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## Constitutional Law in 1919-1920

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# MICHIGAN LAW REVIEW

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## CONSTITUTIONAL LAW IN 1919-1920\*

A REVIEW OF THE DECISIONS OF THE SUPREME COURT OF  
THE UNITED STATES ON CONSTITUTIONAL QUESTIONS  
DURING THE OCTOBER TERM, 1919

**T**HIS review aims to include all the decisions on constitutional questions rendered by the Supreme Court of the United States during the October Term of court which began in October, 1919, and ended in June, 1920.<sup>1</sup> The treatment for the most part contents itself

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\* This is the first of a series of three papers on this topic. The others will appear in succeeding issues.

<sup>1</sup> Similar reviews of decisions from 1914 to 1919 have appeared in the *AMERICAN POLITICAL SCIENCE REVIEW*, XII, 17-49, 427-457, 640-666, XIII, 47-77, 229-250, 607-633, and XIV, 53-73. That journal plans to continue to review each year the more important decisions of the Supreme Court. It also publishes in nearly every issue a review called "Judicial Decisions on Public Law." Recent ones by Robert E. Cushman will be found in volume XI, pp. 545-555, 720-730, volume XII, pp. 95-105, 272-287, 475-488, 685-694, volume XIII, pp. 100-107, 281-292, 451-459, and volume XIV, pp. 303-316, 461-470. In the *Record of Political Events* published as a supplement to each September issue of the *POLITICAL SCIENCE QUARTERLY* is a section called "The Federal Judiciary" which summarizes briefly the important decisions of the Supreme Court during the preceding year. In 35 *POL. SCI. QUART.* 411, is an article called "The Supreme Court and the Constitution, 1919-1920," which reviews the important decisions of the past year. The *QUARTERLY* plans to publish similar articles in each September issue. In the *AMERICAN BAR ASSOCIATION JOURNAL*, volume VI, pp. 22-33, is a "Review of Recent Supreme Court Decisions" by S. S. Gregory, dealing with selected decisions. It is announced that similar reviews will be contained in the succeeding issues. Each issue of the *BULLETIN OF THE NATIONAL TAX ASSOCIATION* contains a department called "Decisions and Rulings" which reviews a large number of decisions on taxation. This is not confined to decisions of the Supreme Court.

with exposition. The footnotes give references to articles and editorial notes in recognized law journals commenting on the cases here reviewed and on the more important constitutional decisions of other courts.<sup>2</sup> The classification of the cases and the arrangement of topics are not satisfactory, but no alternative seems distinctly superior. A classification on the basis of the clauses of the Constitution under which the cases arise would have decided demerits. Under the Fourteenth Amendment we should have to jumble together complaints against judicial procedure, tax laws, police measures, exercises of eminent domain and other governmental action. It seems preferable to follow established distinctions between various governmental powers and to let them set the plan for the main structure of the classification.

# I. MISCELLANEOUS NATIONAL POWERS

The validity and the effect of the Eighteenth Amendment<sup>3</sup> was passed upon in two cases. *Hawke v. Smith*<sup>4</sup> decided that a state

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Beginning with volume 33, the HARVARD LAW REVIEW contains a series of articles called "The Progress of the Law", written by professors in the Harvard Law School. Cases on police power and administrative law will be found in Beale, "Municipal Corporations" (XXXIII, 1058); cases on taxation in Beale, "Conflict of Laws" (XXXIII, 1), and Warren, "Wills and Administration" (XXXIII, 556); and cases on the jurisdiction and procedure of courts in Beale, "Conflict of Laws" (XXXIII, 1), and Scott, "Civil Procedure" (XXXIII, 236).

<sup>2</sup>It is intended to include references to all articles and notes in law journals which deal with any question of public law. References given without introduction are to discussions of the case considered in the text. For reference to articles in other than technical law journals, the issues of the AMERICAN ECONOMIC REVIEW, AMERICAN HISTORICAL REVIEW, and AMERICAN POLITICAL SCIENCE REVIEW should be consulted. Each issue of these reviews contains a list of articles in periodicals, a considerable number of which have to do with matters out of which spring issues of constitutional law.

<sup>3</sup>"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

<sup>4</sup>253 U. S. —, 40 Sup. Ct. 495 (1920). See also *Hawke v. Smith*, 253 U. S. —, 40 Sup. Ct. 498 (1920), applying the same principle to the Suffrage

constitution cannot authorize a referendum to the electorate from the action of a state legislature in ratifying an amendment to the federal Constitution. The power to ratify was said to have its source in the federal Constitution. The Fifth Article which provides for amendments is a grant of authority by the people to Congress. Congress is restricted to the choice between two methods of ratification. It may send an amendment to state legislatures or to state conventions. When the Constitution uses the term "state legislature" it means the representative law-making body and not the general electorate. What the term meant when the Constitution was adopted, it means still. The argument that the Constitution looks to ratification by legislative action in the states is unsound. "Ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment." Legislatures get their authority to ratify, not from the people of the state, but through the grant to Congress by the people of the United States. A case<sup>5</sup> which allowed a state with the assent of Congress to apply the referendum to an act of the state legislature fixing the boundaries of congressional districts was said to be inapposite, since such action is legislative in character while the ratification of an amendment is not. "The choice of means of ratification was wisely withheld from conflicting action in the several states." Otherwise there might be "endless confusion in the manner of ratification of federal amendments." It is apparent that what Mr. Justice Day says about the referendum is applicable to other state attempts to restrict state legislatures in ratifying amendments to the federal Constitution, and that the Tennessee legislature was justified in acting on the Nineteenth Amendment in disregard of the requirement of the Tennessee constitution that an election of members of the legislature must intervene between

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Amendment. See 91 CENT. L. J. 1. For discussions of the referendum question prior to the Supreme Court decision, see William Howard Taft, "Can Ratification of an Amendment to the Constitution Be Made to Depend on a Referendum?", 28 YALE L. J. 821, and notes in 8 CALIF. L. REV. 185, 89 CENT. L. J. 334, 19 COLUM. L. REV. 502, 4 CORNELL L. Q. 195, 33 HARV. L. REV. 287, 23 LAW NOTES 62, 102, 119, 24 LAW NOTES 64, 4 MASS. L. Q. 236, 342, and 18 MICH. L. REV. 51, 698. Some of the discussions cited in note 6, *infra*, also consider the referendum question.

<sup>5</sup> Davis v. Hildebrandt, 241 U. S. 565, 36 Sup. Ct. 708 (1916).

the submission of a proposed amendment by Congress and its consideration by the state legislature.

The Eighteenth Amendment as a whole was sustained in *Rhode Island v. Palmer*.<sup>6</sup> The court introduced a novelty into its practice by contenting itself with a statement of its conclusions and refraining from giving its reasons. This is often done in so-called memorandum opinions, but these have heretofore been confined to questions of minor importance or to issues already well settled. The validity of the Amendment was contested on the ground of alleged defects in the methods of its submission and adoption and on the basis of objections to its substance. *Hawke v. Smith*<sup>7</sup> was cited for the affirmation of the court that a state cannot apply a referendum

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<sup>6</sup> 253 U. S. —, 40 Sup. Ct. 486 (1920). See 91 CENT. L. J. 1. For discussions of the validity of the Amendment prior to the Supreme Court decisions, see Everett V. Abbott, "Inalienable Rights and the Eighteenth Amendment", 20 COLUM. L. REV. 183, Lucilius A. Emery, "The Eighteenth Amendment to the Constitution of the United States", 13 MAINE L. REV. 121, William L. Frierson, "Amending the Constitution of the United States", 33 HARV. L. REV. 659, Frank W. Grinnell, "Limitations on the Kind of Amendments to the Federal Constitution Provided for by Article V", 5 MASS. L. Q. 116, Fred B. Hart, "The Amendatory Power Under the Constitution, Particularly with Reference to Amendment 18", 90 CENT. L. J. 229, Howard C. Joyce, "The Prohibition Amendment as an Encroachment on the Inherent Rights of the States", 23 LAW NOTES 26, William L. Marbury, "The Limitations Upon the Amending Power", 33 HARV. L. REV. 223, D. O. McGovney, "Is the Eighteenth Amendment Void Because of Its Contents?", 20 COLUM. L. REV. 499, Fred H. Peterson, "Modern Views on Amending the Constitution", 89 CENT. L. J. 188, George D. Skinner, "Intrinsic Limitations on the Power of Constitutional Amendment", 18 MICH. L. REV. 213, Wayne B. Wheeler, "The Constitutionality of the Constitution is Not a Justiciable Question", 90 CENT. L. J. 152, Justin DuPratt White, "Is There an Eighteenth Amendment?", 5 CORNELL L. Q. 113, 23 LAW NOTES 188, George Washington Williams, "What, if Any, Limitations Are There Upon the Power to Amend the Constitution of the United States?", 6 VA. L. REG. n.s. 161, and notes in 18 MICH. L. REV. 155, 700. For discussions of the interpretation of the second section of the Amendment see Minor Bronaugh, "Concurrent Jurisdiction", 23 LAW NOTES 85, O. K. Cushing, "'Concurrent Power' in the Eighteenth Amendment", 8 CALIF. L. REV. 205, Wayne B. Wheeler, "Which Definition of 'Concurrent Power' Will the Supreme Court Choose?", 90 CENT. L. J. 283. "'Concurrent Jurisdiction' Not the Same as Concurrent Power", 22 LAW NOTES 107, and note in 33 HARV. L. REV. 968.

<sup>7</sup> Note 4, *supra*.

to the rejection or ratification of an amendment. An earlier case<sup>8</sup> on the vote necessary to pass a bill over the President's veto was adduced for the decision that an amendment may be proposed by a vote of two-thirds of the members present in each house, provided there is a quorum. It is not necessary to have "a vote of two-thirds of the entire membership, present and absent." The proposal by the requisite vote "sufficiently shows that the proposal was deemed necessary by all who voted for it. An express declaration that they regarded it as necessary is not essential." The objections urged against the substance of the amendment were that it was an "addition" and not an "amendment" because not germane to anything in the original Constitution, that it was legislation and hence improper for inclusion in the Constitution, and that it interfered with the powers reserved to the States by the Tenth Amendment and was a step towards the destruction of the federal system ordained by the Constitution and therefore not within the amending power. Without specifying these objections, the court through Mr. Justice Van Devanter states succinctly that the prohibition provision of the Amendment is within the amending power, is now a part of the Constitution and "must be respected and given effect the same as other provisions of that instrument," is "operative throughout the entire territorial limits of the United States" and "of its own force invalidates every legislative Act, whether by Congress, by a state Legislature, or by a territorial assembly, which authorizes or sanctions what the section forbids."

The decision on the validity of the Amendment was unanimous. Mr. Justice McReynolds concurred in the disposition of the cases, but declined to express himself on the effect of the amendment on the power of the states. Mr. Justice McKenna went further and disagreed with the interpretation of the Amendment announced by the majority. This interpretation was put by Mr. Justice Van Devanter as follows:

"The second section of the amendment—the one declaring 'The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation'—does

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<sup>8</sup> *Missouri Pacific Ry. v. Kansas*, 248 U. S. 279, 39 Sup. Ct. 93 (1919).

not enable Congress or the several states to defeat or thwart the prohibition, but only to enforce it by appropriate legislation.

"The words 'concurrent power', in that section, do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several states or any of them; nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign and interstate commerce from intra-state affairs.

"The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them."

The Chief Justice, in a separate concurring opinion confined to the interpretation of the Amendment, expressed his profound regret that the court should have been content to state its conclusions without adding its reasons. He in effect construes "concurrent power" to mean "equal and independent power", and insists that the opposite construction contended for would result in a paramount power of Congress or the states and not a concurrent power, and would also in effect nullify the amendment. In elaboration he adds:

"Comprehensively looking at all these contentions, the confusion and contradiction to which they lead, serve in my judgment to make it certain that it cannot possibly be that Congress and the states entered into the great and important business of amending the Constitution in a matter so vitally concerning all the people solely in order to render governmental action impossible, or, if possible, to so define and limit it as to cause it to be productive of no results and to frustrate the obvious intent and general purpose contemplated. It is true indeed that the mere words of the second section tend to these results, but if they be read in the light of the cardinal rule which compels a consideration of the context in view of the situation and the subject with which the amendment dealt and the pur-

pose which it was intended to accomplish, the confusion will be seen to be only apparent."

Mr. Justice McKenna's disagreement was based largely on the normal and natural meaning of the words "concurrent power" which the Chief Justice conceded. He refused to assent to the proposition that the interpretation put upon concurrent power by him would practically nullify the amendment, saying hopefully:

"The conviction of the evils of intemperance—the eager and ardent sentiment that impelled the amendment, will impel its execution through Congress and the States. It may not be in such legislation as the Volstead Act with its  $\frac{1}{2}$  of 1 per cent. of alcohol or in such legislation as some of the states have enacted with their 2.75 per cent. of alcohol, but it will be a law that will be prohibitive of intoxicating liquor for beverage purposes. It may require a little time to achieve, it may require some adjustments, but of its ultimate achievement there can be no doubt."

To this was added the comment that, if difficulties result from enforcing the amendment according to its terms, they are nothing with which the court has to do. The learned dissident declares his belief that the framers of the amendment "meant what they said and that they must be taken at their word." The word "concurrent", he insists, has the "inexorable requirement of coincident or united action, not alternative or emergent action to safeguard against the delinquency of Congress or the states." His analysis of the situation resulting from the amendment is as follows:

"If it be said that the states get no power over prohibition that they did not have before, it cannot be said that it was not preserved to them by the amendment, notwithstanding the policy of prohibition was made national, and besides, there was a gift of a power to Congress that it did not have before, a gift of a right to be exercised within state lines, but with the limitation or condition that the powers of the states should remain with the states and be participated in by Congress only in concurrence with the states, and thereby preserved from abuse by either, or exercise to the detriment of prohibi-



tion. There was, however, a power given to the states, a power over importations. This power was subject to concurrence with Congress and had the same safeguards."

The remaining question in the case was whether the power to enforce the prohibition of the first section of the Amendment justified Congress in putting the ban on liquor containing as little as one-half of one per cent. of alcohol by volume. The argument against this low limit was that, since the first section prohibited only intoxicating liquors, the enforcing legislation must permit the sale and manufacture of non-intoxicating liquors. Otherwise the restrictive word "intoxicating" in the first section would be nugatory. The case sustaining the one-half of one per cent. limit in the War Prohibition Act was sought to be distinguished on the ground that the war power is general and undefined, while the power under the Amendment is confined to enforcing the prohibition against liquor in fact intoxicating. But the court, without stating or discussing these specific contentions, adduced the *War Prohibition Cases*<sup>9</sup> for the conclusion that, "while recognizing that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement, we think those limits are not transcended by the provision of the Volstead Act".<sup>10</sup>

The War Prohibition Act of 1918, passed ten days after the armistice, came before the court in *Hamilton v. Kentucky Distilleries & Warehouse Co.*,<sup>11</sup> and was unanimously sustained. It was interpreted to apply only to intoxicating liquors. Mr. Justice Brandeis said that "prohibition of the liquor traffic is conceded to be an appropriate means of increasing our war efficiency". He recognized that "the war power of the United States, like its other powers and like the police powers of the states, is subject to applicable constitutional limitations", but he laid down that "the Fifth Amendment imposes

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<sup>9</sup> *Ruppert v. Caffey*, note 12, *infra*.

<sup>10</sup> For an article on the Nineteenth Amendment, see Emmet O'Neal, "The Susan B. Anthony Amendment. Effect of Its Ratification on the Rights of the States to Regulate and Control Suffrage and Elections", 89 CENT. L. J. 169, 6 VA. L. REV. 338.

<sup>11</sup> 251 U. S. 146, 40 Sup. Ct. 106 (1919). See 33 HARV. L. REV. 585, 608, 18 MICH. L. REV. 706, and 29 YALE L. J. 437, 440. For discussions prior to the decision, see 8 CALIF. L. REV. 44, 18 MICH. L. REV. 159, and 29 YALE L. J. 113.

in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon state power". The question whether the immediate and absolute destruction of the value of intoxicating liquors could be caused without compensation was dismissed from consideration by pointing out that the Act gave seven months and nine days in which to dispose of liquors on hand. This was held to be a reasonable period. The fact that liquor is not readily marketable until reasonably aged was called merely an inconvenience to the owner attributable to the inherent character of the property, which inconvenience is not a taking of property in the constitutional sense. On the question whether the Act had become void by the passing of the war emergency, the court confined itself to declaring that it was not convinced that the emergency had passed when the suits in question were begun. The discussion on this point recognizes that change of circumstances may operate to render constitutionally unenforceable a statute concededly valid when passed, and assumes for the purpose of the case that the principle is applicable to exercises of the war power. But, in view of the holding that the Act had not yet expired by its terms and of the facts that the treaty of peace had not yet been concluded, that the railroads were still under national control by virtue of the war powers, and other facts of public knowledge, the court found itself unable to conclude that the Act had ceased to be valid. The contention that the Eighteenth Amendment impliedly guaranteed immunity from prohibition until one year after its ratification was dismissed by pointing out that it would, if sound, emasculate the war power even if hostilities were at their height and would also release the grasp of state prohibition.

The war power was extended still further in *Ruppert v. Caffey*,<sup>12</sup> which by a vote of five to four sustained the Volstead Act of October 28, 1919, with its suppression of the manufacture and sale of liquor conceded by motion to dismiss to be non-intoxicating. Mr. Justice McReynolds, for the minority, declared that it was notorious that the war emergency had passed when the statute was enacted, at least so

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<sup>12</sup> 251 U. S. 264, 40 Sup. Ct. 141 (1920). See 33 HARV. L. REV. 585, 608, 24 LAW NOTES 25, and 5 VA. L. REG. n. s. 874. Justices Day, Van Devanter, McReynolds and Clark dissented.

far as any justification for the suppression of non-intoxicating liquor is concerned. He implied that the statute thus enforced violated both the Fifth and Tenth Amendments. Calling the suppression of non-intoxicants the exercise of a power implied from an implied power, he queried: "If all this be true, why may not the second implied power engender a third under which Congress may forbid the planting of barley or hops, the manufacture of bottles or kegs, etc.?" He insisted that there is a distinction between the control which the states may exercise over non-intoxicants by virtue of their inherent power and that which may be wielded by Congress under authority inferred from the war power. For the majority, Mr. Justice Brandeis answered that the argument that one implied power may not be grafted on another implied power is a mere matter of words. The "war power over intoxicating liquors extends to the enactment of laws which will not merely prohibit the sale of intoxicating liquors but will effectually prevent their sale." All the powers of Congress are express powers. The proper distinction is between "specific" and "general" powers. Thus the war power over intoxicating liquors is as full and complete as the police powers of the states, and the principle that the state may prohibit near beer as a means of suppressing the genuine article applies also to the war power of Congress. On the question of the absence of compensation for the loss occasioned by the fact that the Volstead Act was in effect from the moment of its enactment, Mr. Justice Brandeis said only that "here as in *Hamilton v. Kentucky Distilleries & Warehouse Co.*, there was no appropriation of private property, but merely a lessening of value due to a permissible restriction imposed upon its use."

The constitutionality of the Selective Service Law and the Espionage Act was reaffirmed in *O'Connell v. United States*<sup>18</sup> on the authority of cases decided after the writ of error in the *O'Connell* case was sued out. The opinion was confined to questions of interpretation and of federal practice. A conspiracy to obstruct recruiting and enlistment by persuasion was held to be a crime within the latter Act, and the former was found to cover false statements as to fitness or liability for service as well when made by private persons

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<sup>18</sup> 253 U. S. —, 40 Sup. Co. 444 (1920).

as by officers charged with the enforcement of the law. In three important cases<sup>14</sup> sustaining convictions under the Espionage Act or its amendment of May 16, 1918, there was a difference of opinion as to the scope and application of the First Amendment guaranteeing freedom of speech and of the press. It was not denied that the statute was constitutional if properly restricted. These cases will be considered in a later section dealing with immunities of persons charged with crime.<sup>15</sup>

The treaty-making power and the power of Congress to enforce treaties by legislation was questioned in *Missouri v. Holland*.<sup>16</sup> Great Britain and the United States had made a treaty providing for closed seasons and other protection for migratory birds and engaging to enact legislation to carry the treaty into effect. Congress thereafter passed the Migratory Bird Treaty Act. Missouri brought a bill to enjoin the federal game warden from enforcing the act and the authorized regulations of the Secretary of Agriculture, claiming that such enforcement encroached on the powers reserved to it by the Tenth Amendment. Mr. Justice Holmes, for an unanimous court, laid down that the only question was the validity of the treaty. "If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government." The discussion of the specific issue before the court is prefaced by the statement:

<sup>14</sup> *Abrams v. United States*, 250 U. S. 616, 40 Sup. Ct. 17 (1919), *Pierce v. United States*, 253 U. S. 239, 40 Sup. Ct. 205 (1920), *Schaefer v. United States*, 251 U. S. 466, 40 Sup. Ct. 259 (1920).

<sup>15</sup> For notes on *Northern Pacific Ry Co. v. North Dakota*, 250 U. S. 135, 39 Sup. Ct. 502 (1919), and *Dakota Central Telephone Co v. South Dakota*, 250 U. S. 163, 39 Sup. Ct. 507 (1919), holding that federal control of railroads under the war power precludes the operation of state rate regulations, see 19 COL. L. REV. 489, 33 HARV. L. REV. 94, 115, and 68 U. PA. L. REV. 68. See also Henry Upson Sims, "The Power of the Federal Government to Extend the Recent War Acts of Congress Into Times of Peace", 5 VA. L. REV. 87. For incidents of federal control of the railroads, see 20 COLUM. L. REV. 352, 501. For injunctions under Lever Act against the coal strike, see 5 CORNELL L. Q. 184.

<sup>16</sup> 252 U. S. 416, 40 Sup. Ct. 382 (1920). See 20 COLUM. L. REV. 692 and 6 VA. L. REV. n. s. 214. For discussions prior to the decision see 8 CALIF. L. REV. 177, 33 HARV. L. REV. 281, 312, 23 LAW NOTES 148, 68 U. PA. L. REV. 160, and 29 YALE L. J. 445.

"Acts of Congress are made the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way."

What this different way is is not definitely set forth, but the treaty in question was found to involve "a national interest of very nearly the first magnitude." The inference is that the test of the validity of a treaty is an adequate national interest in the subject matter with which it deals. The fact that the states are individually incompetent to deal with the subject matter seems to be regarded as important. "It is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found." Then follows a plea for a progressive recognition of new national needs:

"When we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that amendment has reserved."

The opinion makes clear that a treaty on any subject of national interest has nothing to fear from any reserved powers of the states.

Its hint that there may be no other test to be applied than whether the treaty has been duly concluded indicates that the court might hold that specific constitutional limitations in favor of individual liberty and property are not applicable to deprivations wrought by treaties. It would be going a step further to extend the same immunity to legislation enforcing treaties. It is of course not safe to take expressions in a judicial opinion as the considered judgment of all the members of the court. Missouri's contention in the principal case received the approval of Justices Pitney and Van Devanter who dissented, but without giving their reasons.<sup>17</sup>

In the endeavor to allow state workmen's compensation laws to apply to injuries within the admiralty and maritime jurisdiction vested in the federal courts, Congress in 1917 added to the admiralty provision of the Judicial Code a clause saving "to claimants their rights and remedies under the workmen's compensation laws of any state." This provision a majority of the Supreme Court declared unconstitutional in *Knickerbocker Ice Co. v. Stewart*.<sup>18</sup> The basis of the decision seems to be a belief that the Constitution somehow adopted and established the approved rules of general maritime law and that such power as Congress has under the necessary and proper

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<sup>17</sup> See a note in 29 YALE L. J. 114 on the effect of a treaty on a state tax law. Articles on the League of Nations and the Constitution will be found in 89 CENT. L. J. 21, 70, 79, 93, 113, 226, 244, and 370. See also Edward S. Corwin, "The Power of Congress to Declare Peace", 18 MICH. L. REV. 669, John M. Matthews, "The League of Nations and the Constitution", 18 MICH. L. REV. 378, Albert H. Washburn, "Treaty Amendments and Reservations", 5 CORNELL L. Q. 247, and Quincy Wright, "Treaties and the Constitutional Separation of Powers in the United States", 12 AM. J. INT. LAW 64, "The Legal Nature of Treaties", 13 AM. J. INT. LAW 706, "The Constitutionality of Treaties", 13 AM. J. INT. LAW 242, "Conflicts of International Law with National Laws and Ordinances", 11 AM. J. INT. LAW 1, "Amendments and Reservations to the Treaty", 4 MINN. L. REV. 14, and "Validity of the Proposed Reservations to the Treaty", 20 COLUM. L. REV. 121.

<sup>18</sup> 253 U. S. —, 40 Sup. Ct. 438 (1920). The majority opinion is by Mr. Justice McReynolds. The dissenting Justices are Holmes, Pitney, Brandeis and Clarke. See 8 CALIF. L. REV. 339, 20 COLUM. L. REV. 685, 18 MICH. L. REV. 793, and 29 YALE L. J. 925. For discussions prior to the decision see 8 CALIF. L. REV. 169, 5 CORNELL L. Q. 275, and 4 MINN. L. REV. 444. A few months before the *Knickerbocker* case, the Supreme Court had held that the amendment in question is not retroactive. *Peters v. Vesey*, 251 U. S. 121, 40 Sup. Ct. 65 (1919). See 29 YALE L. J. 363.

clause to add to or change the maritime law is limited to the attainment of the object of relieving "maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation" and the establishment "so far as practicable" of "harmonious and uniform rules applicable throughout every part of the United States." Instead of doing this Congress was thought to have attempted to delegate its powers to the states, which under recognized principles it cannot do. For the minority Mr. Justice Holmes insisted that, since the state compensation law in question was in force when Congress passed the act of 1917, it should be regarded as having been adopted by Congress as part of the federal maritime law. He was further of opinion that it would not be a delegation of power to the states if Congress adopted in advance their future compensation laws, just as Congress has provided that the practice in the federal courts shall conform as near as may be to the practice in the state courts; but he thought it not necessary to go so far in order to allow the application of the law before the court. He denied that the Constitution itself adopted any maritime law by extending the federal judicial power to cases of admiralty and maritime jurisdiction, and he found no implication in the Constitution that such maritime law as Congress may establish must be uniform throughout the United States. It would be extravagant, he declared, to read into the silence of the Constitution "a requirement of uniformity more mechanical than is educed from the express requirement of equality in the Fourteenth Amendment."<sup>19</sup>

The power of Congress to attach conditions to the appropriation of money to pay private claims raised a sharp difference of opinion in *Calhoun v. Massie*.<sup>20</sup> The court had previously sustained a clause in the statute providing that not more than twenty per cent. of the

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<sup>19</sup> For a note on *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, 38 Sup. Ct. 501 (1918), holding the common-law rules of liability inapplicable to an injury within the admiralty jurisdiction, see 33 HARV. L. REV. 300, 309. For a note on *Union Fish Co. v. Erickson*, 248 U. S. 308, 39 Sup. Ct. 112 (1919), holding a state statute of frauds inapplicable to a maritime contract, see 8 CALIF. L. REV. 114.

<sup>20</sup> 253 U. S. —, 40 Sup. Ct. 474 (1920). Justices McKenna, Van Devanter, Pitney and McReynolds dissent. The same statute was declared to be valid in *Newman v. Moyers*, 252 U. S. —, 40 Sup. Ct. 478 (1920).

money paid by the government should be paid to or received by any attorney on account of services rendered in connection with the claim. In that case<sup>21</sup> Mr. Justice McKenna had said that if the judgment of the attorney against his client sought to reach only assets other than those received from the Government, "the limitation in the act appropriating the money to 20 per cent. as the amount to be paid to an agent or attorney would have no application or be involved." In the principal case, Calhoun who had received from the Government twenty per cent. of the amount awarded to his client Massie, sued in a state court to get an additional thirty per cent. under a contract made before the passage of the appropriation bill containing the limitation previously referred to and also this additional one:

"It shall be unlawful for any agent or agents, attorney or attorneys to exact, collect, withhold or receive any sum which in the aggregate exceeds twenty percentum of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding."

Massie insisted that this clause protected him from paying from any source more than twenty per cent. of what he received from the government, and a majority of the Supreme Court agreed with him. Mr. Justice Brandeis found the clause in question so clear as to leave "no room for construction." Mr. Justice McReynolds, for the minority, without quoting or discussing the paragraph in question, rebuked his colleague for not quoting or discussing the previous dictum of Mr. Justice McKenna by saying that "the result is necessarily injurious both to the court and to the public." It is doubtful whether this dictum was intended, as Mr. Justice McReynolds assumes, to apply to the paragraph of the statute adduced by Mr. Massie. If it did, it is pretty obviously erroneous. The dissent is not confined to the question of construction, though Mr. Justice McReynolds says nothing more specific on the constitutional issue than to remind us that "the Fifth Amendment was intended to protect the individual against arbitrary exercise of federal power" and that its

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<sup>21</sup> Capital Trust Co. v. Calhoun, 250 U. S. 208, 39 Sup. Ct. 486 (1919).



"inhibition protects every man in his right to engage in honest and useful work for compensation." His earlier mention of the fact that the contract in question was made prior to the statute regulating the fee to be charged leaves it doubtful whether his dissent would apply to such a regulation that is wholly prospective. He rests his objections wholly on grounds of due process, without touching on the possible point that the regulation of private contracts goes beyond the field of federal power and poaches on the reserved preserves of the states. For the majority, Mr. Justice Brandeis posits the constitutionality of the statute on the fact that the appropriation to pay the claim is a condition precedent to liability on the part of the client to the attorney. Calhoun's chance to get anything is dependent on congressional grace or favor. Therefore the favor may be extended on terms. He has no constitutional right to bite the hand which feeds him. Since he undertook to get his client's claim approved by the government, his assent to the terms under which the approval was given may be implied. He is also estopped from repudiating the statute after he has received his authorized twenty per cent. under it. Of these "special reasons", Mr. Justice McReynolds says that one "can only serve to mislead" and the other "lacks substance and can serve no good purpose". Both, he insists, assume the construction and the constitutionality of the statute. Cases cited in the majority opinion "as authority for such oppressive legislation" are said to "give it no support," and it is pointed out wherein the statutes therein sustained stop short of the one before the court. Mr. Justice McReynolds takes much more pains to prove Mr. Justice Brandeis wrong than to prove himself right. His peppery opinion gives interesting evidence of the human factors that enter into the solution of constitutional issues.

In *Ervien v. United States*<sup>22</sup> the answer to an interesting constitutional question is assumed without discussion or citation of authority. The Enabling Act under which New Mexico was admitted to the Union granted the new state certain public lands on specified trusts. The state later proposed to spend three per cent. of the proceeds from the sale of the lands in advertising the advantages of the state as a place to live in. The District Court thought this a wise

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<sup>22</sup> 251 U. S. 41, 40 Sup. Ct. 75 (1919).

administration of the trust as it tended to enhance the price of the lands. This, the Supreme Court did not deny, but it held nevertheless that the United States as grantor might, as it did, reserve control over the matter and exact the performance of the conditions on which the lands were given and held. This case, like the preceding one, illustrates the power of the United States to keep a string attached to its grants and to continue to pull the string even though all but the string has passed from its control. In this respect the case differs from stipulations in enabling acts which seek to continue control over the public, governmental powers of states admitted thereunder.<sup>23</sup>

The other cases on national power are of minor importance, with the exception of those involving questions of taxation and of commerce which will be treated in succeeding sections. National control over the Indians, was sustained in two decisions. *United States v. Board of Commissioners*<sup>24</sup> sanctioned the authority of the United States, as guardian of the Indians to bring a suit in the federal courts to protect lands owned by non-competent Indians from illegal state taxes. The fact that the lands were taxable by the state after proper assessment was held insufficient to deprive the United States of its duty and right to ensure that its wards are not illegally deprived of the property rights previously conferred upon them. This same benevolent guardianship of the Indians arose also in *Nadeau v. Union Pacific R. Co.*,<sup>25</sup> which affirmed a grant to a railroad in 1862 of a four hundred foot strip of land through an Indian reservation. The tract was said to be "part of the domain held by the tribe under the ordinary Indian claim—the right of possession and occupancy—with fee in the United States." On the authority of earlier decisions it was declared that "the power of the United States, as guardian for the Indians, to legislate in respect to such lands is settled." Patents issued subsequent to the grant to the railroad, without expressly reserving a right of way to the road, were held to give no rights to the strip in question. Any claim based on occupancy or possession was

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<sup>23</sup> See *Coyle v. Smith*, 221 U. S. 559, 31 Sup. Ct. 688 (1911). For an article bearing on the general question involved in the Ervien case, see Andrew A. Bruce, "State Socialism and the School Land Grants", 33 HARV. L. REV. 401.

<sup>24</sup> 251 U. S. 128, 40 Sup. Ct. 100 (1919).

<sup>25</sup> 253 U. S. —, 40 Sup. Ct. 570 (1920).

said to be precluded by earlier decisions. Mr. Justice Clarke dissented, and Justices Holmes, Pitney and Brandeis did not sit.

While it is not clear that any constitutional issue was directly involved in *Burnap v. United States*,<sup>26</sup> Mr. Justice Brandeis in the course of the opinion pointed out that Congress might invest the appointment of inferior officers either in the President alone, in the courts of law, or in the heads of departments. The power to remove was declared to be, "in the absence of statutory provision to the contrary, an incident of the power to appoint." The term "head of a department", as used in the statute, was said to mean "the Secretary in charge of a great division of the executive branch of the government, like the State, Treasury, and War, who is a member of the Cabinet", and not to "include heads of bureaus of lesser divisions."<sup>27</sup>

Another case involving the application of an uncontested constitutional principle is *Evans v. National Bank of Savannah*.<sup>28</sup> It was agreed that the powers of a national bank in respect to discounts and the rate to be charged is subject to the control of Congress and not of the states. But Congress had prescribed that the rate to be charged should be that "allowed by the laws of the state or territory where the bank is located, and no more." The application of this provision to the case at bar depended upon a combination of elementary mathematics and advanced jurisprudence. The Georgia statute forbade a rate of interest in excess of eight per cent. "either directly or indirectly by way of commission for advances." The Georgia supreme court held that eight per cent. discount charged in advance was more than eight per cent. interest. Mr. Justice Pitney for himself and Justices Brandeis and Clarke agreed. He insisted that "the laws of the state" as used by Congress meant not merely the words of particular sections of state statutes, but "all applicable provisions of the statutes as interpreted and construed by the decisions of the court of last resort" of the state. Mr. Justice McReynolds, for the majority, did not specifically controvert these positions, but he relied on the rule of the federal courts that it is not usurious

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<sup>26</sup> 252 U. S. 512, 40 Sup. Ct. 374 (1920).

<sup>27</sup> For a discussion of the President's power of removal, see Thomas Reed Powell, "The President's Veto of the Budget Bill", 9 NAT. MUN. REV. 538.

<sup>28</sup> 251 U. S. 108, 40 Sup. Ct. 58 (1919). See 33 HARV. L. REV. 725, 18 MICH. L. REV. 345, and 29 YALE L. J. 457.

to collect the highest rate of legal interest at the time the loan is made, and insisted that the power given to national banks to discount notes includes "the power, which banks generally exercise, of discounting notes reserving charges at the highest rate permitted for interest." He looked to the state law only for the rate, and to the national law for the definition of usury.<sup>29</sup>

## II. REGULATION OF COMMERCE

### I. Power of Congress

The extensive power of Congress over foreign commerce finds illustration in *Strathearn S. S. Co. v. Dillon*.<sup>30</sup> This sustained a provision in the Seamen's Act which, as interpreted, entitles any seaman shipping in foreign ports on foreign ships to disregard contracts postponing payment of wages until the end of the voyage and to demand at any American port one-half the wages earned to date. If the demand is not complied with, the seaman may sue in a federal district court for the entire wages then earned. Most of the opinion of Mr. Justice Day deals with the question of interpretation. The shipping company, backed by the British Embassy, urged that the Act should be limited to American seamen; but the court adduced against them the plain language of the statute and the further consideration that such "construction would have a tendency to prevent the employment of American seamen, and to promote the engage-

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<sup>29</sup> For a note on the power of a national bank to manage a railroad, see 33 HARV. L. REV. 718, 726. See also Randall J. LeBoeuf, "National Banks as Fiduciaries in New York", 5 CORNELL L. Q. 128, and Walter Wyatt, "Fiduciary Powers of National Banks", 6 VA. L. REV. 301.

For a discussion of the national postal power, see Robert E. Cushman, "National Police Power Under the Postal Clause of the Constitution", 4 MINN L. REV. 402.

Consideration of the power of the national government over aliens will be found in Howard L. Bevis, "The Deportation of Aliens", 68 U. PA. L. REV. 97, and notes in 20 COLUM. L. REV. 680, 18 MICH. L. REV. 422, 6 VA. L. REV. 201, and 29 YALE L. J. 561. The right of aliens to take real property is discussed in 5 CORNELL L. Q. 209.

<sup>30</sup> 253 U. S. 348, 40 Sup. Ct. 350 (1920). The case is followed in *Thompson v. Lucas* (The Westmeath), 253 U. S. 358, 40 Sup. Ct. 353 (1920). See 20 COLUM. L. REV. 479, and for comment prior to the decision, 20 COLUM. L. REV. 207.

ment of those who were not entitled to sue for one-half wages under the provisions of the law" and thus defeat the purpose of Congress in passing it. The constitutional issue involved was declared to have been settled by an earlier case<sup>31</sup> in which the conclusion was "reached that the jurisdiction of this government over foreign merchant vessels in our ports was such as to give authority to Congress to make provisions of the character now under consideration; that it was for this government to determine upon what terms and conditions vessels of other countries might be permitted to enter our harbors, and to impose conditions upon the shipment of sailors in our own ports and make them applicable to foreign as well as domestic vessels." From this it seems that ships which wish to enter our ports must behave according to our taste on the high seas and in their home ports.

*Board of Public Utility Commissioners v. Ynchausti & Co.*<sup>32</sup> found no denial of due process of law in an order of the Philippine Board of Public Utility Commissioners requiring the free carriage of mails as a condition of granting to vessels a permit to engage in the coastwise trade. The case was said to depend entirely upon the power to limit the coastwise trade. This was found to be plenary. Hence it was assumed to follow inevitably that no condition attached to a grant could deny due process of law. There is a hint in the opinion of the Chief Justice that the doctrine of the case is limited to legislation for "territory not forming part of the United States because not incorporated therein" under the principles of the *Insular Cases*; but the hint is back-handed and, in view of the frequent declarations of the complete power of Congress over foreign commerce, it must be doubted whether any distinction would be made in favor of ships engaged in that commerce. Yet plainly the opinion leaves room for a different attitude towards a congressional regulation of the interstate coasting trade. The order was questioned under the due-process clause of the Philippine Bill of Rights, which, it was recognized, was intended by Congress to have in the Philippines the settled construction that similar clauses receive in the United States. Yet it was added that the "result of their application must depend upon the

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<sup>31</sup> *Patterson v. Bark Eudora*, 190 U. S. 169, 23 Sup. Ct. 821 (1903).

<sup>32</sup> 251 U. S. 401, 40 Sup. Ct. 277 (1920).

nature and character of the powers conferred by Congress upon the government of the Islands."

The so-called Reed Amendment which had been sustained in an earlier case,<sup>33</sup> came before the court again in *United States v. Simpson*,<sup>34</sup> in which a person who transported five gallons of whiskey in his own automobile sought to escape from the toils of the statute. Mr. Justice Clarke in dissenting insisted that "interstate commerce, in the constitutional sense, is defined to mean commercial, business, intercourse" and especially "the exchange, buying or selling of commodities, of merchandise, on a large scale between the inhabitants of different states." He thought that liquor purchased by a man for his personal use and transported by him in a private vehicle was "withdrawn from trade or commerce as thus defined", and that at the time when the Reed Amendment was enacted Congress had no power to deal with Mr. Simpson on such a frolic of his own. "The grant of power to Congress is over Commerce,—not over isolated movements of small amounts of private property, by private persons for their personal use." The rest of the court contented themselves with asserting, through Mr. Justice Van Devanter, that the introduction of intoxicating liquor across state lines into forbidden territory "could be effected only through transportation, and whether this took one form or another it was transportation in interstate commerce." In refusing to restrict the natural meaning of the words of the statute, Mr. Justice Van Devanter pointed out that the law would not be of much practical benefit if its purpose could be frustrated by transportation in automobiles. Mr. Justice Clarke in his dissent said he thought that the *Hill* case was wrongly decided. Mr. Justice McReynolds who had dissented with him in the *Hill* case concurred in this.

Three prosecutions under the Sherman Anti-trust Law turned wholly on the question whether there had been restraint of trade, it being assumed that the trade involved was interstate commerce.<sup>35</sup>

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<sup>33</sup> *United States v. Hill*, 248 U. S. 420, 39 Sup. Ct. 143 (1919).

<sup>34</sup> 252 U. S. 465, 40 Sup. Ct. 364 (1920). See 26 W. VA. L. Q. 73, and 29 YALE L. J. 922. For a general article see Lindsay Rogers, "Life, Liberty, and Liquor: A Note on the Police Power", 6 VA. L. REV. 156.

<sup>35</sup> In *United States v. United States Steel Corporation*, 251 U. S. 417, 40 Sup. Ct. 293 (1920), the acts charged were regarded by four judges as not

*Blumenstock Brothers' Advertising Agency v. Curtis Publishing Co.*,<sup>38</sup> however, turned on a construction of the commerce clause. This was a suit for triple damages under the Sherman Act, based on the refusal of the defendant to accept advertising from the plaintiff unless the plaintiff would accede to the defendant's conditions as to advertising in rival publications. The court held that the complaint did not state a cause of action, since the contracts for advertising were not interstate commerce. Mr. Justice Day's reference to cases on insurance carries the implication that advertising is not commerce, but this is not explicitly stated, and the case is direct authority only on the question whether the contracts or commerce in question were interstate. In answering this in the negative, Mr. Justice Day said that "the advertising contracts did not involve any movement of goods or merchandise in interstate commerce or any transmission of intelligence in such commerce." The circulation of the journals in interstate commerce was thought not to "depend upon or have any direct relation to the advertising contract." The case was said to

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within the statute. Justices Day, Pitney, and Clarke dissented, and Justices McReynolds and Brandeis did not sit, so that a minority of the full bench was sufficient to give the defendant a clean bill of health. See 20 COLUM. L. REV. 462, and 33 HARV. L. REV. 964, 986. In *United States v. Reading Co.*, 253 U. S. —, 40 Sup. Ct. 425 (1920), the three judges who dissented in the Steel case joined with Justices McKenna, McReynolds and Brandeis in finding the defendant guilty of an illegal monopoly under the Act. The Chief Justice and Justices Holmes and Van Devanter dissented. In *United States v. A. Schrader's Son*, 252 U. S. 85, 40 Sup. Ct. 251 (1920), the making of agreements by manufacturers with retailers for the purpose of maintaining resale prices were held to be an unlawful restraint of trade. Mr. Justice Clarke confined his concurrence to the result, and Justices Holmes and Brandeis dissented. See 33 HARV. L. REV. 966, 986, 18 MICH. L. REV. 556, and 29 YALE L. J. 696. The Schrader case was distinguished from *United States v. Colgate & Co.*, 250 U. S. 300, 39 Sup. Ct. 465 (1919), decided the preceding term, on the ground that in the Colgate case there were no definite contracts for resale price maintenance. For notes on the Colgate case see 5 CORNELL L. Q. 100 and 29 YALE L. J. 365. For other notes on cases on unfair competition and restraint of trade see 20 COLUM. L. REV. 328, 5 CORNELL L. Q. 323, 33 HARV. L. REV. 320, 617, 18 MICH. L. REV. 71, and 29 YALE L. J. 125. See also Charles Grove Haines, "Efforts to Define Unfair Competition", 29 YALE L. J. 1, and William Notz, "The Webb-Pomerene Law—Extraterritorial Scope of the Unfair Competition Clause", 29 YALE L. J. 29.

<sup>38</sup>252 U. S. 436, 40 Sup. Ct. 385 (1920).

be wholly unlike one involving a correspondence school<sup>87</sup> "wherein there was a continuous interstate traffic in text-books and apparatus for a course of study pursued by interstate commerce", and more like the cases holding that insurance is not commerce and a case<sup>88</sup> in which the court was said to have held that "a broker engaged in negotiating sales between residents of Tennessee and non-resident merchants of goods situated in another state was not engaged in interstate commerce."<sup>89</sup>

The general terms of the federal Employers' Liability Law contain no specifications as to when injured employees are engaged in

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<sup>87</sup> *International Text-book Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. 481 (1910).

<sup>88</sup> *Ficklen v. Shelby County*, 145 U. S. 1, 12 Sup. Ct. 810 (1892). This case did not, when decided, proceed on any theory that the broker was not engaged in interstate commerce. It sustained a license on the privilege of doing a general business which included intra-state as well as interstate commerce. The fact that the broker asked for a license which included intra-state business was regarded as controlling. The difficulty of sustaining the case on the theory adduced in the opinion has led the court lately to slide it over the ground that the nature of the brokerage business is one degree removed from interstate commerce.

<sup>89</sup> An interesting case under the Federal Trade Commission Act of 1914 is *Federal Trade Commission v. Gratz*, 252 U. S. —, 40 Sup. Ct. 572 (1920). The Commission after notice and hearing had ordered Gratz to desist from refusing to sell ties for cotton bales unless the purchaser bought bagging at the same time. Under the provisions of the statute the defendant applied to the Circuit Court of Appeals to set aside the order of the Commission. The petition was granted for the reason given that the evidence failed to show that the practice complained of was general and that the Commission had not jurisdiction to determine the merits of specific individual grievances. The opinion of the Supreme Court, by Mr. Justice McReynolds, sustains the dismissal of the order of the Commission, on the ground that the complaint issued by the Commission fails to state facts sufficient to show that the defendant's refusal to sell ties without bagging is unfair or detrimental to the public interest. Mr. Justice Brandeis, in dissenting, insisted that the complaint filed by the Commission was sufficient though in general terms, that the Commission is vested with power to forbid "unfair methods" of competition before those methods become established as a general practice, that the Circuit Court of Appeals had found that the specific facts charged were supported by the evidence, and that these facts included sufficient evidence of a dominating position enjoyed by the defendants so that it was not unreasonable for the Commission to find that the methods used amounted to "unfair competition." Mr. Justice Clarke joined in the dissent. Mr. Justice Pitney confined his concurrence to the result. See 20 Col. L. Rev. 806.



interstate commerce so as to come within the Act. This is left to the courts in each individual case. The issue is not the constitutionality of the statute but the constitutionality of its application to a particular state of facts. In four cases during the past term the employee was held to have been engaged in interstate commerce at the time of his injury. The test applied is whether the work being done is so closely related to interstate commerce as to be practically a part of it. *Erie R. Co. v. Collins*<sup>40</sup> involved an employee who operated a signal tower and water tank, both accessory to the operation of interstate trains. He was hurt by an explosion of the gasoline tank for the pump for the water tank. *Erie R. Co. v. Szary*<sup>41</sup> involved an employee whose job was to dry sand for use in engines some of which were used in interstate commerce. After sanding some engines destined for other states, he emptied the ashes from the stove, took them in a pail across the tracks to the ash pit, emptied the pail, got a drink of water at the engine house, was hit by an engine when crossing the track again to get the pail. In these two cases suit had been brought under the federal law, so the employee guessed right. Justices Van Devanter and Pitney dissented in both cases. In the next two cases the employee sought to come within state compensation acts and got his award only to have the Supreme Court set it aside and hold he should have sued under the federal law. Mr. Justice Clarke dissented in both cases. In *Southern Pacific Co. v. Industrial Accident Commission*<sup>42</sup> the deceased was killed while wiping insulators supporting a wire carrying power then used in the propulsion of interstate trains. In *Philadelphia & Reading R. Co. v. Hancock*<sup>43</sup> the accident occurred to one aiding in transporting from the coal mines a train of cars some of which were destined for other states. The court held that the interstate transportation had already begun, though the crew to which plaintiff belonged took them only to the yard, from which they were taken by another crew to scales ten miles away, after which they were first billed to extra-state consignees. But the shipping clerk at the mine designated the

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<sup>40</sup> 253 U. S. —, 40 Sup. Ct. 450 (1920).

<sup>41</sup> 253 U. S. —, 40 Sup. Ct. 454 (1920).

<sup>42</sup> 251 U. S. 259, 40 Sup. Ct. 130 (1920).

<sup>43</sup> 253 U. S. —, 40 Sup. Ct. 512 (1920).

particular cars that were to go outside the state, and the freight charges were through rates from the mine to the ultimate destination.<sup>44</sup>

In *New York Central R. Co. v. Mohney*<sup>45</sup> the question was whether a release of liability contained in a pass should be governed by the state or federal law. This was thought to depend on the question whether the passenger was on a local or interstate journey when the injury occurred, but the character of the journey was determined by the character of the pass on which the plaintiff was travelling. The pass was good only between two points within Ohio. Plaintiff intended to pay his fare from the second Ohio city to a third, where he was to get a promised pass good from there to his ultimate destination in Pennsylvania. Justices Day and Van Devanter thought that under the facts he was on an interstate journey when injured on the first stretch. But Mr. Justice Clarke, for the majority, held that the contract must govern and not the intention of the traveller. As the only contract he had was a pass between two local points, he was on a local journey. "The mental purpose of one of the parties to a written contract cannot change its terms." The application of the decision is doubtless limited to the particular issue before the court, since it was declared that the written contract of release on the pass was the only reliance of the defendant.<sup>46</sup>

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<sup>44</sup> In *Hull v. Philadelphia & Reading Ry. Co.*, 252 U. S. 475, 40 Sup. Ct. 358 (1920), an agreement between two connecting railroads that each might run trains manned by its crews over the line of the other and that each would be responsible for all accidents on its own line was held not to make a person hired by one road an employee of the other when on its line so as to be able to sue the latter under the Employers' Liability Law. Mr. Justice Clarke dissented. See 20 COLUM. L. REV. 709.

In 19 COLUM. L. REV. 395 is a note to *Kinzell v. Chicago, M. & St. P. Ry. Co.*, 250 U. S. 130, 39 Sup. Ct. 412 (1919), and *Philadelphia, B. & W. R. Co. v. Smith*, 250 U. S. 101, 39 Sup. Ct. 396 (1919), two cases decided during the October, 1918, term, and holding employees within the federal Employers' Liability Law. The latter case is also commented on in 6 VA. L. REV. 66. See 68 U. PA. L. REV. 372 for a note on the "Nature of the Services of a Flagman at a Crossing Under the Federal Employers' Liability Act."

<sup>45</sup> 252 U. S. 152, 40 Sup. Ct. 287 (1920). See 29 YALE L. J. 803.

<sup>46</sup> In *Fort Smith & W. R. Co. v. Mills*, 253 U. S. —, 40 Sup. Ct. 526 (1920), the Adamson Law was held not to apply to an insolvent railroad in the hands of a receiver which had a wage agreement with its employees who

## 2. *State Police Power and Interstate Commerce*

The last three cases, which for convenience were included under the head of the power of Congress, belong technically in the group now being considered. The question in each case was whether the subject matter was interstate or local in character. The intra-state pass was held to make the journey on which it was used an intra-state journey at least for the purpose of allowing state law to control the effect of a stipulation in the pass against liability for injury to the holder. In the other two cases state compensation laws were held inapplicable because the injuries were found to be within the scope of the federal Employers' Liability Law. State action on a matter normally within reserved state power was precluded because Congress under its commerce power had taken control of the same matter. The only question was whether the injuries occurred in local or in interstate commerce, since it had previously been settled that Congress had taken within its control the regulation of liability for all injuries to employees engaged in interstate commerce and that the state law could not apply to such injuries even though the federal law provided no remedy. It is not, however, a universal rule that all state action is necessarily precluded by congressional regulation of matters within the general field in question. If the state law is in conflict with the congressional prescription, it is of

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not only refrained from making any demands under the Adamson Law but appreciated the situation and desired to continue under the existing agreement.

Kansas City So. Ry. v. Interstate Commerce Commission, 252 U. S. 178, 40 Sup. Ct. 187 (1920), ordered the defendant to obey the Act of Congress in respect to making a physical valuation of the railroads and to ascertain the present cost of condemnation and damages, or of purchase in excess of the original cost or present value, notwithstanding the declarations of the Supreme Court in the Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729 (1913) that the estimation of such hypothetical cost was "wholly beyond reach of any process of rational determination", was based on an "impossible hypothesis", and would be an indulgence in "mere speculation" and "mere conjecture." The court evidently assumes that the members of the commission are endowed with some supernatural powers which mere judges lack.

For articles on federal control of the railroads, see J. A. Fowler, "Federal Power to Own and Operate Railroads in Peace Time", 33 HARV. L. REV. 775, Gerard C. Henderson, "Railway Valuation and the Courts", 33 HARV. L. REV. 902, 1031, and Fordney Johnston, "The Transportation Act, 1920", 6 VA. L. REV. 482.

course inapplicable. Where the two are not in conflict, the question is whether Congress has meant to cover the whole field or only that part it has specifically dealt with. This was the issue in three cases decided during the last term.

*Pennsylvania R. Co. v. Public Service Commission*<sup>47</sup> had before it the question whether a state statute requiring a platform and guard rails on the rear end of the last car of trains was precluded by any federal regulation. The car which violated the state statute was a mail car. Mr. Justice Holmes said that the federal rules for the construction of mail cars not only exclude the platform required by the state but provide an equipment for them when used as end cars. They also provide for caboose cars without such platforms as the state requires. Since caboose cars are constantly used as end cars, the federal law makes lawful such an end car as the state law forbids. Mr. Justice Clarke, who alone dissented, looked at the state order as directed at trains rather than at individual cars. He found no evidence that the Interstate Commerce Commission had prescribed how trains should be made up or what sort of cars should be put at the end. Caboose cars are commonly attached to slow-moving freight trains, not to fast-moving express and mail trains. No federal requirement would be interfered with if the railroad carried at the end of its trains the kind of car demanded by the state. The federal rules have a different purpose and therefore have not occupied the whole field of the regulation of trains. But eight members of the court thought otherwise.

In two unanimous decisions it was laid down that Congress had so far taken over the regulation of interstate telegraphic communication as to preclude the application of state laws on matters allowed to be within state control until Congress acts. *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*<sup>48</sup> negated the application of the Mississippi doctrine that a stipulation limiting liability for

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<sup>47</sup> 250 U. S. 566, 40 Sup. Ct. 36 (1919). See 5 VA. L. REG. n. s. 719, and 29 YALE L. J. 456.

<sup>48</sup> 251 U. S. 27, 40 Sup. Ct. 69 (1919). See 33 HARV. L. REV. 988, 14 ILL. L. REV. 525, 5 IOWA L. B. 280, 18 MICH. L. REV. 418, 4 MINN. L. REV. 293, U. PA. L. REV. 259, and 29 YALE L. J. 566. For discussions prior to the decision see W. M. Williams, "Applicability of the Interstate Commerce Act to Telegraph Companies", 90 CENT. L. J. 370, and notes in 18 COLUM. L. REV. 612, and 18 MICH. L. REV. 248.

error in transmitting an unrepeatd message is void as one limiting liability for negligence, and held the contract governed by the contrary rule obtaining in the federal courts. *Western Union Telegraph Co. v. Boegli*<sup>49</sup> saved the company from a penalty fixed by the law of Indiana for failure to deliver a message promptly. The Act of Congress looked to in both cases for the banishment of state authority was the 1910 Amendment to the Interstate Commerce Act. This allows telegraph companies to establish reasonable rates subject to the control of the Interstate Commerce Commission, requires their rates to be equal and uniform, and permits the classification of messages into day, night, repeated, unrepeatd, etc., with different rates for each class. This specific authorization to vary the rates as a message is repeated or unrepeatd was thought "unmistakably to draw under the federal control the very power which the construction given below to the act necessarily denied." The purpose of Congress in its provisions was said to be to subject interstate telegraph companies to a uniform national rule, and to exclude the possibility of applying varying state laws. The state penalty failed because the state law did not apply. The state rule as to the legality of the limitation of liability failed because, since the subject is under federal law, it is governed by the non-existent federal common law consisting of those principles of general jurisprudence which the federal courts modestly profess to be better able to discover than are their colleagues who sit in state tribunals.<sup>50</sup>

In the absence of congressional regulation, the states are allowed to regulate such interstate commerce as is not "national in character." Only over such commerce as is thought to require uniformity of regulation throughout the country is the mere grant to Congress regarded as a grant of the whole power and therefore a prohibition on the states. And interstate commerce, even though "national in character" and hence such as to require uniformity of regulation, may still be subjected to state requirements in minor matters, provided Congress has not passed inconsistent regulations or taken the whole field within its control. Reiterated formulae as to the ex-

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<sup>49</sup> 251 U. S. 315, 40 Sup. Ct. 167 (1920).

<sup>50</sup> For notes on the law governing telegraph messages between two points within the same state but routed partly through another state, see 18 MICH. L. REV. 559 and 4 MINN. L. REV. 295.

clusiveness of congressional power over such commerce are saved from formal impairment by saying that the state requirements which are sanctioned do not "regulate" interstate commerce, but merely "incidentally affect" it. Thus "regulate" becomes a word of art which applies, not to all that regulates in fact, but only to that which regulates too much or in some disapproved way. The cases decided during the past term afford two rather striking instances of this tolerant attitude towards state laws thought merely to affect interstate commerce incidentally without regulating it.

*Pennsylvania Gas Co. v. Public Service Commission*,<sup>51</sup> allowed the New York Public Service Commission to prescribe the rates for natural gas piped from Pennsylvania and furnished to consumers of a New York municipality. There was no break in the continuity of the transmission, as there had been in some previous cases, and the court was clear that such commerce is interstate and that the local rates may affect the interstate business of the company. But the service which was rendered was said to be essentially local, and not one that requires general and uniform regulation of rates by congressional action. Obviously the deciding factor in the case is a judgment that it is better for the rates to be regulated than for the monopoly to demand what it pleases, and that any interference with the freedom of interstate commerce is the lesser of two evils and one readily obviated by national action whenever Congress sees fit.<sup>52</sup>

*South Covington & Cincinnati St. Ry. Co. v. Kentucky*<sup>53</sup> allowed a state Jim Crow car law to apply to an interurban street railway company though eighty per cent. of its traffic was interstate. Mr. Justice Day wrote a dissenting opinion which was concurred in by Justices Van Devanter and Pitney. This pointed out that Ohio, across the river, forbade the separation of passengers according to

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<sup>51</sup> 252 U. S. 23, 40 Sup. Ct. 279 (1920). See 68 U. PA. L. REV. 393 and 29 YALE L. J. 926.

<sup>52</sup> For discussions of an important issue soon to reach the Supreme Court, see Fred O. Blue, "Has the Legislature the Power to Restrict the Sale of the State's Natural Products Into Other States?", 90 CENT. L. J. 154, and Thomas Porter Hardman, "The Right of a State to Restrain the Exportation of Its Natural Resources", 26 W. VA. L. Q. 1, 224.

<sup>53</sup> 252 U. S. 399, 40 Sup. Ct. 378 (1920). The same point is affirmed in *Cincinnati, C. & E. Ry. Co. v. Kentucky*, 252 U. S. 408, 40 Sup. Ct. 381 (1920). See 18 MICH. L. REV. 791.

complexion and that to comply with the Kentucky law the company would have to attach an extra car for the six-mile journey in Kentucky. As not over six per cent. of the passengers were colored and on many trips there were no colored passengers at all, the attachment of this extra car was thought to be an unreasonable burden on interstate commerce both in respect to cost and in the practical operation of the traffic. For the majority Mr. Justice McKenna declared that "the regulation of the act affects interstate business incidentally and does not subject it to unreasonable demands." He also relied on the fact that the Kentucky part of the line was separately owned by a Kentucky corporation which, he said, should not be permitted to escape its obligations to the state by running its coaches beyond the state line. But Mr. Justice Day answered that this Kentucky company owned no cars and conducted no operations and that its stock was entirely owned by the defendant company whose business was preponderantly interstate. Mr. Justice McKenna, for the majority, spoke of "the equal necessity, under our system of government, to preserve the powers of the states within their sovereignties as to prevent the power from intrusive exercise within the national sovereignty," but he did not mention a regard for certain strongly-held sentiments which may have influenced the favor shown to the state. It would not be safe to rely on the case as authority for equally great burdens imposed from other motives.<sup>54</sup>

### 3. *State Taxation and Interstate Commerce*

The recently developed doctrine that the inclusion of extra-territorial values in the assessment of an excise on the local business of foreign corporations doing both local and interstate commerce makes the exaction an invalid regulation of interstate commerce and a taking of property without due process of law finds expression in *Wallace v. Hines*.<sup>55</sup> The case sustained a preliminary injunction against a North Dakota excise imposed by a statute under which

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<sup>54</sup> For other discussions of state police power in relation to interstate commerce, see Kenneth F. Burgess, "New Limitations Upon State Regulations of Rates", 20 COLUM. L. REV. 660, Julius Henry Cohen, "The New York Harbor Problem in Its Legal Aspects", 5 CORNELL L. Q. 373, and notes in 33 HARV. L. REV. 292, 312, on state control over interstate bridges.

<sup>55</sup> 253 U. S. —, 40 Sup. Ct. 435 (1920).

"the tax commissioner fixes the value of the total property of each railroad by the total value of its stocks and bonds and assesses the proportion of this value that the main track mileage in North Dakota bears to the main track of the whole line." The mileage ratio was declared indefensible both because the physical value of a mile of track over the North Dakota plains is worth less than that of a mile in more mountainous and more populous states and because the road in question had valuable terminals and other property in other states with no corresponding assets and facilities in North Dakota. Mr. Justice Holmes puts the principle of the case as follows:

"The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart—not, in other words, to open to taxation what is not within the State. Therefore no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State. Hence the possession of bonds secured by mortgage of lands in other States, or of a land-grant in another State or of other property that adds to the riches of the corporation but does not affect the North Dakota part of the road is no sufficient ground for the increase of the tax—whatever it may be—whether a tax on property, or, as here, an excise upon doing business in the State."

Two divergent cases on occupation taxes imposed on those selling within the state goods of extra-state origin still in the original package show how fine a line can be drawn between vice and virtue. *Wagner v. Covington*<sup>56</sup> presented the familiar distinction between sales by peddlers and sales by drummers. An Ohio bottler of soft drinks with a regular line of customers in Covington, Kentucky, was subjected to a license tax on wholesalers. Some of his deliveries were in response to previous specific orders. For these the Kentucky court had held him not taxable. The rest were the result of

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<sup>56</sup> 251 U. S. 95, 40 Sup. Ct. 93 (1919). See 6 VA. L. REV. 378.



fairly assured expectancies, but occasionally the wagons returned from Kentucky to Ohio with some or all of the goods they had taken over to meet the hoped-for demand. Over the silent dissent of Justices McKenna and Holmes, Mr. Justice Pitney for the majority declared:

"Of course the transportation of plaintiffs' goods across the state line is of itself interstate commerce; but it is not this that is taxed by the city of Covington, nor is such commerce a part of the business that is taxed, or anything more than a preparation for it. So far as the itinerant vending is concerned, the goods might just as well have been manufactured within the state of Kentucky; to the extent that plaintiffs dispose of their goods in that kind of sales, they make them the subject of local commerce; and, this being so, they can claim no immunity from local regulation, whether the goods remain in the original packages or not."

The previous peddler cases sustaining taxes on sales of goods which, so far as appears, were still in the original packages in which they came from other states, make us curious to know why Justices McKenna and Holmes dissented. The provisions of the ordinance are not set forth in the majority opinion, and it may be that the dissentients did not agree that its general language was properly separable into an invalid tax on concededly interstate sales and a valid tax on those made in Kentucky without prior assured orders. Or they may have thought that the regular and continuous business of supplying the recurring and fairly certain demands of retailers is substantially different from the casual and precarious peddling heretofore held not interstate commerce.

That it was the itinerant character of the vending that put it within the grasp of the state seems fairly clear from the unanimous decision in *Askren v. Continental Oil Co.*<sup>57</sup> four months later. This held a state license tax inapplicable to sales of gasoline in the barrels in which they had come from another state and to sales of the whole contents of tank cars. Mr. Justice Day, after citing an earlier decision,<sup>58</sup> declared:

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<sup>57</sup> 252 U. S. 444, 40 Sup. Ct. 355 (1920).

<sup>58</sup> *Standard Oil Co. v. Graves*, 249 U. S. 389, 39 Sup. Ct. 320 (1919).

"In that case we reaffirmed, what had often been adjudicated heretofore in this court, that the direct and necessary effect of such legislation was to impose a burden upon interstate commerce; that under the federal Constitution the importer of such products from another state into his own state for sale in the original packages, had a right to sell the same in such packages without being taxed for the privilege by taxation of the sort here involved. Upon this branch of the case we deem it only necessary to refer to that case, and the cases therein cited, as establishing the proposition that the license tax upon the sale of gasoline brought into the state in tank cars, or original packages, and thus sold, is beyond the power of the state."

A different attitude was taken towards that part of the business which was said to consist "in selling gasoline in quantities to suit purchasers." Of such sales Mr. Justice Day said:

"Much is made of the fact that New Mexico does not produce gasoline, and all of it that is dealt in within that state must be brought in from other states. But, so long as there is no discrimination against the products of another state, and none is shown from the mere fact that the gasoline is produced in another state, the gasoline thus stored and dealt in is not beyond the taxing power of the state."

The best reason for allowing the taxation of these sales would seem to be that the original package was broken to make them. But that is not mentioned by the court. Instead Mr. Justice Day cites *Wagner v. Covington*<sup>59</sup> without comment. The sales there held taxable were in the original packages. Why should the sale of a full case of ginger ale be held taxable and the sale of a full barrel of gasoline be held not taxable? The only substantial difference between the cases seems to be that the ginger ale was peddled while presumably the purchaser of the gasoline had to come and get it.

In *Shaffer v. Carter*<sup>60</sup> an Illinois citizen based one of his objections

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<sup>59</sup> Note 56, *supra*.

<sup>60</sup> 252 U. S. 37, 40 Sup. Ct. 221 (1920). This case will be reviewed more at length in the section on "Taxation", and references to discussions in law reviews will there be given. Mr. Justice McReynolds dissented but, as he filed no opinion, it cannot be known whether his dissent is based on the commerce clause or on the Fourteenth Amendment or on both.

to an Oklahoma tax on the net income from his Oklahoma oil wells on the ground that the tax was an invalid regulation of interstate commerce. Mr. Justice Pitney answered that the tax since it was not on gross receipts but only upon the net proceeds "is plainly sustainable, even if it includes net gains from interstate commerce." For this he cited the case<sup>61</sup> sustaining the application of the Wisconsin income tax to the net income of a domestic corporation from business within the state. He thus makes it evident that the doctrine of that case is not confined to domestic corporations or to domiciled citizens. Whether it applies only to general state-wide income taxes or covers as well as a special excise on net incomes confined to corporations is a question now before the Supreme Court in cases contesting the corporation income tax law of Connecticut.<sup>62</sup>

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(To be continued)

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<sup>61</sup>United States Glue Co. v. Oak Creek, 247 U. S. 321, 38 Sup. Ct. 399 (1918).

<sup>62</sup>For discussions of the Connecticut decision sustaining the tax, see 20 COLUM. L. REV. 324 and 33 HARV. L. REV. 736.