on many matters. Under the act creating it, all of its decisions were to be of that nature. 11 Afterwards, some were to have effect as binding judgments, but others were still to be merely advisory. 12 This is true at the present time. 13 A duty to give decisions which are advisory only, and so without force as judicial judgments, may be laid on a legislative court, but not on a constitutional court established under Article III. 14

1929, Ex parte Bakelite Corporation, 279 U.S. 454

In Gordon v. United States, 117 U.S. 697, and again in In re Sanborn, 148 U.S. 222, this Court plainly was of opinion that the Court of Claims is a legislative court [279 U.S. 455] specially created to consider claims for money against the United States, and, on that basis, distinctly recognized that Congress may require it to give advisory decisions. And in United States v. Klein, 13 Wall. 128, 144-145, this Court described it as having all the functions of a court, but being, as respects its organization and existence, undoubtedly and completely under the control of Congress.

1929, Ex parte Bakelite Corporation, 279 U.S. 455

In the present case, the court below regarded the recent decision in Miles v. Graham, 268 U.S. 501, as disapproving what was said in the cases just cited, and holding that the Court of Claims is a constitutional, rather than a legislative, court. But, in this, Miles v. Graham was taken too broadly. The opinion therein contains no mention of the cases supposed to have been disapproved, nor does it show that this Court's attention was drawn to the question whether that court is a statutory court or a constitutional court. In fact, as appears from the briefs, that question was not mooted. Such as were mooted were considered and determined in the opinion. Certainly the decision is not to be taken in this case as disturbing the earlier rulings or attributing to the Court of Claims a changed status. Webster v. Fall, 266 U.S. 507, 511.

1929, Ex parte Bakelite Corporation, 279 U.S. 455

That court was said to be a constitutional court in United States v. Union Pacific R. Co., 98 U.S. 569, 602-603, but this statement was purely an obiter dictum, because the question whether the Court of Claims is a constitutional court or a legislative court was in no way involved. And any weight the dictum, as such, might have is more than overcome by what has been said on the question in other cases where there was need for considering it.

1929, Ex parte Bakelite Corporation, 279 U.S. 455

Without doubt, that court is a court of the United States within the meaning of section 375 of title 28, U.S.C. 15 just as the superior courts of the District of Columbia are, 16 but this does not make it a constitutional court. [279 U.S. 456]

1929, Ex parte Bakelite Corporation, 279 U.S. 456

The authority to create legislative courts finds illustration also in the late Court of Private Land Claims. It was created in virtue of the power of Congress over the fulfillment of treaty stipulations, and its special function was that of hearing and finally determining claims founded on Spanish or Mexican grants, concessions, etc., and embracing lands within the territory ceded by Mexico to the United States and subsequently included within the Territories of New Mexico, Arizona and Utah and the States of Nevada, Colorado, and Wyoming. 17 By the treaties of cession, the United States was obligated to inquire into private claims to lands within the ceded territory, and to respect inviolably those that were valid. Congress at first intrusted the preliminary inquiry to executive officers, and required that they make reports whereon it could make the ultimate determinations. This was an admissible mode of dealing with the subject, and many claims were finally determined under it. 18 But, later on, Congress created the Court of Private Land Claims, and charged it with the duty of examining and adjudicating, as between claimants and the United States, all claims not already determined. In United States v. Coe, 155 U.S. 76, that court was held to be a legislative court, and the validity of the act creating it was sustained. And, while that case related to lands in a territory, there can be no real doubt that the same rule would apply were the lands in a State. The obligation of the United States would be the same in either case, and Congress would have the same discretion respecting the mode of fulfilling it. 19 In fact, the act creating the court included within its jurisdiction all claims within three States, as well as those within three territories, and the court adjudicated [279 U.S. 457] all within these limits that were brought before it within the periods fixed by Congress.

1929, Ex parte Bakelite Corporation, 279 U.S. 457

The Choctaw and Chickasaw Citizenship Court was another legislative court. It was created to hear and determine controverted claims to membership in two Indian tribes. The tribes were under the guardianship of the United States, which, in virtue of that relation, was proceeding to distribute the lands and funds of the tribes among their members. How the membership should be determined rested in the discretion of Congress. It could commit the task to officers of the department in charge of Indian affairs, to a commission, or to a judicial tribunal. As the controversies were difficult of solution, and large properties were to be distributed, Congress chose to create a special court and to authorize it to determine the controversies. In Wallace v. Adams, 204 U.S. 415, this was held to be a valid exertion of authority belonging to Congress by reason of its control over the Indian tribes. And it is of significance here that, in so ruling, this Court approvingly cited and gave effect to the opinion of Chief Justice Taney in Gordon v. United States respecting the status of the Court of Claims.

1929, Ex parte Bakelite Corporation, 279 U.S. 457

Before we turn to the status of the Court of Customs Appeals, it will be helpful to refer briefly to the Customs Court. Formerly it was the Board of General Appraisers. Congress assumed to make the board a court by changing its name. There was no change in powers, duties, or personnel. 20 The Board was an executive agency charged with the duty of reviewing acts of appraisers and collectors in appraising and classifying imports and in liquidating and collecting customs duties. 21 But its functions, [279 U.S. 458] although mostly quasi judicial, were all susceptible of performance by executive officers, and had been performed by such officers in earlier times.

1929, Ex parte Bakelite Corporation, 279 U.S. 458

The Court of Customs Appeals was created by Congress in virtue of its power to lay and collect duties on imports and to adopt any appropriate means of carrying that power into execution. 22 The full province of the Court under the act creating it is that of determining matters arising between the government and others in the executive administration and application of the customs laws. These matters are brought before it by appeals from decisions of the Customs Court, formerly called to Board of General Appraisers. 23 The appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and, at times, has been, committed exclusively to executive officers. True, the provisions of the customs laws requiring duties to be paid and turned into the treasury promptly, without awaiting disposal of protests against rulings of appraisers and collectors, operate in many instances to convert the protests into applications to refund part or all of the money paid; 24 but this does not make the matters involved in the protests any the less susceptible of determination by executive officers. 25 In fact, their final determination has been at times confided to the Secretary of the Treasury, with no recourse to judicial proceedings. 26

1929, Ex parte Bakelite Corporation, 279 U.S. 458

This summary of the court's province as a special tribunal, of the matters subjected to its revisory authority, [279 U.S. 459] and of its relation to the executive administration of the customs laws, shows very plainly that it is a legislative, and not a constitutional, court.

1929, Ex parte Bakelite Corporation, 279 U.S. 459

Some features of the act creating it are referred to in the opinion below as requiring a different conclusion, but, when rightly understood, they cannot be so regarded.

1929, Ex parte Bakelite Corporation, 279 U.S. 459

A feature much stressed is the absence of any provision respecting the tenure of the judges. From this it is argued that Congress intended the court to be a constitutional one, the judges of which would hold their offices during good behavior. And, in support of the argument, it is said that, in creating courts, Congress has made it a practice to distinguish between those intended to be constitutional and those intended to be legislative by making no provision respecting the tenure of judges of the former, and expressly fixing the tenure of judges of the latter. But the argument is fallacious. It mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created, and in the jurisdiction conferred. Nor has there been any settled practice on the part of Congress which gives special significance to the absence or presence of a provision respecting the tenure of judges. This may be illustrated by two citations. The same Congress that created the Court of Customs Appeals made provision for five additional circuit judges, and declared that they should hold their offices during good behavior; 27 and yet the status of the judges was the same as it would have been had that declaration been omitted. In creating courts for some of the territories, Congress failed to include a provision fixing the tenure of the judges; 28 but [279 U.S. 460] the courts became legislative courts just as if such a provision had been included.

1929, Ex parte Bakelite Corporation, 279 U.S. 460

Another feature much stressed is a provision purporting to authorize temporary assignments of circuit and district judges to the Court of Customs Appeals when vacancies occur in its membership or when any of its members are disqualified or otherwise unable to act. This, it is said, shows that Congress intended the court to be a constitutional one, for otherwise such assignments would be inadmissible under the Constitution. But if there be constitutional obstacles to assigning judges of constitutional courts to legislative courts, the provision cited is, for that reason, invalid, and cannot be saved on the theory that Congress intended the court to be in one class when, under the Constitution, it belongs in another. Besides, the inference sought to be drawn from that provision is effectually refuted by two later enactments—one permitting judges of that court to be assigned from time to time to the superior courts of the District of Columbia, 29 which are legislative courts, and the other transferring to that court the advisory jurisdiction in respect of appeals from the Patent Office which formerly was vested in the Court of Appeals of the District of Columbia. 30

1929, Ex parte Bakelite Corporation, 279 U.S. 460

Another feature to which attention was given is the denomination of the court as a United States court. That the court is a court of the United States is plain; but this is quite consistent with its being a legislative court.

1929, Ex parte Bakelite Corporation, 279 U.S. 460

As it is plain that the Court of Customs Appeals is a legislative, and not a constitutional, court, there is no need for now inquiring whether the proceeding under section 316 of the Tariff Act of 1922, now pending before it, is a case of controversy within the meaning of section 2 of Article [279 U.S. 461] III of the Constitution, for this section applies only to constitutional courts. Even if the proceeding is not such a case or controversy, the Court of Customs Appeals, being a legislative court, may be invested with jurisdiction of it, as is done by section 316.

1929, Ex parte Bakelite Corporation, 279 U.S. 461

Of course, a writ of prohibition does not lie to a court which is proceeding within the limits of its jurisdiction, as the Court of Customs Appeals appears to be doing in this instance.

1929, Ex parte Bakelite Corporation, 279 U.S. 461

Prohibition denied.

Footnotes

VANDEVANTER, J., lead opinion (Footnotes)

1929, Ex parte Bakelite Corporation, 279 U.S. 461

1. See Rev. Stat, §§ 688, 716; U.S.C. title 28, §§ 342, 377.

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2. See Ex parte City Bank of New Orleans, 3 How. 292, 311, 322; Ex parte Joins, 191 U.S. 93, 102, and cases cited; Ex parte United States, 226 U.S. 420.

1929, Ex parte Bakelite Corporation, 279 U.S. 461

3. Ex parte City Bank of New Orleans, 3 How. 292, 311, 322; Smith v. Whitney, 116 U.S. 167, 175-176; Ex parte Joins, 191 U.S. 93, 102; In re Rice, 155 U.S. 396; In re Huguley Manufacturing Co., 184 U.S. 297; Ex parte Oklahoma, 220 U.S. 191; Ex parte Oklahoma (No. 2), 220 U.S. 210; Ex parte Southwestern Surety Insurance Co., 247 U.S. 19; Ex parte Tiffany, 252 U.S. 32: Ex parte Peterson, 253 U.S. 300; Ex parte Chicago, Rock Island & Pacific Ry. Co., 255 U.S. 273; Ex parte United States, 263 U.S. 389.

1929, Ex parte Bakelite Corporation, 279 U.S. 461

4. Benner v. Porter, 9 How. 235, 242; Clinton v. Englebrecht, 13 Wall. 434, 447; Hornbuckle v. Toombs, 18 Wall. 648, 655; Good v. Martin, 95 U.S. 90, 98; Reynolds v. United States, 98 U.S. 145, 154; The City of Panama, 101 U.S. 453, 460; McAllister v. United States, 141 U.S. 174, 180 et seq.; Romeu v. Todd, 206 U.S. 358, 368.

1929, Ex parte Bakelite Corporation, 279 U.S. 461

5. Keller v. Potomac Electric Power Co., 261 U.S. 428, 442-444; Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693, 700. And see Butterworth v. Hoe, 112 U.S. 50, 60; United States v. Duell, 172 U.S. 576, 582-583.

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6. See title 22, cc. 2 and 3, U.S.C.

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7. In re Ross, 140 U.S. 453; American China Development Co. v. Boyd, 148 Fed. 258; Biddle v. United States, 156 Fed. 759; Cunningham v. Rodgers, 171 Fed. 835; Swayne & Hoyt v. Everett, 255 Fed. 71; Fleming v. United States, 279 Fed. 613; Wulfsohn v. Russo-Asiatic Bank, 11 F.2d 715; 2 Moore's Digest International Law, § 262; 1 Hyde, International Law, § 264.

1929, Ex parte Bakelite Corporation, 279 U.S. 461

8. Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 280, 284; Grisar v. McDowell, 6 Wall. 363, 379; Auffmordt v. Hedden, 137 U.S. 310, 329; In re Fassett, 142 U.S. 479, 486-487; Nishimura Ekiu v. United States, 142 U.S. 651, 659; Astiazaran v. Santa Rita Land & Mining Co., 148 U.S. 80, 81-83; Passavant v. United States, 148 U.S. 214, 219; Fong Yue Ting v. United States, 149 U.S. 698, 714-715; United States v. Coe, 155 U.S. 76, 84; Wallace v. Adams, 204 U.S. 415, 423; Gordon v. United States, 117 U.S. 697, 699; La Abra Silver Mining Co. v. United States, 175 U.S. 423, 459-461; United States v. Babcock, 250 U.S. 328, 331; Luckenbach S.S. Co. v. United States, 272 U.S. 533, 536.

1929, Ex parte Bakelite Corporation, 279 U.S. 461

9. United States v. Ferrira, 13 How. 40, 47; De Groot v. United States, 5 Wall. 419, 431-433; Ex parte Russell, 13 Wall. 664, 668; McElrath v. United States, 102 U.S. 426, 440; United States v. Louisiana, 123 U.S. 32, 36-37; Schillinger v. United States, 155 U.S. 163, 166; Luckenbach S.S. Co. v. United States, 272 U.S. 533, 536.

1929, Ex parte Bakelite Corporation, 279 U.S. 461

10. Act Feb. 24, 1855, c. 122, 10 Stat. 612.

1929, Ex parte Bakelite Corporation, 279 U.S. 461

11. Act Feb. 24, 1855, c. 122, §§ 7-9, 10 Stat. 612.

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12. Acts March 3, 1863, c. 92, §§ 3, 5, and 7, 12 Stat. 765; March 17, 1866, c. 19, 14 Stat. 9; March 3, 1883, c. 116, §§ 1 and 2, 22 Stat. 485; Jan. 20, 1885, c. 25, § 6, 23 Stat. 283; March 3, 1887, c. 359, §§ 12-14, 24 Stat. 505.

1929, Ex parte Bakelite Corporation, 279 U.S. 461

13. Title 28, §§ 254, 257, U.S.C.

1929, Ex parte Bakelite Corporation, 279 U.S. 461

14. United States v. Ferreira, 13 How. 40, 48-51; Gordon v. United States, 117 U.S. 697; In re Sanborn, 148 U.S. 222; Muskrat v. United States, 219 U.S. 346; Keller v. Potomac Electric Co., 261 U.S. 428, 442-444; Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693, 698; Liberty Warehouse Co. v. Grannis, 273 U.S. 70, 74; Fidelity National Bank & Trust Co. v. Swope, 274 U.S. 123, 134; Willing v. Chicago Auditorium Ass'n, 277 U.S. 274, 289.

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15. 21 Op.Attys.Gen. 449.

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16. James v. United States, 202 U.S. 401, 407-408.

1929, Ex parte Bakelite Corporation, 279 U.S. 461

17. Act March 3, 1891, c. 539, 26 Stat. 854.

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18. Tameling v. United States Freehold Co., 93 U.S. 644, 662-663; Astiazaran v. Santa Rita Land & Mining Co., 148 U.S. 80, 81-82.

1929, Ex parte Bakelite Corporation, 279 U.S. 461

19. Grisar v. McDowell, 6 Wall. 363, 379.

1929, Ex parte Bakelite Corporation, 279 U.S. 461

20. Act May 28, 1926, c. 411, 44 Stat. 669.

1929, Ex parte Bakelite Corporation, 279 U.S. 461

21. Acts June 10, 1890, c. 407, §§ 12-18, 26 Stat. 131, 136; August 5, 1909, c. 6, reenacted §§ 12-17, 36 Stat. 11, 98; September 21, 1922, c. 356, § 518, 42 Stat. 858, 972; title 19, §§ 381, 383, 398-402, 404-406, U.S.C..

1929, Ex parte Bakelite Corporation, 279 U.S. 461

22. Constitution, Article I, § 8, cls. 1 and 18; Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 281.

1929, Ex parte Bakelite Corporation, 279 U.S. 461

23. Act August 5, 1909, c. 6, § 28, 36 Stat. 11, 105; title 28, §§ 301-311, U.S.C.

1929, Ex parte Bakelite Corporation, 279 U.S. 461

24. Title 19, §§ 386, 396-399, 407, 408, U.S.C.

1929, Ex parte Bakelite Corporation, 279 U.S. 461

25. Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 280-281; Auffmordt v. Hedden, 137 U.S. 310, 329; Fong Yue Ting v. United States, 149 U.S. 698, 714-715.

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26. Cary v. Curtis, 3 How. 236, 242, 245-246.

1929, Ex parte Bakelite Corporation, 279 U.S. 461

27. Act June 18, 1910, c. 309, 36 Stat. 539, 540.

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28. Acts May 7, 1800, c. 41, § 3, 2 Stat. 58; January 11, 1805, c. 5, § 3, 2 Stat. 309; February 3, 1809, c. 13, § 3, 2 Stat. 514.

1929, Ex parte Bakelite Corporation, 279 U.S. 461

29. Act September 14, 1922, c. 306, § 5, 42 Stat. 837, 839; Title 28, § 22, U.S.C.

1929, Ex parte Bakelite Corporation, 279 U.S. 461

30. Act March 2, 1929.

Pocket Veto Case, 1929

Title: The Pocket Veto Case

Author: U.S. Supreme Court

Date: May 27, 1929

Source: 279 U.S. 655

The docket title of this case is The Okanogan, Methow, San Poelis (or San Poil), Nespelem, Colville, and Lake Indian Tribes or Bands of the State of Washington v. United States. This case was argued March 11, 1929, and was decided May 27, 1929.

1929, The Pocket Veto Case, 279 U.S. 655

CERTIORARI TO THE COURT OF CLAIMS

Syllabus

1929, The Pocket Veto Case, 279 U.S. 655

1. Under the second clause in § 7 of Article I of the Constitution, a bill which is passed by both Houses of Congress during the first regular session of a particular Congress and presented to the President less than ten days (Sundays excepted) before the adjournment of that session, but is neither signed by the President nor returned by him to the House in which it originated, does not become a law. P. 672.

1929, The Pocket Veto Case, 279 U.S. 655

2. The Constitution, in giving the President a qualified negative over legislation—commonly called a veto—entrusts him with an authority, and imposes upon him an obligation, that are of the highest [279 U.S. 656] importance, in the execution of which it is made his duty not only to sign bills that he approves in order that they may become law, but to return bills that he disapproves, with his objections, in order that they may be reconsidered by Congress. P. 677.

1929, The Pocket Veto Case, 279 U.S. 656

3. The faithful and effective exercise of this duty necessarily requires time in which the President may carefully examine and consider a bill and determine, after due deliberation, whether he should approve or disapprove it, and, if he disapproves it, formulate his objections for the consideration of Congress. To that end, a specified time is given, after the bill has been presented to him, in which he may examine its provisions and either approve it or return it, not approved, for reconsideration. P. 677.

1929, The Pocket Veto Case, 279 U.S. 656

4. The power thus conferred upon the President cannot be narrowed or cut down by Congress, nor the time within which it is to be exercised lessened, directly or indirectly. P. 677.

1929, The Pocket Veto Case, 279 U.S. 656

5. It is just as essential a part of the constitutional provisions guarding against ill-considered and unwise legislation that the President, on his part, should have the full time allowed him for determining whether he should approve or disapprove a bill, and, if disapproved, for adequately formulating the objections that should be considered by Congress as it is that Congress, on its part, should have an opportunity to repass the bill over his objections. P. 678.

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6. When the adjournment of Congress prevents the return of a bill within the allotted time, the failure of the bill to become a law cannot properly be ascribed to the disapproval of the President—who presumably would have returned it before the adjournment if there had been sufficient time in which to complete his consideration and take such action—but is attributable solely to the action of Congress in adjourning before the time allowed the President for returning the bill had expired. P. 678.

1929, The Pocket Veto Case, 279 U.S. 656

7. The phrase "within ten days (Sundays excepted)" in the clause of the Constitution here in question refers not to legislative days, but to calendar days. P. 679.

1929, The Pocket Veto Case, 279 U.S. 656

8. The term "adjournment," as used in this constitutional provision, is not limited to the final adjournment of the Congress. P. 680.

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9. The determinative question in reference to an "adjournment" is not whether it is a final adjournment of Congress or an interim adjournment, such as an adjournment of the first session, but whether it is one that "prevents" the President from returning the bill to the House in which it originated within the time allowed. P. 680. [279 U.S. 657]

1929, The Pocket Veto Case, 279 U.S. 657

10. An interim adjournment of Congress at the end of the first session, as the result of which, although the legislative existence of the House in which the bill originated has not been terminated, it is not in session on the last day of the period allowed the President for returning the bill, prevents him from returning it to such House. P. 681.

1929, The Pocket Veto Case, 279 U.S. 657

11. The "House" to which the bill is to be returned is a House in session—sitting in an organized capacity for the transaction of business and having authority to receive the return, enter the President's objections on its journal, and proceed to reconsider the bill; and no return can be made to the House when it is not in session as a collective body and its members are dispersed. P. 682.

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12. This accords with the long-established practice of both Houses of Congress to receive messages from the President while they are in session. P. 683.

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13. There is no substantial basis for the suggestion that, although the House in which the bill originated be not in session, the bill may nevertheless be returned, consistently with the constitutional mandate, by delivering it, with the President's objections, to an officer or agent of the House for subsequent delivery to the House when it resumes its sittings at the next session, with the same force and effect as if the bill had been returned to the House on the day when it was delivered to such officer or agent. P. 683.

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14. The above construction is confirmed by the practical construction given to this provision of the Constitution by the Presidents through a long course of years, and in which Congress has acquiesced. P. 688.

1929, The Pocket Veto Case, 279 U.S. 657

66 Ct.Cls. 26, affirmed.

1929, The Pocket Veto Case, 279 U.S. 657

Certiorari, 278 U.S. 597, to review a judgment of the Court of Claims dismissing a petition upon the ground that a bill passed by Congress, upon which the jurisdiction was dependent, had not become a law. [279 U.S. 672]

SANFORD, J., lead opinion

1929, The Pocket Veto Case, 279 U.S. 672

MR. JUSTICE SANFORD delivered the opinion of the Court.

1929, The Pocket Veto Case, 279 U.S. 672

This case presents the question whether, under the second clause in section 7 of Article 1 of the Constitution of the United States, a bill which is passed by both Houses of Congress during the first regular session of a particular Congress and presented to the President less than ten days (Sundays excepted) before the adjournment of that session, but is neither signed by the President nor returned by him to the house in which it originated, becomes a law in like manner as if he had signed it.

1929, The Pocket Veto Case, 279 U.S. 672

At the first session of the 69th Congress, Senate Bill No. 3185, entitled "An Act authorizing certain Indian tribes and bands, or any of them, residing in the State of Washington, to present their claims to the Court of Claims," having been passed by both Houses of Congress and duly authenticated, was presented to the President on June 24, 1926. On July 3, the first session of the 69th Congress was adjourned under a house concurrent resolution. 1 The Congress was not again in session until the commencement of the second session on the first Monday in December. 2 And neither House of Congress was in session on July 6—the tenth day after the bill had been presented to the President (Sundays excepted). [279 U.S. 673]

1929, The Pocket Veto Case, 279 U.S. 673

The President neither signed the bill nor returned it to the Senate. And it was not published as a law.

1929, The Pocket Veto Case, 279 U.S. 673

Taking the position that the bill had become a law without the signature of the President, the Okanogan and other Indian tribes residing in the State of Washington in March, 1927, filed a petition in the Court of Claims setting up certain claims in accordance with the terms of the bill. The United States demurred to the petition. The court sustained the demurrer and dismissed the petition on the ground that, under the provisions of the Constitution, the bill had not become a law.

1929, The Pocket Veto Case, 279 U.S. 673

In view of the public importance of the question presented, we granted the petitioners a writ of certiorari. 278 U.S. 597. And for like reason, at the request of the Committee on the Judiciary of the House of Representatives, we granted Mr. Sumners, a member of that Committee, leave to appear as amicus curiae. He has aided us by a comprehensive and forcible presentation of arguments against the conclusion of the court below.

1929, The Pocket Veto Case, 279 U.S. 673

The clause of the Constitution here in question reads as follows:

1929, The Pocket Veto Case, 279 U.S. 673

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; if he approve he shall sign it, but if not be shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. . . . If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like manner as if he had signed it, [279 U.S. 674] unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law. 3

1929, The Pocket Veto Case, 279 U.S. 674

The specific question here presented is whether, within the meaning of the last sentence—which we have italicized—Congress, by the adjournment on July 3, prevented the President from returning the bill within ten days, Sundays excepted, after it had been presented to him. If the adjournment did not prevent him from returning the bill within the prescribed time, it became a law without his signature; but, if the adjournment prevented him from so doing, it did not become a law. This is unquestioned.

1929, The Pocket Veto Case, 279 U.S. 674

In support of the position that the adjournment did not prevent the President from returning the bill within the prescribed time, counsel for the petitioners and the amicus curiae urge that the only "adjournment" which prevents the President from returning a bill within the prescribed time is the final adjournment of the Congress, terminating its legislative existence and making it impossible for the President to return the bill for its reconsideration, and that an adjournment of the first session of the Congress does not prevent the President from returning the bill within the prescribed time, since the legislative existence of the Congress is not terminated, and he may within that time return the bill to the House in which it originated, although not then in session, by delivering it, with his objections, to the Secretary, Clerk, or other appropriate agent of that House, to be held by such agent [279 U.S. 675] and presented to the House when the Congress resumes its sitting at the next session—thereby enabling the Congress to proceed with the reconsideration of the bill as a part of the unfinished legislative business carried over from the first session. And it is also said, by counsel for the petitioners, that the "ten days" allowed for the return of the bill, may be construed as meaning "legislative days," that is, days on which the Congress is in legislative session, and not calendar days, thereby enabling the President to return the bill within ten days, Sundays excepted, exclusive of all days on which the Congress was not in legislative session, even although, by reason of an adjournment, this period does not expire until after the Congress has resumed its legislative sittings at the second session.

1929, The Pocket Veto Case, 279 U.S. 675

In support of the position that Congress, by the adjournment on July 3, prevented the president from returning the bill within the prescribed time, the Attorney General maintains that the word "adjournment" includes an interim adjournment as well as the final adjournment at the end of a Congress; that the words "ten days" mean calendar days, and not legislative days; that the President cannot return a bill with his objections to the House in which it originated except by returning it to the House while in session; that if, by reason of an adjournment taken by Congress within the prescribed time, the House in which the bill originated be not in session on the last of such days and the bill cannot be thus returned, the President is thereby prevented from returning the bill within the prescribed time; and that this view is supported by the practical construction given to the constitutional provision by the President through a long course of years, in which Congress has acquiesced.

1929, The Pocket Veto Case, 279 U.S. 675

No light is thrown on the meaning of the constitutional provision in the proceedings and debates of the Constitutional Convention; and there has been no decision of [279 U.S. 676] this Court dealing directly with its meaning and effect in respect to the precise question here involved. And while we have been cited to various decisions of state courts construing similar provisions in state constitutions, an examination of them discloses such a conflict of opinion—due in some part to differences in phraseology or their application to the procedure of the state legislatures—that, viewed as a whole, they furnish no substantial aid in the determination of the question here presented, and a detailed consideration of them here would not be helpful. For that reason, we shall cite in this opinion only some that seem most apposite and persuasive in their reasoning.

1929, The Pocket Veto Case, 279 U.S. 676

1. It is earnestly insisted by counsel for the petitioners and by the amicus curiae, as the underlying basis of their contentions, that since clause 2 gives the President merely a qualified negative over legislation and requires him, if he disapproves a bill, to return it with his objections to the House in which it originated so that Congress may have an opportunity to reconsider it in the light of such objections and pass it by a two-thirds vote of each House, the provision as to the return of a bill within a specified time is to be construed in a manner that will give effect to the reciprocal rights and duties of the President and of Congress, and not enable him to defeat a bill of which he disapproves by a silent and "absolute veto," that is, a so-called "pocket veto," which neither discloses his objections nor gives Congress an opportunity to pass the bill over them. This argument involves a misconception of the reciprocal rights and duties of the President and of Congress and of the situation resulting from an adjournment of Congress which prevents the President from returning a bill with his objections within the specified time. This is illustrated in the use of the term "pocket veto," which does not accurately describe the situation, and is misleading in its implications in that it suggests that the [279 U.S. 677] failure of the bill in such case is necessarily due to the disapproval of the president and the intentional withholding of the bill from reconsideration. The Constitution, in giving the President a qualified negative over legislation—commonly called a veto—entrusts him with an authority and imposes upon him an obligation that are of the highest importance, in the execution of which it is made his duty not only to sign bills that he approves in order that they may become law, but to return bills that he disapproves, with his objections, in order that they may be reconsidered by Congress. The faithful and effective exercise of this momentous duty necessarily requires time in which the President may carefully examine and consider a bill and determine, after due deliberation, whether he should approve or disapprove it, and if he disapproves it, formulate his objections for the consideration of Congress. To that, end a specified time is given, after the bill has been presented to him, in which he may examine its provisions and either approve it or return it, not approved, for reconsideration. See La Abra Silver Mining Co. v. United States, 175 U.S. 423, 455. 4 The power thus conferred [279 U.S. 678] upon the President cannot be narrowed or cut down by Congress, nor the time within which it is to be exercised lessened, directly or indirectly. 5 And it is just as essential a part of the constitutional provisions guarding against ill-considered and unwise legislation that the President, on his part, should have the full time allowed him for determining whether he should approve or disapprove a bill, and if disapproved, for adequately formulating the objections that should be considered by Congress as it is that Congress, on its part, should have an opportunity to repass the bill over his objections.

1929, The Pocket Veto Case, 279 U.S. 678

It will frequently happen—especially when many bills are presented to the President near the close of a session, some of which are complicated or deal with questions of great moment—that when Congress adjourns before the time allowed for his consideration and action has expired, he will not have been able to determine whether some of them should be approved or disapproved, or, if disapproved, to formulate adequately the objections which should receive the consideration of Congress. And it is plain that, when the adjournment of Congress prevents the return of a bill within the allotted time, the failure of the bill to become a law cannot properly be ascribed to the disapproval of the President—who presumably would have returned it before the adjournment if there had been sufficient time in which to complete his consideration and [279 U.S. 679] take such action—but is attributable solely to the action of Congress in adjourning before the time allowed the President for returning the bill had expired. Thus, in La Abra Silver Mining Co. v. United States, supra, 454, this Court said that,

1929, The Pocket Veto Case, 279 U.S. 679

if, by its action, after the presentation of a bill to the President during the time given him by the Constitution for an examination of its provisions and for approving it by his signature, Congress puts it out of his power to return it, not approved, within that time to the House in which it originated, then the bill fails, and does not become a law. 6

1929, The Pocket Veto Case, 279 U.S. 679

2. There is plainly no warrant for adopting the suggestion of counsel for the petitioners—which is not urged by the amicus curiae—that the phrase "within ten Days (Sundays excepted)," may be construed as meaning not calendar days, but "legislative days," that is, days during which Congress is in legislative session—thereby excluding all calendar days which are not also legislative days from the computation of the period allowed the President for returning a bill. The words used in the Constitution are to be taken in their natural and obvious sense, Martin v. Hunter's Lessee, 1 Wheat. 304, 326, and are to be given the meaning they have in common use unless there are very strong reasons to the contrary. Tennessee v. Whitworth, 117 U.S. 139, 147. The word "days," when not qualified, means in ordinary and common usage calendar days. This is obviously the meaning in which it is used in the constitutional provision, and is emphasized by the fact that "Sundays" are excepted. There is nothing whatever to justify changing this meaning by inserting the word "legislative" as a qualifying adjective. And no President or Congress has ever suggested that the President [279 U.S. 680] has ten "legislative days" in which to consider and return a bill, or proceeded upon that theory.

1929, The Pocket Veto Case, 279 U.S. 680

3. Nor can we agree with the argument that the word "adjournment," as used in the constitutional provision, refers only to the final adjournment of the Congress. The word "adjournment" is not qualified by the word "final," and there is nothing in the context which warrants the insertion of such a limitation. On the contrary, the fact that the word "adjournment," as used in the Constitution, is not limited to a final adjournment is shown by the first clause in section 5 of Article 1, which provides that a smaller number than a majority of each House may "adjourn" from day to day, and by the fourth clause of the same Article, which provides that neither House, during the session of Congress, shall, without the consent of the other, "adjourn" for more than three days. And the Standing Rules of the Senate refer specifically to motions to "adjourn to a day certain" (No. XXII); and the Rules of the House of Representatives, to an "adjournment" at the end of one session (No. XXVI). 7

1929, The Pocket Veto Case, 279 U.S. 680

4. We think that, under the constitutional provision, the determinative question in reference to an "adjournment" is not whether it is a final adjournment of Congress or an interim adjournment, such as an adjournment of the first session, but whether it is one that "prevents" the President from returning the bill to the House in which it originated within the time allowed. It is clear, and, as [279 U.S. 681] we understand, is not questioned, that since the President may return a bill at any time within the allotted period, he is prevented from returning it, within the meaning of the constitutional provision, if, by reason of the adjournment, it is impossible for him to return it to the House in which it originated on the last day of that period. It is also conceded, as we understand, that the President is necessarily prevented from returning a bill by a final adjournment of the Congress, since such adjournment terminates the legislative existence of the Congress and makes it impossible to return the bill to either House. And the crucial question here presented is whether an interim adjournment of Congress at the end of the first session, as the result of which, although the legislative existence of the House in which the bill originated has not been terminated, it is not in session on the last day of the period allowed the President for returning the bill, likewise prevents him from returning it to such House. This brings us to the specific question whether, in order to return the bill to the House in which it originated, within the meaning of the constitutional provision, it is necessary, as the Attorney General insists, that it be returned to the House itself while it is in session, or whether, as urged by counsel for the petitioners and by the amicus curiae, it may be returned to the House, although not in session, by delivering it to an officer or agent of the House, to be held by him and delivered to the House when it resumes its sittings at the next session.

1929, The Pocket Veto Case, 279 U.S. 681

Clause 2 specifically provides that, if the President does not approve a bill,

1929, The Pocket Veto Case, 279 U.S. 681

he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.

1929, The Pocket Veto Case, 279 U.S. 681

That is, it provides in the same phrase, and with no change in definition, that the "House" to which the bill is to be returned is that which [279 U.S. 682] is to enter the objections on its journal and proceed to reconsider the bill.

1929, The Pocket Veto Case, 279 U.S. 682

From a consideration of the entire clause, we think that the "House" to which the bill is to be returned is the House in session. In Missouri Pac. Ry. Co. v. Kansas, 248 U.S. 276, 280, 281, 283, this Court, in holding that the provision in this clause requiring a vote of two-thirds of each House to pass a bill over the President's objections, means two-thirds of a quorum of each House and not two-thirds of all its members, said arguendo that "the context leaves no doubt that the provision was dealing with the two Houses as organized and entitled to exert legislative power," that is, the legislative bodies "organized conformably to law for the purpose of enacting legislation"; and, after stating that the identity between this provision and that in Article 5 of the Constitution, giving "two-thirds of both Houses" the power to submit amendments, makes the practice as to one applicable to the other, quoted with approval the "settled rule . . . clearly and aptly stated" by the Speaker, Mr. Reed, in the House, on the passage of the amendment to the Constitution providing for the election of Senators by the vote of the people, as follows:

1929, The Pocket Veto Case, 279 U.S. 682

What constitutes a House? A quorum of the membership, a majority, one-half and one more. That is all that is necessary to constitute a House to do all the business that comes before the House. Among the business that comes before the House is the reconsideration of a bill which has been vetoed by the President; another is a proposed amendment to the Constitution; and the practice is uniform in both cases that, if a quorum of the House is present, the House is constituted, and two-thirds of those voting are sufficient in order to accomplish the object. . . .

1929, The Pocket Veto Case, 279 U.S. 682

Since the bill is to be returned to the same "House," and none other, that is to enter the President's objections [279 U.S. 683] on its journal 8 and proceed to reconsider the bill—there being only one and the same reference to such House—it follows, in our opinion, that, under the constitutional mandate, it is to be returned to the "House" when sitting in an organized capacity for the transaction of business, and having authority to receive the return, enter the President's objections on its journal, and proceed to reconsider the bill; and that no return can be made to the House when it is not in session as a collective body, and its members are dispersed. This is the view expressed in 1 Curtis' Constitutional History of the United States 486, n. 1, in which it is said:

1929, The Pocket Veto Case, 279 U.S. 683

This expression, a "house", or "each house," is several times employed in the Constitution with reference to the faculties and powers of the two chambers respectively, and it always means, when so used, the constitutional quorum, assembled for the transaction of business, and capable of transacting business. This same expression was employed by the committee when they provided for the mode in which a bill, once rejected by the president, should be again brought before the legislative bodies. They directed it to be returned "to that House in which it shall have originated"—that is to say, to a constitutional quorum, a majority of which passed it in the first instance. . . .

1929, The Pocket Veto Case, 279 U.S. 683

This accords with the long established practice of both Houses of Congress to receive messages from the President while they are in session. See Senate Standing Rule XXVIII, cl. 1; House Rule XL; 5 Hind's Precedents of the House of Representatives, ch. CXXXVIII, especially sec. 6591, p. 812.

1929, The Pocket Veto Case, 279 U.S. 683

We find no substantial basis for the suggestion that, although the House in which the bill originated is not in session, the bill may nevertheless be returned, consistently [279 U.S. 684] with the constitutional mandate, by delivering it, with the President's objections, to an officer or agent of the House for subsequent delivery to the House when it resumes its sittings at the next session, with the same force and effect as if the bill had been returned to the House on the day when it was delivered to such officer or agent. Aside from the fact that Congress has never enacted any statute authorizing any officer or agent of either House to receive for it bills returned by the President during its adjournment, and that there is no rule to that effect in either House, the delivery of the bill to such officer or agent, even if authorized by Congress itself, would not comply with the constitutional mandate. The House, not having been in session when the bill was delivered to the officer or agent, could neither have received the bill and objections at that time, nor have entered the objections upon its journal, nor have proceeded to reconsider the bill, as the Constitution requires; and there is nothing in the Constitution which authorizes either House to make a nunc pro tunc record of the return of a bill as of a date on which it had not, in fact, been returned. Manifestly it was not intended that, instead of returning the bill to the House itself, as required by the constitutional provision, the President should be authorized to deliver it, during an adjournment of the House, to some individual officer or agent not authorized to make any legislative record of its delivery, who should hold it in his own hands for days, weeks or perhaps months—not only leaving open possible questions as to the date on which it had been delivered to him, or whether it had in fact been delivered to him at all, but keeping the bill in the meantime in a state of suspended animation until the House resumes its sittings, with no certain knowledge on the part of the public as to whether it had or had not been seasonably delivered, and necessarily causing delay in its reconsideration which the Constitution evidently intended to avoid. In short, it was plainly the object [279 U.S. 685] of the constitutional provision that there should be a timely return of the bill, which should not only be a matter of official record definitely shown by the journal of the House itself, giving public, certain and prompt knowledge as to the status of the bill, but should enable Congress to proceed immediately with its reconsideration; and that the return of the bill should be an actual and public return to the House itself, and not a fictitious return by a delivery of the bill to some individual which could be given a retroactive effect at a later date when the time for the return of the bill to the House had expired.

1929, The Pocket Veto Case, 279 U.S. 685

Thus, Attorney General Devens, in a memorandum to President Hayes, said:

1929, The Pocket Veto Case, 279 U.S. 685

All these provisions indicate that, in order to enable the President to return a bill, the Houses should be in session; and if, by their own act, they see fit to adjourn and deprive him of the opportunity to return the bill with his objections, and are not present themselves to receive and record these objections and to act thereon, the bill cannot become a law unless ten days shall have expired during which the President will have had the opportunity thus to return it. There is no suggestion that he may return it to the Speaker, or Clerk, or any officer of the House; but the return must be made to the House as an organized body. 9

1929, The Pocket Veto Case, 279 U.S. 685

It is significant that only one attempt has ever been made in Congress to authorize the President to return a bill when the House in which it originated was not in session, and that this failed. In 1868, a bill was reported by the Senate Judiciary Committee for regulating the return of bills by the President. 10 While this specifically declared that the constitutional provision allowed the President ten calendar days (Sundays excepted) in which to return a bill not approved by him, and that the return [279 U.S. 686] of a bill would be prevented by "the final adjournment of a session" of Congress, although not by an adjournment to a particular day, it provided that if, at any time within such ten days, the President desired to return the bill to the house in which it originated when such house was not sitting, he might return it to the office of the Secretary of the Senate or Clerk of the House of Representatives, as the case might be, who should endorse thereon the day on which such return was made, and make an entry of the fact of such return in his journal of the proceedings, and that such return should be deemed a return of the bill to all intents and purposes. In the debate in the Senate, strong opposition was expressed to this feature of the bill on constitutional grounds; 11 and [279 U.S. 687] although it passed the Senate by a majority vote, it was never reported from the Judiciary Committee of the House of Representatives, to which it was referred, and thus failed to pass the Congress. It does not appear that this suggestion has ever been renewed in Congress. [279 U.S. 688]

1929, The Pocket Veto Case, 279 U.S. 688

5. The views which we have expressed as to the construction and effect of the constitutional provision here in question are confirmed by the practical construction that has been given to it by the Presidents through a long [279 U.S. 689] course of years, in which Congress has acquiesced. Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character. Compare Missouri Pac. Ry. Co. v. [279 U.S. 690] Kansas, supra, 284; Myers v. United States, 272 U.S. 52, 119, 136; and State v. South Norwalk, 77 Conn. 257, 264, 58 A. 759, 761, in which the court said that a practice of at least twenty years' duration

1929, The Pocket Veto Case, 279 U.S. 690

on the part of the executive department, acquiesced in by the legislative department, while not absolutely binding on the judicial department, is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.

1929, The Pocket Veto Case, 279 U.S. 690

A memorandum prepared in the office of the Attorney General showing the results of an exhaustive research of governmental archives for the purpose of disclosing the practical construction placed upon the constitutional provision here involved in reference to so-called "pocket vetoes" was transmitted by the President to Congress in December 1928, 12 This memorandum—the accuracy of which is not questioned—cites more than 400 bills and resolutions which were passed by Congress and submitted to the President less than ten days before a final or interim adjournment of Congress, which were not signed by the President nor returned with his disapproval. Of these, 119 were instances in which the adjournment was that at the end of a session of Congress, as distinguished from the final adjournment of the Congress. None of these bills or resolutions were placed upon the statute books or treated as having become a law; nor does it appear that there was any attempt to enforce them in the courts until the present suit was brought. Of these instances, 11 occurred [279 U.S. 691] before the end of President Lincoln's administration, and the remainder from the end of that administration to the present time. They arose under the administration of all the Presidents except ten. These 119 bills and resolutions are thus classified in the brief of the amicus curiae: Private relief bills, 36; pension bills, 19; obsolete purposes, 10; relating to District of Columbia, 9; relating to personal status, 8; right of way over Indian and government land, 8; river and harbor bills, 7; disposition of war stores and government property, 5; reduction of national debts, 3; and general legislation, 14. It does not appear that, in any of these instances, either House of Congress in any official manner questioned the validity and effect of the President's action in not returning the bill after the adjournment of the session, or proceeded on the theory that it had become a law, although neither signed nor returned, until the action was taken in the House Committee of the Whole in 1927 to which we have referred. 13 And, in some instances, new bills were introduced in place of those that had not been returned. Without analyzing these 119 instances in detail, we think they show that, for a long series of years, commencing with President Madison's administration and continuing until the action of the House Committee of the Whole in 1927, all the Presidents who have had occasion to deal with this question have adopted and carried into effect the construction of the constitutional provision that they were prevented from returning the bill to the House in which it originated by the adjournment of the session of Congress, and that this construction has been acquiesced in by both Houses of Congress until 1927.

1929, The Pocket Veto Case, 279 U.S. 691

6. For these reasons, we conclude that the adjournment of the first session of the 69th Congress on July 3, 1926, prevented the President, within the meaning of the constitutional [279 U.S. 692] provision, from returning Senate Bill No. 3185 within ten days, Sundays excepted, after it had been presented to him, and that it did not become a law.

1929, The Pocket Veto Case, 279 U.S. 692

The judgment of the Court of Claims is

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Affirmed.

Footnotes

SANFORD, J., lead opinion (Footnotes)

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\* The docket title of this case is The Okanogan, Methow, San Poelis (or San Poil), Nespelem, Colville, and Lake Indian Tribes or Bands of the State of Washington v. United States.

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1. 67 Cong. Rec. pt. 11, pp. 12770, 12885, 13009, 13018, 13100. By the terms of this resolution, the House of Representatives adjourned sine die, and the Senate adjourned to November 10—this being the date to which, sitting as a court of impeachment, it had previously adjourned for the trial of certain articles of impeachment. 67 Cong. Rec. pt. 8, pp. 8725, 8733. And, on that date, the Senate, sitting as a court of impeachment, met and adjourned sine die. 68 Cong.Rec. pt. 1, pp. 3, 4.

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That the adjournment on July 3 was, in effect ,an adjournment of the first session of the Congress is not questioned.

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2. 68 Cong.Rec. pt. 1, p. 7; Constitution, Art. 1, Sec. 4, Cl. 2.

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3. The third clause reads as follows:

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Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

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4. Compare People v. Bowen, 30 Barb. (N. Y.) 24, 32, 34; Lankford v. County Commrs. of Somerset County, 73 Md. 105, 110, 111; Tuttle v. Boston, 215 Mass. 57, 58, 60, in which it was aptly said, in a concurring opinion:

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The convention which framed our Constitution designed to provide for the enactment and enforcement of salutary laws in the mode best calculated to promote the general welfare. They supposed, as one of the means of best attaining this end, that the executive of the State should not only be intrusted with the enforcement of all laws, but should also be vested with a voice in their adoption. In distributing the powers of government, they could, if they had chosen to do so, have authorized the general assembly to adopt laws independent of all executive action. But to prevent the evils of hasty, ill considered legislation, they conferred upon the governor the power to arrest the passage of a bill until his objections could be heard, and the bill be again considered and adopted. As the best means of accomplishing this, and of preventing the adoption of injurious measures, they gave to the governor ten days, exclusive of Sundays, in which to bestow that careful examination and consideration so essentially necessary to determine the effects and consequences likely to flow from the adoption of a new measure. This is the duty imposed, and it is one that must be performed. And the time allowed for the purpose cannot be abridged, or the provision thwarted, by either accident or design. The use of the whole time given to the governor must be allowed. The Constitution has spoken, and it must be obeyed.

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5. Compare Tuttle v. Boston, supra, 60; People v. Hatch, supra, 136.

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6. And, if Congress so desires, the same bill may be reintroduced and passed when Congress resumes its session, and after receiving the due consideration of the President, if returned with his objections, may be then passed by the requisite vote in both Houses.

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7. The view that the "adjournment" contemplated in the constitutional provision is the final adjournment of Congress, and not an interim adjournment, appears to have been expressed in behalf of Congress for the first and only time in a report made by the Judiciary Committee of the House of Representatives in 1927 (H. Rep't No. 2054, 69th Cong., 2d Sess.). This was followed by the Chairman of the Committee of the Whole in overruling a point of order made against a provision in an appropriation bill that presented this question; and no appeal was taken from this ruling. 68 Cong.Rec., pt. 5, pp. 4932-4937.

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8. The journal is the record that each House is required to keep of its own proceedings. Const., Art. I, sec. 5, cl. 3.

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9. Quoted in an opinion of Attorney General Miller, 20 Op.Attys.Gen. 503, 506.

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10. S. 366, 40 Cong., 2d sess.

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11. In the debate in the Senate, the constitutional objections to the provision authorizing the President to return a bill to an officer of the Senate or the House of Representatives when they were not sitting were clearly and, as we think, convincingly expressed.

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Thus, Senator Davis said:

1929, The Pocket Veto Case, 279 U.S. 692

[The] Constitution requires that, if the President does not approve a bill, he shall return it with his objections to the House in which it originated; this bill provides a different mode of disposing of that bill in case Congress has temporarily taken a recess or an adjournment. It dispenses with the requisition of the Constitution that the bill shall be returned to the House, and directs that it be returned to the officer of the House if the body is not in session. I do not believe it is competent for Congress to make any such change as that. . . . Of course, if [the President] is to return the bill to the House, the House must be in session, because it is not a House unless in session in the sense in which the Constitution requires the bill to be returned to the House by the President with his objections. . . . I think it is the duty of the President, in the plain language of the Constitution, to return the bill not to the Secretary or Clerk of either House, but to the House itself. That is the unambiguous and plain language of the Constitution. . . . It is returning it to the Senate or the House of Representatives in session, because when it is returned, it is to be at once considered again. The Constitution contemplates that, simultaneously with the return of the bill to the House in which it originated, the House may take up the matter for consideration. . . . I take the position that to return the bill to the Clerk of the House of Representatives, if it originated there, or to the Secretary of the Senate, if it originated in the Senate, when those bodies are not in session is not a return of the bill to the House in which it originated. It is the duty and the right of the President to communicate to the House, and not to a ministerial officer of the House. To enable him to communicate to the House, it must necessarily be in session, because he cannot communicate with either House when it is in any other situation than in actual session. It must be assembled and in actual session. . . . I think, sir, that the Executive may not only claim it as a right, but the House in which a bill originates may claim it as the performance of a duty by him to that House, and the people of the country may claim it as the performance of a duty by him, that he shall return the bill with his objections, not, in vacation, to the Clerk or to the Secretary of the Senate or House of Representatives, but to the body itself, and to enable him to perform that duty that body must necessarily be in session.

1929, The Pocket Veto Case, 279 U.S. 692

Cong. Globe, 40th Cong., 2d Sess., Pt. 2, pp. 1372, 1374, 1405.

1929, The Pocket Veto Case, 279 U.S. 692

Senator Bayard said:

1929, The Pocket Veto Case, 279 U.S. 692

But, Mr. President, there is an additional objection which, to my mind, is all-powerful. The committee propose . . . that if Congress is not in session during the ten days or at the end of the ten days, the President may send the bill to the office of the Secretary of the Senate or the Clerk of the House of Representatives, according to the House in which the bill may have originated. There is no such provision in the Constitution, and the settled usage of this Government, without a single exception from its foundation, is that no communication is made by the Executive to either House except to the House in session, and that usage ought to have a controlling influence to exclude the idea which is contained in the provision of the bill that I am now referring to. . . . But further, the very object of the clause looks to the fact that the bill should be returned during the session of the House in which it originated. It looks, if I may so speak, to immediate action on the part of Congress—at all events, it looks to giving to Congress the right of immediate action as soon as the objections of the President are received. The Houses are to proceed to consider the objections; they are to spread them at large on the Journal; there is to be a reconsideration of the measure formerly under debate. The whole clause looks to speedy action, at all events, upon objections made by the President, and the language employed providing for a return to the House does not imply filing a document with the Clerk or the Secretary when the House is not in session, whether it be the Senate or the House of Representatives. . . . Here the usage of the Government of the United States, from its origin to the present day, is that in no single case has a President of the United States, on the return of a bill to the Senate or House of Representatives, ever undertaken to file his message with the Clerk of the one or the Secretary of the other; but the action of the Executive has uniformly been by message sent to the House when in session. That is the settled usage; and when you look to the language of the Constitution, that the bill is to be returned to the House, it is certainly forcing language to say that a return to the House means filing a paper with the Secretary or Clerk when the House is not in session.

1929, The Pocket Veto Case, 279 U.S. 692

Cong. Globe, 40th Cong., 2d Sess., Pt. 2, pp. 1941, 1942.

1929, The Pocket Veto Case, 279 U.S. 692

Senator Buckalew said:

1929, The Pocket Veto Case, 279 U.S. 692

I should like to know how the Secretary can make entries and make up a Journal when the Senate is not in session. I can understand that, when the Senate reconvenes, the Clerk may hand to the President of the Senate, just as any member might or any outsider might, the particular paper, and it may then be presented to the Senate, and it may be entered in the Journal. But this bill contemplates that our Secretary shall make and keep a Journal when the Senate is not here at all, when there can be no Journal of its proceedings. . . . [The] Constitution provides that the Senate shall keep a Journal of its proceedings, of what it does itself. In another clause, it is provided that, when the President returns a bill with his objections, that message thus containing his objections shall be entered upon the Journal of the Senate. The fact of receiving such a message and the entry of the message upon the Journal must, in the very nature of the case, be when the Senate itself is in session. . . . The Journal is to be kept by the Senate, and it is to be a Journal of what it does, a Journal of its proceedings. . . . The reception of a message from the President of the United States is a proceeding by the Senate; it is an act by the Senate itself. . . . I think, therefore, it is manifest that, under the Constitution of the United States, this Journal and the entries upon the Journal are matters which relate to a session of the Senate, an actual session, the personal presence of the body, and that it is not competent for the Senate to commit to one of its own officers, or to any officer of the Government, or to any citizen, the performance of a duty which is by the Constitution charged upon itself and to be performed by itself. . . . Now, one objection which applies to the bill . . . is that it is against the practice of the Government. From the time that Congress first convened together in 1789 down to this time, it has been held, and held uniformly, that if the two Houses of Congress adjourned by a concurrent resolution before the expiration of ten days from the presentation of a bill to the President a bill which should then be left in his hands would fail. . . . They have failed upon repeated occasions, not only during recent years, but far back in former times. . . . This bill proposes, in the absence of both Houses of Congress to provide a substitute for the House to which the bill is to be returned. Instead of being returned to the House in which it originated, as the Constitution says, this bill proposes to enact that it shall be returned to the Secretary here alone . . . , and that, upon the paper's . . . being given to that particular person, it shall be considered that it has been returned to the House in which it originated. . . . Can anything more flatly contradict common sense, deny the plain fact? Can we constitute our Secretary into the Senate, and can we make the Clerk of the House of Representatives the House for the purpose of doing any official act whatever? You propose that he shall receive the communication from the President as if he were the Senate or the House; that he, sitting anywhere, responsible to nobody, with no check upon him, shall make up a Journal as if he were the Senate or the House for the occasion.

1929, The Pocket Veto Case, 279 U.S. 692

Cong.Rec., 40th Cong., 2d. Sess., Pt. 3, pp. 2076, 2077.

1929, The Pocket Veto Case, 279 U.S. 692

And Senator Morton said:

1929, The Pocket Veto Case, 279 U.S. 692

The Constitution . . . contemplates that the bill shall pass from the custody of the House in which it shall have originated; and we have no power, in my judgment, to say that it shall be sufficient to return it to the President of the Senate or the Speaker of the House or to the Secretary or Clerk. . . . What has become of the bill? The Constitution does not contemplate such a condition of things. . . . It would be just as good for the private Secretary of the President to retain a bill as for the Secretary of the Senate; just as much a compliance with the provision of the Constitution; and it would be just as satisfactory to my mind for the President to retain it during the odd days as for the Secretary of the Senate to do so.

1929, The Pocket Veto Case, 279 U.S. 692

Cong.Globe, 40th Cong., 2d Sess., Pt. 3, pp. 2077, 2078.

1929, The Pocket Veto Case, 279 U.S. 692

12. Ho.Doc. No. 493, 70 Cong., 2d sess.

1929, The Pocket Veto Case, 279 U.S. 692

13. Note 7, supra.

Patton v. United States, 1930

Title: Patton v. United States

Author: U.S. Supreme Court

Date: April 14, 1930

Source: 281 U.S. 276

This case was argued February 25, 1930, and was decided April 14, 1930.

1930, Patton v. United States, 281 U.S. 276

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS

1930, Patton v. United States, 281 U.S. 276

FOR THE EIGHTH CIRCUIT

Syllabus

1930, Patton v. United States, 281 U.S. 276

1. After the commencement of a trial in a federal court before a jury of twelve men upon an indictment charging a crime, punishment for which may involve a penitentiary sentence, if one juror becomes incapacitated and unable to proceed further with his work as a juror, the defendant and the Government, through its official representative in charge of the case, may consent to the trial's proceeding to a finality with eleven jurors, and defendant thus may waive the right to a trial and verdict by a constitutional jury of twelve men. P. 287 et seq.

1930, Patton v. United States, 281 U.S. 276

2. The phrase "trial by jury," as used in the Federal Constitution (Art. III, § 2, and the Sixth Amendment) means a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted; viz: (1) that the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts, and (3) that the verdict should be unanimous. P. 288.

1930, Patton v. United States, 281 U.S. 276

3. These common law elements of a jury trial are embedded in the provisions of the Federal Constitution relating thereto, and are beyond the authority of the legislative department to destroy or abridge. P. 290.

1930, Patton v. United States, 281 U.S. 276

4. There is no difference in substance between a complete waiver of a jury and consent to be tried by a less number than twelve. Id.

1930, Patton v. United States, 281 U.S. 276

5. A question involving a claim of constitutional right cannot be settled by the simple process of ascertaining that the infraction assailed is unimportant when compared with similar but more serious infractions which might be conceived; to uphold the voluntary reduction of a jury from twelve to eleven upon the ground that the reduction is only a slight reduction is not to interpret the Constitution, but to disregard it. P. 292.

1930, Patton v. United States, 281 U.S. 276

6. The effect of the constitutional provisions in respect of trial by jury is not to establish a tribunal as a part of the frame of government, [281 U.S. 277] but only to guarantee to the accused the right to such a trial. P. 293.

1930, Patton v. United States, 281 U.S. 277

7. The first ten amendments and the original Constitution were substantially contemporaneous, and should be construed in pari materia. P. 298.

1930, Patton v. United States, 281 U.S. 277

8. The provision of Art. III, § 2, of the Constitution, relating to trial by jury, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. Id.

1930, Patton v. United States, 281 U.S. 277

9. A federal district court has authority, in the exercise of a sound discretion, to accept a waiver of jury trial in a criminal case, and to proceed to the trial and determination of the case with a reduced number or without a jury, the grant of jurisdiction by § 24 of the Judicial Code, U.S.C. Title 28, § 41(2), being sufficient to that end. P. 299.

1930, Patton v. United States, 281 U.S. 277

10. The view that power to waive a trial by jury in criminal cases should be denied on grounds of public policy is rejected as unsound. P. 308.

1930, Patton v. United States, 281 U.S. 277

11. The power of waiver of jury trial by the defendant in a criminal case is applicable to cases of felonies, as well as to misdemeanors. P. 309.

1930, Patton v. United States, 281 U.S. 277

12. Before a waiver of jury trial in a criminal case can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant, and the duty of the trial court in this regard is to be discharged with a sound and advised discretion. P. 312.

1930, Patton v. United States, 281 U.S. 277

ANSWER to a question certified by the Circuit Court of Appeals upon review of a judgment of the District Court imposing sentence in a criminal prosecution for conspiring to bribe a federal prohibition agent. [281 U.S. 286]

SUTHERLAND, J., lead opinion

1930, Patton v. United States, 281 U.S. 286

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

1930, Patton v. United States, 281 U.S. 286

The defendants (plaintiffs in error) were indicted in a federal district court, charged with conspiring to bribe a federal prohibition agent, a crime punishable by imprisonment in a federal penitentiary for a term of years. A jury of twelve men was duly impaneled. The trial began on October 19, 1927, and continued before the jury of twelve until October 26 following, at which time one of the jurors, because of severe illness, became unable to serve further as a juror. Thereupon it was stipulated in open court by the government and counsel for defendants, defendants personally assenting thereto, that the trial should proceed with the remaining eleven jurors. To this stipulation the court consented after stating that the defendants and the government both were entitled to a constitutional jury of twelve, and that the absence of one juror would result in a mistrial unless both sides should waive all objections and agree to a trial before the remaining eleven jurors. Following this statement, the stipulation was renewed in open court by all parties. During the colloquy, counsel for defendants stated that he had personally conferred with all counsel and with each of the defendants individually, and it was the desire of all to finish the trial of the case with the eleven jurors [281 U.S. 287] if the defendants could waive the presence of the twelfth juror.

1930, Patton v. United States, 281 U.S. 287

The trial was concluded on the following day, and a verdict of guilty was rendered by the eleven jurors. Each of the defendants was sentenced to terms of imprisonment in the penitentiary on the several counts of the indictment. An appeal was taken to the circuit court of appeals upon the ground that the defendants had no power to waive their constitutional right to a trial by a jury of twelve persons.

1930, Patton v. United States, 281 U.S. 287

The court below, being in doubt as to the law applicable to the situation thus presented, and desiring the instruction of this court, has certified the following question:

1930, Patton v. United States, 281 U.S. 287

After the commencement of a trial in a Federal Court before a jury of twelve men upon an indictment charging a crime, punishment for which may involve a penitentiary sentence, if one juror becomes incapacitated and unable to further proceed with his work as a juror, can defendant or defendants and the Government, through its official representative in charge of the case, consent to the trial's proceeding to a finality with eleven jurors, and can defendant or defendants thus waive the right to a trial and verdict by a constitutional jury of twelve men?

1930, Patton v. United States, 281 U.S. 287

The question thus submitted is one of great importance, in respect of which there are differences of opinion among the various lower federal and state courts, but which this court thus far has not been required definitely to answer. There are, however, statements in some of our former opinions, which, if followed, would require a negative answer. These are referred to and relied upon by the defendants.

1930, Patton v. United States, 281 U.S. 287

The federal Constitution contains two provisions relating to the subject. Article III, Section 2, Clause 3 provides: [281 U.S. 288]

1930, Patton v. United States, 281 U.S. 288

The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

1930, Patton v. United States, 281 U.S. 288

The Sixth Amendment provides:

1930, Patton v. United States, 281 U.S. 288

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

1930, Patton v. United States, 281 U.S. 288

Passing for later consideration the question whether these provisions, although varying in language, should receive the same interpretation, and whether, taken together or separately, the effect is to guaranty a right or establish a tribunal as an indispensable part of the government structure, we first inquire what is embraced by the phrase "trial by jury." That it means a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted, is not open to question. Those elements were—(1) that the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts, and (3) that the verdict should be unanimous.

1930, Patton v. United States, 281 U.S. 288

As to the first of these requisites, it is enough to cite Thompson v. Utah, 170 U.S. 343, 350, where this court [281 U.S. 289] reversed the conviction of a defendant charged with grand larceny by a jury of eight men, saying:

1930, Patton v. United States, 281 U.S. 289

It must consequently be taken that the word "jury" and the words "trial by jury" were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument, and that, when Thompson committed the offence of grand larceny in the Territory of Utah—which was under the complete jurisdiction of the United States for all purposes of government and legislation—the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons.

1930, Patton v. United States, 281 U.S. 289

The second requisite was expressly dealt with in Capital Traction Company v. Hof, 174 U.S. 1, 13-16, where it is said:

1930, Patton v. United States, 281 U.S. 289

"Trial by jury," in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict, but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if, in his opinion, it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion.

1930, Patton v. United States, 281 U.S. 289

The third requisite was held essential in American Publishing Company v. Fisher, 166 U.S. 464, 468; Springville v. Thomas, 166 U.S. 707; Maxwell v. Dow, 176 U.S. 581, 586. [281 U.S. 290]

1930, Patton v. United States, 281 U.S. 290

These common law elements are embedded in the constitutional provisions above quoted, and are beyond the authority of the legislative department to destroy or abridge. What was said by Mr. Justice Brewer in American Publishing Company v. Fisher, supra, with respect to the requirement of unanimity is applicable to the other elements as well:

1930, Patton v. United States, 281 U.S. 290

Whatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys this substantial and essential feature thereof is one abridging the right.

1930, Patton v. United States, 281 U.S. 290

Any such attempt is vain and ineffectual, whatever form it may take. See In re Debs, 158 U.S. 564, 594.

1930, Patton v. United States, 281 U.S. 290

The foregoing principles, while not furnishing a precise basis for an answer to the question here presented, have the useful effect of disclosing the nature and scope of the problem, since they demonstrate the unassailable integrity of the establishment of trial by jury in all its parts, and make clear that a destruction of one of the essential elements has the effect of abridging the right in contravention of the Constitution. It follows that we must reject in limine the distinction sought to be made between the effect of a complete waiver of a jury and consent to be tried by a less number than twelve, and must treat both forms of waiver as, in substance, amounting to the same thing. In other words, an affirmative answer to the question certified logically requires the conclusion that a person charged with a crime punishable by imprisonment for a term of years may, consistently with the constitutional provisions already quoted, waive trial by a jury of twelve and consent to a trial by any lesser number, or by the court without a jury.

1930, Patton v. United States, 281 U.S. 290

We are not unmindful of the decisions of some of the state courts holding that it is competent for the defendant to waive the continued presence of a single juror who has become unable to serve, while at the same time denying [281 U.S. 291] or doubting the validity of a waiver of a considerable number of jurors, or of a jury altogether. See, for example, State v. Kaufman, 51 Iowa 578, 580, with which compare State v. Williams, 195 Iowa 374; Commonwealth ex rel. Ross v. Egan, 281 Pa. 251, 256, with which compare Commonwealth v. Hall, 291 Pa. 341. But in none of these cases are we able to find any persuasive ground for the distinction.

1930, Patton v. United States, 281 U.S. 291

Other state courts, with, we think, better reason, have adopted a contrary view. In State v. Baer, 103 Ohio St. 585, a person charged with manslaughter had been convicted by eleven jurors. The trial began with a jury of twelve, but, one of the jurors becoming incapable of service, the trial was concluded with the remaining eleven. In disposing of the case, the state supreme court thought it necessary to consider the broad question (p. 589): ". . . whether the right of trial by jury, as guaranteed by Sections 5 and 10 of the Bill of Rights, can be waived." After an extensive review of the authorities and a discussion of the question on principle, the court concluded that, since it was permissible for an accused person to plead guilty, and thus waive any trial, he must necessarily be able to waive a jury trial.

1930, Patton v. United States, 281 U.S. 291

In Jennings v. State, 134 Wis. 307, 309, where, again, a juror during the trial was excused from service because of illness, and the case was continued and concluded before the remaining eleven, the Supreme Court of Wisconsin also disposed of the case as involving the power of the defendant to waive a jury altogether, saying:

1930, Patton v. United States, 281 U.S. 291

It seems necessarily to follow that, if a person on trial in a criminal case has no power to waive a jury, he has no right to be tried by a less number than a common law jury of twelve, and, when he puts himself on the country, it requires a jury of twelve to comply with the demands of the constitution. The fact that the jury in [281 U.S. 292] the instant case had the required number of twelve up to the stage in the trial when the cause was to be submitted to them under the instructions of the court cannot operate to satisfy the constitutional demand. At this point, the trial was incomplete, for the very essential duty of having the jury deliberate upon the evidence and agree upon a verdict respecting defendant's guilt or innocence remained unperformed. Without the verdict of a jury of twelve, it cannot be said to be a verdict of the jury required by the constitution. Such a verdict is illegal, and insufficient to support a judgment.

1930, Patton v. United States, 281 U.S. 292

We deem it unnecessary to cite other cases which deal with the problem from the same point of view.

1930, Patton v. United States, 281 U.S. 292

A constitutional jury means twelve men as though that number had been specifically named, and it follows that, when reduced to eleven, it ceases to be such a jury quite as effectively as though the number had been reduced to a single person. This conclusion seems self-evident, and no attempt has been made to overthrow it save by what amounts to little more than a suggestion that, by reducing the number of the jury to eleven or ten, the infraction of the Constitution is slight, and the courts may be trusted to see that the process of reduction shall not be unduly extended. But the constitutional question cannot thus be settled by the simple process of ascertaining that the infraction assailed is unimportant when compared with similar but more serious infractions which might be conceived. To uphold the voluntary reduction of a jury from twelve to eleven upon the ground that the reduction—though it destroys the jury of the Constitution—is only a slight reduction, is not to interpret that instrument, but to disregard it. It is not our province to measure the extent to which the Constitution has been contravened and ignore the violation if, in our opinion, it is not, relatively, as bad as it might have been. [281 U.S. 293]

1930, Patton v. United States, 281 U.S. 293

We come, then, to the crucial inquiry: is the effect of the constitutional provisions in respect of trial by jury to establish a tribunal as a part of the frame of government, or only to guaranty to the accused the right to such a trial? If the former, the question certified by the lower court must, without more, be answered in the negative.

1930, Patton v. United States, 281 U.S. 293

Defendants strongly rely upon the language of this court in Thompson v. Utah, supra, at page 353:

1930, Patton v. United States, 281 U.S. 293

It is said that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore he should not be heard to say that his trial by such a jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt. The law in force when this crime was committed did not permit any tribunal to deprive him of his liberty except one constituted of a court and a jury of twelve persons.

1930, Patton v. United States, 281 U.S. 293

But this statement, though positive in form, is not authoritative. The case involved the validity of a statute dispensing with the common law jury of twelve and providing for trial by a jury of eight. There was no contention that the defendant, Thompson, had consented to the trial, but only that he had not objected until after verdict. The effect of an express consent on his part to a trial by a jury of eight was not involved—indeed he had been silent only under constraint of the statute—and what the court said in respect of that matter is obviously an obiter dictum.

1930, Patton v. United States, 281 U.S. 293

Defendants also cite as supporting their contention two decisions of federal circuit courts of appeal, namely, Low v. United States, 169 Fed. 86, and Dickinson v. United States, 159 Fed. 801. [281 U.S. 294]

1930, Patton v. United States, 281 U.S. 294

In the first of these cases, the opinion, rendered by Judge Lurton, afterwards a justice of this court, definitely holds that the waiver of trial of a crime by jury involves setting aside the tribunal constituted by law for that purpose and the substitution by consent of one unknown to the law, and that this cannot be done by consent of the accused and the district attorney. "Undoubtedly," the opinion concludes,

1930, Patton v. United States, 281 U.S. 294

the accused has a right to waive everything which pertains to form and much which is of the structure of a trial. But he may not waive that which concerns both himself and the public, nor any matter which involves fundamentally the jurisdiction of the court. The jurisdiction of the court to pronounce a judgment or conviction for crime when there has been a plea of not guilty rests upon the foundation of a verdict by a jury. Without that basis, the judgment is void.

1930, Patton v. United States, 281 U.S. 294

This is strong language from a judge whose opinion is entitled to great respect.

1930, Patton v. United States, 281 U.S. 294

In the second case, involving the completion of a trial by consent with a jury of eleven persons, substantially the same was held; but in a scholarly and thoughtful dissenting opinion, Judge Aldrich reviews the common law practice upon the subject antedating the Constitution, and, in the course of his opinion, after referring to Article III, Section 2, and the Sixth Amendment, says (pp. 813-814, 820-821):

1930, Patton v. United States, 281 U.S. 294

The aim of the constitutional safeguards in question is a full, fair, and public trial, and one which shall reasonably and in all substantial ways safeguard the interests of the state and the life and liberty of accused parties. Whether the idea is expressed in words or not, as is done in some of the bills of rights and constitutions, a free and fair trial only means a trial as free and fair as the lot of humanity will admit.

1930, Patton v. United States, 281 U.S. 294

All will doubtless agree, at least the unquestioned authority is that way, that these protective provisions of [281 U.S. 295] the Constitution are not so imperative that an accused shall be tried by jury when he desires to plead guilty; or that his trial, in the event of trial, shall be held invalid for want of due process of law based upon the ground that he was not confronted with his witnesses when he had waived that constitutional right and consented to the use of depositions; or because he had not had compulsory process for obtaining witnesses in his favor when he had waived that; or because he had not had the assistance of counsel when he had intelligently refused such constitutional privilege and insisted upon the right to go to trial without counsel; or upon the ground that he had not had a speedy trial when he had petitioned the court for delay; or that his trial was not public when he had consented to, or silently acquiesced in, a trial in a courthouse with a capacity for holding only 12 members of the public, rather than 1200.

1930, Patton v. United States, 281 U.S. 295

Beyond question, the right of an accused in a case like this to have 12 jurors throughout is so far absolute as a constitutional right that he may have it by claiming it, or even by withholding consent to proceed without that number, and doubtless, under a constitutional government like ours, the interests of the community so far enter into any incidental departure from that number, in the course of the trial, as to require the discretionary approval of the court, and that the proper representative of the government should join the accused in consent.

1930, Patton v. United States, 281 U.S. 295

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1930, Patton v. United States, 281 U.S. 295

It is probable that the history and debates of the constitutional convention will not be found to sustain the idea that the constitutional safeguards in question were in any sense established as something necessary to protect the state or the community from the supposed danger that accused parties would waive away the interest which the government has in their liberties, and go to jail. [281 U.S. 296]

1930, Patton v. United States, 281 U.S. 296

There is not now, and never was, any practical danger of that. Such a theory, at least in its application to modern American conditions, is based more upon useless fiction than upon reason. And when the idea of giving countenance to the right of waiver, as something necessary to a reasonable protection of the rights and liberties of accused, and as something intended to be practical and useful in the administration of the rights of the parties, has been characterized as involving innovation "highly dangerous," it would, as said by Judge Seevers in State v. Kaufman, 51 Iowa, 578, 581, 2 N.W. 275, 277, 33 Am.Rep. 148, "have been much more convincing and satisfactory if we had been informed why it would be highly dangerous."

1930, Patton v. United States, 281 U.S. 296

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1930, Patton v. United States, 281 U.S. 296

Traced to its English origin, it would probably be found, so far as the right of waiver was there withheld from accused parties, that, in a very large sense. the reason for it was that conviction of crime, under the old English system, operated to outlaw and to attaint the blood, and to work a forfeiture of official titles of inheritance, thus affecting the rights of third parties.

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In every substantial sense, our constitutional provisions in respect to jury trials in criminal cases are for the protection of the interests of the accused, and, as such, they may, in a limited and guarded measure, be waived by the party sought to be benefited.

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The record of English and colonial jurisprudence antedating the Constitution will be searched in vain for evidence that trial by jury in criminal cases was regarded as a part of the structure of government, as distinguished from a right or privilege of the accused. On the contrary, it uniformly was regarded as a valuable privilege bestowed upon the person accused of crime for the purpose of safeguarding him against the oppressive power of the King and the arbitrary or partial judgment of the [281 U.S. 297] court. Thus, Blackstone, who held trial by jury both in civil and criminal cases in such esteem that he called it "the glory of the English law," nevertheless looked upon it as a "privilege," albeit "the most transcendent privilege which any subject can enjoy." Book III, p. 379. And Judge Story, writing at a time when the adoption of the Constitution was still in the memory of men then living, speaking of trial by jury in criminal cases, said:

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When our more immediate ancestors removed to America, they brought this great privilege with them, as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our State constitutions as a fundamental right, and the Constitution of the United States would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms.

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2 Story on the Constitution, § 1779.

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In the light of the foregoing, it is reasonable to conclude that the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused. If not, and their intention went beyond this and included the purpose of establishing the jury for the trial of crimes as an integral and inseparable part of the court, instead of one of its instrumentalities, it is strange that nothing to that effect appears in contemporaneous literature or in any of the debates or innumerable discussions of the time. This is all the more remarkable when we recall the minute scrutiny to which every provision of the proposed Constitution was subjected. The reasonable inference is that the concern of the framers of the Constitution was to make clear that the right of trial by jury should remain inviolable, to which end no language was deemed too imperative. That this was the purpose of the Third Article is rendered [281 U.S. 298] highly probable by a consideration of the form of expression used in the Sixth Amendment.

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In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .

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This provision, which deals with trial by jury clearly in terms of privilege, although occurring later than that in respect of jury trials contained in the original Constitution, is not to be regarded as modifying or altering the earlier provision, and there is no reason for thinking such was within its purpose. The first ten amendments and the original Constitution were substantially contemporaneous, and should be construed in pari materia. So construed, the latter provision fairly may be regarded as reflecting the meaning of the former. In other words, the two provisions mean substantially the same thing, and this is the effect of the holding of this court in Callan v. Wilson, 127 U.S. 540, 549, where it is said:

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And we do not think that the amendment was intended to supplant that part of the third article which relates to trial by jury. There is no necessary conflict between them.

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Upon this view of the constitutional provisions, we conclude that Article III, Section 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. To deny his power to do so is to convert a privilege into an imperative requirement.

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But the question remains whether the court is empowered to try the case without a jury—that is to say, whether Congress has vested jurisdiction to that end. We think it has, although some of the state, as well as some of the federal, decisions suggest a different conclusion.

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By the Constitution, Article III, Section; 1, the judicial power of the United States is vested in the Supreme Court and such inferior courts as Congress may from time to [281 U.S. 299] time ordain and establish. In pursuance of that authority, Congress, at an early day, established the district and circuit courts, and, by § 24 of the Judicial Code (U.S.Code, Title 28, § 41(2)), the circuit courts having been abolished, expressly conferred upon the district courts jurisdiction "of all crimes and offenses cognizable under the authority of the United States." This is a broad and comprehensive grant, and gives the courts named power to try every criminal case cognizable under the authority of the United States, subject to the controlling provisions of the Constitution. In the absence of a valid consent, the district court cannot proceed except with a jury, not because a jury is necessary to its jurisdiction, but because the accused is entitled by the terms of the Constitution to that mode of trial. Since, however, the right to a jury trial may be waived, it would be unreasonable to leave the court powerless to give effect to the waiver and itself dispose of the case. We are of opinion that the court has authority, in the exercise of a sound discretion, to accept the waiver and, as a necessary corollary, to proceed to the trial and determination of the case with a reduced number or without a jury, and that jurisdiction to that end is vested by the foregoing statutory provisions. The power of waiver being established, this is the clear import of the decision of this court in Schick v. United States, 195 U.S. 65, 70-71.

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By section 563, Rev.Stat. [superseded by § 24, Judicial Code], the District Courts are given jurisdiction "of all crimes and offenses cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, the punishment of which is not capital." There is no act of Congress requiring that the trial of all offenses shall be by jury, and a court is fully organized and competent for the transaction of business without the presence of a jury. [281 U.S. 300]

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See also In re Belt, 159 U.S. 95, and Riddle v. Dyche, 262 U.S. 333, both of which are out of harmony with the notion that the presence of a jury is a constitutional prerequisite to the jurisdiction of the court in a criminal case. The first of these cases involved the validity of an act of Congress authorizing waiver of a jury in criminal cases in the District of Columbia. The Court of Appeals of that District upheld the statute in Belt v. United States, 4 D.C.App.Cas. 25. Leave was asked of this court to file a petition for writ of habeas corpus. Upon this application, the question to be answered was (p. 97):

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Does the ground of this application go to the jurisdiction or authority of the Supreme Court of the District, or rather is it not an allegation of mere error? If the latter, it cannot be reviewed in this proceeding. In re Schneider, 148 U.S. 162, and cases cited.

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After reviewing authorities, it was held that the Supreme Court of the District had jurisdiction to determine the validity of the act which authorized the waiver, and that its action could not be reviewed on habeas corpus.

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In the second case, Riddle, on habeas corpus, assailed a conviction in a federal district court upon the ground that the jury was composed of only eleven men. This court held that the trial court had jurisdiction, and a record showing upon its face that a lawful jury had been impaneled, sworn and charged could not be collaterally impeached. The remedy was by writ of error.

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This conclusion in respect of the jurisdiction of the courts, notwithstanding the peremptory words of the Third Article of the Constitution, is fortified by a consideration of certain provisions of the Judiciary Act of 1789. That act was passed shortly after the organization of the government under the Constitution, and on the day preceding the proposal of the first ten amendments by the first Congress. Among the members of that Congress were many who had participated in the [281 U.S. 301] convention which framed the Constitution, and the act has always been considered, in relation to that instrument, as a contemporaneous exposition of the highest authority. Capital Traction Company v. Hof, supra, pp. 9-10, and cases cited. Section 9 of that act provides that

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the trial of issues in [of] fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.

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Section 12 provides that

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the trial of issues in [of] fact in the circuit courts shall, in all suits, except those of equity, and of admiralty, and maritime jurisdiction, be by jury.

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It will be observed that this language is mandatory in form, and is precisely the same as that of Article III, Section 2, of the Constitution. It is fair to assume that the framers of the statute, in using the words of the Constitution, intended they should have the same meaning, and if the purpose of the latter was jurisdictional, it is not easy to avoid the conclusion that the purpose of the former was the same. But this court has always held, beginning at an early day, that, notwithstanding the imperative language of the statute, it was competent for the parties to waive a trial by jury. The early cases are collected in a footnote to Kearney v. Case, 12 Wall. 275, 281, following the statement:

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Undoubtedly both the Judiciary Act and the amendment to the Constitution secured the right to either party in a suit at common law to a trial by jury, and we are also of opinion that the statute of 1789 intended to point out this as the mode of trial in issues of fact in such cases. Numerous decisions, however, had settled that this right to a jury trial might be waived by the parties, and that the judgment of the court in such cases should be valid.

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The Seventh Amendment, which is here referred to, provides, in respect of suits at common law involving a value exceeding twenty dollars, that "the right of trial [281 U.S. 302] by jury shall be preserved", and it is significant that this language and the positive provision of the statute that "the trial of issues of fact . . . shall be by jury" were regarded as synonymous.

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Another ground frequently relied upon for denying the power of a person accused of a serious crime to waive trial by jury is that such a proceeding is against public policy. The decisions are conflicting. The leading case in support of the proposition, and one which has influenced other decisions advancing similar views, is Cancemi v. The People, 18 N.Y. 128, 137-138. In that case, Cancemi was indicted for the crime of murder. After a jury had been impaneled and sworn and the trial begun, under a stipulation made by the prisoner and his counsel and counsel for the people, and with the express consent and request of the prisoner, a juror was withdrawn and a verdict subsequently rendered by the remaining eleven jurors. On appeal, a judgment based upon this verdict was reversed. The case was decided in 1858, and the question was regarded by the court as one of first impression. The following excerpt from the opinion indicates the basis of the decision:

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The state, the public, have an interest in the preservation of the liberties and the lives of the citizens, and will not allow them to be taken away "without due process of law " (Const., art. 1, § 6), when forfeited, as they may be, as a punishment for crimes. Criminal prosecutions proceed on the assumption of such a forfeiture, which, to sustain them, must be ascertained and declared as the law has prescribed. Blackstone (vol. 4, 189) says: "The king has an interest in the preservation of all his subjects." . . . Objections to jurors may be waived; the court. may be substituted for triers to dispose of challenges to jurors; secondary in place of primary evidence may be received; admissions of facts [281 U.S. 303] are allowed, and, in similar particulars, as well as in relation to mere formal proceedings generally, consent will render valid what without it would be erroneous. A plea of guilty to any indictment, whatever may be the grade of the crime, will be received and acted upon if it is made clearly to appear that the nature and effect of it are understood by the accused. In such a case, the preliminary investigation of a grand jury, with the admission of the accusation in the indictment, is supposed to be a sufficient safeguard to the public interests. But when issue is joined upon an indictment, the trial must be by the tribunal and in the mode which the constitution and laws provide, without any essential change. The public officer prosecuting for the people has no authority to consent to such a change, nor has the defendant.

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Applying the above reasoning to the present case, the conclusion necessarily follows that the consent of the plaintiff in error to the withdrawal of one juror, and that the remaining eleven might render a verdict, could not lawfully be recognized by the court at the circuit, and was a nullity. If a deficiency of one juror might be waived, there appears to be no good reason why a deficiency of eleven might not be, and it is difficult to say why, upon the same principle, the entire panel might not be dispensed with and the trial committed to the court alone. It would be a highly dangerous innovation, in reference to criminal cases, upon the ancient and invaluable institution of trial by jury, and the constitution and laws establishing and securing that mode of trial, for the court to allow of any number short of a full panel of twelve jurors, and we think it ought not to be tolerated.

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A decision flatly to the contrary, and one fairly representative of others to the same effect, is State v. Kaufman, 51 Iowa 578. The defendant there was indicted [281 U.S. 304] for forgery. Upon the trial, one of the jurors, being ill, was discharged with the consent of the defendant, and the trial concluded with the remaining eleven. There was a verdict of guilty. Upon appeal, the verdict was upheld. The authorities upon the question are reviewed, and, in the course of the opinion, the court says (pp. 579-580):

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A plea of guilty ordinarily dispenses with a jury trial, and it is thereby waived. This, it seems to us, effectually destroys the force of the thought that

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the State, the public, have an interest in the preservation of the lives and the liberties of the citizens, and will not allow them to be taken away without due process of law.

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The same thought is otherwise expressed by Blackstone, vol. 4, p. 189, that "the king has an interest in the preservation of all his subjects."

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It matters not whether the defendant is in fact guilty; the plea of guilty is just as effectual as if such was the case. Reasons other than the fact that he is guilty may induce a defendant to so plead, and thereby the State may be deprived of the services of the citizen, and yet the State never actually interferes in such case, and the right of the defendant to so plead has never been doubted. He must be permitted to judge for himself in this respect. So in the case at bar. The defendant may have consented to be tried by eleven jurors, because his witnesses were then present, and he might not be able to get them again, or that it was best he should be tried by the jury as thus constituted. Why should he not be permitted to do so? Why hamper him in this respect? Why restrain his liberty or right to do as he believed to be for his interest? Whatever rule is adopted affects not only the defendant, but all others similarly situated, no matter how much they may desire to avail themselves of the right to do what the defendant desires to repudiate. We are unwilling to establish such a rule. [281 U.S. 305]

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Referring to the statement in the Cancemi case that it would be a highly dangerous innovation to allow any number short of a full panel of twelve jurors, and one not to be tolerated, it is said (p. 581):

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This would have been much more convincing and satisfactory if we had been informed why it would be "highly dangerous," and should "not be tolerated," or at least something which had a tendency in that direction. For if it be true, as stated, it certainly would not be difficult to give a satisfactory reason in support of the strong language used.

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See also State v. Sackett, 39 Minn. 69, where the court concludes its discussion of the subject by saying (p. 72):

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The wise and beneficent provisions found in the constitution and statutes, designed for the welfare and protection of the accused, may be waived, in matters of form and substance, when jurisdiction has been acquired, and within such limits as the trial court, exercising a sound discretion in behalf of those before it, may permit. The defendants, having formally waived a juror, and stipulated to try their case with 11, cannot now claim that there was a fatal irregularity in their trial.

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It is difficult to see why the fact, frequently suggested, that the accused may plead guilty and thus dispense with a trial altogether, does not effectively disclose the fallacy of the public policy contention; for if the state may interpose the claim of public interest between the accused and his desire to waive a jury trial, a fortiori it should be able to interpose a like claim between him and his determination to avoid any form of trial by admitting his guilt. If he be free to decide the question for himself in the latter case, notwithstanding the interest of society in the preservation of his life and liberty, why should he be denied the power to do so in the former? It is no answer to say that, by pleading guilty, there is nothing left for a jury to try, for that simply ignores the question, which is not [281 U.S. 306] what is the effect of the plea?, the answer to which is fairly obvious, but, in view of the interest of the public in the life and liberty of the accused, can the plea be accepted and acted upon, or must the question of guilt be submitted to a jury at all events? Moreover, the suggestion is wholly beside the point, which is that public policy is not so inconsistent as to permit the accused to dispense with every form of trial by a plea of guilty and yet forbid him to dispense with a particular form of trial by consent.

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The truth is that the theory of public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection. The public policy of one generation may not, under changed conditions, be the public policy of another.

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It may be conceded, at least generally, that, under the rule of the common law, the accused was not permitted to waive trial by jury, as generally he was not permitted to waive any right which was intended for his protection. Nevertheless, in the Colonies, such a waiver and trial by the court without a jury was by no means unknown, as the many references contained in the brief of the Solicitor General conclusively show. But this phase of the matter we do not stop to consider, for the rule of the common law, whether exclusive or subject to exceptions, was justified by conditions which no longer exist, and, as the Supreme Court of Nevada well said in Reno Smelting Works v. Stevenson, 20 Nev. 269, 279:

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It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason to a law when that reason utterly fails—cessante ratione legis, cessat ipsa lex. [281 U.S. 307]

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The maxim seems strikingly apposite to the question here under review. Among other restraints at common law, the accused could not testify in his own behalf; in felonies, he was not allowed counsel (IV Sharswood's Blackstone, 355, Note 14), the judge in such cases occupying the place of counsel for the prisoner, charged with the responsibility of seeing that the prisoner did not suffer from lack of other counsel (id.), and conviction of crime worked an attaint and forfeiture of official titles of inheritance, which, as Judge Aldrich points out (quotation supra), constituted in a large sense the reason for withholding from accused parties the right of waiver.

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These conditions have ceased to exist, and, with their disappearance, justification for the old rule no longer rests upon a substantial basis. In this respect, we fully agree with what was said by the Supreme Court of Wisconsin in Hack v. State, 141 Wis. 346, 351-352:

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The ancient doctrine that the accused could waive nothing was unquestionably founded upon the anxiety of the courts to see that no innocent man should be convicted. It arose in those days when the accused could not testify in his own behalf, was not furnished counsel, and was punished, if convicted, by the death penalty or some other grievous punishment out of all proportion to the gravity of his crime. Under such circumstances, it was well, perhaps, that such a rule should exist, and well that every technical requirement should be insisted on when the state demanded its meed of blood. Such a course raised up a sort of a barrier which the court could utilize when a prosecution was successful which ought not to have been successful, or when a man without money, without counsel, without ability to summon witnesses, and not permitted to tell his own story, had been unjustly convicted, but yet, under the ordinary principles of waiver, [281 U.S. 308] as applied to civil matters, had waived every defect in the proceedings.

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Thanks to the humane policy of the modern criminal law, we have changed all these conditions. The man now charged with crime is furnished the most complete opportunity for making his defense. He may testify in his own behalf; if he be poor, he may have counsel furnished him by the state, and may have his witnesses summoned and paid for by the state; not infrequently, he is thus furnished counsel more able than the attorney for the state. In short, the modern law has taken as great pains to surround the accused person with the means to effectively make his defense as the ancient law took pains to prevent that consummation. The reasons which in some sense justified the former attitude of the courts have therefore disappeared, save perhaps in capital cases, and the question is, shall we adhere to the principle based upon conditions no longer existing? No sound reason occurs to us why a person accused of a lesser crime or misdemeanor, who comes into court with his attorney, fully advised of all his rights and furnished with every means of making his defense, should not be held to waive a right or privilege for which he does not ask, just as a party to a civil action waives such a right by not asking for it.

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The view that power to waive a trial by jury in criminal cases should be denied on grounds of public policy must be rejected as unsound.

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It is not denied that a jury trial may be waived in the case of petty offenses, but the contention is that the rule is otherwise in the case of crimes of the magnitude of the one here under consideration. There are decisions to that effect, and also decisions to the contrary. The conflict is marked and direct. Schick v. United States, supra, is thought to favor the contention. There, the prosecution [281 U.S. 309] was for a violation of the Oleomargarine Act (24 Stat. 209), punishable by fine only. By agreement in writing, a jury was waived and the issue submitted to the court. Judgment was for the United States. This court held that the offense was a petty one, and sustained the waiver. It was said that the word " crimes " in Article III, Section 2, of the Constitution should be read in the light of the common law, and, so read, it does not include petty offenses, and that neither the constitutional provisions nor any rule of public policy prevented the defendant from waiving a jury trial. The question whether the power of waiver extended to serious offenses was not directly involved, and is not concluded by that decision. Mr. Justice Harlan, in a dissenting opinion, after reviewing the authorities, concluded (p. 83) that

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The grounds upon which the decisions rest are, upon principle, applicable alike in cases of felonies and misdemeanors, although the consequences to the accused may be more evident as well as more serious in the former than in the latter cases.

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Although we reject the general view of the dissenting opinion that a waiver of jury trial is not valid in any criminal case, we accept the foregoing statement as entirely sound. We are unable to find in the decisions any convincing ground for holding that a waiver is effective in misdemeanor cases, but not effective in the case of felonies. In most of the decisions, no real attempt is made to establish a distinction beyond the assertion that public policy favors the power of waiver in the former, but denies it in the latter because of the more serious consequences in the form of punishment which may ensue. But that suggested differentiation, in the light of what has now been said, seems to us more fanciful than real. The Schick case, it is true, dealt with a petty offense, but, in view of the conclusions we have already [281 U.S. 310] reached and stated, the observations of the court (pp. 71-72) have become equally pertinent where a felony is involved:

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Article six of the amendments, as we have seen, gives the accused a right to a trial by jury. But the same article gives him the further right "to be confronted with the witnesses against him . . . and to have the assistance of counsel." Is it possible that an accused cannot admit and be bound by the admission that a witness not present would testify to certain facts? Can it be that, if he does not wish the assistance of counsel and waives it, the trial is invalid? It seems only necessary to ask these questions to answer them. When there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy.

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In Commonwealth v. Beard, 48 Pa.Super.Ct. 319, the prosecution was for conspiracy, and there, as here, one of the jurors was discharged and the trial concluded with the remaining eleven. Judgment on a verdict of conviction was sustained. The court, after reviewing the conflicting decisions, was unable to find any good reason for differentiating in the matter of waiver between the two classes of crimes. We fully endorse its concluding words upon that subject (pp. 323-324):

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It surely cannot be true that the public is interested in the protection of an accused in proportion to the magnitude of his offending—that its solicitude goes out to the great offender but not to the small—that there is a difference in point of sacredness between constitutional rights when asserted by one charged with a grave crime and when asserted by one charged with a lesser one. Hence, when it is held in Schick v. United States, 195 U.S. 65 (24 Sup.Ct.Repr. 826), that, in trials for the lowest grades of offenses, the accused may waive not only the continued presence of the full number of jurors required [281 U.S. 311] to make up a jury, but the right to trial by jury, the only possible conclusion is that the purely theoretical element of public concern, as potential to override the accused's own free choice and render him effectually unfree even before conviction and sentence, cannot be regarded as in reality much of a factor in any case.

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This view of the matter subsequently had the approval of the supreme court of the state in Commonwealth ex rel. Ross v. Egan, 281 Pa. 251. After noting the conflict of authority, and that a waiver has been held to be effective in a number of states which are named, it is there said (pp. 255, 256, 257):

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A defendant is supposed to understand his rights, and may be aided, if he so desires, by counsel to advise him. There are many legal provisions for his security and benefit which he may dispense with absolutely, as, for instance, his right to plead guilty and submit to sentence without any trial whatsoever.

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The theory upon which the opposing cases are decided seems to rest on the proposition that society at large is as much interested in an impartial trial of a defendant, who may be sentenced to imprisonment, as he himself is, and therefore no permission to waive any right, when charged with a felony, should be accorded to him. There may be reason for applying this rule to capital cases, as has been done in Pennsylvania, but such a principle ought not to be invoked to relieve those charged with lesser offenses, such as larceny (though technically denominated a felony), from the consequences of their own voluntary act, and where it appears by the record that consent to the course pursued was freely given, the defendant should not be heard thereafter to complain.

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\* \* \* \* [281 U.S. 312]

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The solution of the question depends upon the determination whether a trial by less than twelve is an irregularity or a nullity. If the latter be held, no sentence imposed may be sustained, but the contrary is true if the former and correct conclusion be reached. In the case of misdemeanors, the Superior Court has sustained the sentences where a voluntary waiver appeared: Com. v. Beard, supra. No real justification for a different decision in the case of felonies, not capital, can be supported.

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See also Commonwealth v. Rowe, 257 Mass. 172, 174-176; State v. Ross, 47 S.D. 188, 192-193, involving a misdemeanor, but followed in State v. Tiedeman, 49 S.D. 356, 360, involving a felony.

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In affirming the power of the defendant in any criminal case to waive a trial by a constitutional jury and submit to trial by a jury of less than twelve persons, or by the court, we do not mean to hold that the waiver must be put into effect at all events. That perhaps sufficiently appears already. Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses. In such cases, the value and appropriateness of jury trial have been established by long experience, and are not now to be denied. Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a factfinding body in criminal cases is of such importance and has such a place in our traditions that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of [281 U.S. 313] trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity.

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The question submitted must be answered in the affirmative.

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It is so ordered.

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THE CHIEF JUSTICE took no part in the consideration or decision of this case.

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MR. JUSTICE SANFORD participated in the consideration and agreed to a disposition of the case in accordance with this opinion.

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MR. JUSTICE HOLMES, MR. JUSTICE BRANDEIS, and MR. JUSTICE STONE concur in the result.

President Hoover's Veto of the Muscle Shoals Resolution

Title: President Hoover's Veto of the Muscle Shoals Resolution

Author: Herbert Hoover

Date: March 3, 1931

Source: Public Papers of the Presidents, Herbert Hoover, pp.120-129

Public Papers of the Presidents, Hoover, 1931, p.120

To the Senate:

Public Papers of the Presidents, Hoover, 1931, p.120

I return herewith, without my approval, Senate Joint Resolution 49, "To provide for the national defense by the creation of a corporation for the operation of the Government properties at and near Muscle Shoals in the State of Alabama; to authorize the letting of the Muscle Shoals properties under certain conditions; and for other purposes."

Public Papers of the Presidents, Hoover, 1931, p.120

This bill proposes the transformation of the war plant at Muscle Shoals, together with important expansions, into a permanently operated Government institution for the production and distribution of power and the manufacture of fertilizers.

Public Papers of the Presidents, Hoover, 1931, p.120–p.121

Disregarding for the moment the question of whether the Federal Government should or can manage a power and fertilizer manufacturing business, we should examine this proposal from the point of view of the probabilities of success as a business, even if efficiently managed. Such an analysis involves a consideration of the capital invested, the available commercial power, the operating costs, the revenue to be expected, and the profit and loss involved from this set-up. The figures and estimates given herein are furnished by the War Department upon the authority of the Chief of Engineers.

VALUE OF THE OLD PLANT AND FURTHER CAPITAL OUTLAY REQUIRED

Public Papers of the Presidents, Hoover, 1931, p.121

The following properties and proposed extensions are embraced in the proposed project:

Public Papers of the Presidents, Hoover, 1931, p.121

(a) Wilson Dam and its hydroelectric equipment valued at $37,000,000 being the original cost of $47,000,000 less $10,000,000 applicable to navigation.

Public Papers of the Presidents, Hoover, 1931, p.121

(b) The steam power plant at Muscle Shoals valued at $5,000,000 being a reduction from depreciation of $7,000,000 from the original cost of $12,000,000.

Public Papers of the Presidents, Hoover, 1931, p.121

(c) Proposed further additions to the electrical plant at Muscle Shoals costing $9,000,000.

Public Papers of the Presidents, Hoover, 1931, p.121

(d) Proposed construction of Cove Creek Dam with hydroelectric plant with transmission line to Wilson Dam $41,000,000 of which $5,000,000 may be attributed to flood control and improvement of navigation or, say, $37,000,000.

Public Papers of the Presidents, Hoover, 1931, p.121

(e) Proposed construction of transmission lines for wholesale distribution of power within the transmission area--$40,000,000.

Public Papers of the Presidents, Hoover, 1931, p.121

(f) Nitrate plants, quarries, etc., at Muscle Shoals which originally cost $68,555,000 but upon which no valuation is placed at present.

Public Papers of the Presidents, Hoover, 1931, p.121

The total valuation of the old property to be taken over for the power portion of the project is therefore $42,000,000 after the above deductions from original cost. The new expenditures from the Treasury applicable to the power business are estimated at $90,000,000, less $5,000,000 which might be attributable to flood control, or a total of $127,000,000 of capital in the electrical project. This sum would be further increased by accumulated interest charge during construction. As shown later on several millions further would be required for modernizing the nitrate plants. The total requirement of new money from the Federal Treasury for the project is probably $100,000,000 even if no further extensions were undertaken.

AMOUNT OF POWER AVAILABLE FROM THIS PROJECT

Public Papers of the Presidents, Hoover, 1931, p.121–p.122

Assuming the additional power given by the construction of the Cove Creek Dam and the use of steam power for five months in the [p.122] dry season each year, and taking the average load factor from experience in that region, about 1,300,000,000 kilowatt-hours of continuous power could be produced annually. Considered as a general power business a portion of this must be held in reserve to protect consumers, leaving a net of about 1,000,000,000 kilowatt-hours annually of salable power. This amount would be somewhat increased if a large proportion of 24-hour load were applied to fertilizer manufacture.

Public Papers of the Presidents, Hoover, 1931, p.122

The secondary power for a period of less than seven months in the year is not regarded as of any present commercial value.

OPERATING COSTS

Public Papers of the Presidents, Hoover, 1931, p.122

The following is the estimated annual overhead and operating cost of the electrical end of the project including the steam plant necessary to convert 7-month secondary power into primary power as stated above:

Interest at 4 per cent per annum on capital of $127,000,000 $5, 080,000

Amortization 1,890,000

Operating and maintenance cost of hydroelectric plant 775,000

Operating and maintenance cost of steam plant 850, 000

Operation and maintenance cost of transmission lines 550, 000

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Total $9, 145, 000

Public Papers of the Presidents, Hoover, 1931, p.122

The estimated cost of production and distribution is, therefore, about 9.1 mills per kilowatt-hour. If only part of the transmission lines were constructed it would decrease capital and operating charges but would not comply with the requirement of equitable distribution through the transmission area.

ESTIMATED GROSS INCOME

Public Papers of the Presidents, Hoover, 1931, p.122–p.123

The purpose of the bill is to provide production and wholesale distribution of surplus power and to give preference to States, municipalities, and cooperative organizations. It further provides that the policy of the Government must be to distribute the surplus power equitably amongst States, counties, and municipalities within transmission distance of Muscle Shoals and provides for the construction of transmission lines to effect this purpose. Such a transmission system for wholesale [p.123] purposes only is estimated to cost $40,000,000. If it is proposed to sell power at retail to householders, then there would need be a great increase in the estimates of capital outlay and operation costs for such distribution.

Public Papers of the Presidents, Hoover, 1931, p.123

The average gross income of the power companies in that territory, including retail as well as wholesale power, is about 12 mills per kilowatt-hour. This includes retail residential power averaging something over 50 mills per kilowatt-hour. Miscellaneous industrial power realizes about 10 mills per kilowatt-hour. The power sold wholesale to other companies and those engaged in municipal distribution averages about 7.2 mills per kilowatt-hour.

Public Papers of the Presidents, Hoover, 1931, p.123

It is impossible to compute Muscle Shoals income under this project upon a basis which includes retail power sales, as this is a project for wholesale distribution only. It is impossible to compute it upon the basis of miscellaneous industrial rates as sales for industrial purposes from Muscle Shoals would presumably be mainly for manufacture of fertilizers and it would not be possible to average 10 mills per kilowatt-hour. A rate of not over 2 mills would be a large charge for such power. While the load factor would be improved by large use for this purpose, the net result, however, would be to diminish the gross income below the above rates from municipal and miscellaneous industrial services.

Public Papers of the Presidents, Hoover, 1931, p.123

Assuming that the whole 1,000,000,000 kilowatt-hours should be sold to municipalities or other power distributors, it would on the basis of the realizations of the private companies of 7.2 mills yield a gross annual income to this project of about $7,200,000, or a loss upon this basis of nearly $2,000,000 annually. This territory is now supplied with power and to obtain such an income it would be necessary to take the customers of the present power companies. To secure these customers it would be necessary to undercut the rates now made by them. It is difficult to estimate the extent to which it would be necessary to go in such rate cutting in order to secure the business. In any event it would of course diminish estimated income and increase the losses.

Public Papers of the Presidents, Hoover, 1931, p.123–p.124

It is obvious that any estimate of income contains a large element of conjecture as the proportions of industrial and municipal load can not [p.124] be foretold. But any estimate of the income of the project as set up by this legislation will show a loss.

FERTILIZER MANUFACTURE

Public Papers of the Presidents, Hoover, 1931, p.124

The plants at Muscle Shoals were originally built for a production of nitrates for use in war explosives. I am advised by the War Department that the very large development in the United States by private enterprise in the manufacture of synthetic nitrogen now affords an ample supply covering any possible requirements of war. It is therefore unnecessary to maintain this plant for any such purposes.

Public Papers of the Presidents, Hoover, 1931, p.124

This bill provides that the President for a period of 12 months may negotiate a lease of the nitrate plants for fertilizer manufacture under detailed limitations, but in failure to make such a lease the bill makes it mandatory upon the Government to manufacture nitrogen fertilizers at Muscle Shoals by the employment of existing facilities or by modernizing existing plants or by any other process. I may state at once that the limitations put upon lessees in the bill are such that this provision is of no genuine importance. Inquiries have been made of the most responsible and experienced concerns that might possibly undertake such lease and they have replied that under the conditions set out in the bill it is entirely impractical for them to make any bid. The leasing provision is therefore of no utility; it may at once be dismissed. In consequence the project we have to consider under this bill is the manufacture of fertilizers by the Federal Government.

Public Papers of the Presidents, Hoover, 1931, p.124–p.125

The Department of Agriculture reports that these plants are now more or less obsolete and that with power at even 2 mills per kilowatt-hour, with proper charges included, could not produce the products for which they are constructed as cheaply as these products are now being sold in the wholesale markets. Therefore, it would be necessary to modernize the equipment at an unknown cost in millions. There is no evidence as to the costs of nitrogen fertilizers by the newer equipment, and there is therefore no basis upon which to estimate the results to the Government from entering upon such a competitive business. It can, however, be stated with assurance that no chemical industry [p.125] with its constantly changing technology and equipment, its intricate problems of sales and distribution, can be successfully conducted by the Government.

PROPOSED ADMINISTRATION

Public Papers of the Presidents, Hoover, 1931, p.125

The first essential of all business is competent management. Although the bill provides for the management by three directors, the Congress must from the nature of our institutions be the real board of directors and with all the disadvantages to a technical business that arise from a multitude of other duties, changing personnel, changing policies, and regional interests. These three directors are to have political qualifications, as it is stipulated that not more than two shall be of one political party. They are to receive $50 per item, but are limited to $7,500 each for the first year and $5,000 annually thereafter. The act provides that:

Public Papers of the Presidents, Hoover, 1931, p.125

"All members of the board shall be persons that profess a belief in the feasibility and wisdom, having in view the national defense and the encouragement of interstate commerce, of producing fixed nitrogen under this act of such kinds and at such prices as to induce the reasonable expectation that the farmers will buy said products, and that by reason thereof the corporation may be a self-sustaining and continuing success."

Public Papers of the Presidents, Hoover, 1931, p.125

In other words, they are to say that they believe in Government manufacture of fertilizers, and that it can be made a success on this set-up. We are thus supposed to appoint business administrators on the basis of their beliefs rather than their experience and competency. These directors are manifestly to have a political complexion and apparently the entire working force is likewise to have such a basis of selection, as the usual provision for the merit service required by law in most other Federal activities is omitted. Three men able to conduct a one hundred and fifty million dollar business can not be found to meet these specifications.

GENERAL CONSIDERATIONS

Public Papers of the Presidents, Hoover, 1931, p.125–p.126

I am firmly opposed to the Government entering into any business the major purpose of which is competition with our citizens. There [p.126] are national emergencies which require that the Government should temporarily enter the field of business, but they must be emergency actions and in matters where the cost of the project is secondary to much higher considerations. There are many localities where the Federal Government is justified in the construction of great dams and reservoirs, where navigation, flood control, reclamation or stream regulation are of dominant importance, and where they are beyond the capacity or purpose of private or local government capital to construct. In these cases power is often a by-product and should be disposed of by contract or lease. But for the Federal Government deliberately to go out to build up and expand such an occasion to the major purpose of a power and manufacturing business is to break down the initiative and enterprise of the American people; it is destruction of equality of opportunity amongst our people; it is the negation of the ideals upon which our civilization has been based.

Public Papers of the Presidents, Hoover, 1931, p.126

This bill raises one of the important issues confronting our people. That is squarely the issue of Federal Government ownership and operation of power and manufacturing business not as a minor by-product but as a major purpose. Involved in this question is the agitation against the conduct of the power industry. The power problem is not to be solved by the Federal Government going into the power business, nor is it to be solved by the project in this bill. The remedy for abuses in the conduct of that industry lies in regulation and not by the Federal Government entering upon the business itself. I have recommended to the Congress on various occasions that action should be taken to establish Federal regulation of interstate power in cooperation with State authorities. This bill would launch the Federal Government upon a policy of ownership and operation of power utilities upon a basis of competition instead of by the proper Government function of regulation for the protection of all the people. I hesitate to contemplate the future of our institutions, of our Government, and of our country if the preoccupation of its officials is to be no longer the promotion of justice and equal opportunity but is to be devoted to barter in the markets. That is not liberalism, it is degeneration.

Public Papers of the Presidents, Hoover, 1931, p.127

This proposal can be effectively opposed upon other and perhaps narrower grounds. The establishment of a Federal-operated power business and fertilizer factory in the Tennessee Valley means Federal control from Washington with all the vicissitudes of national politics and the tyrannies of remote bureaucracy imposed upon the people of that valley without voice by them in their own resources, the overriding of State and local government, the undermining of State and local responsibility. The very history of this project over the past 10 years should be a complete demonstration of the ineptness of the Federal Government to administer such enterprise and of the penalties which the local community suffers under it.

Public Papers of the Presidents, Hoover, 1931, p.127

This bill distinctly proposes to enter the field of powers reserved to the States. It would deprive the adjacent States of the right to control rates for this power and would deprive them of taxes on property within their borders and would invade and weaken the authority of local government.

Public Papers of the Presidents, Hoover, 1931, p.127

Aside from the wider issues involved the immediate effect of this legislation would be that no other development of power could take place on the Tennessee River with the Government in that field. That river contains two or three millions of potential horsepower, but the threat of the subjection of that area to a competition which under this bill carries no responsibility to earn interest on the investment or taxes will either destroy the possibility of private development of the great resources of the river or alternately impose the extension of this development upon the Federal Government. It would appear that this latter is the course desired by many proponents of this bill. There are many other objections which can be raised to this bill, of lesser importance but in themselves a warranty for its disapproval.

Public Papers of the Presidents, Hoover, 1931, p.127

It must be understood that these criticisms are directed to the project as set up in this bill; they are not directed to the possibilities of a project denuded of uneconomic and unsound provisions nor is it a reflection upon the value of these resources.

Public Papers of the Presidents, Hoover, 1931, p.127–p.128

I sympathize greatly with the desire of the people of Tennessee and Alabama to see this great asset turned to practical use. It can be so turned [p.128] and to their benefit. I am loath to leave a subject of this character without a suggestion for solution. Congress has been thwarted for 10 years in finding solution, by rivalry of private interests and by the determination of certain groups to commit the Federal Government to Government ownership and operation of power.

Public Papers of the Presidents, Hoover, 1931, p.128

The real development of the resources and the industries of the Tennessee Valley can only be accomplished by the people in that valley themselves. Muscle Shoals can only be administered by the people upon the ground, responsible to their own communities, directing them solely for the benefit of their communities and not for purposes of pursuit of social theories or national politics. Any other course deprives them of liberty.

Public Papers of the Presidents, Hoover, 1931, p.128

I would therefore suggest that the States of Alabama and Tennessee who are the ones primarily concerned should set up a commission of their own representatives together with a representative from the national farm organizations and the Corps of Army Engineers; that there be vested in that commission full authority to lease the plants at Muscle Shoals in the interest of the local community and agriculture generally. It could lease the nitrate plants to the advantage of agriculture. The power plant is to-day earning a margin over operating expenses. Such a commission could increase this margin without further capital outlay and should be required to use all such margins for the benefit of agriculture.

Public Papers of the Presidents, Hoover, 1931, p.128–p.129

The Federal Government should, as in the case of Boulder Canyon, construct Cove Creek Dam as a regulatory measure for the flood protection of the Tennessee Valley and the development of its water resources, but on the same bases as those imposed at Boulder Canyon--that is, that construction should be undertaken at such time as the proposed commission is able to secure contracts for use of the increased water supply to power users or the lease of the power produced as a by-product from such a dam on terms that will return to the Government interest upon its outlay with amortization. On this basis the Federal Government will have cooperated to place the question into the hands of the people primarily concerned. They can lease as their wisdom dictates and for [p.129] the industries that they deem best in their own interest. It would get a war relic out of politics and into the realm of service.

HERBERT HOOVER

The White House,

March 3, 1931.

Public Papers of the Presidents, Hoover, 1931, p.129

NOTE: The Senate sustained the President's veto on March 3, 1931.

Go-Bart Importing Co. v. United States, 1931

Title: Go-Bart Importing Company v. United States

Author: U.S. Supreme Court

Date: January 5, 1931

Source: 282 U.S. 344

This case was argued November 25, 1930, and was decided January 5, 1931.

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CERTIORARI TO THE CIRCUIT COURT OF APPEALS

1931, Go-Bart Importing Company v. United States, 282 U.S. 344

FOR THE SECOND CIRCUIT

Syllabus

1931, Go-Bart Importing Company v. United States, 282 U.S. 344

1. A warrant issued by a United States Commissioner, addressed only to the Marshal and his deputies, and based upon, and reciting the substance of, a complaint that was verified merely on information and belief, and that did not state an offense—held invalid on its face, and no authority to prohibition officers to make an arrest. P. 355.

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2. Acting under color of an invalid warrant of arrest, and falsely claiming to have a search warrant, prohibition agents entered the office of a company, placed under arrest two of its officers, and made a general search of the premises. They compelled by threats of force the opening of a desk and safe, and seized therefrom and from other parts of the office, papers and records belonging to the company and its officers. The officers of the company were arraigned before a United States Commissioner, and by him held on bail further to answer the complaint (U.S.C., Title 18, § 591), while the seized papers were held under the control of the United States Attorney in the care and custody of the prohibition agent in charge. The company, and its two officers individually, before [282 U.S. 345] an information or indictment had been returned against them, applied to the District Court for an order to enjoin the use of the seized papers as evidence and directing their return. On a rule against the United States to show cause, the United States Attorney appeared and opposed the motion, and an affidavit of the agent in charge was also filed in opposition. The applications were denied.

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Held:

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(1) In the proceedings before him, the Commissioner acted merely a an officer of the District Court in a matter of which it had authority to take control at any time. P. 353.

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(2) Notwithstanding the order to show cause was addressed to the United States alone, the proceeding was in substance and effect against the United States Attorney and the prohibition agent in charge, the latter being required by the Prohibition Act to report violations of it to the former and being authorized by the statute, subject to the former's control, to conduct such prosecutions; and both these officers were subject to the proper exertion of the disciplinary powers of the court. P. 354.

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(3) The District Court had jurisdiction summarily to determine whether the evidence should be suppressed and the papers returned to the petitioners. P. 355.

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(4) The company being a stranger to the proceedings before the Commissioner, the order of the District Court as to it was final and appealable. P. 356.

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(5) There being no information or indictment against the officers of the company when the application was made, and nothing to show that any criminal proceeding would ever be instituted in that court against them, it follows that the order was not made in or dependent upon any case or proceeding pending before the court, and therefore the order as to them was appealable. Id.

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(6) The Fourth Amendment forbids every search that is unreasonable, and is to be liberally construed. P. 356.

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(7) Assuming that the facts of which the arresting officers had been previously informed were sufficient to justify the arrests without a warrant, nevertheless the uncontradicted evidence requires a finding that the search of the premises was unreasonable. Marron v. United States, 275 U.S. 192, distinguished. P. 356.

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(8) The District Court is directed to enjoin the United States Attorney and the agent in charge from using the paper as evidence and to order the same returned to petitioners. P. 358.

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40 F.2d 593 reversed. [282 U.S. 346]

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Certiorari, 281 U.S. 719, to review a judgment of the Circuit Court of Appeals which affirmed in part a judgment of the District Court denying applications for an order to suppress and return evidence alleged to have been illegally obtained. [282 U.S. 348]

BUTLER, J., lead opinion

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MR. JUSTICE BUTLER delivered the opinion of the Court.

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In a criminal proceeding before a United States commissioner in the Southern District of New York in which Gowen, Bartels, and others are defendants, the petitioners applied to the district court for an order enjoining the use as evidence of books and papers alleged to have been seized and taken from petitioners in violation of the Fourth and Fifth Amendments, and directing their return. The court made an order that the United States show cause why the relief prayed should not be granted. The United States attorney appeared and opposed the motion, and affidavits of W. J. Calhoun, special agent in charge of special agents of the Bureau of Prohibition, and certain of his subordinates were filed in opposition. The district court denied the applications. The Circuit Court of Appeals affirmed as to the United States attorney and held that, as to the special agent in charge, the order to show cause should have been discharged. 40 F.2d 593.

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Petitioners' applications to the district court, which are in form affidavits, set forth the following: [282 U.S. 349]

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June 5, 1929, Calhoun went before the United States commissioner and, in order to have a warrant issued for the arrest of Gowen, Bartels and others, verified and filed a complaint. He alleged, upon information and belief, that, beginning January 1, 1929, and continuing down to the filing of the complaint Gowen, Bartels, and other defendants conspired in that district to commit a nuisance against the United States, that is to say, to possess, transport, sell, and solicit and receive orders for intoxicating liquor in violation of the National Prohibition Act, and that, in pursuance of the conspiracy and to effect its objects, one Heath purchased an automobile on May 23, 1929. See 27 U.S.C. §§ 33, 35. The complaint did not specify any building , structure, location, or place, or set forth any particulars or other overt act or show any connection between the purchase of the automobile and any offense referred to in the complaint. On the same day, the commissioner issued a warrant in the usual form commanding the marshal of the district and his deputies to apprehend the persons so accused and to bring them before the commissioner or some judge or justice of the United States to be dealt with according to law.

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On the next day Calhoun's subordinates, prohibition agents O'Brien, Collins, and Sipe, went to the petitioning company's office at No. 200 Fifth avenue. Bartels, the secretary-treasurer of the company, was there when they entered. O'Brien said he had a warrant to search the premises, and exhibited a paper which he falsely claimed was such a warrant. The agents arrested Bartels, searched his person, and took papers therefrom. While they were there, Gowen, the president of the company, came to the office. O'Brien told him that he had a warrant for his arrest and a warrant to search the premises. The agents arrested and searched Gowen and took papers from him. They took his keys and by threat of force compelled him to open a desk and safe, searched and took papers from [282 U.S. 350] them, searched other parts of the office, and took therefrom other papers, journals, account books, letter files, insurance policies, cancelled checks, index cards, and other things belonging respectively to Gowen, Bartels, and the company. For brevity, these will be referred to herein as "papers."

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Gowen and Bartels were on the same day arraigned before the commissioner and held on bail further to answer the complaint. A date was set for the examination, hearing has been postponed from time to time, and no examination has been had. The papers so seized were taken to the office of Calhoun in the Subtreasury Building, where they were examined by him and the United States attorney and their subordinates, and such papers have since been kept and held there, as is later herein shown, under the control of the United States attorney in the care and custody of the special agent in charge, for use as evidence against Gowen and Bartels.

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Soon after the seizures were made, each of the petitioners brought a suit in equity in the federal court for that district against the special agent in charge and the United States attorney, to enjoin them from using such papers as evidence and to have them returned. The court dismissed these suits on the ground that the proper remedy was by motion in the criminal proceedings.

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Then, Gowen and Bartels, each in his own behalf, and the company, acting through Bartels, made these applications. The court made its order that the United States show cause why an injunction should not issue restraining it and its officers from using as evidence the papers so seized, and why an order should not issue directing their return.

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In opposition, the affidavit of one Braidwood was submitted. It tends to show that, in 1927 and 1928, petitioners and others acting together engaged in the unlawful sale of intoxicating liquor, that, at the company's office, [282 U.S. 351] they exhibited and took orders for intoxicating liquor some of which was delivered there and some elsewhere, and that, in April, 1929, he reported these facts to Calhoun. Calhoun's affidavit states that Braidwood had so reported, and that, by independent investigations, he had corroborated such statements, and thus knew that a conspiracy unlawfully to sell intoxicating liquors in 1928 and 1929 had been entered into and overt acts in furtherance thereof had been performed within the district, and that he believed the petitioners had been parties to such conspiracy, that, prior to the day of the arrests, he communicated such statements and belief to O'Brien and assigned him to further investigate the case.

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O'Brien's affidavit states: from the information given him by Calhoun, he believed petitioners and others had so conspired. Calhoun described to him the company's office in detail, and the personal appearance of Gowen and Bartels. On June 6, 1929, he took a certified copy of the complaint and warrant "for the purpose of reference as to the names of the various defendants" and went to petitioners' office. It consisted of a suite of three rooms fitted up with office furniture including desks, filing cabinets, and a safe. He told Bartels and Gowen that he was an officer of the United States, and placed them under arrest for such conspiracy. No warrant was "served" upon either of them. The office was searched, and there were found and taken therefrom approximately a dozen bottles of assorted intoxicating liquor, a large number of memoranda, books of account, records, filing cases, and other papers all of which pertained to unlawful dealings by Gowen and Bartels in intoxicating liquors.

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O'Brien's affidavit also states that the papers so seized are of such quantity and bulk that it is impracticable to attach copies to the affidavit, that such papers are

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specifically incorporated herein by reference and made a part hereof, and are further made available for inspection at [282 U.S. 352] any time, if desired by the Court, in connection with the consideration of this order to show cause.

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In reply to O'Brien's affidavit, petitioners submitted affidavits of Gowen, Bartels and other defendants who were arrested at the company's office on that occasion and affidavits of other persons who were present during some part of the time that the prohibition agents were there. These affidavits show that O'Brien said he had a warrant of arrest, and produced a paper which several of these affiants say they read and believe to be the warrant issued by the commissioner, a copy of which was filed with the moving papers. As to these details, there is no conflict in the evidence.

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The district court refused to sustain the contention that no use was made of the warrant, and accepted the statements that O'Brien claimed to have warrants for the arrests and searches. The Circuit Court of Appeals did not definitely express opinion as to that matter. We have examined the evidence. It requires a finding that O'Brien did so claim, that he had the warrant issued by the commissioner or a copy of it, and that, when he arrested Gowen and Bartels, he claimed and purported to act under the warrant. No warrant for the search of the premises was issued.

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The orders dismissing petitioners' suits in equity are not before us. The question whether the district court had jurisdiction summarily to deal with petitioner's applications, while not brought forward by the parties, arises upon the record, was considered by the Circuit Court of Appeals, and suggested during the argument here.

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United States commissioners are inferior officers. 1 United States v. Allred, 155 U.S. 591, 594; Rice v. Ames, [282 U.S. 353] 180 U.S. 371, 377-378. Cf. Ex parte Hennen, 13 Pet. 230, 257, et seq.,. The Act of May 28, 1896, 29 Stat. 184, abolished commissioners of the circuit courts, authorized each district court to appoint United States commissioners, gave to them the same powers and duties that commissioners of the circuit courts had, required such appointments to be entered of record in the district courts, provided that the commissioners should hold their office subject to removal by the court appointing them (28 U.S.C. § 526), and required them to keep records of proceedings before them in criminal cases and deliver the same to the clerks of the courts on the commissioners' ceasing to hold office. Id., § 529. They are authorized by statute in respect of numerous matters, 2 and the relations between them and the district courts vary, as do their official acts. Cf. United States v. Allred, ubi supra; Grin v. Shine, 187 U.S. 181, 187; Todd v. United States, 158 U.S. 278, 282; Collins v. Miller, 252 U.S. 364, 369; United States v. Berry, 4 F. 779; Ex part Perkins, 29 F. 900; The Mary, 233 F. 121.

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We need not consider what power the district court may exert over the commissioners dealing with matters unlike [282 U.S. 354] that now before us. Here the commissioner acted under Rev.St. § 1014, which provides that, for any crime or offense against the United States, the offender may by any justice or judge of the United States or by any commissioner of the circuit court to take bail (now United States commissioner) be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. 18 U.S.C. § 591. All the commissioner's acts and the things done by the prohibition officers in respect of this matter were preparatory and preliminary to a consideration of the charge by a grand jury and, if an indictment should be found, the final disposition of the case in the district court. The commissioner acted not as a court, or as a judge of any court, but as a mere officer of the district court in proceedings of which that court had authority to take control at any time. Todd v. United States, ubi supra; Collins v. Miller, ubi supra; United States v. Berry, supra; United States v. Casino, 286 F. 976, 979.

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Notwithstanding the order to show cause was addressed to the United States alone, this is in substance and effect a proceeding against the United States attorney and the special agent in charge. The special agent in charge was the prosecuting witness. It was his duty under the statute to report violations to the United States attorney. Donnelley v. United States, 276 U.S. 505. And he was authorized, subject to the control of the United States attorney, to "conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury." 27 U.S.C. § 11. It is immaterial whether he intended or was personally to conduct the prosecution before the commissioner. As the United States attorney had control of the prosecution before the commissioner, whether conducted by his assistants or prohibition agents, the papers were held subject to his control and direction although in the immediate care and custody [282 U.S. 355] of the prohibition officers. He and they voluntarily came before the court to defend the seizure, the retention and proposed use of the papers, and so, in effect, became parties to the proceeding. By making the papers a part of O'Brien's affidavit, they brought the papers within the power of the court, and constructively into its possession, if indeed the papers had not already come within its reach. Insofar as it purports to run against the United States, the form of the order may be treated as a mere irregularity.

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The United States attorney and the special agent in charge, as officers authorized to conduct such prosecution and having control and custody of the papers for that purpose, are, in respect of the acts relating to such prosecution, alike subject to the proper exertion of the disciplinary powers of the court. And, on the facts here shown, it is plain that the district court had jurisdiction summarily to determine whether the evidence should be suppressed and the papers returned to the petitioners. Weeks v. United States, 232 U.S. 383, 398; Wise v. Henkel, 220 U.S. 556, 558; Silverthorne Lumber Co. v. United States, 251 U.S. 385, 390; Cogen v. United States, 278 U.S. 221, 225; United States v. Mills, 185 F. 318; United States v. McHie, 194 F. 894, 898; United States v. Lydecker, 275 F. 976, 980; United States v. Kraus, 270 F. 578, 580. Cf. Applybe v. United States, 32 F.2d 873, 874.

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The Government concedes that the warrant did not authorize O'Brien or other prohibition agents to make the arrests. The complaint, which in substance is recited in the warrant, was verified merely on information and belief, and does not state facts sufficient to constitute an offense. Ex parte Burford, 3 Cranch 448, 453; Rice v. Ames, supra, 374; Byars v. United States, 273 U.S. 28; United States v. Cruikshank, 92 U.S. 542, 558; United States v. Hess, 124 U.S. 483; United States v. Ruroede, 220 F. 210, [282 U.S. 356] 212, 213. The warrant was improvidently issued, and invalid on its face. It does not purport to authorize anyone other than the marshal and his deputies.

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The company is not mentioned in the complaint or warrant, and is a stranger to the proceeding before the commissioner. Unquestionably the order of the district court as to it was final and appealable. Cogen v. United States, ubi supra; Ex parte Tiffany, 252 U.S. 32; Savannah v. Jesup, 106 U.S. 563; Gumbel v. Pitkin, 113 U.S. 545. When the application was made, no information or indictment had been found or returned against Gowen or Bartels. There was nothing to show that any criminal proceeding would ever be instituted in that court against them. Post v. United States, 161 U.S. 583, 587. And, as above shown, the complaint does not state an offense. It follows that the order of the district court was not made in or dependent upon any case or proceeding there pending, and therefore the order as to them was appealable. Cogen v. United States, ubi supra; Perlman v. United States, 247 U.S. 7, 13; Burdeau v. McDowell, 256 U.S. 465.

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Without pausing to consider the matter, we assume, as held by the lower courts, that the facts of which Calhoun and O'Brien had been informed prior to the arrests are sufficient to justify the apprehension without a warrant of Gowen and Bartels for the conspiracy referred to in Braidwood's affidavit and on that basis we treat the arrests as lawful and valid.

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No question is here raised as to the search of the persons. There remains for consideration the question whether the search of the premises, the seizure of the papers therefrom and their retention for use as evidence may be sustained. The first clause of the Fourth Amendment declares:

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The right of the people to be secure [282 U.S. 357] in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.

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It is general and forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent, and unquestionably extends to the premises where the search was made and the papers taken. Gouled v. United States, 255 U.S. 298, 307. The second clause declares:

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And no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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This prevents the issue of warrants on loose, vague or doubtful bases of fact. It emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of every State in the Union. Agnello v. United States, 269 U.S. 20, 33. The need of protection against them is attested alike by history and present conditions. The Amendment is to be liberally construed, and all owe the duty of vigilance for its effective enforcement, lest there shall be impairment of the rights for the protection of which it was adopted. Boyd v. United States, 116 U.S. 616, 623. Weeks v. United States, supra, 389-392.

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There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances. It is not, and could not be, claimed that the officers saw conspiracy being committed. And there is no suggestion that Gowen or Bartels was committing crime when arrested. In April, 1929, Braidwood reported to Calhoun the existence of a conspiracy, and that, in pursuance of it, sales and deliveries of intoxicating liquor had been made in 1927 and 1928. The record does not show [282 U.S. 358] any criminal overt act in 1929. Calhoun's description to O'Brien of the company's office in detail and of Gowen and Bartels shows that he knew the place and offenders. Notwithstanding he had an abundance of information and time to swear out a valid warrant, he failed to do so. O'Brien falsely claimed to have a warrant for the search of the premises, and he made the arrests under color of the invalid warrant. By pretension of right and threat of force, he compelled Gowen to open the desk and the safe and, with the others, made a general and apparently unlimited search, ransacking the desk, safe, filing cases, and other parts of the office. It was a lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found. Federal Trade Commission v. American Tobacco Co., 264 U.S. 298, 306.

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Plainly, the case before us is essentially different from Marron v. United States, 275 U.S. 192. There, officers executing a valid search warrant for intoxicating liquors found and arrested one Birdsall, who, in pursuance of a conspiracy, was actually engaged in running a saloon. As an incident to the arrest, they seized a ledger in a closet where the liquor or some of it was kept, and some bills beside the cash register. These things were visible and accessible, and in the offender's immediate custody. There was no threat of force or general search or rummaging of the place.

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The uncontradicted evidence requires a finding that here the search of the premises was unreasonable. Silverthorne Lumber Co. v. United States, supra; Marron v. United States, supra, 199. United States v. Kirschenblatt, 16 F.2d 202. The judgments below must be reversed, and the case remanded to the district court with directions to enjoin the United States attorney and the special agent in charge from using the papers as evidence and to order the same returned to petitioners.

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Reversed.

Footnotes

BUTLER, J., lead opinion (Footnotes)

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1. As to the office of United States commissioner, see Section 4, Act of March 2, 1793, 1 Stat. 334; Section 1, Act of February 20, 1812, 2 Stat. 679; Act of March 1, 1817, 3 Stat. 350; sections 1, 2, Act of August 23, 1842, 5 Stat. 516; Rev. St. § 627; sections 19, 20 and 21, Act of May 28, 1896, 29 Stat. 184. United States v. Maresca, 266 F. 713, 719.

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2. The powers and duties of United States commissioners include: to arrest and imprison, or bail, for trial (18 U.S.C. § 591; see also §§ 593-597), and, in certain cases, to take recognizances from witnesses on preliminary hearings (28 U.S.C. § 657); to issue warrants for and examine persons charged with being fugitives from justice (18 U.S.C. § 651); to hold to security of the peace and for good behavior (28 U.S.C. § 392); to issue search warrants (18 U.S.C. §§ 611-627; 26 U.S.C. § 1195); to take bail and affidavits in civil causes (28 U.S.C. § 758); to discharge poor convicts imprisoned for nonpayment of fines (18 U.S.C. § 641); to institute prosecutions under laws relating to the elective franchise and civil rights and to appoint persons to execute warrants thereunder (8 U.S.C. §§ 49, 50); to enforce arbitration awards of foreign consuls in disputes between captains and crews of foreign vessels (28 U.S.C. § 393); to summon master of ship to show cause why process should not issue against it for seamen's wages (46 U.S.C. § 603); to take oaths and acknowledgments. 5 U.S.C. § 92. 28 U.S.C. § 525.

Stromberg v. California, 1931

Title: Stromberg v. California

Author: U.S. Supreme Court

Date: May 18, 1931

Source: 283 U.S. 359

This case was argued April 15, 1931, and was decided May 18, 1931.

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APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA,

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FOURTH APPELLATE DISTRICT

Syllabus

1931, Stromberg v. California, 283 U.S. 359

Appellant was charged under California Penal Code, § 403a, which condemns displaying a red flag in a public place or in a meeting place(a) "as a sign, symbol or emblem of opposition to organized government" or (b) "as an invitation or stimulus to anarchistic action" or (c) "as an aid to propaganda that is of a seditious character." These three purposes, which are expressed disjunctively in the statute, were alleged conjunctively in the information. On her general demurrer to the information, which was overruled, she contended, as was permitted by the California practice, that the statute was repugnant to the Fourteenth Amendment. At the trial, the jury was instructed, following the express terms of the statute, that the appellant should be convicted if the flag was displayed for any of the three purposes. There was a general verdict of guilty. The appellant accepted this instruction, in the state appellate court, but insisted that, under the Fourteenth Amendment, the statute was invalid as being an unwarranted limitation on the right of free speech. The appellate court entertained the contention and decided adversely, expressing doubt of the validity of the statute as related to the first of the three clauses defining purpose ("opposition to organized government,") but construing them as disjunctive and separable, and, upholding the statute as to the other two.

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Held:

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1. That the objection of unconstitutionality, made in the court below, went not only to the statute as a whole, but to each of the three clauses separately. P. 365.

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2. Inasmuch as the case was submitted to the jury as permitting conviction under any or all of the three clauses, and inasmuch as it is impossible to determine from the general verdict upon which of the clauses the conviction rested, it follows that, if any of the clauses is invalid under the Constitution, the conviction cannot be upheld. P. 367. [283 U.S. 360]

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3. The conception of "liberty " under the due process clause of the Fourteenth Amendment embraces the right of free speech. P. 368.

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4. The State may punish those who abuse the right of free speech by utterances which incite to violence and crime and threaten the overthrow of organized government. Id.

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5. There is no reason to doubt the validity of the second and third clauses of the statute, construed as they are, by the state court, as relating to such incitement to violence. P. 369.

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6. The first clause, condemning display of a flag "as a sign, symbol or emblem of opposition to organized government," construed by the state court as possibly including

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peaceful and orderly opposition to a government as organized and controlled by one political party, by those of another political party equally high minded and patriotic, which did not agree with the one in power,

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or "peaceful and orderly opposition to government by legal means and within constitutional limitations"—is unconstitutional. Id.

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7. The maintenance of opportunity for free political discussion to the end that government may be responsive to the will of the people, and that changes may be obtained by lawful means, is a fundamental principle of our constitutional system. Id.

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8. A statute which upon its face, and authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment. Id.

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62 Cal.App. 788; 290 Pac. 93, reversed.

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APPEAL from a judgment affirming a conviction under § 403a of the Penal Code of California.

HUGHES, J., lead opinion

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MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

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The appellant was convicted in the Superior Court of San Bernardino County, California, for violation of [283 U.S. 361] § 403-a of the Penal Code of that State. That section provides:

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Any person who displays a red flag, banner or badge or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character is guilty of a felony.

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The information, in its first count, charged that the appellant and other defendants, at the time and place set forth,

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did willfully, unlawfully and feloniously display a red flag and banner in a public place and in a meeting place as a sign, symbol and emblem of opposition to organized government and as an invitation and stimulus to anarchistic action and as an aid to propaganda that is and was of a seditious character.

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The information contained a second count charging conspiracy, but this need not be considered, as the conviction on that count was set aside by the state court. The appellant alone was convicted on the first count.

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On the argument of a general demurrer to the information, the appellant contended, as was permitted by the practice in California, that the statute was invalid because repugnant to the Fourteenth Amendment of the Federal Constitution. The demurrer was overruled, and the appellant pleaded not guilty. Conviction followed, motions for a new trial and in arrest of judgment were denied, and, on appeal to the District Court of Appeal, the judgment was affirmed. (People v. Mintz, 290 Pac. 93.) Petition for a hearing by the Supreme Court of California was denied, and an appeal has been taken to this Court.

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This Court granted an order permitting the appellant to prosecute the appeal in forma pauperis, and, for the [283 U.S. 362] purpose of shortening the record, a stipulation of facts has been presented on behalf of the appellant and the Attorney General of the State. It appears that the appellant, a young woman of nineteen, a citizen of the United States by birth, was one of the supervisors of a summer camp for children, between ten and fifteen years of age, in the foothills of the San Bernardino mountains. Appellant led the children in their daily study, teaching them history and economics.

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Among other things, the children were taught class consciousness, the solidarity of the workers, and the theory that the workers of the world are of one blood, and brothers all.

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Appellant was a member of the Young Communist League, an international organization affiliated with the Communist Party. The charge against her concerned a daily ceremony at the camp in which the appellant supervised and directed the children in raising a red flag, "a camp-made reproduction of the flag of Soviet Russia, which was also the flag of the Communist Party in the United States." In connection with the flag-raising, there was a ritual at which the children stood at salute and recited a pledge of allegiance "to the worker's red flag, and to the cause for which it stands; one aim throughout our lives, freedom for the working class." The stipulation further shows that

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a library was maintained at the camp containing a large number of books, papers and pamphlets, including much radical communist propaganda, specimens of which are quoted in the opinion of the state court.

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These quotations abundantly demonstrated that the books and pamphlets contained incitements to violence and to "armed uprisings," teaching "the indispensability of a desperate, bloody, destructive war as the immediate task of the coming action." Appellant admitted ownership of a number of the books, some of which bore her name. It appears from the stipulation that none of these books or pamphlets was used in the teaching at the camp. [283 U.S. 363] With respect to the conduct of the appellant, the stipulation contains the following statement: "She" (the appellant)

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testified, however, that none of the literature in the library, and particularly none of the exhibits containing radical communist propaganda, was in any way brought to the attention of any child or of any other person, and that no word of violence or anarchism or sedition was employed in her teaching of the children. There was no evidence to the contrary.

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The charge in the information, as to the purposes for which the flag was raised, was laid conjunctively, uniting the three purposes which the statute condemned. But, in the instructions to the jury, the trial court followed the express terms of the statute and treated the described purposes disjunctively, holding that the appellant should be convicted if the flag was displayed for any one of the three purposes named. The instruction was as follows:

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In this connection, you are instructed that, if the jury should believe beyond a reasonable doubt that the defendants, or either of them, displayed, or caused to be displayed, a red flag, banner, or badge, or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place, as charged in count one of the information, and if you further believe from the evidence beyond a reasonable doubt that said flag, badge, banner, or device was displayed, or caused to be displayed, as a sign, symbol, or emblem of opposition to organized government, or was an invitation or stimulus to anarchistic action, or was in aid to propaganda that is of a seditious character, you will find such defendants guilty as charged in count one of the information.

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In this connection, you are instructed that, if you believe a red flag, such as herein described, was displayed in either of the places mentioned in said information, that it is only necessary for the prosecution to prove to you, beyond a reasonable doubt, that said flag was displayed [283 U.S. 364] for any one or more of the three purposes mentioned in the information; in other words, if the prosecution should prove to you beyond a reasonable doubt that the red flag, such as herein described, was displayed at the place or either of said places and for the purposes and objects as alleged in said information, it is only necessary for the prosecution to prove to you beyond a reasonable doubt that said flag was displayed for only one or more of the three purposes alleged in said information, and it is not necessary that the evidence show, beyond a reasonable doubt, that said red flag was displayed for all three purposes charged in said information. Proof, beyond a reasonable doubt, of any one or more of the three purposes alleged in said information is sufficient to justify a verdict of guilty under count one of said information.

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Appellant, before the District Court of Appeal, accepted this instruction as correct and waived any claim of error on that account. But appellant continued her challenge of the constitutionality of the statute, and the court on appeal entertained her contention and decided the constitutional question against her. In the District Court of Appeal, there were three justices, and the concurrence of two justices was necessary to pronounce a judgment. Cal.Const., Art. VI, § 4(a); Cal.Stats., 1929, c. 691, pp. 1202, 1203. Two opinions were delivered, one by a single justice and another by the remaining two justices. The three justices concurred with respect to the affirmance of the conviction of the appellant under the first count, and there was a dissent only in relation to the proceedings on the reversal of the judgment under the second count for conspiracy, a point not in question here. The opinions make it clear that the appellant insisted that, under the Fourteenth Amendment, the statute was invalid as being "an unwarranted limitation on the right of free speech."

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As the trial court had treated the three purposes of the statute disjunctively, and the appellant had accepted that [283 U.S. 365] construction, we think that the only fair interpretation of her contention is that it related to the validity not merely of the statute taken as a whole, but of each one of the three clauses separately relied upon by the State in order to obtain a conviction. Her concession as to the interpretation of the statute emphasizes, rather than destroys, that contention. The opinion of the two concurring justices explicitly states: "She" (the appellant) "directs her argument to the phrase in section 403a of the Penal Code `of opposition to organized government.'" Thus, directing her argument, we do not think that it can properly be said that the appellant having agreed that, according to the terms of the statute, her conviction could rest exclusively upon that ground, was not contending that the statute was invalid to the extent that it was so applied.

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We are not left in doubt as to the construction placed by the state court upon each of the clauses of the statute. The first purpose described, that is, relating to the display of a flag or banner "as a sign, symbol or emblem of opposition to organized government," is discussed by the two concurring justices. After referring, in the language above quoted, to the constitutional question raised by the appellant with respect to this clause, these justices said in their opinion [p. 97]:

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If opposition to organized government were the only act prohibited by this section, we might be forced to agree with appellant. "Opposition" is a word broad in its meaning. It has been defined as follows:

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The act of opposing or resisting; antagonism. The state of being opposite or opposed; antithesis; also, a position confronting another or a placing in contrast. That which is, or furnishes an obstacle to some result; as, the stream flows without opposition. The political party opposed to the ministry or administration; often used adjectively as, the opposition press. [283 U.S. 366]

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It might be construed to include the peaceful and orderly opposition to a government as organized and controlled by one political party by those of another political party equally high-minded and patriotic, which did not agree with the one in power. It might also be construed to include peaceful and orderly opposition to government by legal means and within constitutional limitations. Progress depends on new thought and the development of original ideas. All change is, to a certain extent, achieved by the opposition of the new to the old, and, insofar as it is within the law, such peaceful opposition is guaranteed to our people and is recognized as a symbol of independent thought containing the promise of progress. It may be permitted as a means of political evolution, but not of revolution.

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With respect to the second purpose described in the statute, the display of a flag or banner "as an invitation or stimulus to anarchistic action," the concurring justices quoted accepted definitions and judicial decisions as to the meaning of "anarchistic action." These authorities, as set forth and approved in the opinion, show clearly that the term was regarded by the state court as referring to the overthrow by force and violence of the existing law and order, to the use of "unlawful, violent and felonious means to destroy property and human life." The conclusion was thus stated:

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It is therefore clear that, when section 403a of the Penal Code prohibits a display of a red flag as an invitation or stimulus to anarchistic action, it prohibits acts which have a well defined and well settled meaning in the law of our land, a teaching which, if allowed to be put into force and effect, would mean revolution in its most dreaded form.

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The state court further gave its interpretation of the third clause of the statute, that is, in relation to the display of a flag or banner "as an aid to propaganda that is of a seditious character." Both opinions dealt with the [283 U.S. 367] meaning of this clause. Thus, in one opinion, it is said:

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Appellants' counsel concedes that sedition laws which "interdict against the use of force or violence" are consistently upheld by the courts, and all of the authorities cited by him support that proposition. . . . Sedition is defined as the stirring up of disorder in the State, tending toward treason, but lacking an overt act. Certainly the "advocacy of force or violence" in overturning the government of a State falls within that definition.

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The other opinion takes a similar view. Assuming that the local statute is thus construed by the state court as referring to the advocacy of force or violence in the overthrow of government, we do not find it necessary, for the purposes of the present case, to review the historic controversy with respect to "sedition laws," or to consider the question as to the validity of a statute dealing broadly and vaguely with what is termed seditious conduct, without any limiting interpretation either by the statute itself or by judicial construction.

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Having reached these conclusions as to the meaning of the three clauses of the statute, and doubting the constitutionality of the first clause, the state court rested its decision upon the remaining clauses. The basis of the decision, as more fully stated in the opinion of the two concurring justices, was this:

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The constitutionality of the phrase of this section, "of opposition to organized government" is questionable. This phrase can be eliminated from the section without materially changing its purposes. The section is complete without it, and, with it eliminated, it can be upheld as a constitutional enactment by the Legislature of the State of California.

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Accordingly, disregarding the first clause of the statute and upholding the other clauses, the conviction of the appellant was sustained.

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We are unable to agree with this disposition of the case. The verdict against the appellant was a general [283 U.S. 368] one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury were instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause. It may be added that this is far from being a merely academic proposition, as it appears, upon an examination of the original record filed with this Court, that the State's attorney, upon the trial, emphatically urged upon the jury that they could convict the appellant under the first clause alone, without regard to the other clauses. It follows that, instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute was found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld.

1931, Stromberg v. California, 283 U.S. 368

We are thus brought to the question whether any one of the three clauses, as construed by the state court, is, upon its face, repugnant to the Federal Constitution, so that it could not constitute a lawful foundation for a criminal prosecution. The principles to be applied have been clearly set forth in our former decisions. It has been determined that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech. Gitlow v. New York, 268 U.S. 652, 666; Whitney v. California, 274 U.S. 357, 362, 371, 373; Fiske v. Kansas, 274 U.S. 380, 382. The right is not an absolute one, and the State, in the exercise of its police power, may punish the abuse of this freedom. There is no question but that the State may thus provide [283 U.S. 369] for the punishment of those who indulge in utterances which incite to violence and crime and threaten the overthrow of organized government by unlawful means. There is no constitutional immunity for such conduct abhorrent to our institutions. Gitlow v. New York, supra; Whitney v. California, supra. We have no reason to doubt the validity of the second and third clauses of the statute as construed by the state court to relate to such incitements to violence.

1931, Stromberg v. California, 283 U.S. 369

The question is thus narrowed to that of the validity of the first clause, that is, with respect to the display of the flag "as a sign, symbol or emblem of opposition to organized government," and the construction which the state court has placed upon this clause removes every element of doubt. The state court recognized the indefiniteness and ambiguity of the clause. The court considered that it might be construed as embracing conduct which the State could not constitutionally prohibit. Thus, it was said that the clause

1931, Stromberg v. California, 283 U.S. 369

might be construed to include the peaceful and orderly opposition to a government as organized and controlled by one political party by those of another political party equally high minded and patriotic which did not agree with the one in power. It might also be construed to include peaceful and orderly opposition to government by legal means and within constitutional limitations.

1931, Stromberg v. California, 283 U.S. 369

The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which, upon its face and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment. The first [283 U.S. 370] clause of the statute being invalid upon its face, the conviction of the appellant, which, so far as the record discloses, may have rested upon that clause exclusively, must be set aside.

1931, Stromberg v. California, 283 U.S. 370

As, for this reason, the case must be remanded for further proceedings not inconsistent with this opinion, and other facts may be adduced in such proceedings, it is not necessary to deal with the questions which have been argued at the bar as to the constitutional validity of the second and third clauses of the statute, not simply upon their face, but as applied in the instant case; that is, to consider the conclusions of fact warranted by the evidence, either as shown by the original record filed with the Court on the present appeal or as disclosed by the stipulation, as to the import of which the parties do not agree.

1931, Stromberg v. California, 283 U.S. 370

Judgment reversed.

MCREYNOLDS, J., dissenting

1931, Stromberg v. California, 283 U.S. 370

MR. JUSTICE McREYNOLDS, dissenting.

1931, Stromberg v. California, 283 U.S. 370

This Court often has announced, and scores, perhaps hundreds, of times has applied the rule, that it may not pass upon any question in a cause coming from a state court which the record fails to show was there determined or duly presented for determination.

1931, Stromberg v. California, 283 U.S. 370

The only federal matter ruled upon by the court below (District Court of Appeals), and the only one there submitted, arose upon the general demurrer to the information. Did this adequately set forth an offense for which the defendant could be punished without violating the Fourteenth Amendment?

1931, Stromberg v. California, 283 U.S. 370

Section 403a, Penal Code of California, provides:

1931, Stromberg v. California, 283 U.S. 370

Any person who displays a red flag, banner or badge or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol or emblem of opposition to organized [283 U.S. 371] government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character is guilty of a felony.

1931, Stromberg v. California, 283 U.S. 371

And the Information charged that the plaintiff

1931, Stromberg v. California, 283 U.S. 371

did willfully, unlawfully, and feloniously display a red flag and banner in a public place and a meeting place as a sign, symbol, and an emblem of opposition to organized government and as an invitation and stimulus to anarchistic action and as an aid to propaganda that is and was of a seditious character.

1931, Stromberg v. California, 283 U.S. 371

Below, counsel definitely "stated that he was satisfied that the instructions [to the jury] were correct, and waived any claim of error on that account." Accordingly, decision was not requested upon any question arising out of the charge; no such question was decided. The instructions were properly disregarded, and are now unimportant.

1931, Stromberg v. California, 283 U.S. 371

The sole matter of a federal nature considered by the Court of Appeals was the claim that the provisions of § 403a of the Penal Code were in conflict with the Fourteenth Amendment. It held the statute divisible, and that, as petitioner stood charged with violating all of the inhibitions therein, some of which were certainly good, the conviction could not be upset even if one paragraph were invalid. The conclusion seems plainly right and, I think, the challenged judgment should be affirmed.

BUTLER, J., dissenting

1931, Stromberg v. California, 283 U.S. 371

MR. JUSTICE BUTLER, dissenting.

1931, Stromberg v. California, 283 U.S. 371

The Court decides that, insofar as § 403a declares it a crime to display a flag for the first purpose specified, "as an emblem of opposition to organized government," the section denies right of free speech, and the court holds that right to be included in the concept of "liberty" safeguarded against state action by the due process clause of the Fourteenth Amendment. It sustains the parts forbidding [283 U.S. 372] the public display of a flag "as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character." The count on which the conviction rests charges that the appellant displayed a flag in ways and for all the purposes denounced by the section. Assuming all the clauses of the section to be valid, the display of a flag for the purpose specified in any one of them would be sufficient to warrant conviction. The Court holds the first clause invalid and, finding that the judgment may have rested upon that clause exclusively, sets aside the conviction.

1931, Stromberg v. California, 283 U.S. 372

1. I am of opinion that the record affirmatively shows that appellant was not convicted for violation of the first clause.

1931, Stromberg v. California, 283 U.S. 372

Shortly prior to the trial of this case, the supreme court of California held invalid a city ordinance purporting to make unlawful the public display of a flag or emblem of an organization espousing for the government of the people of the United States principles antagonistic to our Constitution or form of government. In re Hartman, 182 Cal. 447; 188 Pac. 548. Under that decision, the California lower courts were bound to hold invalid the first clause of § 403a construed as peaceable opposition to organized government. And the record shows that, in the case before us, counsel and the trial court had that decision in mind.

1931, Stromberg v. California, 283 U.S. 372

The instruction quoted and relied on in the opinion here is No. 17, requested by the state's attorney. The opinion construes that instruction as if it stood alone. It does not stand alone. Defendant's attorney did not object or except to it, but, on the other hand, requested, and the court gave, other instructions. They are Nos. 10 and 11, as follows:

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You are instructed that the inhabitants of the United States have, both individually and collectively, the right to advocate peaceable changes in our constitution, laws, [283 U.S. 373] or form of government, although such changes may be based upon theories or principles of government antagonistic to those which now serve as their basis.

1931, Stromberg v. California, 283 U.S. 373

You are instructed that, under the Constitution and laws of the United States, and of this State, an organization peaceably advocating changes in our constitution, laws or form of government, although such changes may be based upon theories or principles of government antagonistic to those which now serve as their basis, may adopt a flag or emblem signifying the purpose of such organization, and that the display or possession of such flag or emblem cannot be made an unlawful act.

1931, Stromberg v. California, 283 U.S. 373

The effect of the three instructions here referred to was definitely to direct the jury that defendant had the right, without limit, to advocate peaceable changes in our government, that, under our constitution and laws, an organization peaceably advocating changes in our government, no matter to what extent or upon what theories or principles, may adopt a flag signifying the purposes of such organization, and that it is impossible to make that unlawful.

1931, Stromberg v. California, 283 U.S. 373

2. The record fails to show that, aside from having the trial judge give to the jury these instructions suggested by her, defendant did in any manner separately challenge in the trial court the validity of the first clause.

1931, Stromberg v. California, 283 U.S. 373

That question could not have been raised by the demurrer to the information because it charged conjunctively the three purposes that are disjunctively denounced by the section. And the failure of defendant's counsel in any manner to object or except to state's instruction No. 17, coupled with his statement before the district court of appeal (People v. Mintz, 290 Pac. 93) that "he was satisfied that the instructions were correct, and waived any claim of error on that account" indubitably shows that he was of opinion that the giving of defendant's instructions above-quoted eliminated all possibility of conviction [283 U.S. 374] for the display of a flag as an emblem of peaceable opposition to organized government.

1931, Stromberg v. California, 283 U.S. 374

3. And, if defendant at the trial did assail the first clause, that contention is shown by the opinion of the court below to have been definitely waived.

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It is there stated that (p. 95):

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The part of section 403a necessary to be considered in passing upon the questions raised by the appeal, reads as follows:

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Any person who displays a red flag, . . . in any meeting place . . . as an aid to propaganda that is of a seditious character is guilty of a felony.

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That statement is closely followed by the one showing that defendant's counsel was satisfied with the instructions.

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These definite statements in the opinion were agreed to by the three judges constituting the court. They are not in any manner negatived or impaired by the concurring opinion of two of the judges. Pp. 96-102. The first clause was discussed in the concurring opinion only for the purpose of shoving that, notwithstanding its questionable validity, the rest of the section should be held valid. Clearly these judges did not intend to sustain a conviction resting on the clause so questioned in their opinion.

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The full substance of all they say that has any bearing follows (p. 97):

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Appellant's contention that section 403a of the Penal Code is unconstitutional on the ground that it is an unwarranted limitation on the right of free speech guaranteed to the people by the Constitutions of the United States and of the State of California, deserves serious consideration. She directs her argument to the phrase in section 403a of the Penal Code "of opposition to organized government." If opposition to organized government were the only act prohibited by this section. we might be forced to agree with appellant.

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After some pages of discussion, they conclude as to the second clause [283 U.S. 375] (p. 99):

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It is therefore clear that, when section 403a of the Penal Code prohibits a display of a red flag as an invitation or stimulus to anarchistic action. it prohibits acts which have a well defined and well settled meaning in the law of our land, a teaching which, if allowed to be put into force and effect, would mean revolution in its most dreaded form.

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Turning, then, to a consideration of the third clause, they say: "The section in question also prohibits the display of a red flag as an aid to propaganda that is of a seditious nature." After discussion, they conclude (p. 99) that:

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The term "sedition" and the word "seditious" have well defined meanings in law. That the teaching of sedition against our Government can be and has long been prohibited needs no further citation of authorities.

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Then, summing up as to the second and third clauses, they say (p. 99):

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As we view the provisions of section 403a of the Penal Code, its prohibition of displaying a red flag "as an invitation or stimulus to anarchistic action, or as an aid to propaganda that is of a seditious character" is certain, and a proper and constitutional and legislative enactment. It is not contrary to the provisions of either the State or Federal Constitutions guaranteeing freedom of speech to our people.

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They refer again to the first clause: "The constitutionality of the phrase of this section `of opposition to organized government' is questionable." And, disclosing the purpose of the reference, they say:

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This phrase can be eliminated from the section without materially changing its purposes. The section is complete without it, and, with it eliminated, it can be upheld as a constitutional enactment by the Legislature of the State of California.

1931, Stromberg v. California, 283 U.S. 375

I am of opinion that fair consideration of both opinions in all their parts makes it very clear that defendant did not claim below that, under the charge, the jury might or could [283 U.S. 376] have found her guilty of violating the first clause of the section, that the district court of appeal did not decide or consider whether conviction under that clause was or could lawfully be had, and that the validity of the first clause was discussed in the concurring opinion only upon the question whether, if that part of the section were unconstitutional, the other parts must also fail.

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4. It seems to me that, on this record. the Court is not called on to decide whether the mere display of a flag as the emblem of a purpose, whatever its sort, is speech within the meaning of the constitutional protection of speech and press, or to decide whether such freedom is a part of the liberty protected by the Fourteenth Amendment, or whether the anarchy that is certain to follow a successful "opposition to organized government" is not a sufficient reason to hold that all activities to that end are outside the "liberty" so protected. Cf. Prudential Ins. Co. v. Cheek, 259 U.S. 530. Gitlow v. New York, 268 U.S. 652, 666. Whitney v. California, 274 U.S. 357. Fiske v. Kansas, 274 U.S. 380.

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I am of opinion that the judgment below should be affirmed.

Phillips v. Commissioner, 1931

Title: Phillips v. Commissioner of Internal Revenue

Author: U.S. Supreme Court

Date: May 25, 1931

Source: 283 U.S. 589

This case was argued April 23, 1931, and was decided May 25, 1931.

1931, Phillips v. Commissioner of Internal Revenue, 283 U.S. 589

CERTIORARI TO THE CIRCUIT COURT OF APPEALS

1931, Phillips v. Commissioner of Internal Revenue, 283 U.S. 589

FOR THE SECOND CIRCUIT

Syllabus

1931, Phillips v. Commissioner of Internal Revenue, 283 U.S. 589

1. Stockholders who have received the assets of a dissolved corporation may be compelled to discharge therefrom the unpaid federal taxes on the income and excess profits of the corporation. P. 592.

1931, Phillips v. Commissioner of Internal Revenue, 283 U.S. 589

2. Under the Revenue Act of 1926, § 280(a)(1), and Act of May 29, 1928, this liability of the transferee, "at law or in equity," may be enforced summarily in the same manner as that of any delinquent taxpayer, as well as by proceedings to enforce the tax lien or by actions at law or in equity. Id.

1931, Phillips v. Commissioner of Internal Revenue, 283 U.S. 589

3. The rule that the United States may collect its internal revenue by summary administrative proceedings if adequate opportunity be afforded for a later determination of legal rights applies to taxes assessed against transferees of corporate property. P. 593.

1931, Phillips v. Commissioner of Internal Revenue, 283 U.S. 589

4. The procedure provided in § 280(a)(1) satisfies the requirements of due process because two alternative methods of eventual judicial review are available to the transferee: (a) he may contest his liability by bringing an action, either against the United States or the Collector, to recover the amount paid, or (b) he may avail himself of the provisions for immediate redetermination of the liability by the Board of Tax Appeals, and, if dissatisfied, may have a further review by the Circuit Court of Appeals, and possibly by this Court on certiorari. P. 597. [283 U.S. 590]

1931, Phillips v. Commissioner of Internal Revenue, 283 U.S. 590

5. The review by the Board of Tax Appeals and the Circuit Court of Appeals is not to be deemed constitutionally inadequate because the tax may be collected while the case is before that court unless a bond is filed, or because the Board's findings of fact are to be treated by that court as final if there is any evidence to support them. P. 599.

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6. The right of the taxpayer to stay payment pending immediate judicial review, by filing a bond, is a privilege granted by the sovereign as an act of grace. Id.

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7. Save as there may be an exception for issues presenting claims of constitutional right, such administrative findings on issues of fact are accepted by the court as conclusive if the evidence was legally sufficient to sustain them and there was no irregularity in the proceedings. P. 600.

1931, Phillips v. Commissioner of Internal Revenue, 283 U.S. 590

8. The method of assessment and collection permitted by § 280(a)(1) was intended to apply, and is constitutionally applicable, where the transfer of assets occurred before the enactment of the Revenue Act, of 1926. P. 601.

1931, Phillips v. Commissioner of Internal Revenue, 283 U.S. 590

9. Assuming that the liability "at law and in equity" of the transferees of corporate assets to meet federal taxes incurred by their corporation may vary according to the laws of the States of incorporation, this does not make the tax provision invalid either as an unconstitutional delegation of federal taxing power to the States or as a departure from the requirement of geographical uniformity. P. 602.

1931, Phillips v. Commissioner of Internal Revenue, 283 U.S. 590

10. The time within which the summary proceeding to enforce liability for the tax of a corporation may be taken against a stockholder transferee of its assets is determined by the federal Act, and not by the state statute of limitations on suits against stockholders. P. 602.

1931, Phillips v. Commissioner of Internal Revenue, 283 U.S. 590

11. One who receives corporate assets upon dissolution of the corporation is severally liable, to the extent of the assets received, for the payment of income and excess profits taxes of the corporation. P. 603.

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12. In a summary proceeding under § 280, Revenue Act of 1926, to collect such taxes from one such transferee, the Government is not obliged to join other transferees and marshal the assets of the corporation so as to adjust the rights of the various stockholders. P. 604.

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42 F.2d 177, affirmed. [283 U.S. 591]

1931, Phillips v. Commissioner of Internal Revenue, 283 U.S. 591

CERTIORARI, 282 U.S. 828, to review a judgment affirming the action of the Board of Tax Appeals, 15 B.T.A. 1218, in sustaining certain deficiency tax assessments.

BRANDEIS, J., lead opinion

1931, Phillips v. Commissioner of Internal Revenue, 283 U.S. 591

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

1931, Phillips v. Commissioner of Internal Revenue, 283 U.S. 591

In 1919, the Coombe Garment Company, a Pennsylvania corporation, distributed all of its assets among its stockholders, and then dissolved. Thereafter, the Commissioner of Internal Revenue made deficiency assessments against it for income and profits taxes for the years 1918 and 1919. A small part of these assessments was collected, leaving an unpaid balance of $9,306.36. I. L. Phillips, of New York City, had owned one-fourth of the company's stock, and had received $17,139.61 as his distributive dividend. Pursuant to § 280(a)(1) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 61, the Commissioner sent due notice that he proposed to assess against, and collect from, Phillips the entire remaining amount of the deficiencies. No notice of such deficiencies was sent [283 U.S. 592] to any of the other transferees, and no suit or proceedings for collection was instituted against them. Upon petition by Phillips' executors for a redetermination, the Board of Tax Appeals held that the estate was liable for the full amount. 15 B.T.A. 1218. Its order was affirmed by the United States Circuit Court of Appeals for the Second Circuit. 42 F.2d 177. Because of conflict in the decisions of the lower courts, 1 a writ of certiorari was granted. 282 U.S. 828.

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Stockholders who have received the assets of a dissolved corporation may confessedly be compelled, in an appropriate proceeding, to discharge unpaid corporate taxes. Compare Pierce v. United States, 255 U.S. 398. Before the enactment of § 280(a)(1), such payment by the stockholders could be enforced only by bill in equity or action at law. 2 Section 280(a)(1) provides that the liability of the transferee for such taxes may be enforced in the same manner as that of any delinquent taxpayer. 3

1931, Phillips v. Commissioner of Internal Revenue, 283 U.S. 592

The procedure prescribed for collection of the tax from a stockholder is thus the same as that now followed when payment is sought directly from the corporate taxpayer. This procedure is now generally known, and some parts of it will later be considered in detail. As applied directly to the taxpayer, its constitutionality is not now assailed. Compare Old Colony Trust Co. v. Commissioner, 279 U.S. 716. But it is contended that to apply it to stockholder transferees violates several constitutional guaranties; that [283 U.S. 593] additional obstacles are encountered if it is applied to transfers made before the enactment of § 280(a)(1); that the specific liability here sought to be enforced is governed by the law of Pennsylvania and barred by its statute of limitations, and that in no event can the stockholder be held liable for more than his pro rata share of the unpaid corporate tax.

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First. The contention mainly urged is that the summary procedure permitted by the section violates the Constitution because it does not provide for a judicial determination of the transferee's liability at the outset. The argument [283 U.S. 594] is that such liability (except where a lien had attached before the transfer) is dependent upon questions of law and fact which have heretofore been adjudicated by courts; that to confer upon the Commissioner power to determine these questions in the first instance offends against the principle of the separation of the powers, and that the inherent denial of due process is not saved by the provisions for deferred review in a suit to recover taxes paid, or, in the alternative, for an immediate appeal to the Board of Tax Appeals with the right to review its determination in the courts, because there are limitations and conditions in either method of judicial review.

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Section 280(a)(1) provides the United States with a new remedy for enforcing the existing "liability at law or in equity." The quoted words are employed in the statute to describe the kind of liability to which the new remedy is to be applied, and to define the extent of such liability. The obligation to be enforced is the liability for the tax. Russell v. United States, 278 U.S. 181, 186; United States v. Updike, 281 U.S. 489, 493. The proceeding is one to collect the revenue. That Congress deemed the section necessary in order to make the tax collecting system more effective is established not only by the fact of enactment, but also by the reports of the committees. 4 [283 U.S. 595]

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The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. 5 Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained. Compare Cheatham v. United States, 92 U.S. 85, 85, 89; Springer v. United States, 102 U.S. 586, 594; Hagar v. Reclamation District No. 108, 111 U.S. 701, 708-709. Property rights must yield provisionally to governmental need. Thus, while protection of life and liberty from administrative action alleged to be illegal may be obtained promptly by the writ of habeas corpus, United States v. Woo Jan, 245 U.S. 552; Ng Fung Ho v. White, 259 U.S. 276, the statutory prohibition of any "suit for the purpose of restraining the assessment or collection of any tax " postpones redress [283 U.S. 596] for the alleged invasion of property right if the exaction is made under color of their offices by revenue officers charged with the general authority to assess and collect the revenue. 6 Snyder v. Marks, 109 U.S. 189; Dodge v. Osborn, 241 U.S. 118; Graham v. du Pont, 262 U.S. 234. This prohibition of injunctive relief is applicable in the case of summary proceedings against a transferee. Act of May 29, 1928, c. 852, § 604, 45 Stat. 791, 873. Proceedings more summary in character than that provided in 280, and involving less directly the obligation of the taxpayer, were sustained in Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272. It is urged that the decision in the Murray case was based upon the peculiar relationship of a collector of revenue to his government. The underlying principle in that case was not such relation, but the need of the government promptly to secure its revenues.

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Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due [283 U.S. 597] process, if the opportunity given for the ultimate judicial determination of the liability is adequate. Springer v. United States, 102 U.S. 586, 593; Scottish Union & National Ins. Co. v. Bowland, 196 U.S. 611, 631. Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied. For the protection of public health, a State may order the summary destruction of property by administrative authorities without antecedent notice or hearing. Compare North American Cold Storage Co. v. Chicago, 211 U.S. 306; Hutchinson v. Valdosta, 227 U.S. 303; Adams v. Milwaukee, 228 U.S. 572, 584. Because of the public necessity, the property of citizens may be summarily seized in wartime. Central Union Trust Co. v. Garvan, 254 U.S. 554, 566; Stoehr v. Wallace, 255 U.S. 239, 245; United States v. Pfitsch, 256 U.S. 547, 553. Compare Miller v. United States, 11 Wall. 268, 296; International Paper Co. v. United States, 282 U.S. 399; Russian Volunteer Fleet v. United States. 282 U.S. 481. And, at any time, the United States may acquire property by eminent domain without paying, or determining the amount of the compensation before the taking. Compare Kohl v. United States, 91 U.S. 367, 375; United States v. Jones, 109 U.S. 513, 518; Crozier v. Fried. Krupp Aktiengesellschaft, 224 U.S. 290, 306. 7

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The procedure provided in § 280(a)(1) satisfies the requirements of due process because two alternative methods of eventual judicial review are available to the transferee. He may contest his liability by bringing an action, either against the United States or the collector, to recover the amount paid. This remedy is available where the transferee does not appeal from the determination of [283 U.S. 598] the Commissioner, and the latter makes an assessment and enforces payment by distraint; or where the transferee voluntarily pays the tax and is thereafter denied administrative relief. Compare United States v. Emery, Bird, Thayer Realty Co., 237 U.S. 28, 31; Wickwire v. Reinecke, 275 U.S. 101, 105; Williamsport Wire Rope Co. v. United States, 277 U.S. 551, 560. Or the transferee may avail himself of the provisions for immediate redetermination of the liability by the Board of Tax Appeals, since all provisions governing this mode of review are made applicable by § 280. Compare Routzahn v. Tyroler, 36 F.2d 208, 209. Thus, within sixty days after the Commissioner determines that the transferee is liable for an unpaid deficiency and gives due notice thereof, the latter may file a petition with the Board of Tax Appeals. Act of February 26, 1926, c. 27, § 274(a), 44 Stat. 9, 55; Act of May 29, 1928, c. 852, § 272(a), 45 Stat. 791, 852. Formal notice of the tax liability is thus given; the Commissioner is required to answer, and there is a complete hearing de novo according to the rules of evidence applicable in courts of equity of the District of Columbia. Act of May 29, 1928, c. 852, § 601, 45 Stat. 791, 872. Compare International Banding Machine Co. v. Commissioner, 37 F.2d 660. This remedy may be had before payment, without giving bond (unless the Commissioner in his discretion deems a jeopardy assessment necessary). The transferee has the right to a preliminary examination of books, papers, and other evidence of the taxpayer, and the burden of proof is on the Commissioner to show that the appellant is liable as a transferee of property, though not to show that the taxpayer was liable for the tax. Act of May 29, 1928, c. 852, § 602, 45 Stat. 791, 873. 8 A review by the Circuit Court of Appeals of an adverse determination may be had, and assessment [283 U.S. 599] and collection meanwhile may be stayed by giving a bond to secure payment. Act of February 26, 1926, c. 27, § 1001, 44 Stat. 9, 10; Act of May 29, 1928, c. 852, § 603, 45 Stat. 791, 873. There may be a further review by this Court on certiorari. These provisions amply protect the transferee against improper administrative action. Compare Hurwitz v. North, 271 U.S. 40.

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It is argued that such review by the Board of Tax Appeals and Circuit Court of Appeals is constitutionally inadequate because of the conditions and limitations imposed. Specific objection is made to the provision that collection will not be stayed while the case is pending before the Circuit Court of Appeals, unless a bond is filed, and also to the rule under which the Board's findings of fact are treated by that court as final if there is any evidence to support them. 9 As to the first of these objections, it has already been shown that the right of the United States to exact immediate payment and to relegate the taxpayer to a suit for recovery is paramount. The privilege of delaying payment pending immediate judicial review by filing a bond was granted by the sovereign as a matter of grace solely for the convenience of the taxpayer. 10 [283 U.S. 600] Nor is the second objection of weight. It has long been settled that determinations of fact or ordinary administrative purposes are not subject to review. Johnson v. Drew, 171 U.S. 93, 99; Public Clearing House v. Coyne, 194 U.S. 497, 508; United States v. Ju Toy, 198 U.S. 253, 263; Red "C" Oil Co. v. North Carolina, 222 U.S. 380, 394; Mutual Film Co. v. Industrial Commission, 236 U.S. 230, 246. Compare Williamsport Wire Rope Co. v. United States, 277 U.S. 551, 560. Save as there may be an exception for issues presenting claims of constitutional right, such administrative findings on issues of fact are accepted by the court as conclusive if the evidence was legally sufficient to sustain them and there was no irregularity in the proceedings. Reetz v. Michigan, 188 U.S. 505, 507; Lieberman v. Van De Carr, 199 U.S. 552, 562; Douglas v. Noble, 261 U.S. 165, 167; Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 443. 11 The adequacy of the scope of review offered by the Revenue Act of 1926 in the case of a deficiency determined directly against the taxpayer was assumed in Old Colony Trust Co. v. Commissioner, 279 U.S. 716, and this procedure is now thoroughly established. 12 Questions of fact involved in proceedings against transferees are no different or more complex than those often encountered in determining the direct liability of a taxpayer. 13 [283 U.S. 601] The alternative judicial review provided is adequate in both cases.

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Second. It is urged by amici curiae that the method of assessment and collection permitted by § 280(a)(1) cannot be applied where, as in the case at bar, the transfer of assets, upon which the transferee's liability is based, occurred prior to the enactment of the Revenue Act of 1926, and, moreover, that, if applied retroactively to such transfer, the section would be unconstitutional. The power of Congress to provide an additional remedy for the enforcement of existing liabilities is clear. Compare Grahm & Foster v. Goodcell, 282 U.S. 409, 427. It is clear also that Congress intended that the section should be available for enforcing the liability of a transferee in respect to taxes "imposed . . . by any prior income, excess profits, or war-profits tax Act," irrespective of the time at which the transfer was made. The need for a more effective and expedient remedy was not limited to liabilities of transferees thereafter arising. To have so limited the operation of the section would, at least as to earlier Acts, have seriously impaired the value of the new remedy. 14 [283 U.S. 602]

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Third. It is contended that § 280(a)(1) is invalid because the liability at law or in equity of a transferee is dependent upon the law of the State of incorporation, and that, thus, the section improperly delegates the federal taxing power to the state legislatures; and, further, that the tax liability of the transferee, as thus assessed and collected, violates the constitutional requirement of uniformity because differences in state laws may affect such liability. The extent and incidence of federal taxes not infrequently are affected by differences in state laws; but such variations do not infringe the constitutional prohibitions against delegation of the taxing power or the requirement of geographical uniformity. Florida v. Mellon, 273 U.S. 12, 17; Crooks v. Harrelson, 282 U.S. 55; Poe v. Seaborn, 282 U.S. 101, 117. Compare Head Money Cases, 112 U.S. 580, 594; Clark Distilling Co. v. Western Maryland Ry. Co., 242 U.S. 311, 327. We have, therefore, no occasion to decide whether the right of the United States to follow transferred assets is limited by any state laws.

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Fourth. It is contended that summary proceeding by the United States to enforce the liability for the tax is barred by the six-month statute of limitations on suits against stockholders provided by the Pennsylvania statute. Laws 1874, c. 32, § 15; Penn.Stat. (1920) § 5728. The United States is not bound by state statutes of limitation [283 U.S. 603] unless Congress provides that it shall be. United States v. Nashville, Chattanooga & St. Louis Ry. Co., 118 U.S. 120; Chesapeake & Delaware Canal Co. v. United States, 250 U.S. 123, 125; E. I. du Pont de Nemours & Co. v. Davis, 264 U.S. 456, 462. The detailed limitation periods specified in § 280 evidence the intention that they alone shall be applicable to the proceedings therein authorized.

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Fifth. It is contended that, even if petitioners are liable, the amount determined is excessive, and that the findings of the Board of Tax Appeals in the present case are insufficient to support an assessment of the entire balance of the deficiencies. It is first urged that the estate of Phillips can be assessed only for its pro rata share of the deficiency, according to the ratio which the stock held by him bore to the total outstanding stock of the corporate taxpayer at the time of dissolution. The argument is that the federal Equity Rules require that all stockholders be brought in as necessary parties and be proportionately subjected to liability. While it is permissible for a respondent to bring in other stockholders or transferees by a cross-bill, 15 this procedure is founded upon the desire not to burden the courts with a multiplicity of suits. Compare Hatch v. Dana, 101 U.S. 205, 211. Such rule of convenience is not applicable in summary administrative proceedings like that provided by § 280(a)(1). One who receives corporate assets upon dissolution is severally liable, to the extent of assets received, for the payment of taxes of the corporation, and other stockholders or transferees need not be joined. 16 [283 U.S. 604] Nonjoinder cannot affect or diminish the several liability of the stockholder or transferee sued. Compare Benton v. American National Bank, 276 Fed. 368. 17 The individual several liability of Phillips may be fully enforced by the United States in the present proceeding. Whatever the petitioners' right to contribution may be against other stockholders who have also received shares of the distributed assets, the Government is not required, in collecting its revenue, to marshal the assets of a dissolved corporation so as to adjust the rights of the various stockholders. There is nothing in § 280 to indicate that Congress intended to limit the procedure in this way. And any such requirement would seriously impair the efficiency of the summary method provided.

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Petitioners assert also that the finding of the Board that the total assets of the corporation, amounting to $68,588.35, were paid "to its stockholders between July 25, 1919, and September 27, 1919," is insufficient to support the assessment against the estate of the entire remaining deficiency of $9,306.36. The argument is that there may have been several distributions within this period; that, since there was no finding as to the existence of other creditors, it must be assumed that, until the assets had been depleted below the amount due for taxes, the corporation was solvent, and that, thus, the stockholder-transferees did not become liable until the final $9,306.36 of assets was distributed. Hence, it is claimed [283 U.S. 605] that Phillips' liability for the tax is limited to a pro rata share of the assets finally distributed, that is, to one quarter of the unpaid deficiency. But the plain import of the findings is that there was a single distribution which took several months to complete, and there is no question that the entire assets were thereby distributed. Moreover, such argument, urged for the first time here, comes too late. For while the burden was on the Commissioner to prove before the Board that Phillips was liable as a transferee, the facts in the case at bar were stipulated, and it was agreed that the date of complete liquidation was September 27, 1919, by which time petitioners' decedent had received his full share of the distributed assets. Since it was stipulated that the final transfers of assets were without consideration; that they completely exhausted the corporate assets; that the balance of the deficiencies, assessed against the corporation, remains unpaid, and that the distributive dividend received by Phillips was in excess of the remaining tax liability, the burden resting upon the Commissioner was sustained.

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Affirmed.

Footnotes

BRANDEIS, J., lead opinion (Footnotes)

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1. Compare Owensboro Ditcher & Grader Co. v. Lewis, 18 F.2d 798; Mid-Continent Petroleum Corp. v. Alexander, 35 F.2d 43; Rotzahn v. Tyroler, 36 F.2d 208. See also Felland v. Wilkinson, 33 F.2d 961; Cappellini v. Commissioner, 14 B.T.A. 1269.

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2. Such proceedings to obtain payment of corporate income and profits taxes from stockholders or other transferees have been frequently brought. See United States v. McHatton, 266 Fed. 602; Updike v. United States, 8 F.2d 913, certiorari denied, 271 U.S. 661; United States v. Capps Mfg. Co., 9 F.2d 79, affirmed, 15 F.2d 528; United States v. Fairall, 16 F.2d 328; United States v. Klausner, 25 F.2d 608; United States v. Armstrong, 26 F.2d 227; United States v. Garbutt, 27 F.2d 1000, modified, 35 F.2d 924; United States v. Pann, 23 F.2d 714, affirmed, 44 F.2d 321. Compare United States v. Boss & Peake Automobile Co., 285 Fed. 410, affirmed, 290 Fed. 167; Dreyfuss Dry Goods Co. v. Lines, 18 F.2d 611, reversed, 24 F.2d 29; United States v. Snook, 24 F.2d 844, reversed sub. nom. Austin v. United States, 28 F.2d 677; United States v. Updike, 25 F.2d 746, affirmed, 32 F.2d 1, 281 U.S. 489; People's Industrial Life Ins. Co. v. United States, 29 F.2d 650.

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Where the transferee took property subject to the tax lien of the United States, the lien could be enforced by summary proceeding. Rev.Stat. §§ 3185-3205; Mansfield v. Excelsior Rfg. Co., 135 U.S. 326, 336; Blacklock v. United States, 208 U.S. 75, 87. Or by an action in equity. Rev.Stat. 3207. Compare 26 U.S.C. §§ 115, 136; Heyward v. United States, 2 F.2d 467; In re Glover-McConnell Co., 9 F.2d 683, 686. See also United States v. Capital City Dairy Co., 252 Fed. 900, 904; United States v. Haar, 27 F.2d 250, 251, certiorari denied, 278 U.S. 634.

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3.

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The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax . . . imposed . . . by any prior income, excess-profits, or war profits tax Act

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shall

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be assessed, collected, and paid in the same manner . . . as a deficiency in a tax imposed by this title (including the provisions in case of a delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds).

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44 Stat. 61. This remedy is in addition to proceedings to enforce the tax lien or actions at law and in equity. Act of February 26, 1926, c. 27, § 1122(b), 44 Stat. 9, 121; Act of May 29, 1928, c. 852, § 617(b), 45 Stat. 791, 877. Compare United States v. Greenfield Tap & Die Corp., 27 F.2d 933; United States v. Updike, 25 F.2d 746, 747, affirmed, 32 F.2d 1, 4, 281 U.S. 489.

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4. Conference Report to accompany H.R. 1, H.Rep. No. 356, 69th Cong., 1st Sess., February 22, 1926, p. 44, states that the section

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makes the procedure for the collection of the amount of the liability of transferees conform to the procedure for the collection of taxes . . . for procedural purposes the transferee is treated as a taxpayer would be treated.

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Compare H.Rep. No. 2, 70th Cong., 1st Sess., December 7, 1927, pp. 31-32:

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Section 280 of the 1926 Act has proved a very effective and necessary method of stopping tax evasion through the various favorite methods recognized by everyone prior to the 1926 Act. The enforcement of the liability through court process had been ineffective, and the amount of revenue lost through mala fide transfers or through corporate distribution of assets was admittedly large.

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5. Cheatham v. United States, 92 U.S. 85, 89; State Railroad Tax Cases, 92 U.S. 575, 615; Springer v. United States, 102 U.S. 586, 593; Dodge v. Osborn, 240 U.S. 118, 120; Graham v. du Pont, 262 U.S. 234, 255. The earliest federal excise tax acts contained provisions for suit, or levy by distraint and sale. E.g., Act of March 3, 1791, c. 15, § 23, 1 Stat. 199, 204; Act of December 21, 1814, c. 15, § 5, 3 Stat. 152, 154; Act of January 9, 1815, c. 21, § 26, 3 Stat. 164, 173; Act of January 18, 1815, c. 22, § 5, 3 Stat. 180, 182; id. c. 23, § 9, 3 Stat. 186, 188. Similarly, a tax lien on lands and chattels was early introduced. Act of July 22, 1813, c. 16, § 19, 3 Stat. 22, 30; Act of January 9, 1815, c. 21, § 24, 3 Stat. 164, 172. Compare Act of March 3, 1815, c. 100, §§ 12-15, 3 Stat. 239, 241.

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For the ancient English practise of summary seizure of the property of a debtor of a Crown debtor, by means of an immediate extent in the second degree, see West, The Law and Practice of Extents, cc. 1 3, 24; Chitty, Laws of the Prerogative of the Crown, pp. 261, 303-07; Price, Laws and Course of the Exchequer, c. XIV; Robertson, Civil Proceedings By and Against the Crown, c. III, pp. 203-04, 206-07. As to the adoption of the writ in this country, see Hackett v. Amsden, 56 Vt. 201, 206-07. Compare McMillen v. Anderson, 95 U.S. 41.

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6. Rev.Stat. § 3224. There is no substantial relaxation of this principle in the provision that, while an appeal is pending before the Board of Tax Appeals, no proceeding by distraint may be taken, and, notwithstanding Rev.Stat. § 3224, such proceeding may be enjoined. Act of February 26, 1926, c. 27, § 274(a), 44 Stat. 9, 55; Act of May 29, 1928, c. 852, § 272(a), 45 Stat. 791, 852; Peerless Woolen Mills v. Rose, 28 F.2d 661. For even in such case, if the Commissioner believes the assessment or collection of the tax will be endangered by delay, he may make an immediate jeopardy assessment and collect by distraint unless the taxpayer files a bond. Act of February 26, 1926, c. 27, § 279, 44 Stat. 9, 59; Act of May 29, 1928, c. 852, § 273, 45 Stat. 791, 854; Salikoff v. McCaughn, 24 F.2d 434. Compare Burnet v. Chicago Ry. Equip. Co., 282 U.S. 295, 303. The paramount right of the United States to require immediate payment, or surety therefor, is not diminished.

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7. The same rule is applied to eminent domain proceedings by a State. Sweet v. Rechel, 159 U.S. 380; Backus v. Fort Street Union Depot Co., 169 U.S. 557; Williams v. Parker, 188 U.S. 491; Bragg v. Weaver, 251 U.S. 57, 62; Hays v. Port of Seattle, 251 U.S. 233, 238; Joslin Mfg. Co. v. Providence, 262 U.S. 668, 677.

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8. It is asserted that these latter provisions, added by the Revenue Act of 1928, could not render valid an assessment void under § 280 of the 1926 Act. But as the objection relates only to the remedy and the hearing before the Board was not held until November, 1928, that is, after the 1928 Act was in effect, any alleged defect was cured.

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9. Avery v. Commissioner, 22 F.2d 6, 7; Geo. Feick & Sons Co. v. Blair, 26 F.2d 540, 542; Bishoff v. Commissioner, 27 F.2d 91, 92; Conklin-Zoone-Loomis Co. v. Commissioner, 29 F.2d 698, 700; E. G. Robichaux Co. v. Commissioner, 32 F.2d 780, 781; Meinrath Brokerage Co. v. Commissioner, 35 F.2d 614, 616. The further objection that this mode of review may deprive the taxpayer of a jury trial contrary to the Seventh Amendment, is unfounded. Even in the alternative action to recover taxes alleged to have been illegally collected, the right

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to a jury . . . is not to be found in the Seventh Amendment . . . , but merely arises by implication from the provisions of § 3226, Revised Statutes, which has reference to a suit at law.

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Wickwire v. Reinecke, 275 U.S. 101, 105.

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10. See Williamsport Wire Rope Co. v. United States, 277 U.S. 551, 562, Note 7; Russell v. United States, 278 U.S. 181, 186-87; Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 721.

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11. Compare Davis v. Massachusetts, 167 U.S. 43, 48; Gundling v. Chicago, 177 U.S. 183, 187; Fischer v. St. Louis, 194 U.S. 361, 371.

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12. By November 1, 1930, 644 petitions for review under the Revenue Act of 1926 had been decided by the various circuit court of appeals, and 671 petitions were pending. See statement of the Chairman of the Board of Tax Appeals in Hearing Before the Subcommittee of House Committee on Appropriations, 71st Cong., 3d Sess., January 7, 1931, pp 19, 26.

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13. Compare Lonsdale v. Commissioner, 32 F.2d 537; Hoosier Casualty Co. v. Commissioner, 32 F.2d 940; Jacobs v. Commissioner, 34 F.2d 233; O'Meara v. Commissioner, 34 F.2d 390; Insurance & Title Guarantee Co. v. Commissioner, 36 F.2d 842; Penney & Long, Inc. v. Commissioner, 39 F.2d 849; Barde Steel Products Corp. v. Commissioner, 40 F.2d 412.

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14. There is no suggestion in the Committee Reports on the 1926 Act that § 280 was to be so limited. A contrary intention is perhaps indicated by subdivision (b)(2), which provided that, where

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the period of limitation for assessment against the taxpayer expired before the enactment of this Act, but assessment against the taxpayer was made within such period,

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the Commissioner should have six years in which to make an assessment against the transferee, provided he could do so within one year after the enactment of the 1926 Act. Moreover, in all cases, an additional period of one year after the expiration of the period for assessing the taxpayer, was given. Compare H.R.Rep. No. 356, 69th Cong., 1st Sess., February 22, 1926, p. 44. Subdivision (c) provides that, in the case of corporations which had been dissolved, the period for assessment of the transferee was to be the same as if such "termination of existence had not occurred." These provisions clearly contemplated a dissolution and transfer of assets prior to the passage of the Act. Compare United States v. Updike, 281 U.S. 489, 494. In the case at bar, two assessments against the corporate taxpayer had been made prior to 1926.

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15. Compare Equity Rules 25, 39, 42; Watson v. National Life & Trust Co., 162 Fed. 7.

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16. Benton v. American National Bank, 276 Fed. 368; McWilliams v. Excelsior Coal Co., 298 Fed. 884. Compare United States v. Boss & Peake Automobile Co., 285 Fed. 410, affirmed, 290 Fed. 167; Capps Mfg. Co. v. United States, 15 F.2d 528; Pann v. United States, 44 F.2d 321. See also Adams v. Perryman & Co., 202 Ala. 469, 80 So. 853; Singer v. Hutchinson, 183 Ill. 606, 620, 56 N.E. 388; Kimbrough v. Davies, 104 Miss. 722, 61 So. 697; Bartlett v. Drew, 57 N.Y. 587.

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17. It was conceded below that, if the other stockholders are insolvent, or absent from the jurisdiction, or cannot be ascertained, they need not be joined. Compare Kennedy v. Gibson, 8 Wall. 498, 506; Second National Bank of Erie v. Georger, 246 Fed. 517, 520; United States v. Armstrong, 26 F.2d 227, 233.

Near v. Minnesota, 1931

Title: Near v. Minnesota

Author: U.S. Supreme Court

Date: June 1, 1931

Source: 283 U.S. 697

This case was argued January 30, 1931, and was decided June 1, 1931.

1931, Near v. Minnesota, 283 U.S. 697

APPEAL FROM THE SUPREME COURT OF MINNESOTA

Syllabus

1931, Near v. Minnesota, 283 U.S. 697

1. A Minnesota statute declares that one who engages "in the business of regularly and customarily producing, publishing," etc., "a malicious, scandalous and defamatory newspaper, magazine or other periodical," is guilty of a nuisance, and authorizes suits, in the name of the State, in which such periodicals may be abated and their publishers enjoined from future violations. In such a suit, malice may be inferred from the fact of publication. The defendant is permitted to prove, as a defense, that his publications were true and published "with good motives and for justifiable ends." Disobedience of an injunction is punishable as a contempt. Held unconstitutional, as applied to publications charging neglect of duty and corruption upon the part of law-enforcing officers of the State. Pp. 704, 709, 712, 722.

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2. Liberty of the press is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. P. 707.

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3. Liberty of the press is not an absolute right, and the State may punish its abuse. P. 708.

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4. In passing upon the constitutionality of the statute, the court has regard for substance, and not for form; the statute must be tested by its operation and effect. P. 708. [283 U.S. 698]

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5. Cutting through mere details of procedure, the operation and effect of the statute is that public authorities may bring a publisher before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter—in particular, that the matter consists of charges against public officials of official dereliction—and, unless the publisher is able and disposed to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is the essence of censorship. P. 713.

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6. A statute authorizing such proceedings in restraint of publication is inconsistent with the conception of the liberty of the press as historically conceived and guaranteed. P. 713.

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7. The chief purpose of the guaranty is to prevent previous restraints upon publication. The libeler, however, remains criminally and civilly responsible for his libels. P. 713.

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8. There are undoubtedly limitations upon the immunity from previous restraint of the press, but they are not applicable in this case. P. 715.

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9. The liberty of the press has been especially cherished in this country as respects publications censuring public officials and charging official misconduct. P. 716.

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10. Public officers find their remedies for false accusations in actions for redress and punishment under the libel laws, and not in proceedings to restrain the publication of newspapers and periodicals. P. 718.

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11. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity from previous restraint in dealing with official misconduct. P. 720.

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12. Characterizing the publication of charges of official misconduct as a "business," and the business as a nuisance, does not avoid the constitutional guaranty; nor does it matter that the periodical is largely or chiefly devoted to such charges. P. 720.

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13. The guaranty against previous restraint extends to publications charging official derelictions that amount to crimes. P. 720.

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14. Permitting the publisher to show in defense that the matter published is true and is published with good motives and for justifiable ends does not justify the statute. P. 721.

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15. Nor can it be sustained as a measure for preserving the public peace and preventing assaults and crime. Pp. 721, 722.

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179 Minn. 40; 228 N.W. 326, reversed. [283 U.S. 699]

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APPEAL from a decree which sustained an injunction abating the publication of a periodical as malicious, scandalous and defamatory, and restraining future publication. The suit was based on a Minnesota statute. See also s.c., 174 Minn. 457, 219 N.W. 770. [283 U.S. 701]

HUGHES, J., lead opinion

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MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

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Chapter 285 of the Session Laws of Minnesota for the year 1925 1 provides for the abatement, as a public nuisance, of a "malicious, scandalous and defamatory newspaper, [283 U.S. 702] magazine or other periodical." Section one of the Act is as follows:

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Section 1. Any person who, as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away

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(a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or

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(b) a malicious, scandalous and defamatory newspaper, magazine or other periodical,

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is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided.

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Participation in such business shall constitute a commission of such nuisance and render the participant liable and subject to the proceedings, orders and judgments provided for in this Act. Ownership, in whole or in part, directly or indirectly, of any such periodical, or of any stock or interest in any corporation or organization which owns the same in whole or in part, or which publishes the same, shall constitute such participation.

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In actions brought under (b) above, there shall be available the defense that the truth was published with good motives and for justifiable ends and in such actions the plaintiff shall not have the right to report (sic) to issues or editions of periodicals taking place more than three months before the commencement of the action.

1931, Near v. Minnesota, 283 U.S. 702

Section two provides that, whenever any such nuisance is committed or exists, the County Attorney of any county where any such periodical is published or circulated, or, in case of his failure or refusal to proceed upon written request in good faith of a reputable citizen, the Attorney General, or, upon like failure or refusal of the latter, any citizen of the county may maintain an action in the district court of the county in the name of the State to enjoin [283 U.S. 703] perpetually the persons committing or maintaining any such nuisance from further committing or maintaining it. Upon such evidence as the court shall deem sufficient, a temporary injunction may be granted. The defendants have the right to plead by demurrer or answer, and the plaintiff may demur or reply as in other cases.

1931, Near v. Minnesota, 283 U.S. 703

The action, by section three, is to be " governed by the practice and procedure applicable to civil actions for injunctions," and, after trial, the court may enter judgment permanently enjoining the defendants found guilty of violating the Act from continuing the violation, and, "in and by such judgment, such nuisance may be wholly abated." The court is empowered, as in other cases of contempt, to punish disobedience to a temporary or permanent injunction by fine of not more than $1,000 or by imprisonment in the county jail for not more than twelve months.

1931, Near v. Minnesota, 283 U.S. 703

Under this statute, clause (b), the County Attorney of Hennepin County brought this action to enjoin the publication of what was described as a " malicious, scandalous and defamatory newspaper, magazine and periodical" known as " The Saturday Press," published by the defendants in the city of Minneapolis. The complaint alleged that the defendants, on September 24, 1927, and on eight subsequent dates in October and November, 1927, published and circulated editions of that periodical which were "largely devoted to malicious, scandalous and defamatory articles" concerning Charles G. Davis, Frank W. Brunskill, the Minneapolis Tribune, the Minneapolis Journal, Melvin C. Passolt, George E. Leach, the Jewish Race, the members of the Grand Jury of Hennepin County impaneled in November, 1927, and then holding office, and other persons, as more fully appeared in exhibits annexed to the complaint, consisting of copies of the articles described and constituting 327 pages of the record. While the complaint did not so allege, it [283 U.S. 704] appears from the briefs of both parties that Charles G. Davis was a special law enforcement officer employed by a civic organization, that George E. Leach was Mayor of Minneapolis, that Frank W. Brunskill was its Chief of Police, and that Floyd B. Olson (the relator in this action) was County Attorney.

1931, Near v. Minnesota, 283 U.S. 704

Without attempting to summarize the contents of the voluminous exhibits attached to the complaint, we deem it sufficient to say that the articles charged in substance that a Jewish gangster was in control of gambling, bootlegging and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties. Most of the charges were directed against the Chief of Police; he was charged with gross neglect of duty, illicit relations with gangsters, and with participation in graft. The County Attorney was charged with knowing the existing conditions and with failure to take adequate measures to remedy them. The Mayor was accused of inefficiency and dereliction. One member of the grand jury was stated to be in sympathy with the gangsters. A special grand jury and a special prosecutor were demanded to deal with the situation in general, and, in particular, to investigate an attempt to assassinate one Guilford, one of the original defendants, who, it appears from the articles, was shot by gangsters after the first issue of the periodical had been published. There is no question but that the articles made serious accusations against the public officers named and others in connection with the prevalence of crimes and the failure to expose and punish them.

1931, Near v. Minnesota, 283 U.S. 704

At the beginning of the action, on November 22, 1927, and upon the verified complaint, an order was made directing the defendants to show cause why a temporary injunction should not issue and meanwhile forbidding the defendants to publish, circulate or have in their possession any editions of the periodical from September [283 U.S. 705] 24, 1927, to November 19, 1927, inclusive, and from publishing, circulating, or having in their possession, "any future editions of said The Saturday Press" and

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any publication, known by any other name whatsoever containing malicious, scandalous and defamatory matter of the kind alleged in plaintiff's complaint herein or otherwise.

1931, Near v. Minnesota, 283 U.S. 705

The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and on this demurrer challenged the constitutionality of the statute. The District Court overruled the demurrer and certified the question of constitutionality to the Supreme Court of the State. The Supreme Court sustained the statute (174 Minn. 457, 219 N.W. 770), and it is conceded by the appellee that the Act was thus held to be valid over the objection that it violated not only the state constitution, but also the Fourteenth Amendment of the Constitution of the United States.

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Thereupon, the defendant Near, the present appellant, answered the complaint. He averred that he was the sole owner and proprietor of the publication in question. He admitted the publication of the articles in the issues described in the complaint, but denied that they were malicious, scandalous or defamatory as alleged. He expressly invoked the protection of the due process clause of the Fourteenth Amendment. The case then came on for trial. The plaintiff offered in evidence the verified complaint, together with the issues of the publication in question, which were attached to the complaint as exhibits. The defendant objected to the introduction of the evidence, invoking the constitutional provisions to which his answer referred. The objection was overruled, no further evidence was presented, and the plaintiff rested. The defendant then rested without offering evidence. The plaintiff moved that the court direct the issue of a permanent injunction, and this was done. [283 U.S. 706]

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The District Court made findings of fact which followed the allegations of the complaint and found in general terms that the editions in question were "chiefly devoted to malicious, scandalous and defamatory articles" concerning the individuals named. The court further found that the defendants, through these publications,

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did engage in the business of regularly and customarily producing, publishing and circulating a malicious, scandalous and defamatory newspaper,

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and that "the said publication" "under said name of The Saturday Press, or any other name, constitutes a public nuisance under the laws of the State." Judgment was thereupon entered adjudging that "the newspaper, magazine and periodical known as The Saturday Press," as a public nuisance, "be and is hereby abated." The Judgment perpetually enjoined the defendants

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from producing, editing, publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law,

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and also "from further conducting said nuisance under the name and title of said The Saturday Press or any other name or title."

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The defendant Near appealed from this judgment to the Supreme Court of the State, again asserting his right under the Federal Constitution, and the judgment was affirmed upon the authority of the former decision. 179 Minn. 40, 228 N.W. 326. With respect to the contention that the judgment went too far, and prevented the defendants from publishing any kind of a newspaper, the court observed that the assignments of error did not go to the form of the judgment, and that the lower court had not been asked to modify it. The court added that it saw no reason

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for defendants to construe the judgment as restraining them from operating a newspaper in harmony with the public welfare, to which all must yield,

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that the allegations of the complaint had been [283 U.S. 707] found to be true, and, though this was an equitable action, defendants had not indicated a desire "to conduct their business in the usual and legitimate manner."

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From the judgment as thus affirmed, the defendant Near appeals to this Court.

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This statute, for the suppression as a public nuisance of a newspaper or periodical, is unusual, if not unique, and raises questions of grave importance transcending the local interests involved in the particular action. It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property. Gitlow v. New York, 268 U.S. 652, 666; Whitney v. California, 274 U.S. 357, 362, 373; Fiske v. Kansas, 274 U.S. 380, 382; Stromberg v. California, ante, p. 359. In maintaining this guaranty, the authority of the State to enact laws to promote the health, safety, morals and general welfare of its people is necessarily admitted. The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise. Thus, while recognizing the broad discretion of the legislature in fixing rates to be charged by those undertaking a public service, this Court has decided that the owner cannot constitutionally be deprived of his right to a fair return, because that is deemed to be of the essence of ownership. Railroad Commission Cases, 116 U.S. 307, 331; Northern Pacific Ry. Co. v. North Dakota, 236 U.S. 585, 596. So, while liberty of contract is not an absolute right, and the wide field of activity in the making of contracts is subject to legislative supervision (Frisbie v. United States, 157 U.S. 161, 165), this Court has held that the power of the State stops short of interference with what are deemed [283 U.S. 708] to be certain indispensable requirements of the liberty assured, notably with respect to the fixing of prices and wages. Tyson Bros. v. Banton, 273 U.S. 418; Ribnik v. McBride, 277 U.S. 350; Adkins v. Children's Hospital, 261 U.S. 525, 560, 561. Liberty of speech, and of the press, is also not an absolute right, and the State may punish its abuse. Whitney v. California, supra; Stromberg v. California, supra. Liberty, in each of its phases, has its history and connotation, and, in the present instance, the inquiry is as to the historic conception of the liberty of the press and whether the statute under review violates the essential attributes of that liberty.

1931, Near v. Minnesota, 283 U.S. 708

The appellee insists that the questions of the application of the statute to appellant's periodical, and of the construction of the judgment of the trial court, are not presented for review; that appellant's sole attack was upon the constitutionality of the statute, however it might be applied. The appellee contends that no question either of motive in the publication, or whether the decree goes beyond the direction of the statute, is before us. The appellant replies that, in his view, the plain terms of the statute were not departed from in this case, and that, even if they were, the statute is nevertheless unconstitutional under any reasonable construction of its terms. The appellant states that he has not argued that the temporary and permanent injunctions were broader than were warranted by the statute; he insists that what was done was properly done if the statute is valid, and that the action taken under the statute is a fair indication of its scope.

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With respect to these contentions, it is enough to say that, in passing upon constitutional questions, the court has regard to substance, and not to mere matters of form, and that, in accordance with familiar principles, the statute must be tested by its operation and effect. Henderson v. Mayor, 92 U.S. 259, 268; Bailey v. Alabama, 219 [283 U.S. 709] U.S. 219, 244; United States v. Reynolds, 235 U.S. 133, 148, 149; St. Louis Southwestern R. Co. v. Arkansas, 235 U.S. 350, 362; Mountain Timber Co. v. Washington, 243 U.S. 219, 237. That operation and effect we think is clearly shown by the record in this case. We are not concerned with mere errors of the trial court, if there be such, in going beyond the direction of the statute as construed by the Supreme Court of the State. It is thus important to note precisely the purpose and effect of the statute as the state court has construed it.

1931, Near v. Minnesota, 283 U.S. 709

First. The statute is not aimed at the redress of individual or private wrongs. Remedies for libel remain available and unaffected. The statute, said the state court, "is not directed at threatened libel, but at an existing business which, generally speaking, involves more than libel." It is aimed at the distribution of scandalous matter as "detrimental to public morals and to the general welfare," tending "to disturb the peace of the community" and "to provoke assaults and the commission of crime." In order to obtain an injunction to suppress the future publication of the newspaper or periodical, it is not necessary to prove the falsity of the charges that have been made in the publication condemned. In the present action, there was no allegation that the matter published was not true. It is alleged, and the statute requires the allegation, that the publication was "malicious." But, as in prosecutions for libel, there is no requirement of proof by the State of malice in fact, as distinguished from malice inferred from the mere publication of the defamatory matter. 2 The judgment in this case proceeded upon the mere proof of publication. The statute permits the defense not of the truth alone, but only that the truth was published with good motives and [283 U.S. 710] for justifiable ends. It is apparent that, under the statute, the publication is to be regarded as defamatory if it injures reputation, and that it is scandalous if it circulates charges of reprehensible conduct, whether criminal or otherwise, and the publication is thus deemed to invite public reprobation and to constitute a public scandal. The court sharply defined the purpose of the statute, bringing out the precise point, in these words:

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There is no constitutional right to publish a fact merely because it is true. It is a matter of common knowledge that prosecutions under the criminal libel statutes do not result in efficient repression or suppression of the evils of scandal. Men who are the victims of such assaults seldom resort to the courts. This is especially true if their sins are exposed and the only question relates to whether it was done with good motives and for justifiable ends. This law is not for the protection of the person attacked, nor to punish the wrongdoer. It is for the protection of the pubic welfare.

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Second. The statute is directed not simply at the circulation of scandalous and defamatory statements with regard to private citizens, but at the continued publication by newspapers and periodicals of charges against public officers of corruption, malfeasance in office, or serious neglect of duty. Such charges, by their very nature, create a public scandal. They are scandalous and defamatory within the meaning of the statute, which has its normal operation in relation to publications dealing prominently and chiefly with the alleged derelictions of public officers. 3 [283 U.S. 711]

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Third. The object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical. The reason for the enactment, as the state court has said, is that prosecutions to enforce penal statutes for libel do not result in "efficient repression or suppression of the evils of scandal." Describing the business of publication as a public nuisance does not obscure the substance of the proceeding which the statute authorizes. It is the continued publication of scandalous and defamatory matter that constitutes the business and the declared nuisance. In the case of public officers, it is the reiteration of charges of official misconduct, and the fact that the newspaper or periodical is principally devoted to that purpose, that exposes it to suppression. In the present instance, the proof was that nine editions of the newspaper or periodical in question were published on successive dates, and that they were chiefly devoted to charges against public officers and in relation to the prevalence and protection of crime. In such a case, these officers are not left to their ordinary remedy in a suit for libel, or the authorities to a prosecution for criminal libel. Under this statute, a publisher of a newspaper or periodical, undertaking to conduct a campaign to expose and to censure official derelictions, and devoting his publication principally to that purpose, must face not simply the possibility of a verdict against him in a suit or prosecution for libel, but a determination that his newspaper or periodical is a public nuisance to be abated, and that this abatement and suppression will follow unless he is prepared with legal evidence to prove the truth of the charges and also to satisfy the court that, in [283 U.S. 712] addition to being true, the matter was published with good motives and for justifiable ends.

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This suppression is accomplished by enjoining publication, and that restraint is the object and effect of the statute.

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Fourth. The statute not only operates to suppress the offending newspaper or periodical, but to put the publisher under an effective censorship. When a newspaper or periodical is found to be "malicious, scandalous, and defamatory," and is suppressed as such, resumption of publication is punishable as a contempt of court by fine or imprisonment. Thus, where a newspaper or periodical has been suppressed because of the circulation of charges against public officers of official misconduct, it would seem to be clear that the renewal of the publication of such charges would constitute a contempt, and that the judgment would lay a permanent restraint upon the publisher, to escape which he must satisfy the court as to the character of a new publication. Whether he would be permitted again to publish matter deemed to be derogatory to the same or other public officers would depend upon the court's ruling. In the present instance, the judgment restrained the defendants from

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publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law.

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The law gives no definition except that covered by the words "scandalous and defamatory," and publications charging official misconduct are of that class. While the court, answering the objection that the judgment was too broad, saw no reason for construing it as restraining the defendants "from operating a newspaper in harmony with the public welfare to which all must yield," and said that the defendants had not indicated "any desire to conduct their business in the usual and legitimate manner," the manifest inference is that, at least with respect to a [283 U.S. 713] new publication directed against official misconduct, the defendant would be held, under penalty of punishment for contempt as provided in the statute, to a manner of publication which the court considered to be "usual and legitimate" and consistent with the public welfare.

1931, Near v. Minnesota, 283 U.S. 713

If we cut through mere details of procedure, the operation and effect of the statute, in substance, is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter—in particular, that the matter consists of charges against public officers of official dereliction—and, unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship.

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The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. 4 The liberty deemed to be established was thus described by Blackstone:

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The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an [283 U.S. 714] undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.

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4 Bl.Com. 151, 152; see Story on the Constitution, §§ 1884, 1889. The distinction was early pointed out between the extent of the freedom with respect to censorship under our constitutional system and that enjoyed in England. Here, as Madison said,

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the great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, a in Great Britain, but from legislative restraint also.

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Report on the Virginia Resolutions, Madison's Works, vol. IV, p. 543. This Court said, in Patterson v. Colorado, 205 U.S. 454, 462:

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In the first place, the main purpose of such constitutional provisions is "to prevent all such previous restraints upon publications as had been practiced by other governments," and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. Commonwealth v. Blanding, 3 Pick. 304, 313, 314; Respublica v. Oswald, 1 Dallas 319, 325. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all. Commonwealth v. Blanding, ubi sup.; 4 Bl.Com. 150.

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The criticism upon Blackstone's statement has not been because immunity from previous restraint upon publication has not been regarded as deserving of special emphasis, but chiefly because that immunity cannot be deemed to exhaust the conception of the liberty guaranteed by [283 U.S. 715] state and federal constitutions. The point of criticism has been "that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions", and that

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the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications.

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2 Cooley, Const.Lim., 8th ed., p. 885. But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions. Id., pp. 883, 884. The law of criminal libel rests upon that secure foundation. There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions. Patterson v. Colorado, supra; Toledo Newspaper Co. v. United States, 247 U.S. 402, 419. 5 In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment. For whatever wrong the appellant has committed or may commit by his publications the State appropriately affords both public and private redress by its libel laws. As has been noted, the statute in question does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint upon publication.

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The objection has also been made that the principle as to immunity from previous restraint is stated too [283 U.S. 716] broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases:

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When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right.

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Schenck v. United States, 249 U.S. 47, 52. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. 6 On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not

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protect a man from an injunction against uttering words that may have all the effect of force. Gompers v. Buck Stove & Range Co., 221 U.S. 418, 439.

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Schenck v. United States, supra. These limitations are not applicable here. Nor are we now concerned with questions as to the extent of authority to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity. 7

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The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally, although not exclusively, immunity from previous restraints or censorship. The conception of the liberty of the press in this country had broadened with the exigencies of the colonial [283 U.S. 717] period and with the efforts to secure freedom from oppressive administration. 8 That liberty was especially cherished for the immunity it afforded from previous restraint of the publication of censure of public officers and charges of official misconduct. As was said by Chief Justice Parker, in Commonwealth v. Blanding, 3 Pick. 304, 313, with respect to the constitution of Massachusetts:

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Besides, it is well understood, and received as a commentary on this provision for the liberty of the press, that it was intended to prevent all such previous restraints upon publications as had been practiced by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and the duties of rulers. The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse.

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In the letter sent by the Continental Congress (October 26, 1774) to the Inhabitants of Quebec, referring to the "five great rights," it was said: 9

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The last right we shall mention regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them whereby oppressive officers are shamed or intimidated into more honourable and just modes of conducting affairs.

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Madison, who was the leading spirit in the preparation of the First Amendment of the Federal Constitution, thus described the practice and sentiment which led to the guaranties of liberty of the press in state constitutions: 10 [283 U.S. 718]

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In every State, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this footing it yet stands. . . . Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States that it is better to leave a few of its noxious branches to their luxuriant growth than, by pruning them away, to injure the vigour of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficent source the United States owe much of the lights which conducted them to the ranks of a free and independent nation, and which have improved their political system into a shape so auspicious to their happiness? Had "Sedition Acts," forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing at this day under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke?

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The fact that, for approximately one hundred and fifty years, there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. Public officers, whose character and [283 U.S. 719] conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals. The general principle that the constitutional guaranty of the liberty of the press gives immunity from previous restraints has been approved in many decisions under the provisions of state constitutions. 11

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The importance of this immunity has not lessened. While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and [283 U.S. 720] property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy consistent with constitutional privilege.

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In attempted justification of the statute, it is said that it deals not with publication per se, but with the "business" of publishing defamation. If, however, the publisher has a constitutional right to publish, without previous restraint, an edition of his newspaper charging official derelictions, it cannot be denied that he may publish subsequent editions for the same purpose. He does not lose his right by exercising it. If his right exists, it may be exercised in publishing nine editions, as in this case, as well as in one edition. If previous restraint is permissible, it may be imposed at once; indeed, the wrong may be as serious in one publication as in several. Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint. Similarly, it does not matter that the newspaper or periodical is found to be "largely" or "chiefly" devoted to the publication of such derelictions. If the publisher has a right, without previous restraint, to publish them, his right cannot be deemed to be dependent upon his publishing something else, more or less, with the matter to which objection is made.

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Nor can it be said that the constitutional freedom from previous restraint is lost because charges are made of derelictions which constitute crimes. With the multiplying provisions of penal codes, and of municipal charters and ordinances carrying penal sanctions, the conduct of [283 U.S. 721] public officers is very largely within the purview of criminal statutes. The freedom of the press from previous restraint has never been regarded as limited to such animadversions as lay outside the range of penal enactments. Historically, there is no such limitation; it is inconsistent with the reason which underlies the privilege, as the privilege so limited would be of slight value for the purposes for which it came to be established.

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The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends. If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details) and required to produce proof of the truth of his publication, or of what he intended to publish, and of his motives, or stand enjoined. If this can be done, the legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends, and restrain publication accordingly. And it would be but a step to a complete system of censorship. The recognition of authority to impose previous restraint upon publication in order to protect the community against the circulation of charges of misconduct, and especially of official misconduct, necessarily would carry with it the admission of the authority of the censor against which the constitutional barrier was erected. The preliminary freedom, by virtue of the very reason for its existence, does not depend, as this Court has said, on proof of truth. Patterson v. Colorado, supra.

1931, Near v. Minnesota, 283 U.S. 721

Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends [283 U.S. 722] to disturb the public peace and to provoke assaults and the commission of crime. Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication.

1931, Near v. Minnesota, 283 U.S. 722

To prohibit the intent to excite those unfavorable sentiments against those who administer the Government is equivalent to a prohibition of the actual excitement of them, and to prohibit the actual excitement of them is equivalent to a prohibition of discussions having that tendency and effect, which, again, is equivalent to a protection of those who administer the Government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it by free animadversions on their characters and conduct. 12

1931, Near v. Minnesota, 283 U.S. 722

There is nothing new in the fact that charges of reprehensible conduct may create resentment and the disposition to resort to violent means of redress, but this well understood tendency did not alter the determination to protect the press against censorship and restraint upon publication. As was said in New Yorker Staats-Zeitung v. Nolan, 89 N.J. Eq. 387, 388, 105 Atl. 72:

1931, Near v. Minnesota, 283 U.S. 722

If the township may prevent the circulation of a newspaper for no reason other than that some of its inhabitants may violently disagree with it, and resent its circulation by resorting to physical violence, there is no limit to what may be prohibited.

1931, Near v. Minnesota, 283 U.S. 722

The danger of violent reactions becomes greater with effective organization of defiant groups resenting exposure, and if this consideration warranted legislative interference with the initial freedom of publication, the constitutional protection would be reduced to a mere form of words.

1931, Near v. Minnesota, 283 U.S. 722

For these reasons we hold the statute, so far as it authorized the proceedings in this action under clause (b) [283 U.S. 723] of section one, to be an infringement of the liberty of the press guaranteed by the Fourteenth Amendment. We should add that this decision rests upon the operation and effect of the statute, without regard to the question of the truth of the charges contained in the particular periodical. The fact that the public officers named in this case, and those associated with the charges of official dereliction, may be deemed to be impeccable cannot affect the conclusion that the statute imposes an unconstitutional restraint upon publication.

1931, Near v. Minnesota, 283 U.S. 723

Judgment reversed.

BUTLER, J., dissenting

1931, Near v. Minnesota, 283 U.S. 723

MR. JUSTICE BUTLER, dissenting.

1931, Near v. Minnesota, 283 U.S. 723

The decision of the Court in this case declares Minnesota and every other State powerless to restrain by injunction the business of publishing and circulating among the people malicious, scandalous and defamatory periodicals that in due course of judicial procedure has been adjudged to be a public nuisance. It gives to freedom of the press a meaning and a scope not heretofore recognized, and construes "liberty" in the due process clause of the Fourteenth Amendment to put upon the States a federal restriction that is without precedent.

1931, Near v. Minnesota, 283 U.S. 723

Confessedly, the Federal Constitution, prior to 1868, when the Fourteenth Amendment was adopted, did not protect the right of free speech or press against state action. Barron v. Baltimore, 7 Pet. 243, 250. Fox v. Ohio, 5 How. 410, 434. Smith v. Maryland, 18 How. 71, 76. Withers v. Buckley, 20 How. 84, 89-91. Up to that time, the right was safeguarded solely by the constitutions and laws of the States, and, it may be added, they operated adequately to protect it. This Court was not called on until 1925 to decide whether the "liberty" protected by the Fourteenth Amendment includes the right of free speech and press. That question has been finally answered [283 U.S. 724] in the affirmative. Cf. Patterson v. Colorado, 205 U.S. 454, 462. Prudential Ins. Co. v. Cheek, 259 U.S. 530, 538, 543. See Gitlow v. New York, 268 U.S. 652. Fiske v. Kansas, 274 U.S. 380. Stromberg v. California, ante, p. 359.

1931, Near v. Minnesota, 283 U.S. 724

The record shows, and it is conceded, that defendants' regular business was the publication of malicious, scandalous and defamatory articles concerning the principal public officers, leading newspapers of the city, many private persons and the Jewish race. It also shows that it was their purpose at all hazards to continue to carry on the business. In every edition, slanderous and defamatory matter predominates to the practical exclusion of all else. Many of the statements are so highly improbable as to compel a finding that they are false. The articles themselves show malice. 1 [283 U.S. 725]

1931, Near v. Minnesota, 283 U.S. 725

The defendant here has no standing to assert that the statute is invalid because it might be construed so as to violate the Constitution. His right is limited solely to [283 U.S. 726] the inquiry whether, having regard to the point properly raised in his case, the effect of applying the statute is to deprive him of his liberty without due process of law. [283 U.S. 727] This Court should not reverse the judgment below upon the ground that, in some other case, the statute may be applied in a way that is repugnant to the freedom of the press protected by the Fourteenth Amendment. Castillo v. McConnico, 168 U.S. 674, 680. Williams v. Mississippi, 170 U.S. 213, 225. Yazoo & Miss. R. Co. v. Jackson Vinegar Co., 226 U.S. 217, 219-220. Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531, 544-546.

1931, Near v. Minnesota, 283 U.S. 727

This record requires the Court to consider the statute as applied to the business of publishing articles that are, in fact, malicious, scandalous and defamatory.

1931, Near v. Minnesota, 283 U.S. 727

The statute provides that any person who "shall be engaged in the business of regularly or customarily producing, publishing or circulating" a newspaper, magazine or other periodical that is (a) "obscene, lewd and lascivious" or (b) "malicious, scandalous and defamatory" [283 U.S. 728] is guilty of a nuisance, and may be enjoined as provided in the Act. It will be observed that the qualifying words are used conjunctively. In actions brought under (b) "there shall be available the defense that the truth was published with good motives and for justifiable ends."

1931, Near v. Minnesota, 283 U.S. 728

The complaint charges that defendants were engaged in the business of regularly and customarily publishing "malicious, scandalous and defamatory newspapers" known as the Saturday Press, and nine editions dated respectively on each Saturday commencing September 25 and ending November 19, 1927, were made a part of the complaint. These are all that were published.

1931, Near v. Minnesota, 283 U.S. 728

On appeal from the order of the district court overruling defendants' demurrer to the complaint, the state supreme court said (174 Minn. 457, 461, 219 N.W. 770):

1931, Near v. Minnesota, 283 U.S. 728

The constituent elements of the declared nuisance are the customary and regular dissemination by means of a newspaper which finds its way into families, reaching the young as well as the mature, of a selection of scandalous and defamatory articles treated in such a way as to excite attention and interest so as to command circulation. . . . The statute is not directed at threatened libel, but at an existing business which, generally speaking, involves more than libel. The distribution of scandalous matter is detrimental to public morals and to the general welfare. It tends to disturb the peace of the community. Being defamatory and malicious, it tends to provoke assaults and the commission of crime. It has no concern with the publication of the truth, with good motives and for justifiable ends. . . . In Minnesota no agency can hush the sincere and honest voice of the press; but our constitution was never intended to protect malice, scandal and defamation when untrue or published with bad motives or without justifiable ends. . . . It was never the intention of the constitution to afford protection [283 U.S. 729] to a publication devoted to scandal and defamation. . . . Defendants stand before us upon the record as being regularly and customarily engaged in a business of conducting a newspaper sending to the public malicious, scandalous and defamatory printed matter.

1931, Near v. Minnesota, 283 U.S. 729

The case was remanded to the district court.

1931, Near v. Minnesota, 283 U.S. 729

Near's answer made no allegations to excuse or justify the business or the articles complained of. It formally denied that the publications were malicious, scandalous or defamatory, admitted that they were made as alleged, and attacked the statute as unconstitutional. At the trial, the plaintiff introduced evidence unquestionably sufficient to support the complaint. The defendant offered none. The court found the facts as alleged in the complaint, and, specifically, that each edition "was chiefly devoted to malicious, scandalous and defamatory articles" and that the last edition was chiefly devoted to malicious, scandalous and defamatory articles concerning Leach (mayor of Minneapolis), Davis (representative of the law enforcement league of citizens), Brunskill (chief of police), Olson (county attorney), the Jewish race, and members of the grand jury then serving in that court; that defendants, in and through the several publications,

1931, Near v. Minnesota, 283 U.S. 729

did thereby engage in the business of regularly and customarily producing, publishing and circulating a malicious, scandalous and defamatory newspaper.

1931, Near v. Minnesota, 283 U.S. 729

Defendant Near again appealed to the supreme court. In its opinion (179 Minn. 40, 228 N.W. 326), the court said:

1931, Near v. Minnesota, 283 U.S. 729

No claim is advanced that the method and character of the operation of the newspaper in question was not a nuisance if the statute is constitutional. It was regularly and customarily devoted largely to malicious, scandalous and defamatory matter. . . . The record presents the same questions, upon which we have already passed. [283 U.S. 730]

1931, Near v. Minnesota, 283 U.S. 730

Defendant concedes that the editions of the newspaper complained of are "defamatory per se," and he says:

1931, Near v. Minnesota, 283 U.S. 730

It has been asserted that the constitution was never intended to be a shield for malice, scandal, and defamation when untrue, or published with bad motives, or for unjustifiable ends. . . . The contrary is true; every person does have a constitutional right to publish malicious, scandalous, and defamatory matter though untrue, and with bad motives, and for unjustifiable ends, in the first instance, though he is subject to responsibility therefor afterwards.

1931, Near v. Minnesota, 283 U.S. 730

The record, when the substance of the articles is regarded, requires that concession here. And this Court is required to pass on the validity of the state law on that basis.

1931, Near v. Minnesota, 283 U.S. 730

No question was raised below, and there is none here, concerning the relevancy or weight of evidence, burden of proof, justification or other matters of defense, the scope of the judgment or proceedings to enforce it, or the character of the publications that may be made notwithstanding the injunction.

1931, Near v. Minnesota, 283 U.S. 730

There is no basis for the suggestion that defendants may not interpose any defense or introduce any evidence that would be open to them in a libel case, or that malice may not be negatived by showing that the publication was made in good faith in belief of its truth, or that, at the time and under the circumstances, it was justified as a fair comment on public affairs or upon the conduct of public officers in respect of their duties as such. See Mason's Minnesota Statutes, §§ 10112, 10113.

1931, Near v. Minnesota, 283 U.S. 730

The scope of the judgment is not reviewable here. The opinion of the state supreme court shows that it was not reviewable there, because defendants' assignments of error in that court did not go to the form of the judgment, and because the lower court had not been asked to modify the judgment. [283 U.S. 731]

1931, Near v. Minnesota, 283 U.S. 731

The Act was passed in the exertion of the State's power of police, and this court is, by well established rule, required to assume, until the contrary is clearly made to appear, that there exists in Minnesota a state of affairs that justifies this measure for the preservation of the peace and good order of the State. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 79. Gitlow v. New York, supra, 668-669. Corporation Commission v. Lowe, 281 U.S. 431, 438. O'Gorman & Young v. Hartford Ins. Co., 282 U.S. 251, 257-258.

1931, Near v. Minnesota, 283 U.S. 731

The publications themselves disclose the need and propriety of the legislation. They show:

1931, Near v. Minnesota, 283 U.S. 731

In 1913 one Guilford, originally a defendant in this suit, commenced the publication of a scandal sheet called the Twin City Reporter; in 1916, Near joined him in the enterprise, later bought him out and engaged the services of one Bevans. In 1919, Bevans acquired Near's interest, and has since, alone or with others, continued the publication. Defendants admit that they published some reprehensible articles in the Twin City Reporter, deny that they personally used it for blackmailing purposes, admit that, by reason of their connection with the paper their reputation did become tainted, and state that Bevans, while so associated with Near, did use the paper for blackmailing purposes. And Near says it was for that reason he sold his interest to Bevans.

1931, Near v. Minnesota, 283 U.S. 731

In a number of the editions, defendants charge that, ever since Near sold his interest to Bevans in 1919, the Twin City Reporter has been used for blackmail, to dominate public gambling and other criminal activities, and as well to exert a kind of control over public officers and the government of the city.

1931, Near v. Minnesota, 283 U.S. 731

The articles in question also state that, when defendants announced their intention to publish the Saturday Press, they were threatened, and that, soon after the first publication, [283 U.S. 732] Guilford was waylaid and shot down before he could use the firearm which he had at hand for the purpose of defending himself against anticipated assaults. It also appears that Near apprehended violence, and was not unprepared to repel it. There is much more of like significance.

1931, Near v. Minnesota, 283 U.S. 732

The long criminal career of the Twin City Reporter—if it is, in fact, as described by defendants—and the arming and shooting arising out of the publication of the Saturday Press, serve to illustrate the kind of conditions, in respect of the business of publishing malicious, scandalous and defamatory periodicals, by which the state legislature presumably was moved to enact the law in question. It must be deemed appropriate to deal with conditions existing in Minnesota.

1931, Near v. Minnesota, 283 U.S. 732

It is of the greatest importance that the States shall be untrammeled and free to employ all just and appropriate measures to prevent abuses of the liberty of the press.

1931, Near v. Minnesota, 283 U.S. 732

In his work on the Constitution (5th ed.), Justice Story, expounding the First Amendment, which declares "Congress shall make no law abridging the freedom of speech or of the press," said (§ 1880):

1931, Near v. Minnesota, 283 U.S. 732

That this amendment was intended to secure to every citizen an absolute right to speak, or write, or print whatever he might please, without any responsibility, public or private, therefor is a supposition too wild to be indulged by any rational man. This would be to allow to every citizen a right to destroy at his pleasure the reputation, the peace, the property, and even the personal safety of every other citizen. A man might, out of mere malice and revenge, accuse another of the most infamous crimes; might excite against him the indignation of all his fellow citizens by the most atrocious calumnies; might disturb, nay, overturn, all his domestic peace, and embitter his parental affections; might inflict the most distressing punishments upon the weak, the timid, and the innocent; [283 U.S. 733] might prejudice all a man's civil, and political, and private rights, and might stir up sedition, rebellion, and treason even against the government itself in the wantonness of his passions or the corruption of his heart. Civil society could not go on under such circumstances. Men would then be obliged to resort to private vengeance to make up for the deficiencies of the law, and assassination and savage cruelties would be perpetrated with all the frequency belonging to barbarous and brutal communities. It is plain, then, that the language of this amendment imports no more than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always that he does not injure any other person in his rights, person, property, or reputation, and so always that he does not thereby disturb the public peace or attempt to subvert the government. It is neither more nor less than an expansion of the great doctrine recently brought into operation in the law of libel, that every man shall be at liberty to publish what is true, with good motives and for justifiable ends. And, with this reasonable limitation, it is not only right in itself, but it is an inestimable privilege in a free government. Without such a limitation, it might become the scourge of the republic, first denouncing the principles of liberty and then, by rendering the most virtuous patriots odious through the terrors of the press, introducing despotism in its worst form.

1931, Near v. Minnesota, 283 U.S. 733

(Italicizing added.)

1931, Near v. Minnesota, 283 U.S. 733

The Court quotes Blackstone in support of its condemnation of the statute as imposing a previous restraint upon publication. But the previous restraints referred to by him subjected the press to the arbitrary will of an administrative officer. He describes the practice (Book IV, p. 152):

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To subject the press to the restrictive power of a licenser, as was formerly done both before and since the revolution [of 1688], is to subject all freedom [283 U.S. 734] of sentiment to the prejudices of one man and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. 2

1931, Near v. Minnesota, 283 U.S. 734

Story gives the history alluded to by Blackstone (§ 1882):

1931, Near v. Minnesota, 283 U.S. 734

The art of printing, soon after its introduction, we are told, was looked upon, as well in England as in other countries, as merely a matter of state, and subject to the coercion of the crown. It was, therefore, regulated in England by the king's proclamations, prohibitions, charters of privilege, and licenses, and finally by the decrees of the Court of Star-Chamber, which limited the number of printers and of presses which each should employ, and prohibited new publications unless previously approved by proper licensers. On the demolition of this odious jurisdiction, in 1641, the Long Parliament of Charles the First, after their rupture with that prince, assumed the same powers which the Star-Chamber exercised with respect to licensing books, and during the Commonwealth (such is human frailty and the love of power even in republics), they issued their ordinances for that purpose, founded principally upon a Star-Chamber decree of 1637. After the restoration of Charles the Second, a statute on the same subject was passed, copied, with some few alterations, from the parliamentary ordinances. The act expired in 1679, and was revived and continued for a few years after the revolution of 1688. Many attempts were made by the government to keep it in force, but it was [283 U.S. 735] so strongly resisted by Parliament that it expired in 1694, and has never since been revived.

1931, Near v. Minnesota, 283 U.S. 735

It is plain that Blackstone taught that, under the common law liberty of the press means simply the absence of restraint upon publication in advance as distinguished from liability, civil or criminal, for libelous or improper matter so published. And, as above shown, Story defined freedom of the press guaranteed by the First Amendment to mean that "every man shall be at liberty to publish what is true, with good motives and for justifiable ends." His statement concerned the definite declaration of the First Amendment. It is not suggested that the freedom of press included in the liberty protected by the Fourteenth Amendment, which was adopted after Story's definition, is greater than that protected against congressional action. And see 2 Cooley's Constitutional Limitations, 8th ed., p. 886. 2 Kent's Commentaries (14th ed.) Lect. XXIV, p. 17.

1931, Near v. Minnesota, 283 U.S. 735

The Minnesota statute does not operate as a previous restraint on publication within the proper meaning of that phrase. It does not authorize administrative control in advance such as was formerly exercised by the licensers and censors but prescribes a remedy to be enforced by a suit in equity. In this case, there was previous publication made in the course of the business of regularly producing malicious, scandalous and defamatory periodicals. The business and publications unquestionably constitute an abuse of the right of free press. The statute denounces the things done as a nuisance on the ground, as stated by the state supreme court, that they threaten morals, peace and good order. There is no question of the power of the State to denounce such transgressions. The restraint authorized is only in respect of continuing to do what has been duly adjudged to constitute a nuisance. The controlling words are

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All persons guilty of such nuisance may be enjoined, as hereinafter [283 U.S. 736] provided. . . . Whenever any such nuisance is committed . . . , an action in the name of the State

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may be brought

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to perpetually enjoin the person or persons committing, conducting or maintaining any such nuisance, from further committing, conducting or maintaining any such nuisance. . . . The court may make its order and judgment permanently enjoining . . . defendants found guilty . . . from committing or continuing the acts prohibited hereby, and in and by such judgment, such nuisance may be wholly abated. . . .

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There is nothing in the statute 3 purporting to prohibit publications that have not been adjudged to constitute a nuisance. It is fanciful to suggest similarity between the granting or enforcement of the decree authorized by this statute to prevent further publication of malicious, scandalous and defamatory articles and the previous restraint upon the press by licensers as referred to by Blackstone and described in the history of the times to which he alludes. [283 U.S. 737]

1931, Near v. Minnesota, 283 U.S. 737

The opinion seems to concede that, under clause (a) of the Minnesota law, the business of regularly publishing and circulating an obscene periodical may be enjoined as a nuisance. It is difficult to perceive any distinction, having any relation to constitutionality, between clause (a) and clause (b) under which this action was brought. Both nuisances are offensive to morals, order and good government. As that resulting from lewd publications constitutionally may be enjoined, it is hard to understand why the one resulting from a regular business of malicious defamation may not.

1931, Near v. Minnesota, 283 U.S. 737

It is well known, as found by the state supreme court, that existing libel laws are inadequate effectively to suppress evils resulting from the kind of business and publications that are shown in this case. The doctrine that measures such as the one before us are invalid because they operate as previous restraints to infringe freedom of press exposes the peace and good order of every community and the business and private affairs of every individual to the constant and protracted false and malicious [283 U.S. 738] assaults of any insolvent publisher who may have purpose and sufficient capacity to contrive and put into effect a scheme or program for oppression, blackmail or extortion. The judgment should be affirmed.

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MR. JUSTICE VAN DEVANTER, MR. JUSTICE McREYNOLDS, and MR. JUSTICE SUTHERLAND concur in this opinion.

Footnotes

HUGHES, J., lead opinion (Footnotes)

1931, Near v. Minnesota, 283 U.S. 738

1. Mason's Minnesota Statutes, 1927, 10123-1 to 10123-3.

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2. Mason's Minn.Stats. 10112, 10113; State v. Shipman, 83 Minn. 441, 445, 86 N.W. 431; State v. Minor, 163 Minn. 109, 110, 203 N.W. 596.

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3. It may also be observed that, in a prosecution for libel, the applicable Minnesota statute (Mason's Minn.Stats., 1927, §§ 10112, 10113) provides that the publication is justified "whenever the matter charged as libelous is true and was published with good motives and for justifiable ends," and also

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is excused when honestly made, in belief of its truth, and upon reasonable grounds for such belief, and consists of fair comments upon the conduct of a person in respect to public affairs.

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The clause last mentioned is not found in the statute in question.

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4. May, Constitutional History of England, vol. 2, chap. IX, p. 4; DeLolme, Commentaries on the Constitution of England, chap. IX, pp. 318, 319.

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5. See Hugonson's Case, 2 Atk. 469; Respublica v. Oswald, 1 Dallas 319; Cooper v. People, 13 Colo. 337, 373, 22 Pac. 790; Nebraska v. Rosewater, 60 Nebr. 438, 83 N.W. 353; State v. Tugwell, 19 Wash. 238, 52 Pac. 1056; People v. Wilson, 64 Ill. 195; Storey v. People, 79 Ill. 45; State v. Circuit Court, 97 Wis. 1, 72 N.W.193.

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6. Chafee, Freedom of Speech, p. 10.

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7. See 29 Harvard Law Review, 640.

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8. See Duniway "The Development of Freedom of the Press in Massachusetts," p. 123; Bancroft's History of the United States, vol. 2, 261.

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9. Journal of the Continental Congress, 1904 ed., vol. I, pp. 104, 108.

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10. Report on the Virginia Resolutions, Madison's Works, vol. iv, 544.

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11. Dailey v. Superior Court, 112 Cal. 94, 98, 44 Pac. 458; Jones, Varnum & Co. v. Townsend's Admx., 21 Fla. 431, 450; State ex rel. Liversey v. Judge, 34 La. 741, 743; Commonwealth v. Blanding, 3 Pick, 304, 313; Lindsay v. Montana Federation of Labor, 37 Mont. 264, 275, 277, 96 Pac. 127; Howell v. Bee Publishing Co., 100 Neb. 39, 42, 158 N.W. 358; New Yorker Staats-Zeitung v. Nolan, 89 N.J.Eq. 387, 105 Atl. 72; Brandreth v. Lane, 8 Paige 24; New York Juvenile Guardian Society v. Roosevelt, 7 Daly 188; Ulster Square Dealer v. Fowler, 111 N.Y.Supp. 16; Star Co. v. Brush, 170 id. 987, 172 id. 320, 172 id. 851; Dopp v. Doll, 9 Ohio Dec.Rep. 428; Respublica v. Oswald, 1 Dall. 319, 325; Respublica v. Dennie, 4 Yeates 267, 269; Ex parte Neill, 32 Tex.Cr. 275, 22 S.W. 923; Mitchell v. Grand Lodge, 56 Tex.Civ.App. 306, 309, 121 S.W. 178; Sweeney v. Baker, 13 W.Va. 158, 182; Citizens Light, Heat & Power Co. v. Montgomery Light & Water Co., 171 Fed. 553, 556; Willis v. O'Connell, 231 Fed. 1004, 1010; Dearborn Publishing Co. v. Fitzgerald, 271 Fed. 479, 485.

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12. Madison, op. cit. p. 549.

BUTLER, J., dissenting (Footnotes)

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1. The following articles appear in the last edition published, dated November 19, 1927:

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FACTS NOT THEORIES

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"I am a bosom friend of Mr. Olson," snorted a gentleman of Yiddish blood, "and I want to protest against your article," and blah, blah, blah, ad infinitum, ad nauseam.

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I am not taking orders from men of Barnett's faith, at least right now. There have been too many men in this city and especially those in official life, who HAVE been taking orders and suggestions from JEW GANGSTERS, therefore we HAVE Jew Gangsters, practically ruling Minneapolis.

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It was buzzards of the Barnett stripe who shot down my buddy. It was Barnett gunmen who staged the assault on Samuel Shapiro. It is Jew thugs who have "pulled" practically every robbery in this city. It was a member of the Barnett gang who shot down George Rubenstein (Ruby) while he stood in the shelter of Mose Barnett's ham-cavern on Hennepin avenue. It was Mose Barnett himself who shot down Roy Rogers on Hennepin avenue. It was at Mose Barnett's place of "business" that the "13 dollar Jew" found a refuge while the police of New York were combing the country for him. It was a gang of Jew gunmen who boasted that, for five hundred dollars, they would kill any man in the city. It was Mose Barnett, a Jew, who boasted that he held the chief of police of Minneapolis in his hand—had bought and paid for him.

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It is Jewish men and women—pliant tools of the Jew gangster, Mose Barnett, who stand charged with having falsified the election records and returns in the Third ward. And it is Mose Barnett himself, who, indicted for his part in the Shapiro assault, is a fugitive from justice today.

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Practically every vendor of vile hooch, every owner of a moonshine still, every snake-faced gangster and embryonic yegg in the Twin Cities is a JEW.

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Having these examples before me, I feel that I am justified in my refusal to take orders from a Jew who boasts that he is a "bosom friend" of Mr. Olson.

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I find in the mail at least twice per week letters from gentlemen of Jewish faith who advise me against "launching an attack on the Jewish people." These gentlemen have the cart before the horse. I am launching, nor is Mr. Guilford, no attack against any race, BUT:

1931, Near v. Minnesota, 283 U.S. 738

When I find men of a certain race banding themselves together for the purpose of preying upon Gentile or Jew; gunmen, KILLERS, roaming our streets shooting down men against whom they have no personal grudge (or happen to have); defying OUR laws; corrupting OUR officials; assaulting businessmen; beating up unarmed citizens; spreading a reign of terror through every walk of life, then I say to you in all sincerity that I refuse to back up a single step from that "issue"—if they choose to make it so.

1931, Near v. Minnesota, 283 U.S. 738

If the people of Jewish faith in Minneapolis wish to avoid criticism of these vermin whom I rightfully call "Jews," they can easily do so BY THEMSELVES CLEANING HOUSE.

1931, Near v. Minnesota, 283 U.S. 738

I'm not out to cleanse Israel of the filth that clings to Israel's skirts. I'm out to "hew to the line, let the chips fly where they may."

1931, Near v. Minnesota, 283 U.S. 738

I simply state a fact when I say that ninety percent of the crimes committed against society in this city are committed by Jew gangsters.

1931, Near v. Minnesota, 283 U.S. 738

It was a Jew who employed JEWS to shoot down Mr. Guilford. It was a Jew who employed a Jew to intimidate Mr. Shapiro and a Jew who employed JEWS to assault that gentleman when he refused to yield to their threats. It was a JEW who wheedled or employed Jews to manipulate the election records and returns in the Third ward in flagrant violation of law. It was a Jew who left two hundred dollars with another Jew to pay to our chief of police just before the last municipal election, and:

1931, Near v. Minnesota, 283 U.S. 738

It is Jew, Jew, Jew, as long as one cares to comb over the records.

1931, Near v. Minnesota, 283 U.S. 738

I am launching no attack against the Jewish people As A RACE. I am merely calling attention to a FACT. And if the people of that race and faith wish to rid themselves of the odium and stigma THE RODENTS OF THEIR OWN RACE HAVE BROUGT UPON THEM, they need only to step to the front and help the decent citizens of Minneapolis rid the city of these criminal Jews.

1931, Near v. Minnesota, 283 U.S. 738

Either Mr. Guilford or myself stands ready to do battle for a MAN, regardless of his race, color or creed, but neither of us will step one inch out of our chosen path to avoid a fight IF the Jews ant to battle.

1931, Near v. Minnesota, 283 U.S. 738

Both of us have some mighty loyal friends among the Jewish people, but not one of them comes whining to ask that we "lay off" criticism of Jewish gangsters, and none of them who comes carping to us of their "bosom friendship" for any public official now under our journalistic guns.

1931, Near v. Minnesota, 283 U.S. 738

GIIL's [Guilford's] CHATTERBOX

1931, Near v. Minnesota, 283 U.S. 738

I headed into the city on September 26th, ran across three Jews in a Chevrolet; stopped a lot of lead, and won a bed for myself in St. Barnabas Hospital for six weeks. . . .

1931, Near v. Minnesota, 283 U.S. 738

Whereupon I have withdrawn all allegiance to anything with a hook nose that eats herring. I have adopted the sparrow as my national bird until Davis' law enforcement league or the K.K.K. hammers the eagle's beak out straight. So if I seem to act crazy as I ankle down the street, bear in mind that I am merely saluting MY national emblem.

1931, Near v. Minnesota, 283 U.S. 738

All of which has nothing to do with the present whereabouts of Big Mose Barnett. Methinks he headed the local delegation to the new "Palestine for Jews only." He went ahead of the boys so he could do a little fixing with the Yiddish chief of police and get his twenty-five percent of the gambling rake-off. Boys will be boys, and "ganefs" will be ganefs.

1931, Near v. Minnesota, 283 U.S. 738

GRAND JURIES AND DITTO

1931, Near v. Minnesota, 283 U.S. 738

There are grand juries, and there are grand juries. The last one was a real grand jury. It acted. The present one is like the scion who is labelled "Junior." That means not so good. There are a few mighty good folks on it—there are some who smell bad. One petty peanut politician whose graft was almost pitiful in its size when he was a public official has already shot his mouth off in several places. He is establishing his alibi in advance for what he intends to keep from taking place.

1931, Near v. Minnesota, 283 U.S. 738

But George, we won't bother you. [Meaning a grand juror.] We are aware that the gambling syndicate was waiting for your body to convene before the big crap game opened again. The Yids had your dimensions, apparently, and we always go by the judgment of a dog in appraising people.

1931, Near v. Minnesota, 283 U.S. 738

We will call for a special grand jury and a special prosecutor within a short time, as soon as half of the staff can navigate to advantage, and then we'll show you what a real grand jury can do. Up to the present, we have been merely tapping on the window. Very soon, we shall start smashing glass.

1931, Near v. Minnesota, 283 U.S. 738

2. May, Constitutional History of England, c. IX. Duniway, Free dom of the Press in Massachusetts, cc. I and II. Cooley, Constitutional Limitations (8th ed.) Vol. II, pp. 880-881. Pound, Equitable Relief against Defamation, 29 Harv.L.Rev. 640, 650 et seq. Madison, Letters and Other Writings (1865 ed.) Vol. IV, pp. 542, 543. Respublica v. Oswald, 1 Dall. 319, 325. Rawle, A View of the Constitution (2d ed. 1829) p. 124. Paterson, Liberty of the Press, c. III.

1931, Near v. Minnesota, 283 U.S. 738

3.

1931, Near v. Minnesota, 283 U.S. 738

§ 1. Any person who, as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away

1931, Near v. Minnesota, 283 U.S. 738

(a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or

1931, Near v. Minnesota, 283 U.S. 738

(b) a malicious, scandalous and defamatory newspaper, magazine, or other periodical,

1931, Near v. Minnesota, 283 U.S. 738

is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided.

1931, Near v. Minnesota, 283 U.S. 738

\* \* \* \*

1931, Near v. Minnesota, 283 U.S. 738

In actions brought under (b) above, there shall be available the defense that the truth was published with good motives and for justifiable ends and in such actions the plaintiff shall not have the right to report [resort] to issues or editions of periodicals taking place more than three months before the commencement of the action.

1931, Near v. Minnesota, 283 U.S. 738

§ 2. Whenever any such nuisance is committed or is kept, maintained, or exists, as above provided for, the County Attorney of any county where any such periodical is published or circulated . . . may commence and maintain in the District Court of said county, an action in the name of the State of Minnesota . . . to perpetually enjoin the person or persons committing, conducting or maintaining any such nuisance, from further committing, conducting, or maintaining any such nuisance. . . .

1931, Near v. Minnesota, 283 U.S. 738

§ 3. The action may be brought to trial and tried as in the case of other actions in such District Court, and shall be governed by the practice and procedure applicable to civil actions for injunctions.

1931, Near v. Minnesota, 283 U.S. 738

After trial, the court may make its order and judgment permanently enjoining any and all defendants found guilty of violating this Act from further committing or continuing the acts prohibited hereby, and in and by such judgment, such nuisance may be wholly abated.

1931, Near v. Minnesota, 283 U.S. 738

The court may, as in other cases of contempt, at any time punish, by fine of not more than $1,000, or by imprisonment in the county jail for not more than twelve months, any person or persons violating any injunction, temporary or permanent, made or issued pursuant to this Act.

President Hoover's Statement About the Bonus Marchers

Title: President Hoover's Statement About the Bonus Marchers

Author: Herbert Hoover

Date: July 29, 1932

Source: Public Papers of the Presidents, Herbert Hoover, pp.348-350

Public Papers of the Presidents, Hoover, 1932-1933, p.348

THE PRESIDENT said:

Public Papers of the Presidents, Hoover, 1932-1933, p.348

"A challenge to the authority of the United States Government has been met, swiftly and firmly.

Public Papers of the Presidents, Hoover, 1932-1933, p.348

"After months of patient indulgence, the Government met overt lawlessness as it always must be met if the cherished processes of self-government are to be preserved. We cannot tolerate the abuse of constitutional rights by those who would destroy all government, no matter who they may be. Government cannot be coerced by mob rule.

Public Papers of the Presidents, Hoover, 1932-1933, p.348–p.349

"The Department of Justice is pressing its investigation into the violence which forced the call for Army detachments, and it is my sincere hope that those agitators who inspired yesterday's attack upon the Federal authority may be brought speedily to trial in the civil [p.349] courts. There can be no safe harbor in the United States of America for violence.

Public Papers of the Presidents, Hoover, 1932-1933, p.349

"Order and civil tranquillity are the first requisites in the great task of economic reconstruction to which our whole people now are devoting their heroic and noble energies. This national effort must not be retarded in even the slightest degree by organized lawlessness. The first obligation of my office is to uphold and defend the Constitution and the authority of the law. This I propose always to do."

Public Papers of the Presidents, Hoover, 1932-1933, p.349

NOTE: On the same day, the White House issued a text of the charge given to the grand jury by Judge Oscar R. Luhring of the Supreme Court of the District of Columbia. The charge, dated July 29, 1932, follows:

Public Papers of the Presidents, Hoover, 1932-1933, p.349

The Court must take notice of the startling news appearing in the public press yesterday afternoon and this morning.

Public Papers of the Presidents, Hoover, 1932-1933, p.349

It appears that a considerable group of men, styling themselves as bonus marchers, have come to the District of Columbia from all parts of the country for the stated purpose of petitioning Congress for the passage of legislation providing for the .immediate payment of the so-called bonus certificates. The number of these men has been variously estimated as from five to ten thousand.

Public Papers of the Presidents, Hoover, 1932-1933, p.349

It is reported that certain buildings in this city, belonging to the Government, were in the possession of members of this so-called bonus army, who had been requested to vacate but had declined to do so; that possession of the property by the Government was immediately necessary for the erection of new buildings which Congress had directed built; that yesterday agents of the Treasury, proceeding lawfully, went upon the premises to dispossess the bonus army, and a force of district police was present to afford protection and prevent disorder; that the bonus marchers were removed from one old building which the public contractor was waiting to demolish; that thereupon a mob of several thousand bonus marchers, coming from other quarters, proceeded to this place for the purpose of resisting the officials and of regaining possession of the Government property.

Public Papers of the Presidents, Hoover, 1932-1933, p.349

It appears that this mob, incited by some of their number, attacked the police, seriously injured a number of them, and engaged in riot and disorder. Their acts of resistance reached such a point that the police authorities were unable to maintain order and the Commissioners of the District were compelled to call upon the Federal authorities for troops to restore order and protect life and property.

Public Papers of the Presidents, Hoover, 1932-1933, p.349

It is obvious that the laws of the District were violated in many respects. You should undertake an immediate investigation of these events with a view to bringing to justice those responsible for this violence, and those inciting it as well as those who took part in acts of violence.

Public Papers of the Presidents, Hoover, 1932-1933, p.350

It is reported that the mob guilty of actual violence included few men, and was made up mainly of communists, and other disorderly elements. I hope you will find that is so and that few men who have worn the Nation's uniform engaged in this violent attack upon law and order. In the confusion not many arrests have been made, and it is said that many of the most violent disturbers and criminal elements in the unlawful gathering have already scattered and escaped from the city, but it may be possible yet to identify and apprehend them and bring them to justice.

Public Papers of the Presidents, Hoover, 1932-1933, p.350

It is important that this matter be dealt with promptly. The United States Attorney is prepared to assist you in every way you may require.

Public Papers of the Presidents, Hoover, 1932-1933, p.350

That is all I have to say. The matter is in your hands.

Blockburger v. United States, 1932

Title: Blockburger v. United States

Author: U.S. Supreme Court

Date: January 4, 1932

Source: 284 U.S. 299

This case was argued November 24, 1931, and was decided January 4, 1932.

1932, Blockburger v. United States, 284 U.S. 299

CERTIORARI TO THE CIRCUIT COURT OF APPEALS

1932, Blockburger v. United States, 284 U.S. 299

FOR THE SEVENTH CIRCUIT

Syllabus

1932, Blockburger v. United States, 284 U.S. 299

1. Two sales of morphine not in or from the original stamped package, the second having been initiated after the first was complete, held separate and distinct offenses under § 1 of the Narcotics Act, although buyer and seller were the same in both cases and but little time elapsed between the end of the one transaction and the beginning of the other. P. 301.

1932, Blockburger v. United States, 284 U.S. 299

2. Section 1 of the Narcotics Act, forbidding sale except in or from the original stamped package, and § 2, forbidding sale not in pursuance of a written order of the person to whom the drug is sold, create two distinct offenses, and both are committed by a single [284 U.S. 300] sale not in or from the original stamped package and without a written order. P. 303.

1932, Blockburger v. United States, 284 U.S. 300

3. Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. P. 304.

1932, Blockburger v. United States, 284 U.S. 300

4. The penal section of the Act, "any person who violates or fails to comply with any of the requirements of this act" shall be punished, etc., means that each offense is subject to the penalty prescribed. P. 305.

1932, Blockburger v. United States, 284 U.S. 300

Certiorari, post, p. 607, to review a judgment affirming a sentence under the Narcotics Act.

SUTHERLAND, J., lead opinion

1932, Blockburger v. United States, 284 U.S. 300

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

1932, Blockburger v. United States, 284 U.S. 300

The petitioner was charged with violating provisions of the Harrison Narcotic Act, c. 1, § 1, 38 Stat. 785, as amended by c. 18, § 1006, 40 Stat. 1057, 1131; 1 and c. 1, § 2, 38 Stat. 785, 786. 2 The indictment [284 U.S. 301] contained five counts. The jury returned a verdict against petitioner upon the second, third, and fifth counts only. Each of these counts charged a sale of morphine hydrochloride to the same purchaser. The second count charged a sale on a specified day of ten grains of the drug not in or from the original stamped package; the third count charged a sale on the following day of eight grains of the drug not in or from the original stamped package; the fifth count charged the latter sale also as having been made not in pursuance of a written order of the purchaser as required by the statute. The court sentenced petitioner to five years' imprisonment and a fine of $2,000 upon each count, the terms of imprisonment to run consecutively; and this judgment was affirmed on appeal. 50 F.(2d) 795.

1932, Blockburger v. United States, 284 U.S. 301

The principal contentions here made by petitioner are as follows: (1) that, upon the facts, the two sales charged in the second and third counts as having been made to the same person constitute a single offense; and (2) that the sale charged in the third count as having been made not from the original stamped package, and the same sale charged in the fifth count as having been made not in pursuance of a written order of the purchaser, constitute but one offense, for which only a single penalty lawfully may be imposed.

1932, Blockburger v. United States, 284 U.S. 301

One. The sales charged in the second and third counts, although made to the same person, were distinct and separate sales made at different times. It appears from the evidence that, shortly after delivery of the drug which was the subject of the first sale, the purchaser paid for an additional quantity, which was delivered the next day. But the first sale had been consummated, and the payment for the additional drug, however closely following, was the initiation of a separate and distinct sale completed by its delivery.

1932, Blockburger v. United States, 284 U.S. 301

The contention on behalf of petitioner is that these two sales, having been made to the same purchaser and [284 U.S. 302] following each other, with no substantial interval of time between the delivery of the drug in the first transaction and the payment for the second quantity sold, constitute a single continuing offense. The contention is unsound. The distinction between the transactions here involved and an offense continuous in its character is well settled, as was pointed out by this court in the case of In re Snow, 120 U.S. 274. There, it was held that the offense of cohabiting with more than one woman, created by the Act of March 22, 1882, c. 47, 22 Stat. 31 was a continuous offense, and was committed, in the sense of the statute, where there was a living or dwelling together as husband and wife. The court said (pp. 281, 286):

1932, Blockburger v. United States, 284 U.S. 302

It is, inherently, a continuous offense, having duration, and not an offense consisting of an isolated act. . . .

1932, Blockburger v. United States, 284 U.S. 302

\* \* \* \*

1932, Blockburger v. United States, 284 U.S. 302

A distinction is laid down in adjudged cases and in text writers between an offense continuous in its character, like the one at bar, and a case where the statute is aimed at an offense that can be committed uno ictu.

1932, Blockburger v. United States, 284 U.S. 302

The Narcotic Act does not create the offense of engaging in the business of selling the forbidden drugs, but penalizes any sale made in the absence of either of the qualifying requirements set forth. Each of several successive sales constitutes a distinct offense, however closely they may follow each other. The distinction stated by Mr. Wharton is that,

1932, Blockburger v. United States, 284 U.S. 302

when the impulse is single, but one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie.

1932, Blockburger v. United States, 284 U.S. 302

Wharton's Criminal Law (11th Ed.) § 34. Or, as stated in note 3 to that section,

1932, Blockburger v. United States, 284 U.S. 302

The test is whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately. . . . If the latter, there can be but one penalty. [284 U.S. 303]

1932, Blockburger v. United States, 284 U.S. 303

In the present case, the first transaction, resulting in a sale, had come to an end. The next sale was not the result of the original impulse, but of a fresh one—that is to say, of a new bargain. The question is controlled, not by the Snow case, but by such cases as that of Ebeling v. Morgan, 237 U.S. 625. There, the accused was convicted under several counts of a willful tearing, etc., of mail bags with intent to rob. The court (p. 628) stated the question to be

1932, Blockburger v. United States, 284 U.S. 303

whether one who, in the same transaction, tears or cuts successively mail bags of the United States used in conveyance of the mails, with intent to rob or steal any such mail, is guilty of a single offense, or of additional offenses because of each successive cutting with the criminal intent charged.

1932, Blockburger v. United States, 284 U.S. 303

Answering this question, the court, after quoting the statute, § 189, Criminal Code, (U.S. C. title 18, § 312) said (p. 629):

1932, Blockburger v. United States, 284 U.S. 303

These words plainly indicate that it was the intention of the lawmakers to protect each and every mail bag from felonious injury and mutilation. Whenever any one mail bag is thus torn, cut, or injured, the offense is complete. Although the transaction of cutting the mail bags was, in a sense, continuous, the complete statutory offense was committed every time a mail bag was cut in the manner described, with the intent charged. The offense as to each separate bag was complete when that bag was cut, irrespective of any attack upon, or mutilation of, any other bag.

1932, Blockburger v. United States, 284 U.S. 303

See also Ex parte Henry, 123 U.S. 372, 374; Ex parte De Bara, 179 U.S. 316, 320; Badders v. United States, 240 U.S. 391, 394; Wilkes v. Dinsman, 7 How. 89, 127; United States v. Daugherty, 269 U.S. 360; Queen v. Scott, 4 Best & S. (Q.B.) 368, 373.

1932, Blockburger v. United States, 284 U.S. 303

Two. Section 1 of the Narcotic Act creates the offense of selling any of the forbidden drugs except in or from the original stamped package; and § 2 creates the offense of selling any of such drugs not in pursuance of a written [284 U.S. 304] order of the person to whom the drug is sold. Thus, upon the face of the statute, two distinct offenses are created. Here, there was but one sale, and the question is whether, both sections being violated by the same act, the accused committed two offenses, or only one.

1932, Blockburger v. United States, 284 U.S. 304

The statute is not aimed at sales of the forbidden drugs qua sales, a matter entirely beyond the authority of Congress, but at sales of such drugs in violation of the requirements set forth in §§ 1 and 2, enacted as aids to the enforcement of the stamp tax imposed by the act. See Alston v. United States, 274 U.S. 289, 294; Nigro v. United States, 276 U.S. 332, 341, 345, 351.

1932, Blockburger v. United States, 284 U.S. 304

Each of the offenses created requires proof of a different element. The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not. Gavieres v. United States, 220 U.S. 338, 342, and authorities cited. In that case, this court quoted from and adopted the language of the Supreme Court of Massachusetts in Morey v. Commonwealth, 108 Mass. 433:

1932, Blockburger v. United States, 284 U.S. 304

A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

1932, Blockburger v. United States, 284 U.S. 304

Compare Albrecht v. United States, 273 U.S. 1, 11-12 and cases there cited. Applying the test, we must conclude that here, although both sections were violated by the one sale, two offenses were committed.

1932, Blockburger v. United States, 284 U.S. 304

The case of Ballerini v. Aderholt, 44 F.2d 352, is not in harmony with these views, and is disapproved.

1932, Blockburger v. United States, 284 U.S. 304

Three. It is not necessary to discuss the additional assignments of error in respect of cross-examination, admission of testimony, statements made by the district [284 U.S. 305] attorney to the jury claimed to be prejudicial, and instructions of the court. These matters were properly disposed of by the court below. Nor is there merit in the contention that the language of the penal section of the Narcotic Act, "any person who violates or fails to comply with any of the requirements of this act," shall be punished, etc., is to be construed as imposing a single punishment for a violation of the distinct requirements of §§ 1 and 2 when accomplished by one and the same sale. The plain meaning of the provision is that each offense is subject to the penalty prescribed; and, if that be too harsh, the remedy must be afforded by act of Congress, not by judicial legislation under the guise of construction. Under the circumstances, so far as disclosed, it is true that the imposition of the full penalty of fine and imprisonment upon each count seems unduly severe; but there may have been other facts and circumstances before the trial court properly influencing the extent of the punishment. In any event, the matter was one for that court, with whose judgment there is no warrant for interference on our part.

1932, Blockburger v. United States, 284 U.S. 305

Judgment affirmed.

Footnotes

SUTHERLAND, J., lead opinion (Footnotes)

1932, Blockburger v. United States, 284 U.S. 305

1.

1932, Blockburger v. United States, 284 U.S. 305

It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs [opium and other narcotics] except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found. . . .

1932, Blockburger v. United States, 284 U.S. 305

2.

1932, Blockburger v. United States, 284 U.S. 305

It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs specified in section 691 of this title, except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue.

Crowell v. Benson, 1932

Title: Crowell v. Benson

Author: U.S. Supreme Court

Date: February 23, 1932

Source: 285 U.S. 22

This case was argued October 20 and 21, 1931, and was decided February 23, 1932.

1932, Crowell v. Benson, 285 U.S. 22

CERTIORARI TO THE CIRCUIT COURT OF APPEAL

1932, Crowell v. Benson, 285 U.S. 22

FOR THE FIFTH CIRCUIT

Syllabus

1932, Crowell v. Benson, 285 U.S. 22

1. In virtue of its power to alter or revise the maritime law, Congress may provide that, where employees in maritime employment are disabled or die from accidental injuries arising out of or in the course of their employment upon the navigable waters of the United States, their employers shall pay reasonable compensation, without regard to fault as the cause of injury, and be thereby relieved from other liability. P. 39.

1932, Crowell v. Benson, 285 U.S. 22

2. The Longshoremen's and Harbor Workers' Compensation Act, which provides a scheme for compensation in the class of cases above described, applicable if recovery "through workmen's compensation proceedings may not validly be provided by State law," upheld as to substantive provisions. P. 22.

1932, Crowell v. Benson, 285 U.S. 22

3. The classifications of disabilities and beneficiaries and the amounts of compensation provided in the Act not being unreasonable, the Act in those respects is consistent with the due process clause of the Fifth Amendment. Pp. 41-42.

1932, Crowell v. Benson, 285 U.S. 22

4. The difficulty of ascertaining actual damages justifies the fixing of standard compensation in such an Act at figures reasonably approximating probable damages. Id.

1932, Crowell v. Benson, 285 U.S. 22

5. Considerations respecting the relation of master and servant, which sustain workmen's compensation laws of the States against objections under the due process clause of the Fourteenth Amendment, are applicable to the substantive provisions of this Act of Congress, tested by the due process clause of the Fifth Amendment. Id.

1932, Crowell v. Benson, 285 U.S. 22

6. Claims for compensation under the above-mentioned Act are filed with administrative officers called deputy commissioners, who "shall have full power and authority to hear and determine all questions in respect of such claim." They may issue subpoenas which are enforceable through contempt proceedings in federal courts. In investigating [285 U.S. 23] and hearing claims they, are not to be bound by the common law or statutory rules of evidence, except as provided in the Act, but are to proceed in such manner "as to best ascertain the rights of the parties." Hearings are to be public and reported stenographically, and records are to be made for which the Commission created by the Act must provide by regulation. Orders for compensation are to become final in 30 days. When compensation ordered is not paid, a supplementary order may be made declaring the amount in default, and judgment for that amount may be entered in a federal court if the order "is in accordance with law." Review of such judgment may be had as in suits for damages at common law. The Act further provides that, if a compensation order is "not in accordance with law," it may be suspended or set aside, in whole or in part, through injunction proceedings against the deputy commissioner who made it; and also that beneficiaries of such an order, or the deputy commissioner, may have it enforced in a federal court if the court determines that the order " was made and served in accordance with law."

1932, Crowell v. Benson, 285 U.S. 23

Held:

1932, Crowell v. Benson, 285 U.S. 23

(1) As the claims are governed by the maritime law and within the admiralty jurisdiction, trial by jury is not required by the Seventh Amendment. P. 45.

1932, Crowell v. Benson, 285 U.S. 23

(2) The Act reserves to the admiralty courts full power to pass upon all questions of law, including the power to deny effect to an administrative finding which is without evidence or contrary to the indisputable character of the evidence, or where the hearing was inadequate, unfair, or arbitrary. In this respect it, satisfies due process and attempts no interference with the judicial power in admiralty and maritime cases. Pp. 46, 49.

1932, Crowell v. Benson, 285 U.S. 23

(3) As regards questions of fact, the Act does not expressly preclude the court, in proceedings to set aside an order as not in accordance with law, from making its own examination and determination of facts whenever that is deemed necessary to enforce constitutional rights; and, as the Act is to be construed to support, rather than to defeat it, no such limitation should be implied. P. 46.

1932, Crowell v. Benson, 285 U.S. 23

(4) Apart from constitutional rights to be enforced in court, the Act contemplates that, in cases within its purview, the findings of a deputy commissioner on questions of fact respecting injuries to employees shall be final if supported by evidence. P. 46.

1932, Crowell v. Benson, 285 U.S. 23

(5) So limited, the use of the administrative method for determining facts (assuming due notice and opportunity to be heard and that findings are based upon evidence) is consistent with due process [285 U.S. 24] and is not an unconstitutional invasion of the judicial power. Pp. 47, 51.

1932, Crowell v. Benson, 285 U.S. 24

(6) The Act requires a public hearing, and that all proceedings upon a particular claim shall be shown in the record and open to challenge and opposing evidence; facts known to the deputy commissioner but not put in evidence will not support a compensation order. P. 48.

1932, Crowell v. Benson, 285 U.S. 24

(7) The provision that the deputy commissioner shall not be bound by the rules of evidence applicable in a court or by technical rules of procedure is compatible with due process provided the substantial rights of the parties be not infringed. Id.

1932, Crowell v. Benson, 285 U.S. 24

(8) Equipping the admiralty courts with power of injunction, for enforcing the standards of maritime law as defined by the Act, is consistent with Art. III of the Constitution. P. 49.

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(9) Where the question of fact relates to either of the two fundamental and jurisdictional conditions of the statute, viz., (a) occurrence of the injury upon navigable waters of the United States, and (b) existence of the relation of master and servant, the finding of the deputy commissioner is not conclusive, but the question is determinable de novo by the court on full pleadings and proofs in a suit for an injunction, in which the court is not confined to the evidence taken and record made before the deputy commissioner. The statute is susceptible of this construction, and must be so construed to avoid unconstitutionality. Pp. 54, 62.

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(10) In amending and revising the maritime law, Congress can not reach beyond the constitutional limits of the admiralty and maritime jurisdiction. P. 55.

1932, Crowell v. Benson, 285 U.S. 24

(11) Congress has no general authority to amend the maritime law so as to establish liability without fault in maritime cases regardless of particular circumstances or relations—in this instance, the relation of master and servant. P. 56.

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7. As respects the power of Congress to provide for determinations of fact otherwise than through the exercise of the judicial power reposed by the Constitution in the courts of the United States, a clear distinction exists between cases arising between the Government and other persons which, by their nature, do not require judicial determination (though they may be susceptible of it) and cases of private right, that is, of the liability of one individual to another under the law as defined. P. 50.

1932, Crowell v. Benson, 285 U.S. 24

8. Proper maintenance of the federal judicial power in enforcing constitutional restrictions precludes a power in Congress to substitute for constitutional courts, in which the judicial power of the United [285 U.S. 25] States is vested, an administrative agency for the final determination of facts upon which the enforcement of the constitutional rights of the citizen depend. P. 56.

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9. A State, on the other hand, may distribute its powers as it sees fit, provided only that it acts consistently with the essential demands of due process and does not transgress restrictions of the Federal Constitution applicable to state authority. P. 57.

1932, Crowell v. Benson, 285 U.S. 25

10. The power of Congress to change the procedure of the courts of admiralty would not justify lodging in an administrative officer final decision of facts upon which the constitutional rights of individuals are dependent. P. 61.

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11. In deciding upon the validity of an Act of Congress, regard must be had to substance, rather than form. P. 53.

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12. Where the validity of an Act of Congress is drawn in question or where a serious doubt of its constitutionality is raised, it is a cardinal principle that the court will first ascertain whether a construction of the Act is fairly possible by which the question may be avoided. P. 62.

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13. A declaration in a statute that if any of its provisions, or the application thereof to any persons or circumstances, shall be found unconstitutional, the validity of the remainder of the statute and the applicability of its provisions to other persons or circumstances shall not be affected evidences an intention that no implication from the terms of the Act which would render them invalid should be indulged. P. 63.

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45 F.2d 66, affirmed.

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Certiorari, 283 U.S. 814, to review a decree which affirmed a decree of the District Court, 33 F.2d 137; 38 id. 306, enjoining the enforcement of an award of compensation made by a deputy commissioner under the Longshoremen's and Harbor Workers' Compensation Act. [285 U.S. 36]

HUGHES, J., lead opinion

1932, Crowell v. Benson, 285 U.S. 36

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

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This suit was brought in the District Court to enjoin the enforcement of an award made by petitioner Crowell, as Deputy Commissioner of the United States Employees' Compensation Commission, in favor of the petitioner Knudsen and against the respondent Benson. The award was made under the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, c. 509, 44 Stat. 1424, U.S.C. Tit. 33, §§ 901-950), and rested upon [285 U.S. 37] the finding of the deputy commissioner that Knudsen was injured while in the employ of Benson and performing service upon the navigable waters of the United States. The complainant alleged that the award was contrary to law for the reason that Kundsen was not at the time of his injury an employee of the complainant, and his claim was not "within the jurisdiction" of the Deputy Commissioner. An amended complaint charged that the Act was unconstitutional upon the grounds that it violated the due process clause of the Fifth Amendment, the provision of the Seventh Amendment as to trial by jury, that of the Fourth Amendment as to unreasonable search and seizure, and the provisions of Article III with respect to the judicial power of the United States. The District Judge denied motions to dismiss and granted a hearing de novo upon the facts and the law, expressing the opinion that the Act would be invalid if not construed to permit such a hearing. The case was transferred to the admiralty docket, answers were filed presenting the issue as to the fact of employment, and, the evidence of both parties having been heard, the District Court decided that Knudsen was not in the employ of the petitioner and restrained the enforcement of the award. 33 F.2d 137; 38 F.2d 306. The decree was affirmed by the Circuit Court of Appeals (45 F.2d 66) and this Court granted writs of certiorari. 283 U.S. 814.

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The question of the validity of the Act may be considered in relation to (1) its provisions defining substantive rights and (2) its procedural requirements.

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First. The Act has two limitations that are fundamental. It deals exclusively with compensation in respect of disability or death resulting "from an injury occurring upon the navigable waters of the United States" if recovery "through workmen's compensation proceedings [285 U.S. 38] may not validly be provided by State law," and it applies only when the relation of master and servant exists. § 3. 1 "Injury," within the statute, "means accidental injury or death arising out of and in the course of employment," and the term "employer" means one "any of whose employees are employed in maritime employment, in whole or in part," upon such navigable waters. § 2(2)(4). Employers are made liable for the payment to their employees of prescribed compensation "irrespective of fault as a cause for the injury." § 4. The liability is exclusive, unless the employer fails to secure payment of the compensation. § 5. The employer is required to furnish appropriate medical and other treatment. § 7. The compensation for temporary or permanent disability, total or partial, according to the statutory classification, and, in case of the death of the employee, is fixed, being based upon prescribed percentages of average weekly wages, and the persons to whom payments are to be made are designated. §§ 6, 8, 9, 10. Employers must secure the payment [285 U.S. 39] of compensation by procuring insurance or by becoming self-insurers in the manner stipulated. § 32. Failure to provide such security is a misdemeanor. § 38 (33 USCA § 938).

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As the Act relates solely to injuries occurring upon the navigable waters of the United States, it deals with the maritime law, applicable to matters that fall within the admiralty and maritime jurisdiction (Const. Art. 3, § 2; Nogueira v. N.Y., N.H. & H.R. Co., 281 U.S. 128, 138), and the general authority of the Congress to alter or revise the maritime law which shall prevail throughout the country is beyond dispute. 2 In limiting the application of the Act to cases where recovery "through workmen's compensation proceedings may not validly be provided by State law," the Congress evidently had in view the decisions of this Court with respect to the scope of the exclusive authority of the national legislature. 3 The propriety [285 U.S. 40] of providing by federal statute for compensation of employees in such cases had been expressly recognized by this Court, 4 and, within its sphere, the statute was designed to accomplish the same general purpose as the Workmen's Compensation Laws of the states. 5 In defining [285 U.S. 41] substantive rights, the Act provides for recovery in the absence of fault, classifies disabilities resulting from injuries, fixes the range of compensation in case of disability or death, and designates the classes of beneficiaries. In view of federal power to alter and revise the maritime law, there appears to be no room for objection on constitutional grounds to the creation of these rights, unless it can be found in the due process clause of the Fifth Amendment. But it cannot be said that either the classifications of the statute or the extent of the compensation provided are unreasonable. In view of the difficulties which inhere in the ascertainment of actual damages, the Congress was entitled to provide for the payment of amounts which would reasonably approximate the probable damages. See Chicago, B. & Q. R. Co. v. Cram, 228 U.S. 70, 84; compare Missouri Pacific R. Co. v. Tucker, 230 U.S. 346, 348. Liability without fault is not unknown to the maritime law, 6 and, [285 U.S. 42] apart from this fact, considerations are applicable to the substantive provisions of this legislation, with respect to the relation of master and servant, similar to those which this Court has found sufficient to sustain workmen's compensation laws of the states against objections under the due process clause of the Fourteenth Amendment. New York Central R. Co. v. White, 243 U.S. 188; Mountain Timber Company v. Washington, 243 U.S. 219; Ward & Gow v. Krinsky, 259 U.S. 503; Lower Vein Coal Co. v. Industrial Board, 255 U.S. 144; Madera Sugar Pine Company v. Industrial Accident Commission, 262 U.S. 499, 501, 502; Sheehan Company v. Shuler, 265 U.S. 371; Dahlstrom Metallic Door Company v. Industrial Board, 284 U.S. 594. See Nogueira v. N.Y., N.H. & H.R. Co., supra, at pp. 136, 137.

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Second. The objections to the procedural requirements of the Act relate to the extent of the administrative authority which it confers. The administration of the Act—"except as otherwise specifically provided"—was given to the United States Employees' Compensation Commission, 7 which was authorized to establish compensation districts, appoint deputy commissioners, and make regulations. §§ 39, 40. Claimants must give written notice to the deputy commissioner and to the employer of the injury or death within thirty days thereafter; the deputy commissioner may excuse failure to give such notice for satisfactory reasons. § 12. If the employer contests the right to compensation, he is to file notice to that effect. § 14(d). A claim for compensation must be filed with [285 U.S. 43] the deputy commissioner within a prescribed period, and it is provided that the deputy commissioner shall have full authority to hear and determine all questions in respect to the claim. §§ 13, 19(a). Within ten days after the claim is filed, the deputy commissioner, in accordance with regulations prescribed by the Commission, must notify the employer and any other person who is considered by the deputy commissioner to be an interested party. The deputy commissioner is required to make, or cause to be made, such investigations as he deems to be necessary, and upon application of any interested party must order a hearing, upon notice, at which the claimant and the employer may present evidence. Employees claiming compensation must submit to medical examination. § 19. In conducting investigations and hearings, the deputy commissioner is not bound by common law or statutory rules of evidence, or by technical or formal rules or procedure, except as the Act provides, but he is to proceed in such manner "as to best ascertain the rights of the parties." § 23(a). He may issue subpoenas, administer oaths, compel the attendance and testimony of witnesses, the production of documents or other evidence or the taking of depositions, and may do all things conformable to law which may be necessary to enable him effectively to discharge his duties. Proceedings may be brought before the appropriate federal court to punish for misbehavior or contumacy as in case of contempt. § 27. Hearings before the deputy commissioner are to be public and reported stenographically, and the Commission is to provide by regulation for the preparation of a record. § 23(b). 8 Compensation orders are to be filed in the office of the deputy commissioner, and copies must be sent [285 U.S. 44] to the claimant and employer. § 19. The Act provides that it shall be presumed, in the absence of substantial evidence to the contrary, that the claim comes within the provisions of the Act, that sufficient notice of claim has been given, that the injury was not occasioned solely by the intoxication of the injured employee, or by the willful intention of such employee to injure or kill himself or another. § 20. A compensation order becomes effective when filed, and, unless proceedings are instituted to suspend it or set it aside, it becomes final at the expiration of thirty days. § 21(a). If there is a change in conditions, the order may be modified or a new order made. § 22. In case of default for thirty days in the payment of compensation, application may be made to the deputy commissioner for a supplementary order declaring the amount in default. Such an order is to be made after investigation, notice, and hearing, as in the case of claims. Upon filing a certified copy of the supplementary order with the clerk of the federal court, as stated, judgment is to be entered for the amount declared in default, if such supplementary order "is in accordance with law." Review of the judgment may be had as in civil suits for damages at common law, and the judgment may be enforced by writ of execution. § 18.

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The Act further provides that, if a compensation order is "not in accordance with law," it

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may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest

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against the deputy commissioner making the order and instituted in the federal District Court for the judicial district in which the injury occurred. 9 Payment is not to be stayed pending such proceedings unless, on hearing after notice, the court allows the stay on evidence [285 U.S. 45] showing that the employer would otherwise suffer irreparable damage. § 21(b). Beneficiaries of awards or the deputy commissioner may apply for enforcement to the federal District Court, and, if the court determines that the order "was made and served in accordance with law," obedience may be compelled by writ of injunction or other proper process. § 21(c). 10

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As the claims which are subject to the provisions of the Act are governed by the maritime law as established by the Congress, and are within the admiralty jurisdiction, the objection raised by the respondent's pleading as to the right to a trial by jury under the Seventh Amendment is unavailing (Waring v. Clarke, 5 How. 441, 459, 460), and that, under the Fourth Amendment, is neither explained nor urged. The other objections as to procedure invoke the due process clause and the provision as to the judicial power of the United States.

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(1) The contention under the due process clause of the Fifth Amendment relates to the determination of questions of fact. Rulings of the deputy commissioner upon questions of law are without finality. So far as [285 U.S. 46] the latter are concerned, full opportunity is afforded for their determination by the federal courts through proceedings to suspend or to set aside a compensation order, 21(b), by the requirement that judgment is to be entered on a supplementary order declaring default only in case the order follows the law (§ 18), and by the provision that the issue of injunction or other process in a proceeding by a beneficiary to compel obedience to a compensation order is dependent upon a determination by the court that the order was lawfully made and served. § 21(c). Moreover, the statute contains no express limitation attempting to preclude the court, in proceedings to set aside an order as not in accordance with law, from making its own examination and determination of facts whenever that is deemed to be necessary to enforce a constitutional right properly asserted. See Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 289; Ng Fung Ho. v. White, 259 U.S. 276, 284, 285; Prendergast v. New York Telephone Co., 262 U.S. 43, 50; Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 443, 444; Phillips v. Commissioner, 283 U.S. 589, 600. As the statute is to be construed so as to support, rather than to defeat it, no such limitation is to be implied. Panama Railroad Co. v. Johnson, 264 U.S. 375, 390.

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Apart from cases involving constitutional rights to be appropriately enforced by proceedings in court, there can be no doubt that the Act contemplates that as to questions of fact, arising with respect to injuries to employees within the purview of the Act, the findings of the deputy commissioner, supported by evidence and within the scope of his authority, shall be final. To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert, and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task. [285 U.S. 47] The object is to secure within the prescribed limits of the employer's liability an immediate investigation and a sound practical judgment, and the efficacy of the plan depends upon the finality of the determinations of fact with respect to the circumstances, nature, extent, and consequences of the employee's injuries and the amount of compensation that should be awarded. And this finality may also be regarded as extending to the determination of the question of fact whether the injury

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was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

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While the exclusion of compensation in such cases is found in what are called "coverage" provisions of the Act (§ 3), the question of fact still belongs to the contemplated routine of administration, for the case is one of employment within the scope of the Act, and the cause of the injury sustained by the employee as well as its character and effect must be ascertained in applying the provisions for compensation. The use of the administrative method for these purposes, assuming due notice, proper opportunity to be heard, and that findings are based upon evidence, falls easily within the principle of the decisions sustaining similar procedure against objections under the due process clauses of the Fifth and Fourteenth Amendments. 11

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The statute provides for notice and hearing, and an award made without proper notice, or suitable opportunity [285 U.S. 48] to be heard, may be attacked and set aside as without validity. The objection is made that, as the deputy commissioner is authorized to prosecute such inquiries as he may consider necessary, the award may be based wholly or partly upon an ex parte investigation and upon unknown sources of information, and that the hearing may be merely a formality. The statute, however, contemplates a public hearing, and regulations are to require "a record of the hearings and other proceedings before the deputy commissioners." § 23(b). This implies that all proceedings by the deputy commissioner upon a particular claim shall be appropriately set forth, and that whatever facts he may ascertain and their sources shall be shown in the record and be open to challenge and opposing evidence. Facts conceivably known to the deputy commissioner, but not put in evidence so as to permit scrutiny and contest, will not support a compensation order. Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 U.S. 88, 93; The Chicago Junction Case, 264 U.S. 258, 263; United States v. Abilene & Southern Railway Co., 265 U.S. 274, 288. An award not supported by evidence in the record is not in accordance with law. But the fact that the deputy commissioner is not bound by the rules of evidence which would be applicable to trials in court or by technical rules of procedure (§ 23(a)), does not invalidate the proceeding, provided substantial rights of the parties are not infringed. Interstate Commerce Commission v. Baird, 194 U.S. 25, 44; Interstate Commerce Commission v. Louisville & Nashville R. Co., supra; Spiller v. Atchison, T. & S.F. Ry. Co., 253 U.S. 117, 131; United States v. Abilene & Southern Railway Co., supra; Tagg Bros. & Moorhead v. United States, supra, at p. 442.

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(2) The contention based upon the judicial power of the United States, as extended "to all Cases of admiralty [285 U.S. 49] and maritime jurisdiction" (Const. Art. III), presents a distinct question. In Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 284, this Court, speaking through Mr. Justice Curtis, said:

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To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination.

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The question in the instant case, in this aspect, can be deemed to relate only to determinations of fact. The reservation of legal questions is to the same court that has jurisdiction in admiralty, and the mere fact that the court is not described as such is unimportant. Nor is the provision for injunction proceedings, § 21(b), open to objection. The Congress was at liberty to draw upon another system of procedure to equip the court with suitable and adequate means for enforcing the standards of the maritime law as defined by the Act. The Genesee Chief, 12 How. 443, 459, 460. Compare Panama R. Co. v. Johnson, supra, at p. 388. By statute and rules, courts of admiralty may be empowered to grant injunctions, as in the case of limitation of liability proceedings. Hartford Accident & Indemnity Co. v. Southern Pacific Co., 273 U.S. 207, 218. See also Marine Transit Corporation v. Dreyfus, 284 U.S. 263, decided January 4, 1932. The Congress did not attempt to define questions of law, and the generality of the description leaves no doubt of the intention to reserve to the Federal court full authority to pass upon all matters which this Court had held to fall within that category. There is thus no attempt to interfere with, but rather provision is made to facilitate, the exercise by the court of its jurisdiction [285 U.S. 50] to deny effect to any administrative finding which is without evidence, or "contrary to the indisputable character of the evidence," or where the hearing is "inadequate," or "unfair," or arbitrary in any respect. Interstate Commerce Commission v. Louisville R. Co., supra, at pp. 91, 92; Tagg Bros. & Moorhead v. United States, supra.

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As to determinations of fact, the distinction is at once apparent between cases of private right and those which arise between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments. The Court referred to this distinction in Murray's Lessee v. Hoboken Land & Improvement Co., supra, pointing out that

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there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.

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Thus the Congress, in exercising the powers confided to it, may establish "legislative" courts (as distinguished from "constitutional courts in which the judicial power conferred by the Constitution can be deposited") which are to form part of the government of territories or of the District of Columbia, 12 or to serve as special tribunals

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to examine and determine various matters, arising between the government and others, which, from their nature, do not require judicial determination and yet are susceptible of it.

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But

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the mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.

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Ex [285 U.S. 51] parte Bakelite Corporation, 279 U.S. 438, 451. Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions, and payments to veterans. 13

1932, Crowell v. Benson, 285 U.S. 51

The present case does not fall within the categories just described, but is one of private right, that is, of the liability of one individual to another under the law as defined. But, in cases of that sort, there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges. On the common law side of the federal courts, the aid of juries is not only deemed appropriate, but is required by the Constitution itself. In cases of equity and admiralty, it is historic practice to call to the assistance of the courts, without the consent of the parties, masters, and commissioners or assessors, to pass upon certain classes of questions, as, for example, to take and state an account or to find the amount of damages. While the reports of masters and commissioners in such cases are essentially of an advisory nature, it has not been the practice to disturb their findings when they are properly based upon evidence, in the absence of errors of law, 14 [285 U.S. 52] and the parties have no right to demand that the court shall redetermine the facts thus found. In admiralty, juries were anciently in use not only in criminal cases, but apparently in civil cases also. 15 The Act of February 26, 1845 (c. 20, 5 Stat. 726), purporting to extend the admiralty jurisdiction of the federal District Courts to certain cases arising on the Great Lakes, gave the right to "trial by jury of all facts put in issue in such suits, where either party shall require it." After the decision in the case of The Genesee Chief, supra, holding that the federal District Courts possessed general jurisdiction in admiralty over the lakes, and navigable waters connecting them, under the Constitution and the Judiciary Act of 1789 (chapter 20, § 9, 1 Stat. pp. 76, 77), this Court regarded the Enabling Act of 1845 as "obsolete and of no effect, with the exception of the clause which gives to either party the right of trial by jury when requested." The Eagle, 8 Wall. 15, 25. And this provision, the court said, was "rather a mode of exercising jurisdiction than any substantial part of it." See R.S. 566, U.S.C., Tit. 28, § 770. 16 Chief Justice Taney, in delivering the opinion of the court in the case of The Genesee Chief, supra, referring to this requirement, thus broadly stated the authority of Congress to change the procedure in courts of admiralty: [285 U.S. 53]

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The power of Congress to change the mode of proceeding in this respect in its courts of admiralty will, we suppose, hardly be questioned. The Constitution declares that the judicial power of the United States shall extend to "all cases of admiralty and maritime jurisdiction." But it does not direct that the court shall proceed according to ancient and established forms, or shall adopt any other form or mode of practice. The grant defines the subjects to which the jurisdiction may be extended by Congress. But the extent of the power, as well as the mode of proceeding in which that jurisdiction is to be exercised, like the power and practice in all the other courts of the United States, are subject to the regulation of Congress, except where that power is limited by the terms of the Constitution, or by necessary implication from its language. In admiralty and maritime cases, there is no such limitation as to the mode of proceeding, and Congress may therefore, in cases of that description, give either party right of trial by jury, or modify the practice of the court in any other respect that it deems more conducive to the administration of justice.

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It may also be noted that while, on an appeal in admiralty cases, "the facts, as well as the law, would be subjected to review and retrial," this Court has recognized the power of the Congress "to limit the effect of an appeal to a review of the law as applicable to facts finally determined below." The Francis Wright, 105 U.S. 381, 386; The Connemara, 108 U.S. 352, 359. Compare Luckenbach S.S. Co. v. United States, 272 U.S. 533, 536, 537.

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In deciding whether the Congress, in enacting the statute under review, has exceeded the limits of its authority to prescribe procedure in cases of injury upon navigable waters, regard must be had, as in other cases where constitutional limits are invoked, not to mere matters of form, but to the substance of what is required. [285 U.S. 54] The statute has a limited application, being confined to the relation of master and servant, and the method of determining the questions of fact, which arise in the routine of making compensation awards to employees under the Act, is necessary to its effective enforcement. The Act itself, where it applies, establishes the measure of the employer's liability, thus leaving open for determination the questions of fact as to the circumstances, nature, extent, and consequences of the injuries sustained by the employee for which compensation is to be made in accordance with the prescribed standards. Findings of fact by the deputy commissioner upon such questions are closely analogous to the findings of the amount of damages that are made according to familiar practice by commissioners or assessors, and the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases. For the purposes stated, we are unable to find any constitutional obstacle to the action of the Congress in availing itself of a method shown by experience to be essential in order to apply its standards to the thousands of cases involved, thus relieving the courts of a most serious burden while preserving their complete authority to insure the proper application of the law.

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(3) What has been said thus far relates to the determination of claims of employees within the purview of the Act. A different question is presented where the determinations of fact are fundamental or "jurisdictional" 17 in the sense that their existence is a condition precedent to the operation of the statutory scheme. These fundamental [285 U.S. 55] requirements are that the injury occurs upon the navigable waters of the United States, and that the relation of master and servant exists. These conditions are indispensable to the application of the statute not only because the Congress has so provided explicitly (§ 3), but also because the power of the Congress to enact the legislation turns upon the existence of these conditions.

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In amending and revising the maritime law, 18 the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction. 19 Unless the injuries to which the Act relates occur upon the navigable waters of the United States, they fall outside that jurisdiction. 20 Not only is navigability itself a question of fact, as waters that are navigable in fact are navigable in law, 21 but, where navigability is not in dispute, the locality of the injury, that is, whether it has occurred upon the navigable waters of the United States, determines the existence of the congressional power to create the liability prescribed by the statute. 22 Again, it [285 U.S. 56] cannot be maintained that the Congress has any general authority to amend the maritime law so as to establish liability without fault in maritime cases, regardless of particular circumstances or relations. It is unnecessary to consider what circumstances or relations might permit the imposition of such a liability by amendment of the maritime law, but it is manifest that some suitable selection would be required. In the present instance, the Congress has imposed liability without fault only where the relation of master and servant exists in maritime employment, and, while we hold that the Congress could do this, the fact of that relation is the pivot of the statute, and, in the absence of any other justification, underlies the constitutionality of this enactment. If the person injured was not an employee of the person sought to be held, or if the injury did not occur upon the navigable waters of the United States, there is no ground for an assertion that the person against whom the proceeding was directed could constitutionally be subjected, in the absence of fault upon his part, to the liability which the statute creates.

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In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. It is, rather, a question of the appropriate maintenance of the federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance, a single deputy commissioner 23—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of [285 U.S. 57] the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the executive department. That would be to sap the judicial power as it exists under the federal Constitution, and to establish a government of a bureaucratic character alien to our system wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.

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In this aspect of the question, the irrelevancy of state statutes and citations from state courts as to the distribution of state powers is apparent. A state may distribute its powers as it sees fit, provided only that it acts consistently with the essential demands of due process and does not transgress those restrictions of the Federal Constitution which are applicable to state authority. 24 In relation to the federal government, we have already noted the inappositeness to the present inquiry of decisions with respect to determinations of fact, upon evidence and within the authority conferred, made by administrative agencies which have been created to aid in the performance of governmental functions, and where the mode of determination is within the control of the Congress, as, e.g., in the proceedings of the Land Office pursuant to provisions for the disposition of public lands, of the authorities of the Post Office in relation to postal privileges, of the Bureau of Internal Revenue with respect to taxes, and of the Labor Department as to the [285 U.S. 58] admission and deportation of aliens. Ex parte Bakelite Corporation, supra. 25 Similar considerations apply to decisions with respect to determinations of fact by boards and commissions created by the Congress to assist it in its legislative process in governing various transactions subject to its authority, as, for example, the rates and practices of interstate carriers, the legislature thus being able to apply its standards to a host of instances which it is impracticable to consider and legislate upon directly and the action being none the less legislative in character because taken through a subordinate body. 26 And where administrative bodies have been appropriately created to meet the exigencies of certain classes of cases and their action is of a judicial character, the question of the conclusiveness of their administrative findings of fact generally arises where the facts are clearly not jurisdictional 27 and the scope of review as to such facts has been determined by the applicable legislation. None of the decisions of this sort touch the question which is presented where the facts involved are jurisdictional, 28 or where the question concerns the proper exercise of the judicial power of the United States in enforcing constitutional limitations.

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Even where the subject lies within the general authority of the Congress, the propriety of a challenge by judicial proceedings of the determinations of fact deemed to be jurisdictional, as underlying the authority of executive officers, has been recognized. When proceedings are taken against a person under the military law, and enlistment is denied, the issue has been tried and determined de novo upon habeas corpus. In re Grimley, 137 U.S. 147, 154, [285 U.S. 59] 155. See also In re Morrissey, 137 U.S. 157, 158; Givens v. Zerbst, 255 U.S. 11, 20. While, in the administration of the public land system, questions of fact are for the consideration and judgment of the Land Department and its decision of such questions is conclusive, it is equally true that, if lands

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never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them.

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This Court has held that

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matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases, the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act.

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Smelting Co. v. Kemp, 104 U.S. 636, 641. In such a case, the invalidity of the patent may be shown in a collateral proceeding. Polk v. Wendell, 9 Cranch. 87; Patterson v. Winn, 11 Wheat. 380; Minter v. Crommelin, 18 How. 87; Morton v. Nebraska, 21 Wall 660, 675; Noble v. Union River Logging Railroad, 147 U.S. 165, 174. The question whether a publication is a "book" or a "periodical" has been reviewed upon the evidence received in a suit brought to restrain the Postmaster General from acting beyond his authority in excluding the publication from carriage as second class mail matter. Hitchcock v. Smith, 34 App. D. C. 521, 530-533; id., 266 U.S. 54, 59. 29 [285 U.S. 60]

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In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function. The case of confiscation is illustrative, the ultimate conclusion almost invariably depending upon the decisions of questions of fact. This court has held the owner to be entitled to

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a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts.

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Ohio Valley Water Co. v. Ben Avon Borough, supra. See also Prendergast v. New York Telephone Co., 262 U.S. 43, 50; Tagg Bros. & Moorhead v. United States, supra; Phillips v. Commissioner, 283 U.S. 589, 600. Jurisdiction in the executive to order deportation exists only if the person arrested is an alien, and while, if there were jurisdiction, the findings of fact of the executive department would be conclusive, the claim of citizenship "is thus a denial of an essential jurisdictional fact," both in the statutory and the constitutional sense, and a writ of habeas corpus will issue "to determine the status." Persons claiming to be citizens of the United States "are entitled to a judicial determination of their claims," said this Court in Ng Fung Ho v. White, supra, at p. 285, and, in that case, the cause was remanded to the Federal District Court "for trial in that court of the question of citizenship."

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In the present instance, the argument that the Congress has constituted the deputy commissioner a factfinding tribunal is unavailing, as the contention makes the untenable assumption that the constitutional courts may be [285 U.S. 61] deprived in all cases of the determination of facts upon evidence even though a constitutional right may be involved. Reference is also made to the power of the Congress to change the procedure in courts of admiralty, a power to which we have alluded in dealing with the function of the deputy commissioner in passing upon the compensation claims of employees. But when fundamental rights are in question, this Court has repeatedly emphasized "the difference in security of judicial over administrative action." Ng Fung Ho v. White, supra. Even where issues of fact are tried by juries in the federal courts, such trials are under the constant superintendence of the trial judge. In a trial by jury in a federal court, the judge is "not a mere moderator," but "is the governor of the trial" for the purpose of assuring its proper conduct as well as of determining questions of law. Herron v. Southern Pacific Co., 283 U.S. 91, 95. In the federal courts, trial by jury

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is a trial by a jury of 12 men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict, if, in his opinion, it is against the law or the evidence.

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Capital Traction Co. v. Hof, 174 U.S. 1, 13, 14. Where testimony in an equity cause is not taken before the court, the proceeding is still constantly subject to the court's control. And while the practice of obtaining the assistance of masters in chancery and commissioners in admiralty may be regarded, as we have pointed out, as furnishing a certain analogy in relation to the normal authority of the deputy commissioner in making what is virtually an assessment of damages, the proceedings of such masters and commissioners are always subject to the direction of the court, and their reports are essentially advisory, a distinction of controlling importance when questions of a fundamental character are in issue. [285 U.S. 62]

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When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. 30 We are of the opinion that such a construction is permissible, and should be adopted in the instant case. The Congress has not expressly provided that the determinations by the deputy commissioner of the fundamental or jurisdictional facts as to the locality of the injury and the existence of the relation of master and servant shall be final. The finality of such determinations of the deputy commissioner is predicated primarily upon the provision, § 19(a), that he "shall have full power and authority to hear and determine all questions in respect of such claim." But "such claim" is the claim for compensation under the Act, and, by its explicit provisions, is that of an "employee," as defined in the Act, against his "employer." The fact of employment is an essential condition precedent to the right to make the claim. The other provision upon which the argument rests is that which authorizes the federal court to set aside a compensation order if it is "not in accordance with law." § 21(b). In the absence of any provision as to the finality of the determination by the deputy commissioner of the jurisdictional fact of employment, the statute is open to the construction that the court, in determining whether a compensation order is in accordance with law, may determine the fact of employment which underlies the operation of the statute. And, to remove the question as to validity, we think that the statute should be so construed. Further, the Act expressly requires that, [285 U.S. 63] if any of its provisions is found to be unconstitutional, "or the applicability thereof to any person or circumstances" is held invalid, the validity of the remainder of the Act and "the applicability of such provision to other persons and circumstances" shall not be affected. § 50. We think that this requirement clearly evidences the intention of the Congress not only that an express provision found to be unconstitutional should be disregarded without disturbing the remainder of the statute, but also that any implication from the terms of the Act which would render them invalid should not be indulged. This provision also gives assurance that there is no violation of the purpose of the Congress in sustaining the determinations of fact of the deputy commissioner where he acts within his authority in passing upon compensation claims while denying finality to his conclusions as to the jurisdictional facts upon which the valid application of the statute depends.

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Assuming that the federal court may determine for itself the existence of these fundamental or jurisdictional facts, we come to the question: upon what record is the determination to be made? There is no provision of the statute which seeks to confine the court in such a case to the record before the deputy commissioner or to the evidence which he has taken. The remedy which the statute makes available is not by an appeal or by a writ of certiorari for a review of his determination upon the record before him. The remedy is "through injunction proceedings mandatory or otherwise." § 21(b). The question in the instant case is not whether the deputy commissioner has acted improperly or arbitrarily as shown by the record of his proceedings in the course of administration in cases contemplated by the statute, but whether he has acted in a case to which the statute is inapplicable. By providing for injunction proceedings, the Congress evidently contemplated a suit as in equity, and, in such [285 U.S. 64] a suit, the complainant would have full opportunity to plead and prove either that the injury did not occur upon the navigable waters of the United States or that the relation of master and servant did not exist, and hence that the case lay outside the purview of the statute. As the question is one of the constitutional authority of the deputy commissioner as an administrative agency, the court is under no obligation to give weight to his proceedings pending the determination of that question. If the court finds that the facts existed which gave the deputy commissioner jurisdiction to pass upon the claim for compensation, the injunction will be denied insofar as these fundamental questions are concerned; if, on the contrary, the court is satisfied that the deputy commissioner had no jurisdiction of the proceedings before him, that determination will deprive them of their effectiveness for any purpose. We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the federal court should determine such an issue upon its own record and the facts elicited before it.

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The argument is made that there are other facts besides the locality of the injury and the fact of employment which condition the action of the deputy commissioner. That contention in any aspect could not avail to change the result in the instant case. But we think that there is a clear distinction between cases where the locality of the injury takes the case out of the admiralty and maritime jurisdiction, or where the fact of employment being absent there is lacking under this statute any basis for the imposition of liability without fault, and those cases which fall within the admiralty and maritime jurisdiction and where the relation of master and servant in maritime employment exists. It is in the latter field that the provisions for compensation apply, and that, for the reasons stated in the earlier part of this opinion, the determination [285 U.S. 65] of the facts relating to the circumstances of the injuries received, as well as their nature and consequences, may appropriately be subjected to the scheme of administration for which the Act provides.

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It cannot be regarded as an impairment of the intended efficiency of an administrative agency that it is confined to its proper sphere, but it may be observed that the instances which permit of a challenge to the application of the statute, upon the grounds we have stated, appear to be few. Out of the many thousands of cases which have been brought before the deputy commissioners throughout the country, a review by the courts has been sought in only a small number, 31 and an inconsiderable proportion of these appear to have involved the question whether the injury occurred within the maritime jurisdiction or whether the relation of employment existed.

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We are of the opinion that the District Court did not err in permitting a trial de novo on the issue of employment. Upon that issue, the witnesses who had testified before the deputy commissioner and other witnesses were heard by the District Court. The writ of certiorari was not granted to review the particular facts, but to pass upon the question of principle. With respect to the facts, the two courts below are in accord, and we find no reason to disturb their decision.

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Decree affirmed.

BRANDEIS, J., dissenting

Footnotes

HUGHES, J., lead opinion (Footnotes)

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\* Together with No. 20, Crowell, Deputy Commissioner, and Knudsen v. Benson.

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1. Section three of the Act as to "Coverage" provides:

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Sec. 3. (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

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(1) A master or member of a crew of any vessel nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

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(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

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(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

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2. Waring v. Clarke, 5 How. 441, 457, 458; The Lottawanna, 21 Wall. 558, 577; Butler v. Boston & Savannah Steamship Co., 130 U.S. 527, 556, 557; In re Garnett, 141 U.S. 1, 14; The Hamilton, 207 U.S. 398, 404; Atlantic Transport Co. v. Imbrovek, 234 U.S. 52, 62; Southern Pacific Co. v. Jensen, 244 U.S. 205, 214, 215; Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 160; State of Washington v. Dawson, 264 U.S. 219, 227, 228; Panama R. Co. v. Johnson, 264 U.S. 375, 386, 38.

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Important illustrations of the exercise of this authority are the Limitation of Liability Act of 1851 (9 Stat. 635; Hartford Accident & Indemnity Co. v. Southern Pacific Co., 273 U.S. 207, 213-215); the Seamen's Act of 1915 (38 Stat. 1185; Chelentis v. Luckenbach Steamship Co., 247 U.S. 372, 381, 384); the Ship Mortgage Act of 1920 (41 Stat. 1000; Morse Drydock & Repair Co. v. Northern Star, 271 U.S. 552, 555, 556); and the Merchant Marine Act of 1920 (41 Stat. 988), incorporating, in relation to seamen, the Federal Employers' Liability Act into the maritime law of the United States. 41 Stat. 1007; Panama R. Co. v. Johnson, supra; Engel v. Davenport, 271 U.S. 33, 35; Panama R. Co. v. Vasquez, 271 U.S. 557, 559, 560; Northern Coal & Dock Co. v. Strand, 278 U.S. 142, 147. See U.S.C., titles 33 and 46.

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3. Southern Pacific Co. v. Jensen, 244 U.S. 205; Knickerbocker Ice Co. v. Stewart, 253 U.S. 149; Washington v. Dawson, 264 U.S. 219; Robins Dry Dock & Repair Co. v. Dahl, 266 U.S. 449. For decisions since the passage of the Act in question, see Messel v. Foundation Co., 274 U.S. 427; Northern Coal & Dock Co. v. Strand, 278 U.S. 142; London Guarantee & Accident Co. v. Industrial Commission, 279 U.S. 109, 125; Baizley Iron Works v. Span, 281 U.S. 222.

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The application of state Workmen's Compensation Acts has been sustained where the work of the employee has been deemed to have no direct relation to navigation or commerce, and the operation of the local law "would work no material prejudice to the essential features of the general maritime law." Western Fuel Co. v. Garcia, 257 U.S. 233, 242; Grant Smith-Porter Co. v. Rohde, 257 U.S. 469, 477; Millers' Indemnity Underwriters v. Braud, 270 U.S. 59, 64; Sultan Railway & Timber Co. v. Department of Labor, 277 U.S. 135, 137; Baizley Iron Works v. Span, supra, at pp. 230, 231. See also Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109.

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4. Washington v. Dawson, 264 U.S. 219, 227, where the court said:

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Without doubt, Congress has power to alter, amend, or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general Employers' Liability Law or general provisions for compensating injured employees, but it may not be delegated to the several states.

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5. The Committee on the Judiciary of the Senate, in reporting upon the proposed measure, said (Sen.Rep. No. 973, 69th Cong., 1st Sess., p. 16):

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The committee deems it unnecessary to comment upon the modern change in the relation between employers and employees establishing systems of compensation as distinguished from liability. Nearly every State in the Union has a compensation law through which employees are compensated for injuries occurring in the course of their employment without regard to negligence on the part of the employer or contributory negligence on the part of the employee. If longshoremen could avail themselves of the benefits of State compensation laws, there would be no occasion for this legislation; but, unfortunately, they are excluded from these laws by reason of the character of their employment; and they are not only excluded, but the Supreme Court has more than once held that Federal legislation cannot, constitutionally, be enacted that will apply State laws to this occupation. (Southern Pacific Co. v. Jensen, 244 U.S. 205; Knickerbocker Ice Co. v. Stewart, 253 U.S. 149; Washington v. Dawson, 264 U.S. 219.)

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The House Committee, in its report, made the following statement (House Rep. No. 1767, 69th Cong., 2d Sess., p. 20):

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The principle of workmen's compensation has become so firmly established that simple justice would seem to require that this class of maritime workers should be included in this legislation. . . .

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The bill as amended, therefore, will enable Congress to discharge its obligation to the maritime workers placed under their jurisdiction by the Constitution of the United States by providing for them a law whereby they may receive the benefits of workmen's compensation and thus afford them the same remedies that have been provided by legislation for those killed or injured in the course of their employment in nearly every State in the Union.

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6. See, e.g., The Osceola, 189 U.S. 158, 169; The Iroquois, 194 U.S. 240, 241, 242. In Chicago, R. I. & P. R. Co. v. Zernecke, 183 U.S. 582, 586, the Court said:

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Our jurisprudence affords examples of legal liability without fault, and the deprivation of property without fault being attributable to its owner. The law of deodands was such an example. The personification of the ship in admiralty law is another.

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See Holmes, "The Common Law," pp. 26-29; The China, 7 Wall. 53, 67, 68; Sherlock v. Alling, 93 U.S. 99, 105-108; Homer Ramsdell Transp. Co. v. La Compagnie Generale Transatlantique, 182 U.S. 406, 413, 414. As to the basis of general average contribution, see Ralli v. Troop, 157 U.S. 386, 394, 395.

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7. This Commission was created by the Act of September 7, 1916, c. 458, § 28, 39 Stat. 748, U.S.C., Tit. 5, § 778.

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8. In the regulations promulgated by the Commission in the form of instructions to deputy commissioners, provision was made for findings of fact. Report, United States Employees' Compensation Commission, for fiscal year ending June 30, 1930, p. 64. See Howard v. Monahan, 33 F.2d 220.

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9. In the District of Columbia, the proceedings are to be instituted in the Supreme Court of the District.

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10. The United States Employees' Compensation Commission estimates that the number of employees who at times are engaged in employments covered by the Act is in excess of 300,000. Report for fiscal year ending June 30, 1931, p. 66. The Commission states that 138,788 cases have been closed during the four years that the law has been in operation. Id., p. 69. During the last fiscal year, the injuries reported under the Act numbered 28,861, of which 156 were "fatal" cases. The total number of cases disposed of during that year, including those brought forward from the preceding years, was 30,489, of which there were 13,261 "nonfatal" cases which caused no loss of time, and 4,067 of such cases in which the duration of disability did not exceed seven days. Compensation payments were completed in 11,776 cases. Hearings held by deputy commissioners during the fiscal year number 1,217, of which 905 involved compensation payments. At the end of the fiscal year, there were 102 cases pending in federal District Courts wherein the plaintiffs asked review of compensation orders. Id., 68-70.

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11. Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685, 695; Crane v. Hahlo, 258 U.S. 142, 147; Federal Trade Commission v. Curtis Publishing Co., 260 U.S. 568, 580; Silberschein v. United States, 266 U.S. 221, 225; Virginian Railway Co. v. United States, 272 U.S. 658, 663; Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 442; International Shoe Co. v. Federal Trade Commission, 280 U.S. 291, 297; Dohany v. Rogers, 281 U.S. 362, 369; Phillips v. Commissioner, 283 U.S. 589, 600. See also Hardware Dealers Mutual Fire Insurance Co. v. Glidden, 284 U.S. 151; New York Central R. Co. v. White, supra, at pp. 194, 207, 208; Mountain Timber Co. v. Washington, supra, at p. 233.

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12. American Insurance Co. v. Canter, 1 Pet. 511, 546; Keller v. Potomac Electric Power Co., 261 U.S. 428, 442-444; Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693, 700.

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13. Virginian Railway Co. v. United States, supra; Tagg Bros. & Moorhead v. United States, supra; International Shoe Co. v. Federal Trade Commission, supra; Phillips v. Commissioner, supra; United States v. Ju Toy, 198 U.S. 253, 263; United States v. Babcock, 250 U.S. 328, 331; Burfenning v. Chicago, St. P., M. & O. Ry. Co., 163 U.S. 321, 323; Bates & Guild Co. v. Payne, 194 U.S. 106, 109; Houston v. St. Louis Packing Co., 249 U.S. 479, 484; Passavant v. United States, 148 U.S. 214, 219; Silberschein v. United States, 266 U.S. 221, 225.

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14. As to masters in chancery, see Tilghman v. Proctor, 125 U.S. 136, 149, 150; Callaghan v. Myers, 128 U.S. 617, 666, 667; Kimberly v. Arms, 129 U.S. 512, 523, 524; Davis v. Schwartz, 155 U.S. 631, 636.

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As to commissioners in admiralty, see The Cayuga (C.C.A. 6th), 59 F. 483, 488; La Bourgogne (C.C.A. 2d), 144 F. 781, 782, 783; The North Star (C.C.A. 2d), 151 F. 168, 177; Western Transit Co. v. Davidson S.S. Co. (C.C.A. 6th), 212 F. 696, 701; P. Sanford Ross, Inc. v. Public Service Corp. (C.C.A. 3d), 42 F.2d 79, 80.

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15. 4 Chr. Robinson's Admiralty Reports, p. 74, note; Black Book of the Admiralty (Twiss' Ed.) vol. 1, pp. 49, 53, 245; 1 Abbott on Shipping (5th Am. Ed.) pp. 283, 284; 1 Benedict's Admiralty (5th Ed.) p. 304, note.

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16. As to the effect of the verdict of the jury in such cases, see The Western States, 159 F. 354, 358, 359; Sweeting v. The Western States, 210 U.S. 433; The Nyack, 199 F. 383, 389; 1 Benedict's Admiralty (5th Ed.) p. 305.

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17. The term "jurisdictional," although frequently used, suggests analogies which are not complete when the reference is to administrative officials or bodies. See Interstate Commerce Commission v. Humboldt Steamship Co., 224 U.S. 474, 484. In relation to administrative agencies, the question in a given case is whether it falls within the scope of the authority validly conferred.

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18. This power is distinct from the authority to regulate interstate or foreign commerce, and is not limited to cases arising in that commerce. The Genesee Chief v. Fitzhugh, 12 How. 443, 452; The Commerce, 1 Black 574, 578, 579; The Belfast, 7 Wall. 624, 640, 641; Ex parte Boyer, 109 U.S. 629, 632; In re Garnett, 141 U.S. 1, 15; London Guarantee & Accident Co. v. Industrial Commission, 279 U.S. 109, 124.

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19. The Belfast, supra; Panama R. Co. v. Johnson, supra; The Genesee Chief, supra, at p. 459 of 12 How., 13 L. Ed. 1058; 1 Benedict's Admiralty (5th Ed.) § 32, p. 47.

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20. Cleveland Terminal & V. R. Co. v. Cleveland Steamship Co., 208 U.S. 316; Atlantic Transport Co. v. Imbrovek, supra, at pp. 59, 60; Industrial Commission v. Nordenholt Co., 259 U.S. 263, 273; Washington v. Dawson, supra, at pp. 227, 235; Nogueira v. N.Y., N.H. & H.R. Co., 281 U.S. 128, 133, 138.

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21. The Daniel Ball, 10 Wall. 557, 563; United States v. Holt State Bank, 270 U.S. 49, 56; United States v. Utah, 283 U.S. 64, 76, 77; Arizona v. California, 283 U.S. 423, 452.

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22. Industrial Commission v. Nordenholt Co., supra; Washington v. Dawson, supra; Nogueira v. N.Y., N.H. & H.R. Co., supra; 1 Benedict's Admiralty, 5th ed., § 29, pp. 41, 42, note.

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23. See Report of United States Employees' Compensation Commission for fiscal year ending June 30, 1931, pp. 108, 109.

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24. Prentis v. Atlantic Coast Line, 211 U.S. 210, 225; Chicago, Rock Island & Pacific Ry. Co. v. Cole, 251 U.S. 54, 56; Missouri ex rel. Hurwitz v. North, 271 U.S. 40, 42.

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25. Supra, note 13.

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26. See Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co., 284 U.S. 370.

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27. Freund, "Administrative Powers Over Persons and Property," § 154, p. 293.

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28. Id., § 153, pp. 291-293.

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29. Where the doctrine of personal liability of an officer for acting without jurisdiction is applied, courts have received evidence to show the jurisdictional defect. Thus in Miller v. Horton, 152 Mass. 540, 26 N.E. 100, an action was brought against the members of a town board of health who had killed a horse in obedience to an order of the commissioners on contagious diseases among domestic animals, acting under the alleged authority of the state Legislature. The order recited that the animal had been examined and was adjudged to have the glanders. The judge before whom the case was tried "found the horse had not the glanders," but declined to rule against the defendants. The Supreme Judicial Court sustained exceptions, holding that

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The fact as to the horse having the disease was open to investigation in the present action, and, on the finding that it did not have it, the plaintiff was entitled to a ruling that the defendants had failed to make out their justification.

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Id., p. 548. See also Pearson v. Zehr, 138 Ill. 48, 51, 52, 29 N.E. 854.

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30. Panama R. Co. v. Johnson, supra, at p. 390; Missouri Pacific R. Co. v. Boone, 270 U.S. 466, 471, 472; Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 346; Blodgett v. Holden, 275 U.S. 142, 148; Lucas v. Alexander, 279 U.S. 573, 577.

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31. Supra, note 10.

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fmx

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MR. JUSTICE BRANDEIS, dissenting.

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Knudsen filed a claim against Benson under § 19(a) of the Longshoremen's and Harbor Workers' Compensation Act, March 4, 1927, c. 509, 44 Stat. 1424. Benson's answer denied, among other things, that the relation of employer and employee existed between him and the claimant. The evidence introduced before the deputy [285 U.S. 66] commissioner, which occupies 78 pages of the printed record, was directed largely to that issue, and was conflicting. The deputy commissioner found that the claimant was in Benson's employ at the time of the injury, and filed an order for compensation under § 21(a). Benson brought this proceeding under § 21(b) to set aside the order. The District Judge transferred the suit to the admiralty side of the court and held a trial de novo, refusing to consider upon any aspect of the case the record before the deputy commissioner. On the evidence introduced in court, he found that the relation of employer and employee did not exist, and entered a decree setting aside the compensation order. 33 F.2d 137, 38 F.2d 306. The Circuit Court of Appeals affirmed the decree. 45 F.2d 66. This Court granted certiorari. 283 U.S. 814. In my opinion, the decree should be reversed, because Congress did not authorize a trial de novo.

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The primary question for consideration is not whether Congress provided, or validly could provide, that determinations of fact by the deputy commissioner should be conclusive upon the District Court. The question is: upon what record shall the District Court's review of the order of the deputy commissioner be based? The courts below held that the respondent was entitled to a trial de novo; that all the evidence introduced before the deputy commissioner should go for naught; and that respondent should have the privilege of presenting new, and even entirely different, evidence in the District Court. Unless that holding was correct, the judgment below obviously cannot be affirmed.

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First. The initial question is one of construction of the Longshoremen's Act. The Act does not, in terms, declare whether there may be a trial de novo either as to the issue whether the relation of employer and employee existed at the time of the injury or as to any other issue, tried or triable, before the deputy commissioner. It provides, by § 19(a), that "the deputy commissioner shall [285 U.S. 67] have full power and authority to hear and determine all questions in respect of" a claim; by § 21(a), that the compensation order made by the deputy commissioner "shall become effective" when filed in his office, and,

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unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this §, shall become final . . . ;

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and, by § 21(b), that,

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if not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings . . . instituted in the Federal district court. . . .

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The phrase in § 21(b) providing that the order may be set aside "if not in accordance with law" was adopted from the statutory provision, enacted by the same Congress, for review by the Circuit Courts of Appeals of decisions of the Board of Tax Appeals. 1 This Court has settled that the phrase, as used in the tax statute, means a review upon the record made before the Board. Phillips v. Commissioner, 283 U.S. 589, 600. The Compensation Commission has consistently construed the Longshoremen's Act as providing for finality of the deputy commissioners' findings on all questions of fact; 2 and care [285 U.S. 68] has been taken to provide for formal hearings appropriate to that intention. Compare Brown v. United States, 113 U.S. 568, 571; Mason v. Routzahn, 275 U.S. 175, 178. The lower federal courts, except in the case at bar, have uniformly construed the Act as denying a trial de novo of any issue determined by the deputy commissioner; have held that, in respect to those issues, the review afforded must be held upon the record made before the deputy commissioner; and that the deputy commissioner's findings of fact must be accepted as conclusive if supported by evidence, unless there was some irregularity in the proceeding before him. 3 Nearly all the state [285 U.S. 69] courts have construed the state workmen's compensation laws, as limiting the judicial review to matters of law. 4 Provisions in other federal statutes, similar to [285 U.S. 70] those here in question, creating, various administrative tribunals, have likewise been treated as not conferring the right to a judicial trial de novo. 5 [285 U.S. 71]

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The safeguards with which Congress has surrounded the proceedings before the deputy commissioner would be without meaning if those proceedings were to serve merely as an inquiry preliminary to a contest in the courts. 6 Specific provisions of the Longshoremen's Act make clear that it was the aim of Congress to expedite the relief afforded. With a view to obviating the delays incident to judicial proceedings, the Act substitutes an administrative tribunal for the court, and, besides providing for notice and opportunity to be heard, endows the proceedings before the deputy commissioner with the customary incidents of a judicial hearing. It prescribes that the parties in interest may be represented by counsel, § 19(d); that the attendance of witnesses and the [285 U.S. 72] production of documents may be compelled, § 27(a); that the hearings shall be public, and that they shall be stenographically reported, § 23(b); that there shall be made "a record of the hearings and other proceedings before the deputy commissioners," § 23(b); that "the deputy commissioner shall have full power and authority to hear and determine all questions in respect of" a claim, § 19(a); and that his order shall become final after thirty days, unless a proceeding is filed under § 21(b), charging that it is "not in accordance with law." Procedure of this character, instead of expediting relief, would entail useless expense and delay if the proceedings before the deputy commissioner were to be repeated in court and the case tried from the beginning, at the option of either party. The conclusion that Congress did not so intend is confirmed by reference to the legislative history of the Act. 7 Compare Caminetti v. United States, 242 U.S. 470, 490. [285 U.S. 73]

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Second. Nothing in the statute warrants the construction that the right to a trial de novo which Congress has concededly denied as to most issues of fact determined by the deputy commissioner has been granted in respect to the issue of the existence of the employer-employee relation. The language which is held sufficient to foreclose the right to such a trial on some issues forecloses it as to all. Whether the peculiar relation which the fact of employment is asserted to bear to the scheme of the statute and to the constitutional authority under which it was passed might conceivably have induced Congress to provide a special method of review upon that question, it is not necessary to inquire. For Congress expressly declared its intention to put, for purposes of review, all the issues of fact on the same basis, by conferring upon the deputy commissioner "full power to hear and determine all questions in respect of such claim," subject only to the power of the court to set aside his order "if not in accordance with law."

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The suggestion that "such claim" may be construed to mean only a claim within the purview of the Act seems to me without substance. Logically applied, the suggestion would leave the deputy commissioner powerless to hear or determine any issue of asserted nonliability under the Act. For nonexistence of the employer employee relation is only one of many grounds of nonliability. Thus, there is no liability if the injury was occasioned solely by the intoxication of the employee; or if the injury was due to the willful intention of the employee to [285 U.S. 74] injure or kill himself or another; or if it did not arise "out of or in the course of employment"; or if the employer was not engaged in maritime employment in whole or in part; or if the injured person was the employee of a subcontractor who has secured payment of compensation; or if the proceeding is brought against the wrong person as employer; or if the disability or death is that of a master or a member of the crew of any vessel; or if it is that of a person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or if it is that of an officer or employee of the United States or any agency thereof; or if it is that of an officer or employee of any state, or foreign government, or any political subdivision thereof; or if recovery for the disability or death through workmen's compensation proceedings may be validly provided by state law. And obviously there is no liability if there was in fact neither disability nor death. It is not reasonable to suppose that Congress intended to set up a factfinding tribunal of first instance, shorn of power to find a portion of the facts required for any decision of the case; or that, in enacting legislation designed to withdraw from litigation the great bulk of maritime accidents, it contemplated a procedure whereby the same facts must be twice litigated before a longshoreman could be assured the benefits of compensation.

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The circumstance that Congress provided, in § 21(b), of the Act, for review of orders of the deputy commissioner by injunction proceedings is urged as indicative of an intention that in such proceedings the complainant should have full opportunity to plead and prove any facts showing that the case lay outside the purview of the statute. But by this reasoning, again, many other questions besides those referred to by the Court would be open to retrial upon new, and different, evidence. The simple answer is that on bills in equity to set aside orders of a federal [285 U.S. 75] administrative board there is no trial de novo of issues of fact determined by that tribunal. As stated in Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 443, concerning orders of the Secretary of Agriculture under the Packers and Stockyards Act:

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A proceeding under § 316 of the Packers and Stockyards Act is a judicial review, not a trial de novo. The validity of an order of the Secretary, like that of an order of the Interstate Commerce Commission, must be determined upon the record of the proceedings before him—save as there may be an exception of issues presenting claims of constitutional right, a matter which need not be considered or decided now. 8

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In the review of the quasi judicial decisions of these federal administrative tribunals the bill in equity serves the purpose which at common law, and under the practice of many of the states, is performed by writs of certiorari. 9 It presents to the reviewing court the record of the proceedings before the administrative tribunal in order that determination may be made, among other things, whether the authority conferred has been properly exercised. 10 Neither upon bill in equity in the federal [285 U.S. 76] courts nor writ of certiorari in the states is it the practice to permit fresh evidence to be offered in the reviewing court. There is no foundation for the suggestion that Congress intended to provide otherwise in the Longshoremen's Act.

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Third. It is said that the provision for a trial de novo of the existence of the employer employee relation should be read into the Act in order to avoid a serious constitutional doubt. It is true that, where a statute is equally susceptible of two constructions, under one of which it is clearly valid and under the other of which it may be unconstitutional, the court will adopt the former construction. Presser v. Illinois, 116 U.S. 252, 269; Knights Templars' Indemnity Co. v. Jarman, 187 U.S. 197, 205; Carey v. South Dakota, 250 U.S. 118, 122; Missouri Pacific R. Co. v. Boone, 270 U.S. 466, 471, 472. But this Act is not equally susceptible to two constructions. The court may not, in order to avoid holding a statute unconstitutional, engraft upon it an exception or other provision. Butts v. Merchants' & Miners' Transportation Co., 230 U.S. 126, 133; The Employers' Liability Cases, 207 U.S. 463, 500-502; Trade-Mark Cases, 100 U.S. 82, 99; United States v. Fox, 95 U.S. 670, 672, 673; United States [285 U.S. 77] v. Reese, 92 U.S. 214, 221. Compare Illinois Central R. Co. v. McKendree, 203 U.S. 514, 529; Cella Commission Co. v. Bohlinger, 147 F. 419, 423, 424. Neither may it do so to avoid having to resolve a constitutional doubt. To hold that Congress conferred the right to a trial de novo on the issue of the employer employee relation seems to me a remaking of the statute and not a construction of it.

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Fourth. Trial de novo of the issue of the existence of the employer employee relation is not required by the due process clause. That clause ordinarily does not even require that parties shall be permitted to have a judicial tribunal pass upon the weight of the evidence introduced before the administrative body. See Dahlstrom Metallic Door Co. v. Industrial Board, 284 U.S. 594. The findings of fact of the deputy commissioner, the Court now decides, are conclusive as to most issues if supported by evidence. Yet, as to the issue of employment, the Court holds not only that such findings may not be declared final, but that it would create a serious constitutional doubt to construe the Act as committing to the deputy commissioner the simple function of collecting the evidence upon which the court will ultimately decide the issue.

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It is suggested that this exception is required as to issues of fact involving claims of constitutional right. For reasons which I shall later discuss, I cannot believe that the issue of employment is one of constitutional right. But even assuming it to be so, the conclusion does not follow that trial of the issue must therefore be upon a record made in the District Court. That the function of collecting evidence may be committed to an administrative tribunal is settled by a host of cases, 11 and [285 U.S. 78] supported by persuasive analogies, none of which justify a distinction between issues of constitutional right and any others. Resort to administrative remedies may be made a condition precedent to a judicial hearing. Northern Pacific Ry. Co. v. Solum, 247 U.S. 477, 483, 484; First National Bank of Greeley v. Board of County Commissioners, 264 U.S. 450, 454, 455; United States Navigation Co. v. Cunard S.S. Co., 284 U.S. 474. This is so even though a party is asserting deprivation of rights secured by the Federal Constitution. First National Bank of Greeley v. Board of County Commissioners, supra. In federal equity suits, the taking of evidence on any issue in open court did not become common until 1913, 12 compare Los Angeles Brush Mfg. [285 U.S. 79] Corp, v. James, 272 U.S. 701; and in admiralty, it was not required by the rules of this Court until 1921. 13 Compare The P. R.R. No. 35, 48 F.2d 122. On appeals in admiralty, further proof is now taken by a commission. 14 As was said concerning a similar tribunal in Washington ex rel. Oregon Railroad & Navigation Co. v. Fairchild, 224 U.S. 510, 527, the function of the deputy commissioner is like that of a master in chancery who has been required to take testimony and report his findings of fact and conclusions of law. Compare Los Angeles Brush Corporation v. James, supra; Kimberly v. Arms, 129 U.S. 512, 524, 525; Armstrong v. Belding Bros. & Co., 297 F. 728, 729. The holding that the difference between the procedure prescribed by the Longshoremen's Act and these historic methods of hearing evidence transcends the limits of congressional power when applied to the issue of the existence of a relation of employment, as distinguished from that of the circumstances of an injury or the existence of a relation of dependency, seems to me without foundation in reality. Certainly there is no difference to the litigant. [285 U.S. 80]

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Even in respect to the question, discussed by the Court, of the finality to be accorded administrative findings of fact in a civil case involving pecuniary liability, I see no reason for making special exception as to issues of constitutional right unless it be that, under certain circumstances, there may arise difficulty in reaching conclusions of law without consideration of the evidence as well as the findings of fact. See Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 443. Compare Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287. The adequacy of that reason need not be discussed. For, as to the issue of employment, no such difficulty can be urged. Two decades of experience in the states testify to the appropriateness of the administrative process as applied to this issue, as well as all others, in workmen's compensation controversies.

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Fifth. Trial de novo of the existence of the employer employee relation is not required by the Judiciary Article of the Constitution. The mere fact that the Act deals only with injuries arising on navigable waters, and that, independently of legislation, such injuries can be redressed only in courts of admiralty, 15 obviously does not preclude Congress from denying a trial de novo. For the Court holds that it is compatible with the grant of power under Article III to deny a trial de novo as to most of the facts [285 U.S. 81] upon which rest the allowance of a claim and the amount of compensation. Its holding that the Constitution requires a trial de novo of the issue of the employer employee relation is based on the relation which that fact bears to the statutory scheme propounded by Congress, and to the constitutional authority under which the Act was passed. The argument is that existence of the relation of employer and employee is, as a matter of substantive law, indispensable to the application of the statute, because the power of Congress to enact the legislation turns upon its existence, and that, whenever the question of constitutional power depends upon an issue of fact, that issue must, as a matter of procedure, be determinable independently upon evidence freshly introduced in a court. 16 Neither proposition seems to me well founded.

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Whether the power of Congress to provide compensation for injuries occurring on navigable waters is limited to cases in which the employer employee relation exists has not heretofore been passed upon by this Court, and was not argued in this case. I see no justification for assuming, under those circumstances, that it is so limited. [285 U.S. 82] Without doubt the word "employee" was used in the Longshoremen's Act in the sense in which the common law defines it. But that definition is not immutable, and no provision of the Constitution confines the application of liability without fault to instances where the relation of employment, as so defined, exists. 17 Compare Louis Pisitz Dry Goods Co. v. Yeldell, 274 U.S. 112, 116. Whether an individual is an employer or an independent contractor depends upon criteria often subtle and uncertain of application, 18 criteria which have been developed, by processes [285 U.S. 83] of judicial exclusion and inclusion, largely since the adoption of the Constitution 19 and with reference, for the most part, to considerations foreign to industrial accident litigation. It is not to be assumed that Congress, having power to amend and revise the maritime law, is prevented from modifying those criteria and enlarging the liability imposed by this Act so as to embrace all persons who are engaged or engage themselves in the work of another, including those now designated as independent contractors. In the Longshoremen's Act itself, Congress, far from declaring the relation of master and servant indispensable in all cases to the application of the statute, provided expressly that a contractor shall be liable to employees of a subcontractor who has failed to secure payment of compensation. § 4(a) of the Act. State Workmen's Compensation Laws almost invariably contain provisions for liability either to independent contractors or to their employees, sometimes absolute and sometimes conditioned upon default by the immediate employer; 20 and these provisions [285 U.S. 84] appear to have been uniformly upheld. 21 I cannot doubt that, even upon the view of the evidence taken by the District Court, Congress might have made Benson liable to Knudsen for the injury which he sustained.

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Sixth. Even if the constitutional power of Congress to provide compensation is limited to cases in which the [285 U.S. 85] employer-employee relation exists, I see no basis for a contention that the denial of the right to a trial de novo upon the issue of employment is in any manner subversive of the independence of the federal judicial power. Nothing in the Constitution, or in any prior decision of this Court to which attention has been called, lends support to the doctrine that a judicial finding of any fact involved in any civil proceeding to enforce a pecuniary liability may not be made upon evidence introduced before a properly constituted administrative tribunal, or that a determination so made may not be deemed an independent judicial determination. Congress has repeatedly exercised authority to confer upon the tribunals which it creates, be they administrative bodies or courts of limited jurisdiction, the power to receive evidence concerning the facts upon which the exercise of federal power must be predicated, and to determine whether those facts exist. The power of Congress to provide by legislation for liability under certain circumstances subsumes the power to provide for the determination of the existence of those circumstances. It does not depend upon the absolute existence in reality of any fact.

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It is true that, so far as Knudsen is concerned, proof of the existence of the employer employee relation is essential to recovery under the Act. But under the definition laid down in Noble v. Union River Logging R. Co., 147 U.S. 165, 173, 174, that fact is not jurisdictional. It is quasi jurisdictional. The existence of a relation of employment is a question going to the applicability of the substantive law, not to the jurisdiction of the tribunal. Jurisdiction is the power to adjudicate between the parties concerning the subject-matter. Compare Reynolds v. Stockton, 140 U.S. 254, 268. Obviously, the deputy commissioner had not only the power but the duty to determine whether the employer employee relation existed. When a duly constituted tribunal has jurisdiction [285 U.S. 86] of the parties and of the subject matter, that jurisdiction is not impaired by errors, however grave, in applying the substantive law. Dennison v. Payne, 293 F. 333, 341. Compare Chicago, Rock Island & Pacific Ry. Co. v. Schendel, 270 U.S. 611, 617; Marin v. Augedahl, 247 U.S. 142, 149; Binderup v. Pathe Exchange, 263 U.S. 291, 305-307. This is true of tribunals of special as well as of those of general jurisdiction. It is true of administrative, as well as of judicial, tribunals. If errors in the application of law may not be made the basis of collateral attack upon the decision of an administrative tribunal, once that decision has become final, no "jurisdictional" defect can compel the independent reexamination in court, upon direct review, of the facts affecting such applicability.

1932, Crowell v. Benson, 285 U.S. 86

The "judicial power" of Article III of the Constitution is the power of the federal government, and not of any inferior tribunal. There is in that article nothing which requires any controversy to be determined as of first instance in the federal District Courts. The jurisdiction of those courts is subject to the control of Congress. 22 Matters [285 U.S. 87] which may be placed within their jurisdiction may instead be committed to the state courts. If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of any prohibition against the diminution of the jurisdiction of the federal District Courts as such, but because, under certain circumstances, the constitutional requirement of due process is a requirement of judicial process. An accumulation of precedents, already referred to, 23 has established that in civil proceedings involving [285 U.S. 88] property rights determination of facts may constitutionally be made otherwise than judicially; and, necessarily, that evidence as to such facts may be taken outside of a court. I do not conceive that Article III has properly any bearing upon the question presented in this case.

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Seventh. The cases cited by the Court in support of its conclusion that the statute would be invalid if construed to deny a trial de novo of issues of fact affecting the existence of the employer employee relation seem to me irrelevant. Most of those decisions dealt with tribunals exercising functions generically different from the function which Congress has assigned to the deputy commissioners under the Longshoremen's Act, and no question arose analogous to that now presented.

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By the Longshoremen's Act, Congress created factfinding and fact-gathering tribunals, supplementing the courts and intrusted with power to make initial determinations in matters within, and not outside, ordinary judicial purview. The purpose of these administrative bodies is to withdraw from the courts, subject to the power of judicial review, a class of controversy which experience has shown can be more effectively and expeditiously handled in the first instance by a special and expert tribunal. The proceedings of the deputy commissioners are endowed with every substantial safeguard of a judicial hearing. Their conclusions are, as a matter of right, open to reexamination in the courts on all questions of law; and, we assume for the purposes of this discussion, may be open even on all questions of the weight of the evidence.

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The administrative bodies in the cases referred to by the Court, on the contrary, are in no sense fact-gathering [285 U.S. 89] or factfinding tribunals of first instance. They are tribunals of final resort within the scope of their authority. Their concern is with matters ordinarily outside of judicial competence—the deportation of aliens, the enforcement of military discipline, the granting of land patents, and the use of the mails—matters which are within the power of Congress to commit to conclusive executive determination. Compare Ex parte Bakelite Corporation, 279 U.S. 438, 451. Their procedure may be summary and frequently is. 24 With respect to them, the function of the courts is not one of review but essentially of control-the function of keeping them within their statutory authority. 25 [285 U.S. 90] No method of judicial review of the administrative action had been provided by Congress in any of the cases cited, and the question of the power to confine review to the administrative record accordingly did not arise. In each case, the Court held that, if the administrative officer had acted outside his authority, the unwritten law supplied a remedy, and that relief could be had, according to the nature of the case, on bill in equity or habeas corpus. 26 [285 U.S. 91] The question decided in each case was that Congress should not be taken, in the absence of specific provision, to have intended to subject the individual to the uncontrolled action of a public administrative officer. See American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 110. No comparable issue is presented here.

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Reliance is also placed, as illustrative of the necessary independence of the federal judicial power, upon the decision in Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287. 27 That case, however, involved only the question [285 U.S. 92] of the scope of review, upon the administrative record, in confiscation cases. It held that the reviewing court must have power to weigh the evidence upon which the administrative tribunal entered the order. It decided nothing concerning the right to a trial de novo in court, and the opinion made no reference to such a trial. It could not have decided anything as to the effect of Article III of the Constitution. For the case came here from the highest court of the state, arose under the Fourteenth Amendment, and did not relate to the jurisdiction of the lower federal courts. Moreover, in no event, can the issues presented in the review of rate orders alleged to be confiscatory, which involve difficult questions of mixed law and fact, be deemed parallel to those presented in the review of workmen's compensation awards. 28 Compare the issues in Ohio Valley Water Co. v. Ben Avon Borough, supra, with that in Dahlstrom Metallic Door Co. v. Industrial Board, 284 U.S. 594.

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Whatever may be the propriety of the rule permitting special reexamination in a trial court of so-called "jurisdictional [285 U.S. 93] facts" passed upon by administrative bodies having otherwise final jurisdiction over matters properly committed to them, I find no warrant for extending the doctrine to other and different administrative tribunals whose very function is to hear evidence and make initial determinations concerning those matters which it is sought to reexamine. Such a doctrine has never been applied to tribunals properly analogous to the deputy commissioners, such as the Interstate Commerce Commission, the Federal Trade Commission, the Secretary of Agriculture acting under the Packers and Stockyards Act, and the like. 29 Logically applied, it would seriously impair the entire administrative process. 30

1932, Crowell v. Benson, 285 U.S. 93

Eighth. No good reason is suggested why all the evidence which Benson presented to the District Court in this cause could not have been presented before the deputy commissioner, nor why he should have been permitted to try his case provisionally before the administrative tribunal and then to retry it in the District Court upon additional evidence theretofore withheld. To permit him to do so violates the salutary principle that administrative remedied must first be exhausted before resorting to the court, imposes unnecessary and burdensome expense upon the other party, and cripples the effective administration of the Act. Under the prevailing practice, by which the judicial review has been confined to questions of law, the proceedings before the deputy commissioners [285 U.S. 94] have proved for the most part noncontroversial, 31 and relatively few cases have reached the courts. 32 To permit a contest de novo in the District Court of an issue tried, or triable, before the deputy commissioner will, I fear, gravely hamper the effective administration of the Act. The prestige of the deputy commissioner will necessarily be lessened by the opportunity of relitigating facts in the courts. The number of controverted cases may be largely increased. Persistence in controversy will be encouraged. And since the advantage of prolonged litigation lies with the party able to bear heavy expenses, the purpose of the Act will be in part defeated. 33

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In my opinion, the judgment of the Circuit Court of Appeal should be reversed, and the case remanded to the District Court, sitting as a court of equity, for consideration and decision upon the record made before the deputy commissioner.

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MR. JUSTICE STONE and MR. JUSTICE ROBERTS join in this opinion.

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1. Revenue Act of 1926, 44 Stat. 110:

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Sec. 1003. (a) The Circuit Courts of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the board. . . .

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(b) Upon such review, such courts shall have power to affirm or, if the decision of the board is not in accordance with law, to modify or reverse the decision of the board, with or without remanding the case for a rehearing as justice may require.

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2. This opinion was expressed in regulations promulgated by the Commission, under authority conferred by § 39(a), in the form of instructions to deputy commissioners, dated September 28, 1927; and it was repeated in the Commission's report at the close of the first year of its administration of the Act. Report of United States Employees' Compensation Commission, for fiscal year ending June 30, 1928, p. 33. See also id., June 30, 1929, p. 77; id., June 30, 1930, pp. 63-64; id., June 30, 1931, p. 71. The instructions to deputy commissioners, elaborated December 10, 1927, and May 15, 1928, required that the record of proceedings and findings of fact be prepared, and the proceedings be conducted, in consonance with this view of the law.

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3. The question of judicial review under the Act has been passed upon by the First, Second, Third, Fourth, and Ninth Circuit Courts of Appeals, as well as the Fifth; by a District Court in the Sixth Circuit; and by the Court of Appeals of the District of Columbia, under the Act of May 17, 1928, c. 612, 45 Stat. 600. Pocahontas Fuel Co. v. Monahan, 41 F.2d 48, 49 (C.C.A. 1st), affirming 34 F.2d 549, 551, 1929 A.M.C. 1336 (D.C.Me.); Joyce v. United States Deputy Commissioner, 33 F.2d 218, 219 (D.C.Me.); Jarka Corporation v. Monahan, 48 F.2d 283, 284 (D.C.Mass.); Booth v. Monahan, 56 F.2d 168 (D.C.Me.); Wilson & Co., Inc. v. Locke, 50 F.2d 81, 82 (C.C.A. 2d); Travelers Insurance Co. v. Locke, 56 F.2d 443 (D.C.S.D.N.Y.); Calabrese v. Locke, 56 F.2d 458 (D.C.S.D.N.Y.); W. J. McCahan Sugar Refining & Molasses Co. v. Norton, 43 F.2d 505, 506 (C.C.A. 3d), affirming 34 F.2d 499 (D.C.E.D.Pa.); Independent Pier Co. v. Norton, 54 F.2d 734 (C.C.A. 3d); Baltimore & Carolina S.S. Co. v. Norton, 40 F.2d 271, 272 (D.C.E.D.Pa.); Merchants' & Miners' Transp. Co. v. Norton, 32 F.2d 513, 515 (D.C.E.D.Pa.); Jarka Corporation v. Norton, 56 F.2d 287 (D.C.E.D.Pa.); Frank Marra Co. v. Norton, 56 F.2d 246 (D.C.E.D.Pa.); Wheeling Corrugating Co. v. McManigal, 41 F.2d 593, 594, 595 (C.C.A. 4th); Obrecht-Lynch Corporation v. Clark, 30 F.2d 144, 146 (D.C.Md.); Keyway Stevedoring Co. v. Clark, 43 F.2d 983 (D.C.Md.); Kranski v. Atlantic Coast Shipping Co., 56 F.2d 166 (D.C.Md.); Chesapeake Ship Ceiling Co. v. Clark (D.C.Md.), decided May 22, 1930 (oral opinion); Goble v. Clark, 56 F.2d 170 (D.C.Md.); Michigan Transit Corporation v. Brown, 56 F.2d 200 (D.C.W.D.Mich.); Northwestern Stevedoring Co. v. Marshall, 41 F.2d 28, 29 (C.C.A. 9th); Gunther v. United States Employees' Compensation Commission, 41 F.2d 151, 153 (C.C.A. 9th); Grays Harbor Stevedore Co. v. Marshall, 36 F.2d 814, 815 (D.C.W.D.Wash.); Zurich General Accident & Liability Ins. Co. v. Marshall, 42 F.2d 1010, 1011 (D.C.W.D.Wash.); Tood Dry Docks, Inc. v. Marshall, 49 F.2d 621, 623 (D.C.W.D.Wash.); Grays Harbor Stevedore Co. v. Marshall, 36 F.2d 814 (D.C.W.D.Wash.); Rothschild & Co. v. Marshall, 56 F.2d 415 (D.C.W.D.Wash.), reversed on other grounds, 44 F.2d 546 (C.C.A. 9th); Lea Mathew Shipping Corporation v. Marshall, 56 F.2d 860 (D.C.W.D.Wash.); Griffiths & Sprague Stevedoring Co. v. Marshall, 56 F.2d 665 (D.C.W.D.Wash.); W. R. Grace & Co. v. Marshall, 56 F.2d 441 (D.C.W.D.Wash.); Nelson v. Marshall, 56 F.2d 654 (D.C.W.D.Wash.); Grant v. Marshall, 56 F.2d 654 (D.C.W.D.Wash.); Zurich General Accident & Liability Co. v. Marshall, 56 F.2d 652 (D.C.W.D.Wash.); Ocean Accident & Guarantee Corporation v. Solberg, 56 F.2d 607 (D.C.W.D.Wash.). Compare Lake Washington Shipyards v. Brueggeman, 56 F.2d 655 (D.C.W.D.Wash.); New Amsterdam Casualty Co. v. Hoage, 46 F.2d 837 (App.D.C.); Hoage v. Murch Bros. Const. Co., 50 F.2d 983, 984 (App.D.C.). See also the following decisions by district courts in the Fifth Circuit: Showers v. Crowell, 46 F.2d 361 (W.D.La.); Howard v. Monahan, 31 F.2d 480, 481 (S.D.Tex.); id., 33 F.2d 220, 221 (S.D.Tex.). Compare T. J. Moss Tie Co. v. Tanner, 44 F.2d 928 (C.C.A. 5th); Houston Ship Channel Stevedoring Co. v. Sheppeard, 57 F.2d 259, 1931 A.M.C. 1605 (S.D.Tex.).

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4. The Court has been referred to no case arising under the state Workmen's Compensation Laws recognizing a right to trial de novo in court. Numerous decisions declare administrative findings of fact to be conclusive. The following decisions all dealt with controversies concerning the existence of a relation of employment. Hillen v. Industrial Accident Commission, 199 Cal. 577, 580, 250 P. 570; York Junction Transfer & Storage Co. v. Industrial Accident Commissioners, 202 Cal. 517, 521, 261 P. 704; Index Mines Corporation v. Industrial Commission, 82 Colo. 272, 275, 259 P. 1036; Ocean Accident & Guarantee Corp. v. Wilson, 36 Ga. App. 784, 138 S. E. 246; Taylor v. Blackwell Lumber Co., 37 Idaho, 707, 721, 218 P. 356; Cinofsky v. Industrial Commission, 290 Ill. 521, 525 125 N.E. 286; Franklin Coal Co. v. Industrial Commission, 296 Ill. 329, 334, 129 N.E. 811; A. E. Norris Coal Co. v. Jackson, 80 Ind. App. 423, 425, 141 N.E. 227; Murphy v. Shipley, 200 Iowa, 857, 859, 205 N.W. 497; Churchill's Case, 265 Mass. 117, 119, 164 N.E. 68; Hill's Case, 268 Mass. 491, 493, 167 N.E. 914; Matter of Dale v. Saunders Brothers, 218 N.Y. 59, 63, 112 N.E. 571; Federal Mining & Smelting Co. v. Thomas, 99 Okl. 24, 26, 225 P. 967; Oklahoma Pipe Line Co. v. Lindsey, 113 Okl. 296, 298, 241 P. 1092; Belmonte v. Connor, 263 Pa. 470, 472, 106 A. 787.

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5. (a) Interstate Commerce Commission: Act of June 18, 1910, c. 309, § 1, 36 Stat. 539; see Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 U.S. 88, 92; United States v. Louisville & Nashville R. Co., 235 U.S. 314, 320, 321; Louisville & Nashville R. Co. v. United States, 245 U.S. 463, 466, and other cases collected in I. L. Sharfman, "The Interstate Commerce Commission II," pp. 384-393, 417 et seq.; Act of June 18, 1910, c. 309, § 13, 36 Stat. 539, 555; Act of March 1, 1913; c. 92, 37 Stat. 701, 703. See Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 444n.

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(b) Federal Trade Commission: Act of September 26, 1914, c. 311, § 5, 38 Stat. 717, 719, 720; see Federal Trade Commission v. Curtis Publishing Co., 260 U.S. 568, 579, 580; Federal Trade Commission v. Pacific States Paper Trade Assn., 273 U.S. 52, 63; Arkansas Wholesale Grocers' Assn. v. Federal Trade Commission, 18 F.2d 866, 870, 871; Gregory Hankin, "Conclusiveness of the Federal Trade Commission's Findings as to Facts," 23 Mich.L.Rev. 233, 262-267; Act of October 15, 1914, c. 323, § 11, 38 Stat. 730, 735 (applicable also in appropriate cases to Interstate Commerce Commission and Federal Reserve Board); see Federal Trade Commission v. Curtis Publishing Co., supra; International Shoe Co. v. Federal Trade Commission, 280 U.S. 291, 297.

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(c) Federal Power Commission: Act of June 10, 1920, c. 285, § 20, 41 Stat. 1063, 1074.

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(d) United States Shipping Board: Act of September 7, 1916, c. 451, §§ 29, 31, 39 Stat. 728, 737, 738; see Isthmian Steamship Co. v. United States (S.D.N.Y.), 53 F.2d 251, decided December 7, 1931; compare United States Nav. Co. v. Cunard S.S. Co., 284 U.S. 474, decided February 15, 1932.

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(e) Secretary of Agriculture: Act of August 15, 1921, c. 64, §§ 315, 316, 42 Stat. 159, 168; see Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 443, 444; Stafford v. Wallace, 258 U.S. 495, 512; Act of August 15, 1921, c. 64, § 204, 42 Stat. 159, 162; Act of June 10, 1930, c. 436, §§ 10, 11, 46 Stat. 531, 535.

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(f) Board of Tax Appeals: Act of February 26, 1926, c. 27, § 1003(a), 44, Stat. 9, 110; see Phillips v. Commissioner, 283 U.S. 589, 600.

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(g) Grain Futures Commission: Act of September 21, 1922, c. 369, § 6(b), 42 Stat. 998, 1002.

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(h) District of Columbia Rent Commission: Act of October 22, 1919, c. 80, Title 2, § 108, 41 Stat. 297, 301; see Block v. Hirsh, 256 U.S. 135, 158; Killgore v. Zinkhan, 51 App.D.C. 60, 274, F. 140, 142.

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In instances in which Congress intended to permit the introduction of additional evidence in the District Court, it has so provided in express terms. See, e.g., Act of February 18, 1922, c. 57, § 2, 42 Stat. 388, 389 (7 USCA § 292). Compare the provision for review of reparation orders of the Interstate Commerce Commission, Act of June 18, 1910, c. 309, 313, 36 Stat. 539, 554, and of orders for the payment of money by the Shipping Board. Act of September 7, 1916, c. 451, § 30, 39 Stat. 728, 737.

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6. Compare Freund, "Administrative Powers Over Persons and Property," p. 279.

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7. Two bills providing workmen's compensation for longshoremen and harbor workers were before the Congress at the same time. H.R. 9498, which was first reported favorably to the House, declared in terms, §§ 22, 24, that "the decision of the deputy commissioner shall be final as to all questions of fact and except as provided in § 24 as to all questions of law." This bill was abandoned by the House in favor of S. 3170, in order that some legislation on the subject, under what was regarded as an emergency, might be passed at that session. H.D., 69th Cong., 1st Sess., ser. 16, pt. 2, pp. 139-141. Although the differences between the two bills were minutely examined in the hearings before the House Committee on the Judiciary, no reference was made to any change in the provisions for review of compensation orders, but, on the contrary, it was affirmatively stated the Senate bill likewise enacted administrative finality upon questions of fact. Id., pt. 2, p. 200. The same statement was made in the Senate hearings. Id., pt. 1, pp. 53, 66. The bill was reported to the House as having been amended to "conform substantially" to the bill theretofore reported. H.Rep., No. 1767, 69th Cong., 1st Sess. Both in this report and in the brief debates in both houses, the bill was described as designed to prevent the delay and injustice incident to litigation, and as affording to maritime workers the same remedies as those provided in state workmen's compensation laws. See 67 Cong. Rec. 10614; 68 Cong. Rec. 5410-5414, 5908. The state Workmen's Compensation Statutes have, almost universally, been construed to provide for final administrative determination of questions of fact, including the fact of the existence of an employment. See note 35, supra.

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8. Congress has incorporated by reference the provisions for review of orders of the Interstate Commerce Commission in authorizing judicial review of certain orders of the Federal Power Commission and the Shipping Board, as it did in the Packers and Stockyards Act. See note 5, supra.

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9. In People ex rel. New York & Queens Gas Co. v. McCall, 219 N.Y. 84, 88, 90, 113 N.E. 795, it was held that the scope of the review on certiorari of an order of the Public Service Commission was the same as that of the federal court on bill in equity of the orders of the Interstate Commerce Commission as declared in Interstate Commerce Commission v. Illinois Central R. Co., 215 U.S. 452, 470. Compare Vanfleet, "Collateral Attack on Judicial Proceedings," §§ 2, 3.

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10. Certiorari is the historic writ for determining whether the action of an inferior tribunal has been taken within its jurisdiction, and it has sometimes been held that the writ lies only to determine this question. Compare Jackson v. People, 9 Mich. 111. But, although there is considerable divergence is the practice of the various states as to the scope of the review, the proceeding, apart from extraordinary statutory provisions, is universally upon the record and the evidence before the inferior tribunal, and not a trial de novo.. Fore v. Fore, 44 Ala. 478, 484; City of Los Angeles v. Young, 118 Cal. 295, 298, 50 P. 534; Great Western Power Co. v. Pillsbury, 170 Cal. 180, 185, 186, 149 P. 35; Uphoff v. Industrial Board, 271 Ill. 312, 111 N.E. 128; Tiedt v. Carstensen, 61 Iowa, 334, 336, 16 N.W. 214; Lord v. County Commissioners, 105 Me. 556, 561, 75 A. 126; Jackson v. People, 9 Mich. 111, 119, 120; Wait v. Krewson, 59 N.J.Law, 71, 75, 35 A. 742; Milwaukee Western Fuel Co. v. Industrial Commission, 159 Wis. 635, 641, 642, 150 N.W. 998. It was so at common law. See Freund, "Administrative Powers Over Persons and Property," pp. 267-269.

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11. See the statutes and cases cited in note 5, supra. Similar decisions have been repeatedly made, under the Fourteenth Amendment, in cases coming from the state courts. This court has recently decided that a state Workmen's Compensation Act may validly provide for judicial review upon matters of law only. Dahlstrom Metallic Door Co. v. Industrial Board, 284 U.S. 594. See also New York Central R. Co. v. White, 243 U.S. 188, 207, 208. In Missouri ex rel. Hurwitz v. North, 271 U.S. 40, 42, , it was held that a state board of health might be empowered, upon reasonable notice, specification of charges, and opportunity to be heard, to revoke a physician's license, subject only to review in the courts upon certiorari. In Washington ex rel. Oregon Railroad & Navigation Co. v. Fairchild, 224 U.S. 510, 527, a statute was upheld which confined the court upon review of a public service commission's order to the evidence introduced before the commission. See also Wadley Southern Ry. Co. v. Georgia, 235 U.S. 651, 661; New York ex rel. New York & Queens Gas Co. v. McCall, 245 U.S. 345, 348, 349; Napa Valley Electric Co. v. Railroad Commission, 251 U.S. 366, 370; Northern Pacific Ry. Co. v. Department of Public Works, 268 U.S. 39, 42. In Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685, 695, it was held that the findings of fact by commissioners in assessing damages in condemnation proceedings might be made final, leaving open to the court only the question whether there was any error in the basis of appraisal, or otherwise. See also Crane v. Hahlo, 258 U.S. 142, 147; Hardware Dealers Mutual Fire Insurance Co. v. Glidden Co., 284 U.S. 151. Compare Pacific Live Stock Co. v. Lewis, 241 U.S. 440, 451, 452.

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12. See Griswold and Mitchell, "The Narrative Record in Federal Equity Appeals," 42 Harv.L.Rev. 483, 488, 491; Lane, "One Year Under the New Federal Equity Rules," 27 Harv.L.Rev. 629, 639. Compare 2 Daniell, "Chancery Practice" (2d Ed.) 1045, 1046, 1053, 1054, 1069 et seq.

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13. Admiralty Rule 46, 254 U.S. 698. Subsequent to 1842, when the procedure in admiralty became subject to rules promulgated by this Court, and prior to 1921, no rule specifically required that evidence be taken orally in open court, and the practice in some districts appears to have been to take proofs by a commission. Compare Admiralty Rules 44, 46, 210 U.S. 558; The Guy C. Goss, 53 F. 826, 827; The Wavelet, 25 F. 733, 734. See also The Sun, 271 F. 953, 954. Under the present rules, the District Court may still, upon proper circumstances, refer causes in admiralty to a commissioner, without the consent of the parties, to hear the testimony and report conclusions on issues of fact and law. The P. R.R. No. 35, 48 F.2d 122; Sorenson & Co. v. Liverpool, Brazil & River Plate Steam Nav. Co., 47 F.2d 332. Compare The City of Washington, 92 U.S. 31, 39; Los Angeles Brush Mfg. Corp. v. James, 272 U.S. 701. The commissioner's findings of fact are not disturbed unless clearly erroneous. The La Bourgogne, 144 F. 781, 783, affirmed, 210 U.S. 95; Anderson v. Alaska S.S. Co., 22 F.2d 532, 535.

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14. See Admiralty Rule 45, 254 U.S. 698; Supreme Court Rule 15, 275 U.S. 607.

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15. The decision of the District Court, acquiesced in by the Circuit Court of Appeals and this Court, that the remedy under § 21(b) of the Longshoreman's Act is in admiralty, seems to me unfounded. The provision in that section for suspending or setting aside a compensation order by injunction clearly implies a proceeding upon bill in equity. Congress may authorize actions for maritime torts to be brought on the law side of the federal District Courts, Panama R. Co. v. Johnson, 264 U.S. 375, 385; or in the state courts, Engel v. Davenport, 271 U.S. 33, 37. See also Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 384. No constitutional objection can exist, therefore, to giving effect to the remedy in equity provided in this Act.

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16. The opinion of the Court suggests that, upon similar reasoning, the issue whether the injury occurred on navigable waters must likewise be open to independent redetermination, upon the facts as well as the law, in the District Court. The question whether any peculiar significance attaches to such a controversy, entitling it to be twice tried, is not before us. It has never been decided that the power of Congress to provide compensation for injuries to workmen received in the course of maritime employment depends upon the injury having occurred upon navigable waters. See Benedict, "The American Admiralty" (5th Ed.) § 25. Compare Soper v. Hammond Lumber Co. 4 F.2d 872; State Industrial Commission v. Nordenholt Corp., 259 U.S. 263. The Longshoremen's Act undertakes to cover only the field of admiralty jurisdiction within which the decisions of this Court have held uniformity to be required. See Stanley Morrison, "Workmen's Compensation and the Maritime Law," 38 Yale L.J. 472, 500.

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17. That Legislatures may abolish defenses recognized at common law and create new causes of action not so recognized is beyond question. So also is the power, under proper circumstances, to provide for liability without fault. Compare St. Louis & San Francisco Ry. Co. v. Mathews, 165 U.S. 1; Chicago, Rock Island & Pacific Ry. Co. v. Zernecke, 183 U.S. 582; St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor, 210 U.S. 281; New York Central R. Co. v. White, 243 U.S. 188. Congress may provide that a carrier shall be liable for loss or damage to goods occurring beyond its own lines. Atlantic Coast Line R. Co. v. Riverside Mills, 219 U.S. 186, 203. See also Atlantic Coast Line R. Co. v. Glenn, 239 U.S. 388, 393. "The rule," said the Court, "is adapted to secure the rights of the shipper by securing unity of transportation with unity of responsibility." That Congress might not similarly secure unity of responsibility for injuries to all persons working upon the same enterprise, irrespective of the particular relation existing of contract or employment, is not to be assumed without argument and in the absence of circumstances presenting the question. The logic upon which workmen's compensation acts have been sustained does not require insistence upon a technical master and servant relation. Compare Ward & Gow v. Krinsky, 259 U.S. 503. See also Jeremiah Smith, "Sequel to Workmen's Compensation Acts," 27 Harv.L.Rev. 235, 344.

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The common law, of course, holds many examples of liability to third persons for injury sustained at the hands of an independent contractor or his servant. E.g., Ellis v. Sheffield Co., 2 E. & B. 767; Pickard v. Smith, 10 C.B. (N. S.) 470; Doll v. Ribetti, 203 F. 593.

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18. See the analysis and criticism in William O. Douglas, "Vicarious Liability and Administration of Risk," 38 Yale L.J. 584, 594-604. Compare O. W. Holmes, "Agency," 5 Harv.L.Rev. 1, 14-16.

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19. See Baty, "Vicarious Liability," passim; Francis Bowes Sayre, "Criminal Responsibility for Acts of Another," 43 Harv.L.Rev. 689, 691-694; O. W. Holmes, "Agency," 4 Harv.L.Rev. 345, 5 Id. 1. The first textbook on Agency did not appear until 1812. Paley, "The Law of Principal and Agent."

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20. See the digests of the statutes in L. V. Hill and Ralph H. Wilkin, "Workmen's Compensation Statute Law"; and F. Robertson Jones, "Digest of Workmen's Compensation Laws" (10th Ed.). The provision in the New York Workmen's Compensation Act (Consol. Laws, c. 67), § 56, is illustrative:

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A contractor, the subject of whose contract is, involves or includes a hazardous employment, who subcontracts all or any part of such contract shall be liable for and shall pay compensation to any employee injured. . . .

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In 1927, in recommending the extension of this provision to include owners or lessees as well as general contractors, the State Industrial Commissioner said:

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From the point of view of making sure of compensation to injured workers, all the reasons for the existing obligations put upon a general contractor for a piece of building work who sublets part of the work, are equally cogent for doing the same in case of an owner or lessee of premises who lets part of building work in precisely the same way. The practical need for doing it has been shown by experience to be extensive owing to the large amount of building work now being done under the method above noted and which this amendment is designed to cover.

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The existing provision has proven very beneficial in the case of contractors, and it will be equally useful in the case of the type of owner-contractor, so to speak who must now be dealt with for solution of the same problem.

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Annual Report of the Industrial Commissioner (1927) pp. 4, 5.

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21. See, e.g., Industrial Commission v. Continental Investment Co., 78 Colo. 399, 401, 402, 242 P. 49; Palumbo v. George A. Fuller Co., 99 Conn. 355, 358, 122 A. 63; Fisk v. Bonner Tie Co., 40 Idaho, 304, 308, 232 P. 569; Parker-Washington Co. v. Industrial Board, 274 Ill. 498, 504, 113 N.E. 976; American Steel Foundries v. Industrial Board, 284 Ill. 99, 103, 119 N.E. 902; McDowell v. Duer, 78 Ind.App. 440, 444, 445, 133 N.E. 839; Burt v. Clay, 207 Ky. 278, 281, 269 S.W. 322; Seabury v. Arkansas Natural Gas Corp., 171 La. 199, 204, 205, 130 So. 1; White v. George B. H. Macomber Co., 244 Mass. 195, 198, 138 N.E. 239; Burt v. Munising Woodenware Co., 222 Mich. 699, 702, 703, 193 N.W. 895; De Lonjay v. Hartford Accident & Indemnity Co. 35 S.W..2d 911, 912; Sherlock v. Sherlock, 112 Neb. 797, 799, 201 N.W. 645; O'Banner v. Pendlebury, 107 N.J.Law, 245, 247, 153 A. 494; Clark v. Monarch Engineering Co., 248 N.Y. 107, 110, 161 N.E. 436; De Witt v. State, 108 Ohio St. 513, 522-525, 141 N.E. 551; Green v. State Industrial Commission, 121 Okl. 211, 212, 249 P. 933; Qualp v. James Stewart Co., 266 Pa. 502, 109 A. 780; Murray v. Wasatch Grading Co., 73 Utah, 430, 436, 439, 274 P. 940; Threshermen's Nat. Ins. Co. v. Industrial Commission, 201 Wis. 303, 306, 230 N.W. 67; Wisinger v. White Oil Corp., 24 F.2d 101, 102. But compare Flickenger v. Industrial Accident Commission, 181 Cal. 425, 432, 433, 184 P. 851. Liability to pay compensation obtains in England under circumstances in which no relation of employment exists. See Mulrooney v. Todd (1909), 1 K.B. 165; Marks v. Carne (1909), 2 K.B. 516.

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22. Turner v. Bank of North America, 4 Dall. 8, 10; United States v. Hudson & Goodwin, 7 Cranch, 32, 33; Shelden v. Sill, 8 How. 441, 449; Justices v. Murray, 9 Wall. 274, 280; Home Life Insurance Co. v. Dunn, 19 Wall. 214, 226; Stevenson v. Fain, 195 U.S. 165, 167; Kline v. Burke Construction Co., 260 U.S. 226, 234. It was not until the Act of March 3, 1875, c. 137, 18 Stat. 470, that Congress extended the jurisdiction of the circuit courts to "cases arising under the laws of the United States," thus permitting to be exercised "the vast range of power which had lain dormant in the Constitution since 1789." See Felix Frankfurter and James M. Landis, "The Business of the Supreme Court," pp. 65-68; Charles Warren, "Federal Criminal Laws and the State Courts," 38 Harv.L.Rev. 545. Large areas of the potential jurisdiction of the lower federal courts are now occupied by other tribunals. As to legislative courts, see Wilber Griffith Katz, "Federal Legislative Courts," 43 Harv.L.Rev. 894. Congress has repeatedly exercised power to exclude from the federal courts cases not involving the requisite jurisdictional amount. Cases arising under the Federal Employers' Liability Act are triable in either the state courts or the federal District Courts. See Second Employers' Liability Cases, 223 U.S. 1, 56, 57-59; Douglas v. New York, New Haven & Hartford R. Co., 279 U.S. 377. So, also, cases under § 20 of the Seamen's Act, as amended by the Merchant Marine Act of 1920, § 33. Engel v. Davenport, 271 U.S. 33, 37; Panama R. Co. v. Vasquez, 271 U.S. 557, 562.

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23. See decisions and statutes collected in note 5, supra. So far as concerns the question here presented, it is immaterial whether the controversy is wholly between private parties or is between the government and a citizen. The fact that litigation under the Longshoremen's Act is, in substance, between private parties (even though under § 21(b) the deputy commissioner is the only necessary party respondent) does not warrant the inference that the administrative features of the Act present a question not heretofore decided. The tribunals in note 5, supra, listed deal with matters outside the scope of the doctrine recently examined in Ex parte Bakelite Corporation, 279 U.S. 438. While the opinion in that case referred to "various matters, arising between the government and others," as appropriate for the cognizance of legislative courts, the reference was restricted to matters "which from their nature do not require judicial determination and yet are susceptible of it," the mode of determining which "is completely within congressional control." Id. at 451. The suggestion that due process does not require judicial process in any controversy to which the government is a party would involve a revision of historic conceptions of the nature of the federal judicial system. That all questions arising in the administration of the Interstate Commerce Act, for example, or between a taxpayer and the government under the tax laws, could be committed by Congress exclusively to executive officers, in respect to issues of law as well as of fact, has never been supposed. Thus, there is no indication in the opinion in Ex parte Bakelite Corporation that the Commerce Court was a legislative court, although instances of the creation of such courts were considered in detail. See Wilber Griffith Katz, "Federal Legislative Courts," 43 Harv.L.Rev. 894, 914, 915.

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24. Compare Miller v. Horton, 152 Mass. 540, 26 N.E. 100, and Pearson v. Zehr, 138 Ill. 48, 29 N.E. 854, cited by the Court. These cases involved summary administrative action, and the complaining individuals had been given no opportunity to be heard on the question whether their property was in fact subject to the destruction ordered. The degree of finality appropriate in administrative action must always depend upon the character of the administrative hearing provided. Compare Dickinson, "Administrative Justice and the Supremacy of Law," pp. 260-261; E. F. Albertsworth, "Judicial Review of Administrative action by the Federal Supreme Court," 35 Harv.L.Rev. 127, 152, 153. In most states, the tendency appears to be to deny the right, in a tort action against an administrative officer, to question the existence of the fact justifying his act, if a hearing was provided or if a suit for injunction could have been brought. See Freund, "Administrative Powers Over Persons and Property," pp. 248-252; Kirk v. Board of Health, 83 S.C. 372, 383, 65 S.E. 387. Compare North American Cold Storage Co. v. Chicago, 211 U.S. 306, 316, 317. In cases arising under the Workmen's Compensation Laws, where formal hearing is available, the Massachusetts and Illinois courts, in common with many others, have held the administrative finding of the fact of employment conclusive. Churchill's Case, 265 Mass. 117, 164 N.E. 68; Hill's Case, 268 Mass. 491, 167 N.E. 914; Cinofsky v. Industrial Commission, 290 Ill. 521, 125 N.E. 286; Franklin Coal Co. v. Industrial Commission, 296 Ill. 329, 129 N.E. 811.

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25. Compare Frankfurter and Davison, "Cases on Administrative Law," Preface, p. viii. See Albert Levitt, "The Judicial Review of Executive Acts," 23 Mich.L.Rev. 588, 595 et. seq. This authority may embrace as well the determination of questions of law as of fact, depending upon the judicial construction given to the authority of the tribunal. Thus, in In Re Grimley, 137 U.S. 147; In Re Morrissey, 137 U.S. 157; Noble v. Union River Logging Railroad, 147 U.S. 165; Smith v. Hitchcock, 226 U.S. 53; and Bates & Guild Co. v. Payne, 194 U.S. 106, all cited in note 26, infra, the Court recognized the conclusiveness of many decisions of law by the tribunals in question. Tribunals of this character are, of course, empowered, under ordinary circumstances, to make conclusive determinations of fact. See e.g., Passavant v. United States, 148 U.S. 214, 219; Medbury v. United States, 173 U.S. 492, 497, 498; Silberschein v. United States, 266 U.S. 221, 225; Quon Quon Roy v. Johnson, 273 U.S. 352, 358.

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26. (a) In Ng Fung Ho v. White, 259 U.S. 276, the statute authorized the deportation only of aliens, without provision for judicial review of the executive order. Act of February 5, 1917, c. 29, § 19, 39 Stat. 874, 889. Upon application for a writ of habeas corpus, by a person arrested who claimed to be a citizen, it was held that he was entitled to a judicial determination of that claim. No question arose as to whether Congress might validly have provided for review exclusively upon the record made in the executive department; nor as to the scope of review which might have been permissible upon such record.

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(b) In re Grimley, 137 U.S. 147, and In re Morrissey, 137 U.S. 157, deal with the action of military tribunals. Military tribunals from a system of courts separate from the civil courts and created by virtue of an independent grant of power in the Constitution. Article 1, § 8, clauses 14, 16. They have authority to determine finally any case over which they have jurisdiction;

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and their proceedings . . . are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced.

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Carter v. Roberts, 177 U.S. 496, 498; Grafton v. United States, 206 U.S. 333, 347. As Congress did not provide any method for review by the courts of the decision of military tribunals, all questions of law concerning military jurisdiction are open to independent determination in the civil courts; and the cases of In re Grimley and In re Morrissey, decide nothing more. Whether Congress could make the findings of "jurisdictional facts," of military tribunals conclusive upon civil courts is a question which appears never to have been raised.

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(c) In Noble v. Union River Logging Co, 147 U.S. 165, 174, relief was granted by bill in equity to stay illegal and unauthorized action of the Secretary of the Interior in respect to the public lands, there being no method of judicial review prescribed by statute. Compare St. Louis Smelting Co. v. Kemp, 104 U.S. 636, 641.

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(d) In Smith v. Hitchcock, 226 U.S. 53, 58, as in Bates & Guild Co. v. Payne, 194 U.S. 106, 109, 110, and American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 109, bills in equity were entertained to review acts of the Postmaster General alleged to be unauthorized, Congress not having provided any method of judicial review. In each case the question involved was stated to be one of law.

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27. The decision in the Ohio Valley Water Co. case has evoked extensive and varied comment. See, e.g., Curtis, "Judicial Review of Commission Rate Regulation—The Ohio Valley Case," 34 Harv.L.Rev. 862; Albertsworth, "Judicial Review of Administrative action by the Federal Supreme Court," 35 Harv.L.Rev. 127; C. W. Pound, "The Judicial Power," 35 Harv.L.Rev. 787; Brown, "The Functions of Courts and Commissions in Public Utility Rate Regulations," 38 Harv.L.Rev. 141; Wiel, "Administrative Finality," 38 Harv.L.Rev. 447; Buchanan, "The Ohio Valley Water Co. Case and the Valuation of Railroads," 40 Harv.L.Rev. 1033; Beutel, "Valuation as a Requirement of Due Process of Law in Rate Cases," 43 Harv.L.Rev. 1249; Green, "The Ohio Valley Water Case," 4 Ill.L.Q. 55; Freund, "The Right to a Judicial Review in Rate Controversies," 27 W.Va.L.Q. 207; Hardman, "Judicial Review as a Requirement of Due Process in Rate Regulation," 30 Yale L.J. 681; Isaacs, "Judicial Review of Administrative Findings," 30 Yale L.J. 781. No commentator, however, appears to have understood the decision as recognizing in any manner a right to trial de novo in court upon confiscation issues.

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28. It is cause for regret that the Court, in determining this controversy, should have declared, obiter, that, in matters of state public utility regulation involving administrative action of a special character, and raising questions under a different constitutional provision, a mode of procedure is required contrary to that almost universally established under state law (see David E. Lilienthal, "The Federal Courts and State Regulation of Public Utilities," 43 Harv.L.Rev. 379, 412, 413), and calculated seriously to embarrass the operation of the administrative method in that field.

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29. But see Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 U.S. 88, 92. The statement by Mr. Justice Jamar there, however, went no further than to indicate that, in some circumstances, the courts on review of orders of the Interstate Commerce Commission might pass an independent judgment upon the evidence adduced before the Commission. See also Interstate Commerce Commission v. Northern Pacific Ry. Co., 216 U.S. 538, 544; Manufacturers' Ry. Co. v. United States, 246 U.S. 457, 488-490.

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30. See Dickinson, "Administrative Justice and the Supremacy of Law," p. 310.

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31. Out of the 30,383 nonfatal cases disposed of during the fiscal year ending June 30, 1931, the deputy commissioners held hearings in only 729, according to information furnished by the United States Employees' Compensation Commission. Compensation payments were completed in 11,776 cases, or 38.8 percent of the total. In 17,328 cases, or 57 percent, the injured employee failed to receive compensation because no time was lost, or less than seven days, on account of the injury. The balance of 1,279 cases, amounting to 4.2 percent of the whole, were dismissed because they did not come within the scope of the law. Among the 18,607 noncompensated cases, formal claims were filed by the employee in only 1,025 instances. See also Report of the Compensation Commission, 1930, pp. 68-70.

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32. For the fiscal year ending June 30, 1931, 101 new cases were filed in the District Courts, out of a total of 30,489 cases disposed of. Report of the United States Employee's Compensation Commission, pp. 69, 71. For the three preceding years, the number of cases filed in the courts was, respectively, 61, 58, and 15. Report, 1930, p. 62; id., 1929, p. 70; id., 1928, p. 34. The decision of the Circuit Court of Appeals in the case at bar declaring the right to a trial de novo was rendered November 17, 1930, and the first opinion of the District Court on May 27, 1929.

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33. How serious these consequences will be is a question of speculation, but it is plain that they will be aggravated by the inherent uncertainty in the scope of the doctrine announced. The determination of what facts are "jurisdictional" or "fundamental" is calculated to provoke a multitude of disputes. That there is a difference in kind, for example, between the defense that the injured claimant is not an employee and that he was not acting as an employee when he was injured, or that there is a difference between the latter defense and the defense that the disability, if any, from which he suffers resulted only in part, or not at all, from the employment in which he claims to have suffered it, are propositions which employers will be unlikely to accept until they have submitted them to the decision of the courts. The effectiveness of this legislation will be lessened by this opportunity for barren controversy over procedural rights and by delayed or thwarted determination of substantive ones.

New State Ice Co. v. Liebmann, 1932

Title: New State Ice Co. v. Liebmann

Author: U.S. Supreme Court

Date: March 21, 1932

Source: 285 U.S. 262

This case was argued February 19, 1932, and was decided March 21, 1932.

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APPEAL FROM THE CIRCUIT COURT OF APPEALS

1932, New State Ice Co. v. Liebmann, 285 U.S. 262

FOR THE TENTH CIRCUIT

Syllabus

1932, New State Ice Co. v. Liebmann, 285 U.S. 262

1. The business of manufacturing ice and selling it is essentially a private business and not so affected with a public interest that a legislature may constitutionally limit the number of those who may engage in it in order to control competition. Pp. 273 et seq.

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2. An Oklahoma statute, declaring that the manufacture, sale and distribution of ice is a public business, forbids anyone to engage in it without first having procured a license from a state commission; no license is to issue without proof of necessity for the manufacture, sale or distribution of ice in the community or place to which the application relates, and if the facilities already existing and licensed at such place are sufficient to meet the public needs therein, the commission may deny the application. Held, repugnant to the due process clause of the Fourteenth Amendment. P. 278.

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3. A state law infringing the liberty guaranteed to individuals by the Constitution can not be upheld upon the ground that the State is conducting a legislative experiment. P. 279.

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52 F.2d 349, affirmed.

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Appeal from a decree sustaining the dismissal by the District Court, 42 F.2d 913, of a bill by the appellant, a licensed ice company, to enjoin the defendant from engaging in the ice business at a place in Oklahoma without having first procured a license. [285 U.S. 271]

SUTHERLAND, J., lead opinion

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MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

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The New State Ice Company, engaged in the business of manufacturing, selling, and distributing ice under a license or permit duly issued by the Corporation Commission of Oklahoma, brought this suit against Liebmann in the federal District Court for the Western District of Oklahoma to enjoin him from manufacturing, selling, and distributing ice within Oklahoma City without first having obtained a like license or permit from the commission. The license or permit is required by an act of the Oklahoma Legislature, chapter 147, Session Laws 1925. That act declares that the manufacture, sale, and distribution of ice is a public business; that no one shall be permitted to manufacture, sell, or distribute ice within the State without first having secured a license for that purpose from the commission; that whoever shall engage in such business without obtaining the license shall be guilty of a misdemeanor, punishable by fine not to exceed $25, each day's violation constituting a separate offense, and that, by general order of the commission, a fine not to exceed $500 may be imposed for each violation.

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Section 3 of the act provides:

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That the Corporation Commission shall not issue license to any persons, firm or corporation for the manufacture, sale and distribution of ice, or either of them, within this State, except upon a hearing had by said Commission at which said hearing, competent testimony and proof shall be presented showing the necessity for the manufacture, sale or distribution of ice, or either of them, [285 U.S. 272] at the point, community or place desired. If the facts proved at said hearing disclose that the facilities for the manufacture, sale and distribution of ice by some person, firm or corporation already licensed by said Commission at said point, community or place, are sufficient to meet the public needs therein, the said Corporation Commission may refuse and deny the applicant [application] for said license. In addition to said authority, the said Commission shall have the right to take into consideration the responsibility, reliability, qualifications and capacity of the person, firm or corporation applying for said license and of the person, firm or corporation already licensed in said place or community, as to afford all reasonable facilities, conveniences and services to the public, and shall have the power and authority to require such facilities and services to be afforded the public; provided, that nothing herein shall operate to prevent the licensing of any person, firm or corporation now engaged in the manufacture, sale and distribution of ice, or either of them, in any town, city or community of this State, whose license shall be granted and issued by said Commission upon application of such person, firm or corporation and payment of license fee.

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The portion of the section immediately in question here is that which forbids the commission to issue a license to any applicant except upon proof of the necessity for a supply of ice at the place where it is sought to establish the business, and which authorizes a denial of the application where the existing licensed facilities "are sufficient to meet the public needs therein." The District Court dismissed the bill of complaint for want of equity, on the ground that the manufacture and sale of ice is a private business which may not be subjected to the foregoing regulation. 42 F.2d 913. The Court of Appeals affirmed. 52 F.2d 349. [285 U.S. 273]

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It must be conceded that all businesses are subject to some measure of public regulation. And that the business of manufacturing, selling, or distributing ice, like that of the grocer, the dairyman, the butcher, or the baker, may be subjected to appropriate regulations in the interest of the public health cannot be doubted; but the question here is whether the business is so charged with a public use as to justify the particular restriction above stated. If this legislative restriction be within the constitutional power of the state Legislature, it follows that the license or permit, issued to appellant, constitutes a franchise, to which a court of equity will afford protection against one who seeks to carry on the same business without obtaining from the commission a license or permit to do so. Frost v. Corporation Commission, 278 U.S. 515, 519-521. In that view, engagement in the business is a privilege to be exercised only in virtue of a public grant, and not a common right to be exercised independently (id.) by any competent person conformably to reasonable regulations equally applicable to all who choose to engage therein.

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The Frost case is relied on here. That case dealt with the business of operating a cotton gin. It was conceded that this was a business clothed with a public interest, and that the statute requiring a showing of public necessity as a condition precedent to the issue of a permit was valid. But the conditions which warranted the concession there are wholly wanting here. It long has been recognized that mills for the grinding of grain or performing similar services for all comers are devoted to a public use, and subject to public control, whether they be operated by direct authority of the State or entirely upon individual initiative. At a very early period, a majority of the states had adopted general acts authorizing the taking and flowage, in invitum, of lands for their erection and maintenance. In passing these acts, the attention of the Legislatures no [285 U.S. 274] doubt was directed principally to grist mills; but some of the acts, either in precise terms or in their application, were extended to other kinds of mills. Head v. Amoskeag Manufacturing Co., 113 U.S. 9, 16-19; State v. Edwards, 86 Me. 102, 104-106, 29 Atl. 947. The mills were usually operated by the use of water power, but this method of operation has been said not to be essential. State v. Edwards, supra, 86 Me. at p. 106. It was open to the proprietor of a mill to maintain it as a private mill for grinding his own grain, and this free from legislative control; but if the proprietor assumed to serve the general public, he thereby dedicated his mill to the public use and subjected it to such legislative control as was appropriate to that status. In such cases, the mills were regarded as so necessary to the existence of the communities which they served as to justify the government in fostering and maintaining them and imposing limitations upon their operation for the protection of the public. Id.

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In Chickasha Cotton Oil Co. v. Cotton County Gin Co., 40 F.2d 846, three Circuit Judges passed upon the constitutionality of the Oklahoma Cotton Ginning Act. Opinions were delivered seriatim, all to the effect, but for varying reasons, that the business of operating cotton gins in Oklahoma was clothed with a public interest. One of the judges thought that the rule in respect of grist mills should apply by analogy, on the ground of the similarity of service. The rule that mills whose services are open to all comers are clothed with a public interest was formulated in the light, and upon the basis, of historical usage, which had survived the limitations that otherwise might be imposed by the due process clause of the Fourteenth Amendment. While the cotton gin has no such background of ancient usage, and, as the opinion by Judge Phillips points out, there is always danger of our being led afield by relying overmuch upon analogies, the analogy here is not without helpful significance. [285 U.S. 275]

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In that connection, we also may consider Clark v. Nash, 198 U.S. 361, and Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, which dealt with the cognate question of what is a public use in respect of which the right of eminent domain may be exercised. The cases involved a statute of the State of Utah, which declared:

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The cultivation and irrigation of the soil, the production and reduction of ores, are of vital necessity to the people of the State of Utah; are pursuits in which all are interested and from which all derive a benefit; and the use and application of the unappropriated waters of the natural streams and water courses of the State to the generation of electrical force or energy to be employed in industrial pursuits are of great public benefit and utility. So irrigation of land, the mining, milling, smelting or other reduction of ores, and such use and application of such waters for the generation of electrical power to be employed as aforesaid are hereby declared to be for the public use, and the right of eminent domain may be exercised in behalf thereof.

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C. 95, § 1, Laws of Utah 1896.

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In the Nash case, this Court, applying that statute, sustained the condemnation of a right of way across the lands of one private owner for a ditch to convey water for the purpose of irrigating the lands of another private owner. The decision was rested explicitly upon the existence of conditions peculiar to the State. These conditions are epitomized in the legislative declaration above quoted. The court said (pp. 369-370) that its decision was not to be understood as approving the broad proposition that private property might be taken in all cases where the taking might promote the public interest and tend to develop the natural resources of the State, but, having reference to the conditions there appearing,

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that the use is a public one, although the taking of the right of way is for the purpose simply of thereby obtaining the water for an individual, where it is absolutely necessary to [285 U.S. 276] enable him to make any use whatever of his land, and which will be valuable and fertile only if water can be obtained.

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This was followed in the Strickley case, where, mining being one of the chief industries of the State and its development peculiarly important for the public welfare, the condemnation of a right of way for an aerial bucket line across private lands, for the purpose of transporting ores from a mine in private ownership, was upheld under the same statute.

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These cases, though not strictly analogous, furnish persuasive ground for upholding the declaration of the Oklahoma Legislature in respect of the public nature of cotton gins in that State. The production of cotton is the chief industry of the State of Oklahoma, and is of such paramount importance as to justify the assertion that the general welfare and prosperity of the State in a very large and real sense depend upon its maintenance. Cotton ginning is a process which must take place before the cotton is in a condition for the market. The cotton gin bears the same relation to the cotton grower that the old grist mill did to the grower of wheat. The individual grower of the raw product is generally financially unable to set up a plant for himself; but the service is a necessary one with which, ordinarily, he cannot afford to dispense. He is compelled, therefore, to resort for such service to the establishment which operates in his locality. So dependent, generally, is he upon the neighborhood cotton gin that he faces the practical danger of being placed at the mercy of the operator in respect of exorbitant charges and arbitrary control. The relation between the growers of cotton, who constitute a very large proportion of the population, and those engaged in furnishing the service is thus seen to be a peculiarly close one in respect of an industry of vital concern to the general public. These considerations render it not unreasonable [285 U.S. 277] to conclude that the business "has been devoted to a public use, and its use thereby in effect granted to the public." Tyson & Bro. v. Banton, 273 U.S. 418, 434; Wolff Co. v. Industrial Court, 262 U.S. 522, 535, 538; same case, 267 U.S. 552, 563 et seq.

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We have thus, with some particularity, discussed the circumstances which, so far as the State of Oklahoma is concerned, afford ground for sustaining the legislative pronouncement that the business of operating cotton gins is charged with a public use, in order to put them in contrast with the completely unlike circumstances which attend the business of manufacturing, selling, and distributing ice. Here we are dealing with an ordinary business, not with a paramount industry upon which the prosperity of the entire State in large measure depends. It is a business as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor, each of whom performs a service which, to a greater or less extent, the community is dependent upon and is interested in having maintained, but which bears no such relation to the public as to warrant its inclusion in the category of businesses charged with a public use. It may be quite true that, in Oklahoma, ice is not only an article of prime necessity, but indispensable; but certainly not more so than food or clothing or the shelter of a home. And this Court has definitely said that the production or sale of food or clothing cannot be subjected to legislative regulation on the basis of a public use, and that the same is true in respect of the business of renting houses and apartments, except as to temporary measures to tide over grave emergencies. See Tyson & Bro. v. Banton, supra, pp. 437-438, and cases cited.

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It has been said that the manufacture of ice requires an expensive plant beyond the means of the average citizen, and that, since the use of ice is indispensable, patronage [285 U.S. 278] of the producer by the consumer is unavoidable. The same might, however, be said in respect of other articles clearly beyond the reach of a restriction like that here under review. But, for the moment conceding the materiality of the statement, it is not now true, whatever may have been the fact in the past. We know, since it is common knowledge, that today, to say nothing of other means, wherever electricity or gas is available (and one or the other is available in practically every part of the country), anyone, for a comparatively moderate outlay, may have set up in his kitchen an appliance by means of which he may manufacture ice for himself. Under such circumstances, it hardly will do to say that people generally are at the mercy of the manufacturer, seller, and distributor of ice for ordinary needs. Moreover, the practical tendency of the restriction, as the trial court suggested in the present case, is to shut out new enterprises, and thus create and foster monopoly in the hands of existing establishments against, rather than in aid of, the interest of the consuming public.

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Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business such as that under review cannot be upheld consistent with the Fourteenth Amendment. Under that amendment, nothing is more clearly settled than that it is beyond the power of a State,

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under the guise of protecting the public, arbitrarily [to] interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.

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Burns Baking Co. v. Bryan, 264 U.S. 504, 513, and authorities cited; Liggett Co. v. Baldridge, 278 U.S. 105, 113.

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Stated succinctly, a private corporation here seeks to prevent a competitor from entering the business of making and selling ice. It claims to be endowed with state authority to achieve this exclusion. There is no question [285 U.S. 279] now before us of any regulation by the State to protect the consuming public either with respect to conditions of manufacture and distribution or to insure purity of product or to prevent extortion. The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it. There is no difference in principle between this case and the attempt of the dairyman under state authority to prevent another from keeping cows and selling milk on the ground that there are enough dairymen in the business; or to prevent a shoemaker from making or selling shoes because shoemakers already in that occupation can make and sell all the shoes that are needed. We are not able to see anything peculiar in the business here in question which distinguishes it from ordinary manufacture and production. It is said to be recent; but it is the character of the business, and not the date when it began, that is determinative. It is not the case of a natural monopoly, or of an enterprise in its nature dependent upon the grant of public privileges. The particular requirement before us was evidently not imposed to prevent a practical monopoly of the business, since its tendency is quite to the contrary. Nor is it a case of the protection of natural resources. There is nothing in the product that we can perceive on which to rest a distinction, in respect of this attempted control, from other products in common use which enter into free competition, subject, of course, to reasonable regulations prescribed for the protection of the public and applied with appropriate impartiality.

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And it is plain that unreasonable or arbitrary interference or restrictions cannot be saved from the condemnation of that amendment merely by calling them experimental. It is not necessary to challenge the authority of the States to indulge in experimental legislation; but [285 U.S. 280] it would be strange and unwarranted doctrine to hold that they may do so by enactments which transcend the limitations imposed upon them by the Federal Constitution. The principle is imbedded in our constitutional system that there are certain essentials of liberty with which the State is not entitled to dispense in the interest of experiments. This principle has been applied by this Court in many cases. Dorchy v. Kansas, 264 U.S. 286; Wolff Packing Co. v. Industrial Court, 262 U.S. 522; 267 U.S. 552; Pierce v. Sisters, 268 U.S. 510; Nixon v. Herndon, 273 U.S. 536; Tumey v. Ohio, 273 U.S. 510; Manley v. Georgia, 279 U.S. 1; Washington v. Roberge, 278 U.S. 116; Chicago, St. P. M. & O. Ry. Co. v. Holmberg, 282 U.S. 162; Stromberg v. California, 283 U.S. 359; Near v. Minnesota, 283 U.S. 697. In the case last cited, the theory of experimentation in censorship was not permitted to interfere with the fundamental doctrine of the freedom of the press. The opportunity to apply one's labor and skill in an ordinary occupation with proper regard for all reasonable regulations is no less entitled to protection.

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Decree affirmed.

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MR. JUSTICE CARDOZO took no part in the consideration or decision of this case.

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MR. JUSTICE BRANDEIS, dissenting.

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Chapter 147 of the Session Laws of Oklahoma 1925, declares that the manufacture of ice for sale and distribution is "a public business"; confers upon the Corporation Commission in respect to it the powers of regulation customarily exercised over public utilities; and provides specifically for securing adequate service. The statute makes is a misdemeanor to engage in the business without a license from the commission; directs that the license shall not issue except pursuant to a prescribed written application, after a formal hearing upon adequate notice [285 U.S. 281] both to the community to be served and to the general public, and a showing, upon competent evidence, of the necessity "at the place desired"; and it provides that the application may be denied, among other grounds, if

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the facts proved at said hearing disclose that the facilities for the manufacture, sale and distribution of ice by some person, firm or corporation already licensed by said commission at said point, community or place, are sufficient to meet the public needs therein.

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Under a license so granted, the New State Ice Company is, and for some years has been, engaged in the manufacture, sale, and distribution of ice at Oklahoma City, and has invested in that business $500,000. While it was so engaged, Liebmann, without having obtained or applied for a license, purchased a parcel of land in that city and commenced the construction thereon of an ice plant for the purpose of entering the business in competition with the plaintiff. To enjoin him from doing so, this suit was brought by the ice company. Compare Frost v. Corporation Commission, 278 U.S. 515. Liebmann contends that the manufacture of ice for sale and distribution is not a public business; that it is a private business and, indeed, a common calling; that the right to engage in a common calling is one of the fundamental liberties guaranteed by the due process clause; and that to make his right to engage in that calling dependent upon a finding of public necessity deprives him of liberty and property in violation of the Fourteenth Amendment. Upon full hearing, the District Court sustained that contention and dismissed the bill. 42 F.2d 913. Its decree was affirmed by the Circuit Court of Appeals. 52 F.2d 349. The case is here on appeal. In my opinion, the judgment should be reversed.

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First. The Oklahoma statute makes entry into the business of manufacturing ice for sale and distribution dependent, in effect, upon a certificate of public convenience [285 U.S. 282] and necessity. Such a certificate was unknown to the common law. It is a creature of the machine age, in which plants have displaced tools and businesses are substituted for trades. The purpose of requiring it is to promote the public interest by preventing waste. Particularly in those businesses in which interest and depreciation charges in plant constitute a large element in the cost of production, experience has taught that the financial burdens incident to unnecessary duplication of facilities are likely to bring high rates and poor service. 1 There, cost is usually dependent, among other things, upon volume; and division of possible patronage among competing concerns may so raise the unit cost of operation as to make it impossible to provide adequate service at reasonable rates. The introduction in the United States of the certificate of public convenience and necessity marked the growing conviction that, under certain circumstances, free competition might be harmful to the community, and that, when it was so, absolute freedom to enter the business of one's choice should be denied.

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Long before the enactment of the Oklahoma statute here challenged, a like requirement had become common in the United States in some lines of business. The certificate was required first for railroads; then for street railways; then for other public utilities whose operation is dependent upon the grant of some special privilege. 2 [285 U.S. 283] Latterly, the requirement has been widely extended to common carriers by motor vehicle which use the highways but which, unlike street railways and electric light companies, are not dependent upon the grant of any special privilege. 3 In Oklahoma, the certificate was required, as early as 1915, for cotton gins—a business then declared a public one, and, like the business of manufacturing ice, conducted wholly upon private property. Sess.Laws, 1915, c. 176, § 3. See Frost v. Corporation Commission, 278 U.S. 515, 517. As applied to public utilities, the validity under the Fourteenth Amendment of the requirement of the certificate has never been successfully questioned.

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Second. Oklahoma declared the business of manufacturing ice for sale and distribution a "public business"—that is, a public utility. So far as appears, it was the first State to do so. 4 Of course, a legislature cannot by [285 U.S. 284] mere legislative fiat convert a business into a public utility. Producers' Transportation Co. v. Railroad Commission, 251 U.S. 228, 230. But the conception of a public utility is not static. 5 The welfare of the community may require that the business of supplying ice be made a public utility, as well as the business of supplying water or any other necessary commodity or service. If the business is, or can be made, a public utility, it must be possible to make the issue of a certificate a prerequisite to engaging in it.

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Whether the local conditions are such as to justify converting a private business into a public one is a matter primarily for the determination of the state legislature. Its determination is subject to judicial review; but the usual presumption of validity attends the enactment. 6 [285 U.S. 285] The action of the State must be held valid unless clearly arbitrary, capricious or unreasonable.

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The legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference. . . .

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McLean v. Arkansas, 211 U.S. 539, 547. Whether the grievances are real of fancied, whether the remedies are wise or foolish are not matters about which the Court may concern itself. 7

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Our present duty is to pass upon the statute before us, and if it has been enacted upon a belief of evils that is not arbitrary, we cannot measure their extent against the estimate of the legislature.

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Tanner v. Little, 240 U.S. 369, 385. A decision that the Legislature's belief of evils was arbitrary, capricious, and unreasonable may not be made without enquiry into the facts with reference to which it acted.

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Third. Liebmann challenges the statute—not an order of the Corporation Commission. If he had applied for a license and been denied one, we should have been obliged to inquire whether the evidence introduced before [285 U.S. 286] the commission justified it in refusing permission to establish an additional ice plant in Oklahoma City. As he did not apply, but challenges the statute itself, out inquiry is of an entirely different nature. Liebmann rests his defense upon the broad claim that the Federal Constitution gives him the right to enter the business of manufacturing ice for sale even if his doing so be found by the properly constituted authority to be inconsistent with the public welfare. He claims that, whatever the local conditions may demand, to confer upon the commission power to deny that right is an unreasonable, arbitrary, and capricious restraint upon his liberty.

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The function of the court is primarily to determine whether the conditions in Oklahoma are such that the legislature could not reasonably conclude (1) that the public welfare required treating the manufacture of ice for sale and distribution as a "public business"; and (2) that, in order to insure to the inhabitants of some communities an adequate supply of ice at reasonable rates, it was necessary to give the commission power to exclude the establishment of an additional ice plant in places where the community was already well served. Unless the Court can say that the Federal Constitution confers an absolute right to engage anywhere in the business of manufacturing ice for sale, it cannot properly decide that the legislators acted unreasonably without first ascertaining what was the experience of Oklahoma in respect to the ice business. The relevant facts appear, in part, of record. Others are matters of common knowledge to those familiar with the ice business. Compare Muller v. Oregon, 208 U.S. 412, 419-420. They show the actual conditions, or the beliefs, on which the legislators acted. In considering these matters, we do not, in a strict sense, take judicial notice of them as embodying statements of uncontrovertible facts. Our function is only to determine the reasonableness of the legislature's belief in the existence of evils and in the effectiveness of the remedy [285 U.S. 287] provided. In performing this function, we have no occasion to consider whether all the statements of fact which may be the basis of the prevailing belief are well founded; and we have, of course, no right to weigh conflicting evidence.

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(A) In Oklahoma, a regular supply of ice may reasonably be considered a necessary of life, comparable to that of water, gas, and electricity. The climate, which heightens the need of ice for comfortable and wholesome living, precludes resort to the natural product. 8 There, as elsewhere, the development of the manufactured ice industry in recent years 9 has been attended by deep-seated alterations in the economic structure and by radical changes in habits of popular thought and living. Ice has come to be regarded as a household necessity, indispensable to the preservation of food, and so to economical household management and the maintenance of health. 10 Its commercial [285 U.S. 288] uses are extensive. In urban communities, they absorb a large proportion of the total amount of ice manufactured for sale. 11 The transportation, storage, and distribution of a great part of the nation's food supply is dependent upon a continuous, and dependable supply of ice. 12 It appears from the record that, in certain parts of Oklahoma, a large trade in dairy and other products has [285 U.S. 289] been built up as a result of rulings of the Corporation Commission under the act of 1925, compelling licensed manufacturers to serve agricultural communities, 13 and that this trade would be destroyed if the supply of ice were withdrawn. 14 We cannot say that the Legislature of Oklahoma acted arbitrarily in declaring that ice is an article of primary necessity, in industry and agriculture as well as in the household, partaking of the fundamental character of electricity, gas, water, transportation, and communication.

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Nor can the Court properly take judicial notice that, in Oklahoma, the means of manufacturing ice for private use are within the reach of all persons who are dependent upon it. Certainly it has not been so. In 1925, domestic mechanical refrigeration had scarcely emerged from the experimental stage. 15 Since that time, the production and consumption of ice manufactured for sale, far from [285 U.S. 290] diminishing, has steadily increased. 16 In Oklahoma, the mechanical household refrigerator is still an article of relative luxury. 17 Legislation essential to the protection of individuals of limited or no means is not invalidated by the circumstance that other individuals are financially able to protect themselves. The businesses of power companies and of common carriers by street railway, steam railroad, or motor vehicle fall within the field of public control, although it is possible, for a relatively modest outlay, to install individual power plants, or to purchase [285 U.S. 291] motor vehicles for private carriage of passengers or goods. The question whether, in Oklahoma, the means of securing refrigeration otherwise than by ice manufactured for sale and distribution has become so general as to destroy popular dependence upon ice plants is one peculiarly appropriate for the determination of its legislature and peculiarly inappropriate for determination by this Court, which cannot have knowledge of all the relevant facts.

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The business of supplying ice is not only a necessity, like that of supplying food or clothing or shelter, but the legislature could also consider that it is one which lends itself peculiarly to monopoly. 18 Characteristically, the business is conducted in local plants with a market narrowly limited in area, 19 and this for the reason that ice [285 U.S. 292] manufactured at a distance cannot effectively compete with a plant on the ground. 20 In small towns and rural communities, 21 the duplication of plants, and in larger communities the duplication of delivery service, 22 is wasteful and ultimately burdensome to consumers. At the same time, the relative ease and cheapness with which an ice plant may be constructed exposes the industry to destructive and frequently ruinous competition. Competition in the industry tends to be destructive because ice plants have a determinate capacity, and inflexible fixed charges and operating costs, and because in a market of limited area the volume of sales is not readily expanded. Thus, the erection of a new plant in a locality already adequately served often causes managers to go to extremes in cutting prices in order to secure business. Trade journals and reports of association meetings of ice manufacturers bear ample witness to the hostility of the industry to such competition, [285 U.S. 293] and to its unremitting efforts, through trade associations, informal agreements, combination of delivery systems, and, in particular, through the consolidation of plants, to protect markets and prices against competition of any character. 23

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That these forces were operative in Oklahoma prior to the passage of the act under review is apparent from the record. Thus, it was testified that in only six or seven localities in the State containing, in the aggregate, not more than 235,000 of a total population of approximately 2,000,000, was there "a semblance of competition," 24 and that, even in those localities, the prices of ice were ordinarily uniform. The balance of the population was, and still is, served by companies enjoying complete monopoly. Compare Munn v. Illinois, 94 U.S. 113, 131-132; Sinking Fund Cases, 99 U.S. 700, 747; Wabash, St. Louis & Pacific Ry. Co. v. Illinois, 118 U.S. 557, 569; Spring Valley Waterworks v. Schottler, 110 U.S. 347, 354; Budd v. New York, 143 U.S. 517, 545; Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522, 528. Where there was competition, it often resulted to the disadvantage, rather [285 U.S. 294] than the advantage of the public, both in respect to prices and to service. Some communities were without ice altogether, and the State was without means of assuring their supply. There is abundant evidence of widespread dissatisfaction with ice service prior to the act of 1925, 25 and of material improvement in the situation subsequently. It is stipulated in the record that the ice industry as a whole in Oklahoma has acquiesced in and accepted the act and the status which it creates.

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(B) The statute under review rests not only upon the facts just detailed, but upon a long period of experience in more limited regulation dating back to the first year of Oklahoma's statehood. For 17 years prior to the passage of the act of 1925, the Corporation Commission, under section 13 of the Act of June 10, 1908, had exercised jurisdiction over the rates, practices, and service of ice plants, its action in each case, however, being predicated upon a finding that the company complained of enjoyed a "virtual monopoly" of the ice business in the community which it served. 26 The jurisdiction thus exercised [285 U.S. 295] was upheld by the Supreme Court of the State in Oklahoma Light & Power Co. v. Corporation Commission, 96 Okl. 19, 220 Pac. 54. The court said, at page 24:

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The manufacture, sale and distribution of ice in many respects closely resembles the sale and distribution of gas as fuel, or electric current, and in many communities the same company that manufactures, sells, and distributes electric current is the only concern that manufactures, sells and distributes ice, and by reason of the nature and extent of the ice business it is impracticable in that community to interest any other concern in such business. In this situation, the distributor of such a necessity as ice should not be permitted by reason of the impracticability of any one else engaging in the same business to charge unreasonable prices, and if such an abuse is persisted in, the regulatory power of the State should be invoked to protect the public.

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See also Consumers' Light & Power Co. v. Phipps, 120 Okl. 223, 251 Pac. 63.

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By formal orders, the commission repeatedly fixed or approved prices to be charged in particular communities; 27 required ice to be sold without discrimination 28 [285 U.S. 296] and to be distributed as equitably as possible to the extent of the capacity of the plant; 29 forbade short weights and ordered scales to be carried on delivery wagons and ice to be weighed upon the customer's request; 30 and undertook to compel sanitary practices in the manufacture of ice 31 and courteous service of patrons. 32 Many of these regulations, other than those fixing prices, were embodied in a general order to all ice companies, issued July 15, 1921, and are still in effect. 33 Informally, the Commission [285 U.S. 297] adjusted a much greater volume of complaints of a similar nature. 34 It appears from the record that, for some years prior to the act of 1925, one day of each week was reserved by the commission to hear complaints relative to the ice business.

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As early as 1911, the commission, in its annual report to the Governor, had recommended legislation more clearly delineating its powers in this field:

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There should be a law passed putting the regulation of ice plants under the jurisdiction of the Commission. The Commission is now assuming this jurisdiction under an Act passed by the Legislature known as the antitrust law. A specific law upon this subject would obviate any question of jurisdiction. 35

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This recommendation was several times repeated, in terms revealing the extent and character of public complaint against the practices of ice companies. 36 [285 U.S. 298]

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The enactment of the so-called Ice Act in 1925 enlarged the existing jurisdiction of the Corporation Commission by removing the requirement of a finding of virtual monopoly in each particular case, compare Budd v. New York, 143 U.S. 517, 545, with Brass v. Stoeser, 153 U.S. 391, 402-403, by conferring the same authority to compel adequate service as in the case of other public utilities, and by committing to the commission the function of issuing licenses equivalent to a certificate of public convenience and necessity. With the exception of the granting and denying of such licenses and the exertion of wider control over service, the regulatory activity of the commission in respect to ice plants has not changed in character since 1925. It appears to have diminished somewhat in volume. 37 [285 U.S. 299]

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In 1916, the commission urged, in its report to the Governor, that all public utilities under its jurisdiction be required to secure from the commission "what is known as a `certificate of public convenience and necessity' before the duplication of facilities."

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This would prevent ruinous competition resulting in the driving out of business of small though competent public service utilities by more powerful corporations, and often consequent demoralization of service, or the requiring of the public to patronize two utilities in a community where one would be adequate. 38

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Up to that time, a certificate of public convenience and necessity to engage in the business had been applied only to cotton gins. Okla.Sess.Laws 1915, c. 176, § 3. In 1917, a certificate from the commission was declared prerequisite to the construction of new telephone or telegraph lines. 39 In 1923, it was required for the operation of motor carriers. 40 In 1925, the year in which the Ice Act was passed, the requirement was extended also to power, heat, light, gas, electric, or water companies proposing [285 U.S. 300] to do business in any locality already possessing one such utility. 41

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Fourth. Can it be said in the light of these facts that it was not an appropriate exercise of legislative discretion to authorize the commission to deny a license to enter the business in localities where necessity for another plant did not exist? The need of some remedy for the evil of destructive competition, where competition existed, had been and was widely felt. Where competition did not exist, the propriety of public regulation had been proven. Many communities were not supplied with ice at all. The particular remedy adopted was not enacted hastily. The statute was based upon a long established state policy recognizing the public importance of the ice business, and upon 17 years' legislative and administrative experience in the regulation of it. The advisability of treating the ice business as a public utility and of applying to it the certificate of convenience and necessity had been under consideration for many years. Similar legislation had been enacted in Oklahoma under similar circumstances with respect to other public services. The measure bore a substantial relation to the evils found to exist. Under these circumstances, to hold the act void as being unreasonable would, in my opinion, involve the exercise not of the function of judicial review, but the function of a super-legislature. If the act is to be stricken down, it must be on the ground that the Federal Constitution guarantees to the individual the absolute right to enter the ice business, however detrimental the exercise of that right may be to the public welfare. Such, indeed, appears to be the contention made. [285 U.S. 301]

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Fifth. The claim is that manufacturing ice for sale and distribution is a business inherently private, and, in effect, that no state of facts can justify denial of the right to engage in it. To supply one's self with water, electricity, gas, ice, or any other article is inherently a matter of private concern. So also may be the business of supplying the same articles to others for compensation. But the business of supplying to others, for compensation, any article or service whatsoever may become a matter of public concern. Whether it is or is not depends upon the conditions existing in the community affected. 42 If it is a matter of public concern, it may be regulated whatever the business. The public's concern may be limited to a single feature of the business, so that the needed protection can be secured by a relatively slight degree of regulation. Such is the concern over possible incompetence, which dictates the licensing of dentists, Dent v. West Virginia, 129 U.S. 114, 122; Douglas v. Noble, 261 U.S. 165, 170; or the concern over possible dishonesty, which led to the licensing of auctioneers or hawkers, Baccus v. Louisiana, 232 U.S. 334, 338. On the other hand, the public's concern about a particular business may be so pervasive and varied as to require constant detailed supervision and a very high degree of regulation. Where this is true, it is common to speak of the business as being a "public" one, although it is privately owned. It is to such businesses that the designation "public utility" is commonly applied, or they are spoken of as "affected with a public interest." German Alliance Insurance Co. v. Lewis, 233 U.S. 389, 408.

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A regulation valid for one kind of business may, of course, be invalid for another; since the reasonableness [285 U.S. 302] of every regulation is dependent upon the relevant facts. But so far as concerns the power to regulate, there is no difference, in essence, between a business called private and one called a public utility or said to be "affected with a public interest." Whatever the nature of the business, whatever the scope or character of the regulation applied, the source of the power invoked is the same. And likewise the constitutional limitation upon that power. The source is the police power. The limitation is that set by the due process clause, which, as construed, requires that the regulation shall be not unreasonable, arbitrary, or capricious, and that the means of regulation selected shall have a real or substantial relation to the object sought to be obtained. The notion of a distinct category of business "affected with a public interest," employing property "devoted to a public use," rests upon historical error. The consequences which it is sought to draw from those phrases are belied by the meaning in which they were first used centuries ago, 43 and by the decision of this Court, in Munn v. Illinois, 94 U.S. 113, which first introduced them into the law of the Constitution. 44 In my opinion, the true principle is that the [285 U.S. 303] state's power extends to every regulation of any business reasonably required and appropriate for the public protection. I find in the due process clause no other limitation upon the character or the scope of regulation permissible.

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Sixth. It is urged specifically that manufacturing ice for sale and distribution is a common calling, and that the right to engage in a common calling is one of the fundamental liberties guaranteed by the due process clause. To think of the ice manufacturing business as a common calling is difficult, so recent is it in origin and so peculiar in character. Moreover, the Constitution does not require that every calling which has been common shall ever remain so. The liberty to engage in a common calling, like other liberties, may be limited in the exercise of the police power. The slaughtering of cattle had been a common calling in New Orleans before the monopoly sustained in Slaughter House Cases, 16 Wall. 36, was created by the legislature. Prior to the Eighteenth Amendment, selling liquor was a common calling, but this Court held it to be consistent with the due process clause for a State to abolish the calling, Bartemeyer v. Iowa, 18 Wall. 129; Mugler v. Kansas, 123 U.S. 623, or to establish a system limiting the number of licenses, Crowley v. Christensen, 137 U.S. 86. Every citizen has the right to navigate a river or lake, and may even carry others thereon for hire. But the ferry privilege may be made exclusive in order that the patronage may be sufficient to justify maintaining the ferry service, Conway v. Taylor's Executor, 1 Black, 603, 633-634. [285 U.S. 304]

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It is settled that the police power commonly invoked in aid of health, safety, and morals extends equally to the promotion of the public welfare. 45 The cases just cited show that, while ordinarily free competition in the common callings has been encouraged, the public welfare may at other times demand that monopolies be created. Upon this principle is based our whole modern practice of public utility regulation. It is no objection to the validity of the statute here assailed that it fosters monopoly. That, indeed, is its design. The certificate of public convenience and invention is a device—a recent social—economic invention—through which the monopoly is kept under effective control by vesting in a commission the power to terminate it whenever that course is required in the public interest. To grant any monopoly to any person as a favor is forbidden, even if terminable. But where, as here, there is reasonable ground for the legislative conclusion that, in order to secure a necessary service at reasonable rates, it may be necessary to curtail the right to enter the calling, it is, in my opinion, consistent with the due process clause to do so, whatever the nature of the business. The existence of such power in the Legislature seems indispensable in our ever-changing society.

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It is settled by unanimous decisions of this Court that the due process clause does not prevent a State or city from engaging in the business of supplying its inhabitants with articles in general use, when it is believed that they [285 U.S. 305] cannot be secured at reasonable prices from the private dealers. Thus, a city may, if the local law permits, buy and sell at retail coal and wood, Jones v. City of Portland, 245 U.S. 217; or gasoline, Standard Oil Co. v. City of Lincoln, 275 U.S. 504. And a State may, if permitted by its own Constitution, build and operate warehouses, elevators, packinghouses, flour mills, or other factories, Green v. Frazier, 253 U.S. 233. As States may engage in a business, because it is a public purpose to assure to their inhabitants an adequate supply of necessary articles, may they not achieve this public purpose, as Oklahoma has done, by exercising the lesser power of preventing single individuals from wantonly engaging in the business and thereby making impossible a dependable private source of supply? As a State so entering upon a business may exert the taxing power, all individual dealers may be driven from the calling by the unequal competition. If States are denied the power to prevent the harmful entry of a few individuals into a business, they may thus, in effect, close it altogether to private enterprise.

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Seventh. The economic emergencies of the past were incidents of scarcity. In those days it was preeminently the common callings that were the subjects of regulation. The danger then threatening was excessive prices. To prevent what was deemed extortion, the English Parliament fixed the prices of commodities and of services from time to time during the four centuries preceding the Declaration of Independence. 46 Like legislation was enacted [285 U.S. 306] in the Colonies, and in the States, after the Revolution. 47 When the first due process clause was written into the Federal Constitution, the price of bread was being fixed by statute in at least two of the States, and this practice continued long thereafter. 48 Dwelling houses when occupied by the owner are preeminently private property. From the foundation of our government, those who wished to lease residential property had been free to charge to tenants such rentals as they pleased. But, for years after the World War had ended, the scarcity of dwellings in the City of New York was such that the State's legislative power was invoked to insure reasonable rentals. The constitutionality of the statute was sustained by this Court. Marcus Brown Holding Co. v. Feldman, 256 U.S. 170. Similar legislation of Congress for the city of Washington was also upheld. Block v. Hirsh, 256 U.S. 135.

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Eighth. The people of the United States are now confronted with an emergency more serious than war. Misery is widespread in a time not of scarcity, but of overabundance. The long-continued depression has brought unprecedented unemployment, a catastrophic fall in commodity prices, and a volume of economic losses which threatens our financial institutions. 49 Some people [285 U.S. 307] believe that the existing conditions threaten even the stability of the capitalistic system. 50 Economists are searching for the causes of this disorder, and are reexamining the basis of our industrial structure. Business men are seeking possible remedies. Most of them realize that failure to distribute widely the profits of industry has been a prime cause of our present plight. But rightly or wrongly, many persons think that one of the major contributing causes has been unbridled competition. 51 Increasingly, doubt is expressed whether it is economically wise, or morally right, that men should be permitted to [285 U.S. 308] add to the producing facilities of an industry which is already suffering from overcapacity. In justification of that doubt, men point to the excess capacity of our productive facilities resulting from their vast expansion without corresponding increase in the consumptive capacity of the people. They assert that, through improved methods of manufacture, made possible by advances in science and invention and vast accumulation of capital, our industries had become capable of producing from 30 to 100 percent more than was consumed even in days of vaunted prosperity; and that the present capacity will, for a long time, exceed the needs of business. 52 All agree that irregularity in employment—the greatest of our evils—cannot be overcome unless production and consumption are more nearly balanced. Many insist there must be some form of economic control. There are plans for proration. There are many proposals for stabilization. 53 And some thoughtful men [285 U.S. 309] of wide business experience insist that all projects for stabilization and proration must prove futile unless, in some way, the equivalent of the certificate of public convenience and necessity is made a prerequisite to embarking new capital in an industry in which the capacity already exceeds the production schedules. 54

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Whether that view is sound, nobody knows. The objections to the proposal are obvious and grave. The remedy might bring evils worse than the present disease. The [285 U.S. 310] obstacles to success seem insuperable. 55 The economic and social sciences are largely uncharted seas. We have been none too successful in the modest essays in economic control already entered upon. The new proposal involves a vast extension of the area of control. Merely to acquire the knowledge essential as a basis for the exercise of this multitude of judgments would be a formidable task, and each of the thousands of these judgments would call for some measure of prophecy. Even more serious are the obstacles to success inherent in the demands which execution of the project would make upon human intelligence and upon the character of men. Man is weak, and his judgment is, at best, fallible.

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Yet the advances in the exact sciences and the achievements in invention remind us that the seemingly impossible sometimes happens. There are many men now living who were in the habit of using the age-old expression: "It is as impossible as flying." The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation. In those fields, experimentation has, for two centuries, been not only free, but encouraged. Some people assert that our present plight is due, in part, to the limitations set [285 U.S. 311] by courts upon experimentation in the fields of social and economic science, and to the discouragement to which proposals for betterment there have been subjected otherwise. There must be power in the States and the nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the Fourteenth Amendment, or the States which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the useful arts. 56

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To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. 57 We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But, in the exercise of this high power, we must be ever on our guard lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

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MR. JUSTICE STONE joins in this opinion.

Footnotes

SUTHERLAND, J., lead opinion (Footnotes)

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1. Compare Sumner H. Slichter, "Modern Economic Society," pp. 56, 326-328; Eliot Jones and T. C. Bigham, "Principles of Public Utilities," p. 70; Eliot Jones, "Is Competition in Industry Ruinous," 34 Quarterly Journal of Economics, 473, 488.

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2. See Ford P. Hall, "Certificates of Convenience and Necessity," 28 Mich.L.Rev. 107, 276; Waldo O. Willhoft, "Certificates of Convenience and Necessity in Michigan," 10 Mich.State Bar Journal 257; Charles S. Hyneman, "Public Encouragement of Monopoly in the Utility Industries," Annals of American Academy of Political and Social Science, January, 1930, p. 160; 24 Col.L.Rev. 528. Professor Hall lists statutes of forty-three States, most of them enacted within the last 20 years, requiring a certificate for the operation of various classes of public utilities. Before the advent of the certificate of public convenience and necessity, similar but less flexible control over the entry of many public utilities into business was exercised through the grant of franchises, municipal or State. See Eliot Jones and T. C. Bigham, "Principles of Public Utilities," c. III. The certificate was first introduced into federal law by the Transportation Act 1920, c. 91, § 402, pars. 18-20, 41 Stat. 456, 477. Compare Thomas H. Kennedy, "The Certificate of Convenience and Necessity Applied to Air Transportation," 1 Journal of Air Law 76.

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3. See D. E. Lilienthal and I. S. Rosenbaum, "Motor Carrier Regulation by Certificates of Necessity and Convenience," 36 Yale L.J. 163, "Motor Carrier Regulation: Federal, State, and Municipal," 26 Col.L.Rev. 954. Compare LaRue Brown and S. N. Scott, "Regulation of the Contract Motor Carrier Under the Constitution," 44 Harv.L.Rev. 530.

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4. Such a law has since been passed in Arkansas. Ark.Acts 1929, No. 55, p. 110. The state court held that the measure violated the State Constitution in so far as it sanctioned denial of the right to engage in the ice business. Cap. F. Bourland Ice Co. v. Franklin Utilities Co., 180 Ark. 770, 22 S.W.2d 993. The provisions for the regulation of rates, attacked under the Fourteenth Amendment, were sustained. See 15 St. Louis L.Rev. 414. Bills declaring the business of manufacturing ice a public utility have been introduced in Kansas, Louisiana, Michigan, New York, and Texas. See 70 Ice & Refrigeration 425; 72 id. 172, 239; 74 id. 110; 76 id. 216, 217; H. P. Hill, "Commission Control of the Ice Industry," ibid., 80.

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5.

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Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. . . . It presents, therefore, a case for the application of a long known and well established principle in social science, and this statute simply extends the law so as to meet his new development of commercial progress.

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Munn v. Illinois, 94 U.S. 113, 133. See Thomas P. Hardman, "Public Utilities" 37 W.Va.L.Q. 250.

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6. O'Gorman & Young, Inc. v. Hartford Fire Insurance Co., 282 U.S. 251.

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Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.

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Sinking Fund Cases, 99 U.S. 700, 718. See also Legal Tender Cases, 12 Wall. 457, 531; Trade-Mark Cases, 100 U.S. 82, 96. See James B. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 Harv.L.Rev. 129, 142.

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7.

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Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

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Chicago, Burlington & Quincy R. Co. v. McGuire, 219 U.S. 549, 569.

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Questions of policy are not submitted to judicial determination, and the courts have no general authority of supervision over the exercise of discretion which under our system is reposed in the people or other departments of government.

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Green v. Frazier, 253 U.S. 233, 240. See also Price v. Illinois, 238 U.S. 446, 451-452; Rast v. Van Deman & Lewis, 240 U.S. 342, 357; Merrick v. N. W. Halsey & Co., 242 U.S. 568, 586-587.

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8. The mean normal temperature in the State from May to September is 76.4 degrees. Climatological Data, United States Weather Bureau, vol. xxxix, 1930, No. 13, p. 53. The mean normal temperature in January, the coldest month, is 38.3 degrees; in December, 39.2 degrees. Id. So far as appears, no natural ice is harvested in the State for commercial purposes. See Guy L. Andrews, "State Regulation of Ice Industry in Oklahoma," Refrigerating World, Sept. 1928, p. 32.

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9. The industry first assumed commercial importance in the United States about 1880. See Ice and Refrigeration Blue Book (10th Ed.), pp. 12-18. Reports of the Bureau of the Census indicate that, in 1869, there were only four establishments producing artificial ice; in 1879, 35; in 1889, 222; in 1899, 775. See Willard L. Thorp, "The Integration of Industrial Operation," United States Census Monographs, III, 1924, pp. 49, 50. In 1929, the Census of Manufactures shows 4,110 establishments making ice as their product of chief value. The Ice and Refrigeration Blue Book for 1927, p. 30, lists 7,338 plants actually producing ice for sale. It estimates the total production for that year at 52,202,160 tons, as against 4,294,439 tons, reported by the Bureau of the Census for 1899.

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10. See report of Committee on Fundamental Equipment, submitted to the President's Conference on Home Building and Home Ownership, December 3, 1931, p. 107; Elsie P. Wolcott, "Use and Cost of Ice in Families with Children," published by the department of public welfare of the city of Chicago. Lack of ice, in hot seasons, results in constant waste and danger to health. It compels the purchase of food in small quantities at higher prices. The intimate relation of food preservation to health, and infant mortality has long been recognized. Ordinary perishable foodstuffs, it is generally considered, cannot be safely kept at temperatures in excess of from 45 to 50 degrees. Report of Committee on Fundamental Equipment, supra, p. 110.

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11. See Walter R. sanders, "Industrial Application of Refrigeration in the United States," Proceedings of the Fourth International Congress of Refrigeration, London, 1924, p. 967. It was testified that, in Oklahoma City, in April, 1930, 46.4 percent of the sales of ice were to the retail trade, 37.12 percent to the commercial trade, 13.81 percent to the wholesale trade, 2.92 percent for car icing, and the remainder for carload shipments out of the city. In 1922, there were loaded in Oklahoma 1,676 cars of food products under refrigeration; in 1925, 2,940 cars; and in 1929, 3,347. The Ice and Refrigeration Blue Book (10th Ed.), pp. 22, 23, lists 198 industries using refrigeration. In a great number of these, it is impracticable to install a private ice plant.

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12. Were it not for refrigeration, the market for perishable foodstuffs, in warm seasons, would be limited in area to a few miles and in time to a few days, or even hours. A considerable part of this refrigeration is supplied by concerns manufacturing ice for sale. Such concerns commonly supply ice used in car-icing. Mechanical refrigeration is beyond the means of many small retail dealers. Moreover, since decay in food, once begun, cannot be arrested by subsequent refrigeration, ice, or a substitute, is often essential on the farm. See M. E. Pennington and A. D. Greenlee, "The Refrigeration of Dressed Poultry in Transit," Bulletin No. 17, U.S. Department of Agriculture, p. 31.

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13. More than 80 percent of the milk and cream sold from farms in the United States is produced in sections where natural ice can be harvested. See U.S. Department of Agriculture, "Colling Milk and Cream on the Farm," Farmers' Bulletin No. 976, p. 1. The dairy industry in Oklahoma, however, is wholly dependent upon artificial ice, or its substitutes. Refrigeration on the farm is indispensable to the safe marketing of dairy products at any season when the temperature exceeds 50 degrees. See John T. Bown, "The Application of Refrigeration to the Handling of Milk," Bulletin No. 98, U.S. Department of Agriculture, pp. 2, 65 et seq.

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14. The power of the commission to compel this service, of course, depends upon the status of the ice business as a public utility. The evidence shows that the distribution of ice in rural communities not themselves possessing ice plants has developed almost wholly since the passage of the act of 1925. There was testimony that such distribution would be impracticable without the protection afforded by the Act.

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15. The total number of household refrigerators in the entire country manufactured and sold before 1920 was approximately 10,000. In 1924, the annual production reached 30,000; in 1925, 75,000. Electrical Refrigerating News, February 17, 1932.

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16. The Secretary of the National Association of Ice Industries testified that the ice business for the last 11 years had increased upon an average of 5.35 percent each year; that, in 1919, the per capita consumption of ice was 712 pounds; in 1929, 1,157 pounds. A great deal of the increase in consumption of ice in Oklahoma, another witness testified, was in rural communities and among urban dwellers of the poorer classes.

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17. The number of domestic electric meters installed in Oklahoma as of August 31, 1930, was only 222,237, according to a tabulation of the Bureau of Foreign and Domestic Commerce. The population of the State in 1930 was 2,396,000. Fifteenth Census, vol. I, p. 18. It is estimated that 965,000 household refrigerators were sold in 1931, of which only 10,146 were sold in Oklahoma. Electrical Refrigerating News, February 24, 1932. Approximately 3,578,000 such refrigerators are now in use throughout the country. Id., February 10, 1932. From these figures, it may be calculated that the number of refrigerators in use in Oklahoma is between 35,000 and 40,000. The average cost of a household electric refrigerator in 1925 was $425; in 1931, $245. Electrical Refrigerating News, February 17, 1932. The price of ice for domestic use in Oklahoma varies from 40 to 70 cents the hundredweight. Few families use as much as three or four tons of ice in a year. In view of these facts, this Court can scarcely have judicial knowledge that, in Oklahoma, all families or businesses which are able to purchase ice are able to purchase a mechanical refrigerator. See Report of Committee on Fundamental Equipment, submitted to the President's Conference on Home Building and Home Ownership, pp. 111, 128-129. This committee found it impossible to recommend even an ordinary refrigerator, using ice, for families of low income, and suggested the design and marketing of a specially constructed ice-chest.

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18. It is noteworthy that the ice industry has the characteristic of uniformity of product or service common to most public utilities, and distinguishing it from other businesses in which differences in quality or style make difficult effective regulation. See S. Howard Patterson and Karl W. H. Scholz, "Economic Problems of Modern Life" (2d Ed. 1931), p. 426.

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The tendency of the industry to be conducted as a public utility is reflected in the widespread entry into it in recent years of electrical, gas, and water utilities, and the like. Such companies in Oklahoma operate more than one-third of the ice plants. See Ice and Refrigeration Blue Book (10th Ed.), pp. 1268-1288. Compare Oklahoma Light & Power Co. v. Corporation Commission, 96 Okl. 19, 24, 220 Pac. 54.

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Municipalities have engaged extensively in the business of manufacturing and selling ice in foreign countries, and, to a lessor extent, in the United States. On several occasions, departments of the federal government, unable to secure ice at what were regarded as reasonable prices, have installed their own ice plants. Both in the Philippine Islands and in Panama, plants have been operated which sell ice to government employees. See Carl D. Thompson, "Public Ownership," pp. 301-305; Jeanie Wells Wentworth, "A Report on Municipal and Government Ice Plants," submitted to the Borough President of Manhattan, December 15, 1913.

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19. See Willard L. Thorp, "The Integration of Industrial Operation," United States Census Monographs, III, 1924, pp. 49, 50. Neither consolidation of ownership nor increase in production has had the effect of greatly increasing the size of plants in the ice business. Thus, in Oklahoma in 1927, there were only twenty plants manufacturing ice for sale which had a capacity exceeding 200 tons a day, of which eight were in Oklahoma City and Tulsa. Ice and Refrigeration Blue Book (10th Ed.) pp. 1268-1288.

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20. Several reasons were given in the testimony for this localization of the ice business. Freight rates on ice are high in proportion to value. Handling charges are doubled if the ice is put in cold storage at the point of consignment; and, if kept in the car, the ice loses in weight and deteriorates in quality during the period of a week or more before a carload will be exhausted in a small community. Shrinkage, of course, varies with the weather, but is at all times considerable.

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21. Oklahoma is predominantly a State of rural population. Only 34.3 percent of its inhabitants live in towns or cities of more than 2,500. Fifteenth Census of the United States, vol. I, p. 15. It has only four cities over 25,000; 12 cities from 10,000 to 25,000; and 52 cities from 2,500 to 10,000. There are 444 incorporated places of less than 2,500. Id., pp. 895-898.

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22. See Editorials, Refrigerating World, May, 1928, p. 5, June 1, 1928, p. 6; J. H. Reed, "Consolidate Ice Delivery in Atlanta," id., May, 1928, p. 15.

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23. See e.g., John Nickerson, "Consolidations in the Ice Industry," 73 Ice & Refrigeration 333, 334; 69 id. 223; 70 id. 357; 72 id. 39; id. 282; Halbert P. Hill, "The Effect of Recent Mergers on the Ice Industry," Refrigerating World, February, 1926, pp. 15, 42; W. F. Stevens, "What the Future Holds for the Ice Manufacturer," 76 Ice & Refrigeration 81, 82; W. L. Foushee, "The Ice Business as a Public Utility," id. 302. See Tipton v. Ada Ice & Fuel Co., 2d & 3d Ann.Rep.Okla.Corp.Comm., p. 358.

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24. The Ice and Refrigeration Blue Book for 1927 shows that, of 142 communities containing ice plants manufacturing ice for sale, at least 112 were served either by a single plant or by several plants of common ownership. See pp. 1268-1288, 1645 et seq. There is evidence in the record that it was common practice for manufacturing establishments of different ownership to make use of a jointly owned delivery company. Out of 217 plants listed as engaged in manufacturing ice for sale, 101 were owned by corporations owning or controlling other plants within or without the State. Id.

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25. For accounts of the situation in Oklahoma before the passage of the bill, see Guy L. Andrews, "Regulation of the Ice Business in Oklahoma," 75 Ice & Refrigeration 171, "State Regulation of the Ice Industry," id. 437. In the year 1924, 375 formal complaints against ice companies are said to have been filed with the commission.

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26. Okla.Sess.Laws 1907-08, c. 83:

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Sec. 13. Whenever any business, by reason of its nature, extent, or the existence of a virtual monopoly therein, is such that the public must use the same, or its services, or the consideration by it given or taken or offered, or the commodities bought or sold therein are offered or taken by purchase or sale in such a manner as to make it of public consequence, or to affect the community at large as to supply, demand or price or rate thereof, or said business is conducted in violation of the first section of this Act, said business is a public business, and subject to be controlled by the State, by the Corporation Commission or by an action in any district court of the State, as to all of its practices, prices, rates and charges. And it is hereby declared to be the duty of any person, firm or corporation engaged in any public business to render its services and offer its commodities, or either, upon reasonable terms without discrimination and adequately to the needs of the public, considering the facilities of said business.

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27. Powers v. Mangum Ice & Cold Storage Co., 2d & 3d Ann.Rep.Okla.Corp.Comm., p. 354; Tipton v. Ada Ice & Fuel Co., id., p. 358; Scanlon v. Sass, id., p. 361; Worley v. Hill, id., p. 390; Gillian v. Tishomingo Electric Light & Power Co., 4th Ann.Rep., p. 103; Wadlington v. Southern Ice & Utilities Co., 13th Ann.Rep., p. 235; In re General Investigation of Prices, Practices, Rates and Charges of the New State Ice Co., 15th Ann.Rep. p. 176; In re General Investigation of Prices, Practices, Rates, and Charges of the Steffens-Bretch Ice & Ice Cream Co., id., p. 177; McCartney v. Kingfisher Ice Co., id., p. 210; In the Matter of the Investigation of Prices Charged for Ice at Guthrie, Oklahoma, by the Rummeli-Braun Co., id., p. 212.

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28. Brenan v. Tishomingo Ice & Cold Storage Co., 2d & 3d Ann.Rep.Okla.Corp.Comm., p. 353; Tipton v. Ada Ice & Fuel Co., id., p. 358; Scanlon v. Sass, id., p. 361; Order No. 472, 4th Ann.Rep., p. 40; Nunnery v. Mangum Ice & Cold Storage Co., id., p. 63; Order No. 641, 6th Ann.Rep., p. 7; Order No. 650, id., p. 8; Order No. 708, id. p. 10; Garner v. Tulsa Ice Co., 10th Ann.Rep., p. 336; Ratner v. Imperial Ice Co., 11th Ann.Rep., p. 205; Norton v. Chandler Ice Co., 12th Ann.Rep., p. 227; Vance v. Tahlequah Light & Power Co., 13th Ann.Rep., p. 194.

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29. In most instances of complaint of insufficient ice, the commission undertook to secure only the equitable distribution of the available supply; and the terms of the statute gave it no greater authority. See, e. g., Powers v. Mangum Ice & Cold Storage Co., 2d & 3d Ann.Rep.Okla.Corp.Comm., p. 354; Gardiner v. Geary Light & Ice Co., id., p. 403. But compare Ratner v. Imperial Ice Co., 11th Ann.Rep., p. 205; Ada v. Tipton Ice & Fuel Co., 2d & 3d Ann.Rep., p. 358. On no occasion, before 1925, did the commission undertake to extend ice service to communities not theretofore supplied.

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30. Brenan v. Tishomingo Ice & Cold Storage Co., 2d & 3d Ann.Rep.Okla.Corp.Comm., p. 353; Powers v. Mangum Ice & Cold Storage Co., id., p. 354; Tipton v. Ada Ice & Fuel Co., id., p. 358; Scanlon v. Sass, id., p. 361; Worley v. Hull, id., p. 390; Ralston v. Hobart Ice & Bottling Co., 4th Ann.Rep. p. 110; In the Matter of Proposed Order No. 94, 6th Ann.Rep., p. 219, 7th id., p. 266; Langan v. McCoy Bros., 8th & 9th Ann.Rep., p. 226; Ratner v. Imperial Ice Co., 11th Ann.Rep., p. 205; Norton v. Chandler Ice Co., 12th Ann.Rep., p. 227; Vance v. Tahlequah Light & Power Co., 13th Ann.Rep., p. 194.

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31. Gardiner v. Geary Light & Ice Co., 2d & 3d Ann.Rep.Okla.Corp.Comm., p. 403.

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32. Worley v. Hull, 2d & 3d Ann.Rep.Okla.Corp.Comm., p. 390.

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33. Order No. 1906, 15th Ann.Rep.Okla.Corp.Comm., p. 178.

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34. See 8th & 9th Ann.Rep.Okla.Corp.Comm., p. 1.

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35. 2d & 3d Ann.Rep.Okla.Corp.Comm., p. 8.

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36. In its Eighth and Ninth Annual Report, dated November 20, 1916, p. 5, the Commission said:

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The scope of legislation pertaining to those utilities which serve the public generally should be broadened. Two conspicuous examples are ice plants and cotton compresses. Chapter 93, Session Laws, 1915, extends the jurisdiction of the Corporation Commission over water, heat, light, and power companies, but does not include ice plants. Numerous complaints are received by the Commission each year as to extortionate practices of ice companies and exorbitant prices charged. The same jurisdiction should be given the Corporation Commission over ice plants as it exercises over gas, electric and water companies.

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In its Eleventh Annual Report, October 3, 1918, p. xxii, it was said:

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The business of manufacturing and distributing ice is as much a matter of public concern as is the business of rendering water, electric or gas service, and should be subject to the same regulation. Complaints are continuously being made to the Commission in reference to prices of ice, practices of ice companies, or service rendered by such companies, and the Commission has frequently been called upon to exercise jurisdiction under the so-called Anti-Trust Laws. Specific legislation should be enacted in reference to these companies and the power of regulation should be made definite and certain.

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Again, in the Twelfth Annual Report, November 18, 1919, p. 1:

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During the past summer season, numerous complaints against practices and rates of ice utilities have arisen from at least a hundred towns and cities throughout the State. The same jurisdiction should be given the Corporation Commission over ice plants as it exercises over gas, electric and water companies.

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37. Besides continuing in effect order No. 1906, supra, note 33, the commission has issued further general orders pertaining particularly to accounting practices. Order No. 3843, 20th Ann.Rep.Okla.Corp.Comm., p. 562. In the following cases, it has prescribed rates: In re Application of Marietta Ice & Water Co., 22d Ann.Rep., p. 601; In re Application for Reduction in Ice Rates Charged by the Sallisaw Ice Co., id., p. 816; In re Reduction of Rates Charged by the Consumers' Ice Co., id., p. 859; In re Application of Southwestern Light & Power Co., 23d Ann.Rep., p. 755; In re Application of the Ward Ice Industries for Reduction in Ice Rates, id., p. 757. In In re Application of the Shawnee Ice Co. for Increase of Capacity in its Plant, 22d Ann.Rep., p. 834, the applicant was allowed to withdraw its application, and the intervening application of E. A. Liebemann to erect a new plant was denied. In Burbank Ice Co. v. Kaw City Ice & Power Co., 23d Ann.Rep., p. 558, the defendant's permit to distribute ice in the town of Shidler was revoked upon a showing that it distributed during the summer months only and that the plaintiff's local plant was operated throughout the year, was adequate to meet local needs, and could not be maintained in the face of the defendant's competition. See also In re Application of New State Ice Co., id., p. 748. Other formal orders of the commission have been issued without opinion.

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38. 8th & 9th Ann.Rep.Okla.Corp.Comm., pp. 5, 6.

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39. Okla.Sess.Laws, 1917, c. 270.

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40. Okla.Sess.Laws, 1923, c. 113, § 4. This statute was held valid against objections under both the Federal and State Constitutions in Ex parte Tindall, 102 Okl. 192, 229 Pac. 125, and Barbour v. Walker, 126 Okl. 227, 229, 259 Pac. 552. See also Chicago, R. I. & P.Ry. Co. v. State, 123 Okl. 190, 252 Pac. 849; Chicago, R. I. & P. Ry. Co. v. State, 126 Okl. 48, 258 Pac. 874. As to certificates of public convenience and necessity for the operation of a cotton gin, see Hohman v. State, 122 Okl. 45, 250 Pac. 514.

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41. Okla.Sess.Laws, 1925, c. 102, §§ 5, 6. Control over entry into these businesses, power and water plants, and the like, had therefore been exercised by the requirement of a franchise from the municipality to be served. See Mayor and Councilmen of City of Pawhuska v. Pawhuska Oil & Gas Co., 28 Okl. 563, 568, 115 Pac. 353; Huffaker v. Town of Fairfax, 115 Okl. 73, 242 Pac. 254. Compare Okla.Const., art. IX, § 2; art. XVIII, § 5.

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42.

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Plainly, circumstances may so change in time or so differ in space as to clothe with such an [public] interest what, at other times or in other places, would be a matter of purely private concern.

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43. In Lord Hale's "Treatise on the Ports of the Sea," Hargrave, "Law Tracts," pp. 77-78. Lord Hale was speaking of the particulars, wharves and cranes in ports, and did not purport to generalize the obligation to serve all persons at reasonable rates in other circumstances. See Breck P. McAllister, "Lord Hale and Business Affected With a Public Interest," 43 Harv.L.Rev. 759. He was speaking of duties arising at common law, and not of limitations upon the legislative power of Parliament. See J. A. McClain, Jr., "The Convenience of the Public Interest Concept," 15 Minn.L.Rev. 546. He could not have been speaking of such limitations, for in England they did not exist, and Parliament was accustomed to regulate prices of commodities of all kinds. See note 46, infra.

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44. Chief Justice Waite, who wrote the opinion, said generally, p. 126,

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Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large,

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and referred with approval to statutes regulating the prices of bread and the rates of chimney-sweepers, as well as of persons in other callings still regulated. See Walton H. Hamilton, "Affectation with a Public Interest," 39 Yale L.J. 1089, 1095, 1096. See also German Alliance Insurance Co. v. Lewis, 233 U.S. 389, 408.

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45. Lake Shore & Michigan Southern Ry. Co. v. Ohio, 173 U.S. 285, 292; Chicago & Alton R. Co. v. Tranbarger, 238 U.S. 67, 77; Chicago, B. & Q. Ry. Co. v. Illinois ex rel. Drainage Commissioner, 200 U.S. 561, 592; Bacon v. Walker, 204 U.S. 311, 317.

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But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one wills or to contract as one chooses.

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Chicago, B. & Q. R. Co. v. McGuire, 219 U.S. 549, 567. Compare Walls v. Midland Carbon Co., 254 U.S. 300.

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46. "In Lord Hale's time . . . , all activity comprehended under what we call business was public, and all of it subject to price control." Walton H. Hamilton, "Affectation With a Public Interest," 39 Yale L. J. 1089, 1094. For voluminous collections of statutes and materials relating to Parliamentary control of business in England prior to the American Revolution, see the references in Edward A. Adler, "Business Jurisprudence," 28 Harv.L.Rev. 135; J. A. McClain, Jr., "The Convenience of the Public Interest Concept," 15 Minn.L.Rev. 546; Breck P. McAllister, "Lord Hale and Business Affected With a Public Interest," 43 Harv.L.Rev. 759, 767; Milton Handler, "The Constitutionality of Investigations by the Federal Trade Commission," 28 Col.L.Rev. 708, 712-714.

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47. Statutes of eight of the thirteen States, passed during the Revolution, and fixing the price of almost every commodity in the market, are listed in 33 Harv.L.Rev. 838, 839.

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48. Maryland Laws of 1789, c. 8, § 2, Herty's Digest of the Laws of Maryland, 1799, p. 250; 5 Statutes of South Carolina 186, 1 South Carolina Acts of Assembly, 1791-1794, p. 88.

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49. See Hearings before the La Follette subcommittee of the Senate Committee on Manufactures, Seventy-Second Congress, First Session, on Senate Bill 6215 (71st Congress), to establish a National Economic Council, Parts 1 and 2 (October 22 to December 19, 1931), particularly the testimony of Dr. E. A. Goldenweiser, director of research and statistics of the Federal Reserve Board, of Mr. L. H. Sloan, vice president of the Standard Statistics Company, and of Miss Frances Perkins, Industrial Commissioner of the State of New York, pp. 3-150; "When We Choose to Plan," Graphic Survey, March 1, 1932. See also Hearings on December 28, 1931-January 9, 1932, the La Follette-Costigan Bills, Senate Bills Nos. 174, 262, and 3045 (72d Congress).

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50. See Edward S. Corwin, "Social Planning under the Constitution," 26 American Political Science Review 1; W. B. Donham, "Business Adrift," (1931), p. 165; "America Faces the Future," edited by Charles A. Beard (1932), pp. 1-10; Paul M. Mazur, "New Roads to Prosperity" (1931), c. V.

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51. W. B. Donham, "Business Adrift," pp. 141, 142; "The Swope Plan," edited by J. George Frederick (1931), pp. 70, 73, 128; Richard T. Ely, "Hard Times, The Way In and the Way Out" (1931), pp. 62-64, 135, 137; "The Menace of Overproduction," edited by Scoville Hamlin (1930); Dexter M. Keezer and Stacy May, "The Public Control of Business" (1930), p. 83; Walker D. Hines, "Planning in a Particular Industry," Bulletin of the Taylor Society, October, 1931; Philip Cabot, "The Vices of Free Competition," The Yale Review, Autumn, 1931; Julius H. Barnes, "Business Looks at Unemployment," Atlantic Monthly, August, 1931; "The Federal Anti-Trust Laws: A Symposium," edited by Milton Handler (December, 1931).

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52. The depression which began in 1929 has greatly reduced the present consumptive capacity; and the loss of export trade, and the arrest in the growth in population (resulting from the lessened birthrate and the practical stoppage of immigration), apparently preclude the rapid increase of consumptive capacity which followed the earlier periods of depression.

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53. See Charles A. Beard, "America Faces the Future" (1932), pp. 117-140; "The Swope Plan," edited by J. George Frederick (1931); Report No. 12 of the Committee on Continuity of Business and Employment of the United States Chamber of Commerce, October 2, 3, 1931; Report of the Executive Council, American Federation of Labor to the 51st Annual Convention, October 5, 1931; Stuart Chase, "A Ten Year Plan for America," Harpers' Magazine, June, 1931; George Soule, "What Planning Might Do," New Republic, March 11, 1931; "When We Choose to Plan," Graphic Survey, March 1, 1932; "The New Challenge to Scientific Management," Bulletin of the Taylor Society, April, 1931; Robert J. McFall, "Planning Industry," id., June, 1931; Horace B. Drury, "The Hazard of Business," id., December, 1931; Grover A. Whalen, "National Planning," id., February, 1932; J. Russell Smith, "The End of An Epoch," Graphic Survey, July 1, 1931; Mary van Kleeck, "Planning and the World Paradox," id., November 1, 1931; Lewis L. Lorwin, "The Origins of Economic Planning," id., February 1, 1932; H. S. Person, "Scientific Management as a Philosophy and Technique of Progressive Industrial Stabilization," paper presented at World Social Economic Congress, August, 1931; "When Will America Begin to Plan?" Christian Century, March 11, 1931. See generally Hearings before the La Follette Subcommittee, on S. 6215, supra, note 49. Compare Editorial Research Reports, Washington, D.C., August 1, August 8, December 3, 1931.

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54. See Charles R. Stevenson, "The Way Out" (1932), particularly pp. 27, 31, 33; Philip Cabot, "The Vices of Free Competition," The Yale Review, Autumn, 1931; J. A. Hobson, "The State as an Organ of Rationalization," Political Quarterly, January-March, 1931; and the discussions by Professor Beard and Messrs. Swope, Chase, Soule, and Smith, supra, note 53. Concerning the bituminous coal business, see United States Coal Commission, Final Report 1925, Part I, pp. 268, 269; "Opening New Mines on the Public Domain: A Way of Order for Bituminous Coal," by Walter H. Hamilton and Helen R. Wright, pp. 35-37; "The Case of Bituminous Coal," by Walton H. Hamilton and Helen R. Wright, pp. 170-173, 263, 264; Willard E. Atkins, et al., "Economic Behavior," (1931), c. XXII; Senate Bill No. 2935, §§ 2, 8 (72d Congress), introduced by Senator Davis, and report of hearings, U.S. Daily, March 15, 1932, p. 1. Concerning petroleum and gas, see Ralph H. Fuchs, "Legal Technique and National Control of the Petroleum Industry"; J. Howard Marshall and Norman L. Meyers, "Legal Planning of Petroleum Production," 41 Yale Law Journal 33; Samuel H. Slichter, "Modern Economic Society," 861, 862.

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55. Compare Sumner H. Slichter, "Modern Economic Society" (1931), pp. 872-888; Charles Whiting Baker, "Pathways Back to Prosperity" (1932), pp. 59-61; Samuel Crowther, "A Basis for Stability" (1932), pp. 3-17; J. Franklin Ebersole, "National Planning," Bulletin of the Taylor Society, August, 1931; Virgil Jordan, "Some Aspects of National Stabilization," Mechanical Engineering, January, 1932; "What Price Stability," The Annalist, October 9, 1931; Warren Bishop, "The Rain of Plans," The Nation's Business, October, 1931; Myron W. Watkins, "The Economic Philosophy of Anti-Trust Legislation," Annals of the American Academy of Political and Social Science, January, 1930; Albert W. Atwood, "The Craze for National Planning," Saturday Evening Post, March 19, 1932.

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56. Compare Charles Warren, "The New "Liberty" under the Fourteenth Amendment," 39 Harv.L.Rev. 431.

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57. Compare Felix Frankfurter, "The Public and Its Government," pp. 49-51.

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