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Supreme Court's Construction of the Federal Constitution in 1920-1921

Thomas Reed Powell
Columbia University

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THE SUPREME COURT'S CONSTRUCTION OF THE FEDERAL CONSTITUTION IN 1920-1921

THIS review of Supreme Court decisions on constitutional law during the October Term of 1920 follows the plan of its predecessors.[1] Its aim is the modest one of exposing the precise points decided and the precise or unprecise reasons given in support of the results reached. A valiant effort is made to refrain from criticism or from adding anything to the contributions of the judges. In the footnotes are assembled references to discussions of the cases reviewed in the text and of other issues of constitutional law considered in recognized law journals from October, 1920, to October, 1921. No effort has been made to sift the chaff from the wheat except to exclude references to mere news items in commercial periodicals.

I. MISCELLANEOUS NATIONAL POWERS

An important question with respect to the time element in the procedure for adopting amendments to the federal Constitution was answered in *Dillon* v. *Gloss*,[2] which rejected a contention that the Eighteenth Amendment was not validly adopted because Congress in proposing it to the states had declared that it should be inoperative unless ratified within seven years. The premise on which the constitutionality of this restriction was based was broader than necessary, since it was laid down that amendments proposed by Congress would die of inanition if not ratified within a reasonable time. Mr. Justice Van Devanter recognized that the Constitution contains no express provision on the subject, but he pointed

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[1] 12 AM. POL. SCI. REV. 17-49, 427-457, 640-666, 13 *id.* 47-77; 229-250, 607-633, 14 *id.* 53-73, and 19 MICH. L. REV. 1-34, 117-151, 283-323.
[2] 256 U. S. —, 41 Sup. Ct. 510 (1921).

out that "with the Constitution, as with a statute or other written instrument, what is reasonably implied is as much a part of it as what is expressed." The implication that amendments must be ratified with reasonable celerity was wrought out of the considerations that proposal and ratification are interrelated and "succeeding steps in a single endeavor," and therefore steps "not to be widely separated in time"; that amendments are to be proposed only when deemed necessary by Congress, and therefore are to be "considered and disposed of presently"; and that the requirement of ratification by three-fourths of the states leads to the inference that the ratification "must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do." The opinion commends the statement of Judge Jameson that "an alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress," and concludes that "the fair inference or implication from Article 5 is that the ratification must be within some reasonable time after the proposal." Of the specific limitation imposed by Congress on the ratification of the Eighteenth Amendment it is said:

> "Of the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt. As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters or detail as the public interests and changing conditions may require; and Article 5 is no exception to the rule. Whether a definite period for ratification shall be fixed, so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification. It is not questioned that seven years, the period fixed in this instance, was reasonable, if power existed to fix a definite time; nor could it well be questioned, considering the period within which prior amendments were ratified."

Another point settled by the decision is that amendments are ratified and become part of the Constitution when the requisite number of states act favorably, and that the court will take judicial notice of the ratifications. A decision on this point was necessary since the National Prohibition Act was by its terms to be in force "from and after the date when the Eighteenth Amendment should go into effect, and the latter by its own terms was to go into effect one year after being ratified," and the offense of the petitioner was committed exactly one year after the ratification was consummated and so less than one year after the proclamation of ratification issued by the Secretary of State.[3]

The scope of the Eighteenth Amendment was involved in the contentions raised in *Street* v. *Lincoln Safe Deposit Co.*,[4] but eight members of the court found that the Volstead Act does not prohibit the storage with a safe deposit company of liquor lawfully acquired before the Eighteenth Amendment and there kept in the exclusive possession and control of its owner and designed for use only by himself, family and guests. This construction of the statute made it unnecessary to pass upon the constitutional question. Mr. Justice McReynolds, however, in concurring, observed:

> "I think the Volstead Act was properly interpreted by the court below; but to enforce it as thus construed would result in virtual confiscation of lawfully acquired liquors by preventing or unduly interfering with their consumption by the owner. The Eighteenth Amendment gave no such power to Congress. Manufacture, sale and transportation are the things prohibited; not personal use."[5]

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[3] For a note on a case refusing to issue a mandamus to compel Secretary of State Colby to revoke his proclamation of the ratification of the Eighteenth Amendment, see 20 COLUM. L. REV. 912. For discussions of the power to amend the federal Constitution see William L. Marbury, "The Nineteenth Amendment and After," 7 VA. L. REV. 1; Everett P. Wheeler, "Limit of Power to Amend Constitution," 7 A. B. A. JOURN. 75; and Bruce Williams, "The Popular Mandate on Constitutional Amendments", 7 VA. L. REV. 280. A question as to the validity of the submission of an amendment to the Alabama constitution is considered in 5 MINN. L. REV. 551.

[4] 254 U. S. 88, 41 Sup. Ct. 31 (1920). See 34 HARV. L. REV. 437, 15 ILL. L. REV. 405, 6 VA. L. REG. n. s. 690, and 7 VA. L. REV. 400.

[5] For discussion of cases on various aspects of the Volstead Act see 20 COLUM. L. REV. 912, 15 ILL. L. REV. 404, 532, and 5 MINN. L. REV. 482.

Too late for inclusion in the review of constitutional law for 1919-1920, Mr. Justice Clarke filed a dissent to the opinion of the court in *National Prohibition Cases.*[6] His objections were restricted to the eighth, ninth and eleventh paragraphs of the opinion, which, he said, "taken together, in effect declare the Volstead Act to be the supreme law of the land—paramount to any state law with which it may conflict in any respect." The eleventh conclusion also "approves as valid a definition of liquor as intoxicating which is expressly admitted not to be intoxicating in each of the cases in which it is considered." This, says Mr. Justice Clarke, is not appropriate legislation to enforce the prohibition of the first section of the amendment against intoxicating liquor, since that section does not give "that plenary power over the subject which the legislatures of the states derive from the people or which may be derived from the war powers of the Constitution." As to the interpretation of the court that the powers of Congress under the amendment are paramount to those of the states, Mr. Justice Clarke insists that this reads out of the second section the word "concurrent," which means "joint and equal authority," "running together, having the same authority." Congress, therefore, must be joined by the states in any legislation which depends upon the Eighteenth Amendment for its validity. This still leaves Congress independent power over interstate commerce. Moreover, the first section of the Eighteenth Amendment renders invalid any state law which attempts to recognize as lawful any intoxicating liquor proscribed by that section.[7]

Questions as to the exercise of war powers arose in several cases. The sections of the Trading with the Enemy Act relating to the seizure of property in which enemies have an interest were sus-

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[6] 253 U. S. 350, 407, 40 Sup. Ct. 486, 588 (1920), 19 MICH. L. REV. 4-8. Discussion of the National Prohibition Cases will be found in W. F. Dodd, "Amending the Federal Constitution", 30 YALE L. J. 321, Charles W. Needham; "Changing the Fundamental Law", 69 U. PA. L. REV. 223; and notes in 19 MICH. L. REV. 329 and 6 VA. L. REG. n. s. 301.

[7] The effect of the Eighteenth Amendment and federal legislation thereunder on the powers of the states is considered in Minor Bronough, "Effect of Federal Legislation on State Liquor Laws", 25 LAW NOTES 49; J. B. Whitfield, "Do the Eighteenth Amendment and the Volstead Act Supersede State Prohibitions and Regulations?", 24 LAW NOTES 85; and notes in 34 HARV. L. REV. 317, 328, 16 ILL. L. REV. 141, 19 MICH. L. REV. 435, 647, and 7 VA. L. REV. 479.

tained in *Central Union Trust Co.* v. *Garvan*[8] and *Stoehr* v. *Garvan*.[9] The first case was a libel brought by the Alien Property Custodian to get possession of certain securities. Claimants appeared and denied that the funds were held for the benefit of an enemy and insisted that they had a right to have the question settled before the transfer was ordered. The court answered that the present proceeding gives nothing but the preliminary custody that might have been obtained by summary seizure and that it is open to claimants in a separate action to litigate the question of enemy ownership. The power of Congress "to provide for an immediate seizure in war times of property supposed to belong to the enemy, as it could provide for an attachment or distraint, if adequate provision is made for a return in case of a mistake," was said to be without doubt. In the *Stoehr* case the statute was said to be strictly a war measure and to find its sanction in the constitutional provision empowering Congress "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." Here certain corporate stocks had been seized by the Custodian and a claimant brought a suit for their return. His objection that it is inconsistent with due process to take over the property otherwise than through a judicial proceeding brought the complete reply that "there is no warrant for saying that the enemy ownership must be determined judicially before the property can be seized; and the practice has been the other way." In both cases it was pointed out that the court has power to order a re-transfer if in proper proceedings the claimant proves his right. In the *Stoehr* case the dispute as to enemy ownership was considered and decided adversely to the claimant.[10]

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[8] 254 U. S. 554, 41 Sup. Ct. 214 (1921).

[9] 255 U. S. —, 41 Sup. Ct. 293 (1921).

[10] An English decision on the confiscation of private enemy property is considered in 30 YALE L. J. 845. Missouri v. Holland, 252 U. S. 416, 40 Sup. Ct. 382 (1920), 19 MICH. L. REV. 11, which sustained the federal migratory bird treaty and the act of Congress passed to enforce the treaty, is discussed in 6 CORNELL L. Q. 91. For articles on various aspects of federal power over foreign relations see Minor Bronough, "Federal Protection of Treaty Rights of Aliens", 25 LAW NOTES 65; John W. Davis, "Treaty-Making Power in the United States," 6 A. B. A. JOUR. 1; John M. Mathews, "The States and Foreign Relations", 19 MICH. L. REV. 690, and "The Termination of War", 19 MICH. L. REV. 819; David Hunter Miller, "Some Results

Two cases sustaining judgments of courts martial deal mainly with questions of statutory construction, but touch incidentally on constitutional issues. *Kahn* v. *Anderson*[11] affirms that the Fifth Amendment is not violated by trying military prisoners by courts martial for offenses committed during their imprisonment, even though, as a result of their original conviction and sentences, they have ceased to be soldiers. This case and *Givens* v. *Zerbst*[12] both hold that the provision in the Articles of War forbidding court-martial trials for murder in time of peace refer to "peace in the complete sense, officially declared." The War Prohibition Cases[13] are cited for the proposition that it is indisputable "that complete peace, in the legal sense, had not come to pass by the effect of the Armistice and the cessation of hostilities."[14]

A combination of the war power and the postal power appeared in *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson*,[15] in which the court sustained the Postmaster General in his revocation of the second-class mailing privilege previously enjoyed by Mr. Victor Berger's paper, *The Milwaukee Leader*. The Espionage Act provided that any newspaper published in violation of any of its provisions should be "non-mailable" and should not be "conveyed in the mails or delivered from any post office or by any letter carrier." An official of the Post Office Department, after a hearing, decided that *The Milwaukee Leader* had repeatedly violated the Espionage Law. An order was thereupon issued revoking the second-class mailing privilege. This meant that future issues could not be mailed at second-class rates until a new application for the second-class privilege was made and granted. Such issues were

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of the Labor Clauses of the Treaty of Versailles", 6 CORNELL L. Q. 133; Fred K. Nielsen, "Some Vexatious Questions Relating to Nationality", 20 COLUM. L. REV. 840; J. Whitla Stinson, "The Treaty-Making Power and the Restraint of the Common Law", 1 BOSTON U. L. REV. 111; and Charles S. Thomas, "The Power of Congress to Establish Peace", 55 AM. L. REV. 86.

[11] 255 U. S. 1, 41 Sup. Ct. 224 (1921). See 16 ILL. L. REV. 67, and 30 YALE L. J. 521.

[12] 255 U. S. 11, 41 Sup. Ct. 227 (1921).

[13] Hamilton vs. Kentucky Distilleries Co., 251 U. S. 146, 40 Sup. Ct. 106 (1919), 19 MICH. L. REV. 8.

[14] The jurisdiction of courts martial is discussed in 34 HARV. L. REV. 659, 673, and 16 ILL. L. REV. 56.

[15] 255 U. S. —, 41 Sup. Ct. 352 (1921). See 16 ILL. L. REV. 134, 19 MICH. L. REV. 728, and 30 YALE L. J. 859.

not, however, excluded from the mails. They might still be sent upon payment of higher rates of postage. Mr. Justice Clarke in the opinion of the court points to no specific statutory authority for the power exercised by the Postmaster General. He says that "when, for more than five months, a paper had contained, almost daily, articles which under the express terms of the statute rendered it 'non-mailable,' it was reasonable to conclude that it would continue its disloyal publications, and it was therefore clearly within the power given to the Postmaster General * * * 'to execute all laws relating to the postal service,' to enter, as was done in this case, an order suspending the privilege until a proper application and showing should be made for its renewal." Mr. Justice Holmes in a brief dissent insists that "the question of the rate has nothing to do with the question whether the matter is mailable, and affirms that he is "satisfied that the Postmaster cannot determine in advance that a certain newspaper is going to be non-mailable and on that ground deny to it not the use of the mails but the rate of postage that the statute says shall be charged." The only power he finds conferred by statute is to refrain from forwarding specific issues when received and to return them to the senders. While he professedly confines himself to questions of statutory construction, he refers to "the ease with which the power claimed by the Postmaster could be used to interfere with very sacred rights," and concludes "that the refusal to allow the relator the rate to which it was entitled whenever its newspaper was carried, on the ground that the paper ought not to be carried at all, was unjustified by statute and was a serious attack upon liberties that not even the war induced Congress to infringe."

In a separate lengthy dissent Mr. Justice Brandeis raises a "succession of constitutional doubts" which he gives as added reasons for not endowing the Postmaster General with a power not specifically conferred by statute. He does not go so far as to affirm that all these doubts are well founded, but the fact that he is in a minority of two establishes that seven of the judges are convinced that none of them is well founded. Thus, Mr. Justice Brandeis's dissent makes more explicit the constitutional law laid down by the majority. We know, then, that the denial by the Postmaster General of the second-class mailing privilege on account of past derelictions found by him and confirmed by the court does not uncon-

stitutionally abridge the freedom of the press, nor "subject publishers to punishment without a hearing in any court," nor inflict "severe punishment for an infamous crime without trial by jury," nor deprive "publishers of their property without due process of law," nor impose excessive fines or unusual punishment. The majority opinion refrains from detailed dissipation of these suggested doubts and contents itself with pointing out that the Espionage Act has been held constitutional, and that it has been repeatedly decided that "a hearing, such as was accorded the relator, on precisely such a question as is here involved, when fairly conducted, satisfies all the requirements of due process of law." In commendation of the result reached Mr. Justice Clarke says:

> "This is neither a dangerous nor an arbitrary power, as was argued at the bar, for it is not only subject to review by the courts (the claim of the relator was heard and rejected by two courts before this re-examination of it in this court), but it is also subject to control by Congress and by the President of the United States. Under that Constitution, which we shall find it vehemently denouncing, the rights of the relator were, and are, amply protected by the opportunity thus given it to resort for relief to all three departments of the government, if those rights should be invaded by any ruling of the Postmaster General."

The review then undertaken is to discover "whether substantial evidence to support his order may be found in the facts stated in the Postmaster General's answer, which are admitted by the demurrer." The guiding principle of this inquiry is that "the conclusion of the head of an executive department of the government on such a question, when within his jurisdiction, will not be disturbed by the courts unless they are clearly of the opinion that it is wrong." How far from wrong Mr. Justice Clarke found this finding may be inferred from his comment that the relator did not choose to "mend its ways, to publish a paper conforming to the law, and then to apply anew for a second-class mailing privilege * * * but for reasons not difficult to imagine it preferred this futile litigation, undertaken upon the theory that a government competent to wage war against its foreign enemies was powerless against its insidious foes at home."

The effort of Congress under the war power to restrict the prices of necessaries was frustrated by *United States* v. *L. Cohen Grocery Co.,*[16] *Weeds, Inc.,* v. *United States,*[17] and other cases[18] decided at the same time, but the only question of the war power specifically adjudicated was that "the mere existence of a state of war could not suspend or change the operation upon the powers of Congress of the guaranties and limitations of the Fifth and Sixth Amendments" with respect to the statute under consideration. "It follows," remarked Chief Justice White, "that in testing the operation of the Constitution upon the subject here involved the question of the existence or non-existence of a state of war becomes negligible, and we put it out of view." The issue thus laid on the table was the one raised by the contention that "as the country was virtually at peace Congress had no power to regulate the subject" of the prices to be charged for necessaries. This, it is to be observed, is not the issue whether such price regulation is within the war power when circumstances concededly bring the war power into play. No such contention appears to have been urged before the court. Technically, therefore, it is still undetermined whether the regulation of the prices of necessaries is within the war powers of Congress. Yet the failure to raise or to consider a point so fundamental lends strong assurance to the assumption that an objection that the war power does not include regulation of the prices of necessaries would be held without merit. The legislation before the court failed because of the absence of any definite standard by which to ascertain what was prohibited. This point will be considered in a later section on immunities of persons charged with crime.[19]

[16] 255 U. S. 81, 41 Sup. Ct. 298 (1921). See 16 ILL. L. REV. 66, 19 MICH. L. REV. 648, 69 U. PA. L. REV. 381, and 30 YALE L. J. 639. Comment on the case in the court below or on others on the same point appears in 21 COLUM. L. REV. 394, 24 LAW NOTES 105, 19 MICH. L. REV. 336, 337, 5 MINN. L. REV. 298, 69 U. PA. L. REV. 56, 6 VA. L. REG. n. s. 935, and 30 YALE L. J. 81, 98, 99.

[17] 255 U. S. 109, 41 Sup. Ct. 306 (1921).

[18] Tedrow v. A. T. Lewis & Son Dry Goods Co., 255 U. S. 98, 41 Sup. Ct. 303 (1921); Kennington v. Palmer, 255 U. S. 100, 41 Sup. Ct. 303 (1921); Kinnane v. Detroit Creamery Co., 255 U. S. 102, 41 Sup. Ct. 304 (1921); C. A. Weed & Co. v. Lockwood, 255 U. S. 104, 41 Sup. Ct. 305 (1921); G. S. Willard Co. v. Palmer, 255 U. S. 106, 41 Sup. Ct. 305 (1921).

[19] While the special circumstances created by the war were referred to in Block v. Hirsh, 256 U. S. —, 41 Sup. Ct. 458 (1921), sustaining an act of Congress regulating rents in the District of Columbia, the source of the

The question whether the existence or the exercise of federal power precludes the exercise of state power over the same general field was involved in *Gilbert* v. *Minnesota*,[20] which sustained a conviction for violating a state statute forbidding persons to advocate or teach that men should not enlist in the military or naval forces of the United States. Mr. Justice McKenna for the majority of the court held the objection that the state statute is an encroachment on federal authority to be one not warranted by the letter of the constitutional provisions with respect to war and one that could be maintained only on the broad proposition "that a state has no interest or concern in the United States or its armies or power of protecting them from public enemies." To this he answered that "this country is one composed of many and must on occasions be animated as one, and that the constituted and constituting sovereignties must have power of coöperation against the enemies of all." The Minnesota statute in question was said not to conflict with any exercise of federal power, nor to usurp any national power, but only to render a service thereto. Mr. Justice Holmes confined his concurrence to the result, and Chief Justice White dissented briefly, "being of the opinion that the subject-matter is within the exclusive legislative power of Congress, when exerted, and that the action of Congress has covered the whole field." Mr. Justice Brandeis was more elaborate in dissent. He found the Minnesota statute not a war measure because not confined to time of war. He construed it to be one forbidding the teaching of the doctrine of pacificism. It was, "when enacted, inconsistent with the law of the United States, because at that time Congress still permitted free discussion of these governmental functions." After the Espionage Laws of the national government which prohibited only "certain tangible obstructions to the conduct of the existing war with the

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congressional authority was tacitly assumed to be the general legislative power over the federal district and the war power was not mentioned in either the majority or the minority opinion. The dispute among the judges was confined to the question whether the act offends constitutional limitations in favor of liberty and property. This case and Hollis v. Kutz, 255 U. S. —, 41 Sup. Ct. 371 (1921), which involved a complaint against gas rates in the District of Columbia, are treated in a subsequent section on police power.

[20] 254 U. S. 325, 41 Sup. Ct. 125 (1920). See 21 Colum. L. Rev. 483, 15 Ill. L. Rev. 530, 19 Mich. L. Rev. 870, and 30 Yale L. J. 623.

German Empire committed with criminal intent," the Minnesota law produced inconsistency between exercises of state and of federal power, since under it "teaching or advice that men should not enlist is made punishable, although the jury should find (1) that the teaching or advocacy proved wholly futile and no obstruction resulted; (2) that there was no intent to obstruct; and the court, taking judicial notice of the facts, should rule (3) that, when the words were written or spoken, the United States was at peace with all the world." The question of what freedom of discussion should obtain with respect to war and its measures and policies is one of vital national interest, and the freedom which Congress may deem it desirable to allow should not be curbed by inconsistent state legislation. Mr. Justice Brandeis's further grounds of dissent shade off into considerations relating to freedom of speech and to state interference with federal functions, and will be considered in later sections. He insisted that the provisions of the state law and its title "preclude a contention that its purpose was to prevent breaches of the peace," and therefore deprive it of support as a general police measure enacted under the reserved powers of the states, as the majority had urged. But he added that, whatever its source, it must fail, since "when the United States has exercised its exclusive powers * * * so far as to take possession of the field, the states no more can supplement its requirements than it can annul them."[21]

Two cases involve questions of the power of Congress over Indians and Indian lands. *LaMotte* v. *United States*[22] sanctioned the power of the national government to maintain a suit in the interest of the Indians to restrain outsiders from obtaining leases from the Indians in violation of the restrictions imposed by Con-

[21] Aspects of the relation between federal and state power are discussed in William P. Bynum, "States Rights and Federal Power", 55 AM. L. REV. 1, and William D. Guthrie, "Federal Government and Education", 7 A. B. A. JOUR. 14.

Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 Sup. Ct. 438 (1920), 19 MICH. L. REV. 13, which declared unconstitutional an act of Congress making state workmen's compensation laws applicable to injuries within the admiralty jurisdiction of the federal courts, is considered in 8 CALIF. L. REV. 338, and 31 HARV. L. REV. 82. An instance of the enforcement in admiralty of rights created under state law is commented on in 21 COLUM. L. REV. 596. The federal ship mortgage act is treated in 20 COLUM. L. REV. 788.

[22] 254 U. S. 570, 41 Sup. Ct. 204 (1921).

gress and of the regulations of the Secretary of the Interior. *Winton* v. *Amos*[23] held it proper for Congress to authorize the bringing of a suit to impose a charge on Indian funds and Indian lands for the value of services rendered by attorneys in securing participation in those funds and lands by a class of Indians. The Indians in question appeared to have become citizens of Mississippi by failing to remove with other members of their tribe to the Indian Territory. This state citizenship did not turn out to be extremely beneficial and Congress at length provided that the descendants of those who remained in the old hunting grounds might remove to the Indian Territory and there participate in the blessings enjoyed by their fellow Choctaws. Attorneys who were instrumental in bringing about this legislation and in furthering the identification and removal of the Indians who benefited therefrom were authorized to bring the suit before the court to recover a reasonable sum for their services. Provision for such compensation was held not to deny due process of law to the Indians who would be the poorer for its payment. In reaching the result Mr. Justice Pitney observed:

> "It is thoroughly established that Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property. The guardianship arises from their condition of tutelage or dependency; and it rests with Congress to determine when the relationship shall cease; the mere grant of rights of citizenship not being sufficient to terminate it."[24]

An act of Congress limiting the amount to be spent by candidates for nomination for the United States Senate was declared unconstitutional by a vote of five to four in *Newberry* v. *United States*.[25] The statute under which Mr. Newberry was indicted was

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[23] 255 U. S. —, 41 Sup. Ct. 342 (1921).

[24] An instance of federal control over the transfer of land by Indians appears in Blanset v. Cardin, 256 U. S. —, 41 Sup. Ct. 519 (1921), in which the only issue appears to be one of statutory construction. The federal legislation, as construed by the court, was held to preclude the application of state law.

The right of alien enemies to inherit land is discussed in 15 ILL. L. REV. 337, 459, and 5 MINN. L. REV. 373. In 30 YALE L. J. 625 is a note on the deportation of alien communists.

[25] 256 U. S. —, 41 Sup. Ct. 469 (1921). All the court agreed that the

passed before the ratification of the Seventeenth Amendment providing for the direct election of senators, and Mr. Justice McKenna announced that he concurred in the opinion of the court only as applied to the particular statute before it. He reserved the question of the power of Congress under the Seventeenth Amendment. He must have agreed with the point made in the court's opinion that the statute "must be tested by powers possessed at the time of its enactment," since "an after-acquired power cannot *ex proprio vigore* validate a statute void when enacted." This makes it hard to see how Mr. Justice Pitney can be right when in his dissenting opinion he says that "it is clear—indeed, undisputed—that, for present purposes," the statute is "to receive the same construction and effect as if enacted after adoption of the amendment." Mr. Justice Pitney adds nothing to reinforce this position, but the Chief Justice in a separate dissent implies vaguely that the Seventeenth Amendment adds some sanction to the constitutionality of the prior statute. He says that "as the nominating primary was held after the adoption of the Seventeenth Amendment, the power must have been sanctioned by that amendment," and he considers "the question of the power, first from the provisions of the Constitution as they existed before the amendment, and second in contemplation of the light thrown upon the subject by the force of the amendment.' Under this second head he relies on the fact that the amendment as first proposed in the Senate and as first passed by the House left the states in full control of the election of senators, but that as finally submitted for ratification and as ratified and promulgated it left in force the original power to make or alter regulations as to the manner of holding elections for senators, thus preserving the revisory power which Congress enjoyed under the original Constitution when senators were chosen by the state legislatures. From this the Chief Justice concludes:

> "When the plain purpose of the amendment is thus seen, and it is borne in mind that at the time it was pending the amendment to the Corrupt Practices Act dealing with state

trial court had given an erroneous interpretation of the statute. The conclusion that the statute was unconstitutional was reached over the dissent of Chief Justice White and Justices Pitney, Brandeis and Clarke. See 19 MICH. L. REV. 860.

> primaries for nominating United States Senators which is now before us was in the process of consideration in Congress, and when it is further remembered that after the passage of the amendment Congress enacted legislation so that the amendment might be applied to state senatorial primaries, there would seem to be an end to all doubt as to the power of Congress."

Just how the Seventeenth Amendment can be a prop to prior legislation is not specifically set forth by the Chief Justice. Very possibly he means no more than that it confirms the power previously possessed. He introduces his discussion of the Amendment by saying that "from a somewhat different point of view the same result is even more imperative."

Mr. Justice McReynolds in the opinion of the court says that "a concession that the Seventeenth Amendment might be applicable to this controversy if assisted by appropriate legislation would be unimportant, since there is none." This, taken alone, would lead us to believe that he and Justices Holmes, Day and Van Devanter, who agree with him, leave open the question of the power of Congress subsequent to the amendment. But this would be inconsistent with his syllogistic argument that the power of Congress is confined to the manner of holding elections, that nominations are not elections and therefore Congress cannot regulate the manner of holding primaries. Moreover, Mr. Justice McKenna would not have noted his reservation as to the power of Congress under the amendment had he not understood that the opinion of the court contains no such reservation. The absence of any such reservation is to be inferred also from Mr. Justice McReynolds's statement that "as finally submitted and adopted the amendment does not undertake to modify Article 1, Section 4, the source of congressional power to regulate the times, places and manner of holding elections." That section, he points out, remains "intact and applicable both to the election of representatives and senators." Out of this confusion it seems clear that the decision must be confined to an attempt by Congress to regulate senatorial primaries at a time when under the Constitution senators were chosen by the state legislatures. Mr. Justice McKenna invites Congress to try again, now that senators are chosen by the state electorates. He seems

also to prevent the decision from applying to the existing congressional regulation of primary nominations for representatives, since it is difficult to differentiate the election of representatives from the election of senators after the Seventeenth Amendment. The only distinction is that the electorate for senators is a state-wide one, while congressmen as a rule represent constituencies in lesser districts. This distinction does not apply to representatives-at-large, and it is hard to find any significance in it for district representatives. There is, therefore, only a minority of the court definitely registered against the power of Congress to regulate senatorial and congressional primaries under the provisions of the Constitution as they stand today.

So much for the scope of the decision. Its basis is that the congressional power is confined to elections and that a nominating primary is not an election. This is the answer to the contention that the power exercised by the statute in question is an enumerated power conferred by Section 4, Article 1 of the Constitution, which reads:

> "The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make and alter such regulations, except as to the places of choosing senators."

The power, insists Mr. Justice McReynolds, is to regulate the manner of holding elections, "not broadly to regulate them." While as an incident to the grant there is power to make all laws which shall be necessary and proper for carrying it into effect, this does not include control over primaries, for the choice of the candidates "is in no real sense part of the manner of holding the election" and "does not directly affect the manner of holding the election." Control over primaries is not necessary in order to effectuate the power expressly granted. "Many things are prerequisites to elections or may affect their outcome—voters, education, means of transportation, health, public discussion, immigration, private animosities, even the face and figure of the candidate; but authority to regulate the manner of holding them gives no right to control any of these." It would not be contended that Congress might have regulated the choice of members of the state legislatures when these legislatures chose the senators. The word "election," since the Seventeenth

Amendment as before, has the same general significance of "final choice of an officer by the duly qualified electors." The fact that senators hold offices created by the Constitution gives Congress no "indefinite, undefined power" over their election. The supposed anomaly of unrestricted state power to control matters affecting the choice of national officers warrants no inference of national power, since "the federal features of our government are so clear and have been so often declared that no valuable discussion can proceed upon the opposite construction." The exercise of the power here claimed by Congress "would interfere with purely domestic affairs of the state and infringe upon liberties reserved to the people." The state by its inherent police power "may suppress whatever evils may be incident to primary or convention." The control of each House of Congress over the election of its own members and the power of Congress to regulate the times, places and manner of holding elections renders the national government "not without power to protect itself against corruption, fraud or other malign influences."

In dissenting, Mr. Justice Pitney insists that power to regulate "the manner of holding elections" can mean "nothing less than the entire mode of procedure—the essence, not merely the form of conducting the elections." In "the essential sense" the examination of the qualifications of candidates and of electors, "opportunity for the electors to consider and canvass the claims of the eligibles," and some method of narrowing the choice by eliminating candidates are parts of the complex process of an election—i. e., of the "choosing of a person by vote to fill a public office." It should be as easy "to recognize the integral relation of the several steps in the process of election" as it is to recognize the same relation in successive steps of interstate commerce as is done when transportation "incidentally interrupted for a temporary purpose, or proceeding under successive bills of lading or means of transport, some operating wholly interstate," are held none the less interstate commerce, if such commerce is the practical and essential result of all that is done. If Congress cannot control senatorial primaries as part of the control over the manner of elections, the states cannot do so, for the election is a federal function and the only power of the states is that conferred by the federal Constitution, and it is a power not broader than the power of Congress to "make or alter such regulations," and is *a fortiori* not "an authority exclusive of that of Congress." Congres-

sional control over senatorial primaries cannot infringe upon the reserved powers of the states, for "they could not reserve power over a matter that had no previous existence." If somehow control over these primaries could be regarded as a reserved power of the states, "the result would be to leave the general government destitute of the means to insure its own preservation without governmental aid from the states, which they might either grant or withhold according to their own will." Such lack of national supremacy in the exercise of appropriate national powers is inconsistent with a long line of decisions from Marshall's time to this. Even if the word "elections" does not itself cover preliminary elections, control over the antecedent steps is essential to effective control over the final choice and is therefore within the ancillary powers granted by the necessary and proper clause. "Sinister influences exerted upon the primaries inevitably have their effect upon the ultimate election —are employed for no other reason." The choice of many voters is determined by the nominations. In states where one political party has overwhelming predominance the nomination is the substance and election is a mere form. The suggestion that the separate houses might exclude members because of the methods by which they secured nomination concedes the close relation between the nomination and the election. Control by Congress of the incidents of the nominations is ancillary both to the power to regulate the manner of elections and to the major power to legislate through a law-making body genuinely representative in character.

Chief Justice White in his separate dissent emphasizes some of the same points. He calls the proposition that the states may regulate senatorial primaries free from congressional control "a suicidal one," since the power of the states comes from the clause of the federal Constitution which gives to Congress an independent and a revisory power coterminous with that of the states. The insistence that the primary is distinct from the election receives the characteristic comment that "the influence of who is nominated for elective office upon the result of the election to fill that office is so known of all men that the proposition may be left to destroy itself by its own statement." The enactment of senatorial primaries by so many states shows "the tenacity of the conviction that the relation of the primary to the election is so intimate that the influence of the former is largely determinative of the latter." In some cases the result of

the primary is in substance "to render the subsequent election merely perfunctory." This might have been the result in Michigan had one of the candidates who was running in the primaries of both the Republican and the Democratic parties been successful in both. Though "the plenary reservation in Congress of the power to control the states in the exercise of the authority to deal with the times, places and manner of electing senators and representatives, as originally expressed in the Constitution, caused much perturbation in the conventions of the several states," and it was definitely stated in the *Federalist* and other papers that this did not give Congress authority to deal with the election of the state legislatures, "this only served to emphasize the distinction between the state and federal power and affords no ground at this late day for saying that the reserved state power has absorbed and renders impossible of exercise the authority of Congress to regulate the federal power concerning the election of United States senators, submitted, to the extent provided, to the authority of the states upon the express condition that such authority should be subordinate to and controlled by congressional regulation." To this is added the inquiry:

> "Can any other conclusion be upheld except upon the theory that the phantoms of attenuated and unfounded doubts concerning the meaning of the Constitution, which have long perished, may now be revived for the purpose of depriving Congress of the right to exert a power essential to its existence, and this in the face of the fact that the only basis for the doubts which arose in the beginning (the election of senators by the state legislatures) has been completely removed by the Seventeenth Amendment?"

This was the last opinion rendered by Chief Justice White—a strong nationalist position as the final word of an ex-Confederate soldier.[26]

The power of Congress to create the federal land banks and joint-stock land banks was affirmed in *Smith* v. *Kansas City Title &*

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[26] In 24 LAW NOTES 124 is a discussion of "unequal representation in Congress." A constitutional issue of the methods of law-making by the federal government is treated in Lindsay Rogers, "The Power of the President to Sign Bills After Congress Has Adjourned", 30 YALE L. J. 1.

Trust Co.[27] Justices Holmes and McReynolds expressed no opinion on the question, since they insisted that the court did not have jurisdiction of the case. The opinion of the court by Mr. Justice Day summarizes the provisions of the Farm Loan Act with respect to the organization and control of federal land banks and joint-stock land banks, recites their powers to issue bonds and to make loans secured by farm mortgages, and seems to lay stress upon the authority conferred upon them to act as depositories of public money and as financial agents of the government. It observes that "a principal consideration upon which Chief Justice Marshall rested the authority to create a bank" was that its formation "was required, in the judgment of Congress, for the fiscal operations of the government," and that it was not "within the authority of the court to question the conclusion reached by the legislative branch of the government." The suggestion of counsel that the power conferred upon the banks created by the Farm Loan Act to serve as public depositories and fiscal agents of the government is but a pretext was dismissed by saying that the court cannot question the motives of Congress. The facts that the banks had not yet been designated as depositories and that they had acted as federal agents only to a limited extent were put aside with the remark that "the existence of the power under the Constitution is not determined by the extent of the exercise of the authority conferred under it." It is made clear that no objection to the power exercised arises from the facts that the principal business of the banks is private banking and that most of their stock is privately owned; but it would take a clairvoyant to tell just what weight was given to the control exercised by the government and to the authority vested in the Secretary of the Treasury to use the banks as depositories and fiscal agencies. This authority is adduced in support of the decision, but is by no means definitely stated to be essential. The final paragraph on this point of the case is as follows:

> "We therefore conclude that the creation of these banks, and the grant of authority to them to act for the government as depositories of public moneys and purchasers of government bonds, brings them within the creative power of Congress, although they may be intended, in connection with

[27] 255 U. S. —, 41 Sup. Ct. 243 (1921). See 16 ILL. L. REV. 62.

> other privileges and duties, to facilitate the making of loans upon farm security at low rates of interest. This does not destroy the validity of these enactments any more than the general banking powers destroyed the authority of Congress to create the United States Bank, or the authority given to national banks to carry on additional activities destroyed the authority of Congress to create these institutions."

Having determined the public character of the banks, the court declared that the power to exempt their securities from state and federal taxation "necessarily follows."[28]

The monetary powers of Congress were held in *Baender* v. *Barnett*[29] to include authority to forbid and punish "the conscious and willing possession, without lawful authority, of any die in the likeness or similitude of one used or designated for making genuine coin of the United States." The contention of the defendant was that the power given to Congress to punish counterfeiting excludes authority to punish what is not counterfeiting—i. e., that it is a limitation as well as a grant of power. This was said to rest upon a misconception both of the counterfeiting clause and of the one vesting Congress with power "to coin money" and "regulate the value thereof." As to the authority for the statute in question, Mr. Justice Van Devanter says:

> "Both [of the clauses referred to] have been considered by this court, and the purport of the decisions is (1) that Congress not only may coin money in the literal sense, but also may adopt appropriate measures, including the imposition of criminal penalties, to maintain the coin in its purity and to safeguard the public against spurious, simulated, and debased coin; and (2) that the power of Congress in that regard is in no wise limited by the clause relating to the punishment of counterfeiting."

The familiar principle that the privileges and immunities clauses of the original Constitution and of the Fourteenth Amendment are shields against state action only and not against individual action

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[28] A question of federal power with respect to banking is discussed in Walter Wyatt, "Right of National Banks To Act As Transfer Agents", 7 VA. L. REV. 594.

[29] 255 U. S. —, 41 Sup. Ct. 271 (1921).

found application in *United States* v. *Wheeler*,[30] which sustained the quashing of a federal indictment against defendants alleged to be responsible for the so-called Bisbee deportations. The indictment as paraphrased in the opinion of the Chief Justice charged a conspiracy to injure and oppress citizens of the United States—of whom some were citizens of Arizona and the rest were citizens of other states—of rights and privileges secured to them by the Constitution or laws of the United States. The theory of the prosecution, so far as it can be gathered from the opinion of the Chief Justice, was that citizens of Arizona have the right and privilege as citizens of said state "peacefully to reside and remain therein and to be immune from unlawful deportation from that state to another," and that citizens of other states have the same right by virtue of the privileges and immunities clause of Article 4, Section 2 of the original Constitution. Presumably the alleged immunities of the citizens of Arizona were predicated upon the fact that they were citizens of the United States and so within the privileges and immunities clause of the Fourteenth Amendment. The fact that the deportees were all citizens of the United States was also important because the statute under which the indictment was framed applied only to the denial to citizens of the United States of rights and privileges secured to them by the Constitution or laws of the United States. Inasmuch as no law of the United States specifically forbade interstate deportations, the defendants violated the statute only if they had oppressed United States citizens in the enjoyment of immunities secured to them by the federal Constitution. The short and simple answer is that the federal Constitution confers immunity against state action only and not against the acts of unofficial individuals. In making this answer, however, the Chief Justice was neither short nor simple. The justification for his involved and roundabout refutation is evidently to be found in the involved and roundabout contention of the government, which, unfortunately, is not set forth. This contention, says the Chief Justice, is "based, not upon the direct result of any particular provision of the Constitution, but upon implications arising from that instrument as a whole, the conditions existing at the time of its adoption, and the consequences inevitably produced from the creation by it of the

[30] 254 U. S. 281, 41 Sup. Ct. 133 (1920). See 34 HARV. L. REV. 554 and 19 MICH. L. REV. 558.

government of the United States." To meet this contention the Chief Justice adduces certain general doctrines. Prior to the Articles of Confederation, he says, "in all the states * * * the citizens thereof possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states * * * and to have free ingress thereto and egress therefrom, with a consequent authority in the states to forbid and punish violations of this fundamental right." The Articles provided that "the free inhabitants of each of these states * * * shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and egress to and from any other state." By this provision "uniformity was secured, not by lodging power in Congress to deal with the subject, but, while reserving in the several states the authority which they had theretofore enjoyed, yet subjecting such authority to a limitation inhibiting the power from being used to discriminate." The Constitution preserved this limitation on discrimination "and thus necessarily assumed the continued possession by the states of the reserved power to deal with free residence, ingress and egress," limiting it only as to discrimination against citizens of other states. Thus, there is no basis for the contention that the states are without reserved power to deal with the individual wrong complained of in the present proceeding or for the contention "that a wrongful prevention by an individual of the enjoyment by a citizen of one state in another of rights possessed in that state by its own citizens was a violation of a right afforded by the Constitution." The "second section of Article 4, like the Fourteenth Amendment, is directed alone against state action." Cases which have held state action to deprive persons of rights guaranteed by the Constitution are therefore not apposite. To this is added:

> "Nor is the situation changed by assuming that as a state has the power, by depriving its own citizens of the right to reside peacefully therein and to free ingress thereto and egress therefrom, it may, without violating the prohibitions of Article 4 against discrimination, apply a like rule to citizens of other states, and hence engender, outside of Article 4, a federal right. This must be so, since the proposition assumes that a state could, without violating the fundamental limitations of the Constitution, other than those of Article 4,

> Section 2, enact legislation incompatible with its existence as a free government and destructive of the fundamental rights of its citizens, and, furthermore, because the premise upon which the proposition rests is state action and the existence of federal power to determine the repugnancy of such action to the Constitution, matters which, not being here involved, are not disputed."

This might be taken to imply that citizens of the United States may have as such citizens an immunity under the federal Constitution against unjustifiable deportation by the state of which they are citizens, but any such implication seems to be qualified by the concluding paragraphs of the opinion, which read:

> "This leads us, furthermore, to point out that the case of *Crandall* v. *Nevada,* 6 Wall. 35, so much relied upon in the argument, is inapplicable, not only because it involved the validity of state action, but because the state statute considered in that case was held to directly burden the performance by the United States of its governmental functions and also to limit the rights of the citizens growing out of such functions; and hence it also follows that the observation made in *Twining* v. *New Jersey,* 211 U. S. 78, 97, to the effect that it had been held in the *Crandall* case that the privilege of passing from state to state is an attribute of national citizenship, may here be put out of view as inapposite.
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> "With the object of confining our decision to the case before us, we say that nothing we have stated must be taken as implying a want of power in the United States to restrain acts which, although involving ingress or egress into or from a state, have for their direct and necessary effect an interference with the performance of duties which it is incumbent upon the United States to discharge, as illustrated in the *Crandall* case, *supra.*"

Other cases on powers of the federal government will be reviewed in sections dealing with commerce, taxation, and the jurisdiction and procedure of courts. Limitations on federal power because of constitutional clauses protecting individual liberty and property will be considered in several of the succeeding sections.

Columbia University. THOMAS REED POWELL.

(To be continued)